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ORTEGA v. CORDERO. (No. 13,889.)

(*Supreme Court of California.* March 5, 1891.)

REVIEW ON APPEAL—TRIAL BY COURT—FINDINGS—ADMISSIONS IN PLEADINGS.

Where the answer in an action for the unpaid price of land admits the allegations of the complaint as to the terms of sale, and there is nothing in the record to affirmatively show that the parties have actually tried issues outside of the pleadings, a finding by the court establishing different terms of sale from those alleged and admitted will be disregarded on appeal. Explaining Horton v. Dominguez, 68 Cal. 642, 10 Pac. Rep. 186.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Thos. McNutta and *S. W. Bouton*, for appellant. *W. C. Stratton*, for respondent.

VANCLIEF, C. Action to recover balance of unpaid purchase money for land sold and conveyed by plaintiff to defendant. Judgment for defendant, from which plaintiff appeals on the judgment roll.

It is alleged in the complaint that on or about November 22, 1888, the plaintiff agreed to sell to the defendant, and the defendant agreed to purchase from the plaintiff, one undivided third part of a tract of land, described in the complaint, containing about 1,000 acres, of the value of not less than $3,300, for the consideration and upon the terms hereinafter stated. That at the date of said agreement the plaintiff was indebted to various persons in various sums, amounting to about $1,400. "That, as part of the consideration for said purchase, defendant agreed to pay off and discharge all of plaintiff's aforesaid indebtedness, amounting to about said sum of $1,400, and, for the remainder of said consideration, to pay to plaintiff, over and above said indebtedness, the sum of $1,500, and, in earnest of said agreement, said defendant then and there paid plaintiff the sum of $25, part of said $1.500, payable to plaintiff under said agreement. Plaintiff avers that he has in all respects fully performed on his part all the obligations of the agreement of purchase and sale above stated. That on or about the 25th day of January, 1889, he executed, acknowledged, and delivered to said defendant his (plaintiff's) deed, conveying the land above mentioned, in accordance with and pursuant to said agreement of sale." That said deed was a deed of grant, bargain, and sale, and was prepared, as he is informed and believes, under the direction of the defendant, and was recorded by request of defendant on the day of its date. Plaintiff avers that, notwithstanding the recital of full payment on said deed, no part of the said $1,500 due and payable by defendant to plaintiff, under the aforesaid agreement of sale and purchase, has ever been paid plaintiff, excepting the sum of $25 hereinbefore mentioned, and that the balance of said consideration, to-wit, the sum of $1,475, is still due and unpaid to plaintiff from said defendant, who has neglected and refused, and still neglects and refuses, to pay the same, or any portion thereof, although requested to pay said sum." For want of information or belief, the defendant, in his answer, denied that the value of the land was not less than $3,300. The answer then proceeds as follows: "Denies that the deed mentioned in the amended complaint herein was prepared under the direction of defendant. Denies that no part of the $1,500 due and payable by defendant has ever been paid plaintiff, except the sum of $25, and avers that he has paid to plaintiff the full amount of the purchase price of said land. Denies that the sum of $1,475, or any sum, is due or unpaid to plaintiff from defendant.

Wherefore defendant demands judgment that plaintiff take nothing by this action, and for his costs." After finding the value of the property to have been $3,300 at the time of the purchase, and at the time of the trial, as alleged in the complaint, the court made the following findings: "(2) That on or about the 25th day of January, 1889, the plaintiff agreed to sell to the defendant, and the defendant agreed to buy of the plaintiff, the plaintiff's one-third interest in said land for the sum of $1,500, and the plaintiff thereupon executed, acknowledged, and delivered to defendant a deed of grant, bargain, and sale, conveying to the defendant his said one-third interest in said land, and the consideration stated in said deed was $1,500. (3) That the defendant has fully paid to plaintiff said sum of $1,500, and there is no part thereof now due or unpaid; that said sum of $1,500 was paid in the following manner: the defendant liquidated and discharged debts due by plaintiff to various persons, amounting to $1,625, said debts being paid by consent of plaintiff. (4) That the defendant did not at any time agree to pay or give to plaintiff any consideration, other than said sum of $1,500, for his said one-third interest in said land. As a conclusion of law from the foregoing facts, the court finds that the defendant is entitled to judgment against the plaintiff that he take nothing by this action, and for his costs of suit, and it is ordered that judgment be entered accordingly."

The appellant makes the point that the findings of fact are inconsistent with, and contradictory of, the facts admitted and established by the pleadings; and this point seems to be well taken. The agreement, as stated in the complaint, is not denied or in any way qualified by the answer, nor is any other agreement set up in the answer; yet the fourth finding of fact flatly contradicts a material part of the agreement as alleged in the complaint. By the agreement established by the pleadings, the defendant was to pay debts of plaintiff amounting to $1,400, and, in addition thereto, was to pay directly to plaintiff $1,500; but the fourth finding, read in connection with the third, is that defendant never agreed to pay any other consideration for the conveyance than to pay debts of plaintiff amounting to $1,500. This contradicts the admitted allegation of the complaint that the defendant agreed to pay directly to plaintiff $1,500 in addition to the payment of $1,400 to plaintiff's creditors. So far as the second finding sets forth an agreement of a different date and consideration from that alleged in the complaint, it is entirely outside of the issues made by the pleadings. The agreement to convey for a consideration of $1,500, referred to in the second finding, seems to have been inferred from the recital of that consideration in the deed of January 25th, executed in pursuance of the agreement alleged in the complaint. But no such inference was justifiable, since it was averred in the complaint, and not denied in the answer, that the deed did not recite the full consideration. In Burnett v. Stearns, 33 Cal. 469, it is said: "The findings should be confined to the facts in issue. The province of the court in respect to facts is to determine, but not to raise, issues. It is insisted on the other side that it will be presumed the court found the fact in question from competent evidence. The answer is, it would not be presumed that evidence was introduced to contradict the admission of record." This case is emphatically affirmed in Gregory v. Nelson, 41 Cal. 279, where, among other things, it is said: "This court cannot presume that the trial court required or permitted evidence to be introduced on the trial for the purpose of establishing or rebutting allegations of the complaint not denied by the answer; nor can it be presumed that any evidence was received by the trial court except such as was pertinent to the issues made or tendered by the pleadings, and evidence tending to rebut such legitimate evidence." To the same effect are the following cases: Hicks v. Murray, 43 Cal. 515; Bradbury v. Cronise, 46 Cal. 287; Estate of McKinley, 49 Cal. 152; McDonald v. Association, 51 Cal. 210; Hill v. Den, 54 Cal. 20; Tracy v. Craig, 55 Cal. 91; Silvey v. Neary, 59 Cal. 97; Campe v. Lassen, 67 Cal. 139, 7 Pac. Rep. 430. In Re Doyle, 73 Cal. 570, 15 Pac. Rep. 128, the court, by Mr. Justice McKINSTRY, said: "When a trial is had by the court without a jury, a fact admitted by the pleadings should be treated as found. * * * If the court does find adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. * * * In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous." See, also, Reinhart v. Lugo, 75 Cal. 639, 18 Pac. Rep. 112, and Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879.

The class of cases cited by counsel for respondent, such as White v. Railroad Co., 50 Cal. 417; Tevis v. Hicks, 41 Cal. 123; Smith v. Penny, 44 Cal. 161; and Horton v. Dominguez, 68 Cal. 642, 10 Pac. Rep. 186,—has no proper application to the facts of this case. In that class of cases it appears of record that the parties have actually tried issues outside of the pleadings without objection, and by tacit consent, as if the issues had been made by the pleadings, and under such circumstances that if one party had objected the other might have supplied or cured the defect by amendment of his pleading, or otherwise mitigated the effect of the objection. The principle upon which those decisions rest is that of equitable estoppel, it being held that a party who acquiesces and participates in the trial of an issue without objection, as if it arose from the pleadings, when he might have objected on the ground that the issue was not made by the pleadings in the trial court, where the objection might have been met by amendment of the pleadings or otherwise, so that it would have operated less injuriously on the other party than if first made on appeal, has thereby waived the objection and misled the other party to understand that the issue was properly made, and therefore should not be heard to make it on appeal. To justify this application of the principle of estoppel it should appear from the record on appeal, among the other elements of an estoppel, that the issue was actually and intentionally tried by the introduction of pertinent evidence, and that the party against whom the estoppel is invoked consciously participated or acquiesced in such trial, as if the issue had been made by the pleadings, and in such manner as may have induced the other party to believe that the issue had been properly made, or diverted his attention from the fact that it was not made by the pleadings.

It would seem that some of the decisions in the class of cases under consideration have gone to the verge of the province of waivers and equitable estoppels, and press to encroach upon the domain of the law of pleading and evidence, particularly sections 462, 588–590, Code Civil Proc. Section 590 provides: "An issue of fact arises: (1) Upon a material allegation in the complaint controverted by the answer;" and section 462 provides: "Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken to be true." It is not within the discretionary power of any court to dispense with these provisions; yet they are not violated by a decision of the appellate court that a party, by his conduct at the trial, is estopped from asserting, on appeal, for the first time, that a fact found by the trial court was not within the issues made by the pleading, since such a decision assumes that the fact found was within the issues, and its propriety can be questioned only upon the ground that the facts of record are insufficient to create the alleged estoppel. Doubtless the facts should be of a nature and effect similar to those required to effect an estoppel *in pais* in other cases; but, upon a superficial view, there is a seeming conflict in the cases as to how the facts shall be made to appear. Must the conduct of the party which estops him positively appear upon the record? or, may it be presumed for the mere purpose of upholding the decision of the trial court? We have seen that the cases of Burnett v. Stearns, Gregory v. Nelson, and In re Doyle are expressly opposed to any such presumption; but, in the case of Horton v. Dominguez, 68 Cal. 642, 10 Pac. Rep. 186, cited by respondent, there is a *dictum*, at least, in favor of such a presumption. In this last case it was conceded that the agreement pleaded and relied upon by defendant, in his cross-complaint, was void, but the court found a subsequent agreement which was not pleaded, which is fully set out in the finding, and in accordance with which judgment was rendered. This court, by Mr. Justice Thornton, said: "It is objected that the finding is not within the issues. As the record shows nothing to the contrary, we must presume that testimony was introduced to establish the facts found by this finding. It does not appear that any objection was made by the plaintiff to the evidence that it was inadmissible under the pleadings, as not being within the issues joined. As the record stands, it appears that the cause was tried as if the agreement found was put in issue. Under such circumstances, we cannot permit the objection to be now made that this finding is of matters outside of the issues joined in the cause. It should not be permitted that the plaintiff should allow the cause to be tried as if issues are regularly joined, and, when the result is a judgment adverse to his claims, urge in this court that no such issue was made in the court below." This case was not fully reported. By referring to the original record, (Sup. Ct. Records, vol. 362, p. 198,) it will be seen that the subsequent agreement was imperfectly pleaded, and that the judgment roll contains a bill of exceptions showing that testimony sufficient to justify the finding of the subsequent agreement was introduced by the defendant without objection on the ground that the subsequent agreement was not pleaded, (pages 209, 210.) Therefore there was no occasion or room for a presumption that "testimony was introduced to establish the facts found," by the finding set out in the opinion, as to the subsequent agreement. Further on the learned justice says: "As the record stands, it appears that the cause was tried as if the agreement found was put in issue." This must be understood as referring to the evidence contained in the bill of exceptions. So understood, it shows that the learned justice did not rely upon any presumption to establish the fact that testimony was introduced, without objection, to prove the subsequent agreement on which the judgment rested. In the judgment roll of the case at bar there is no bill of exceptions nor anything to show that any evidence was introduced tending to prove a subsequent or other contract than that alleged in the complaint and not denied in the answer; or tending to show, contrary to the admission of the pleadings, that the deed of January 25, 1889, from plaintiff to defendant, correctly recited the full consideration for the conveyance. Perhaps the plea of payment, in the absence of a special demurrer, sufficiently tendered an issue as to payment; but the findings show that the only payment by defendant was $1,500, made by liquidating and discharging debts due by plaintiff to various persons, amounting to $1,625, by consent of plaintiff, thus leaving a balance of the contract price due the plaintiff of, at least, $1,375. I think the judgment should be reversed, and the cause remanded for a new trial, with leave to the parties to amend their pleadings if they so desire.

We concur: Belcher, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial, with leave to the parties to amend their pleadings if they so desire.

88 Cal. 203

SWASEY v. ADAIR *et ux.* (No. 13,178.)

(*Supreme Court of California.* March 3, 1891.)

APPEAL—SUPERSEDEAS—REPLEVIN.

1. Under Code Civil Proc. Cal. § 943, providing that if the judgment appealed from direct the delivery of personal property, the execution cannot be stayed by appeal unless appellant enters into an undertaking to obey the order of the appellate court, the fact that defendant in replevin has given the redelivery bond described by section 514 does not entitle her to a stay of execution on her appeal from a judgment for plaintiff without giving a stay-bond.

2. Other grounds for staying execution than the taking of an appeal cannot be raised for the first time on motion in the appellate court.

In bank. Application for writ of *supersedeas* to superior court, city and county of San Francisco; JOHN F. FINN, Judge.

John F. Burris, (*N. G. Cobb*, of counsel,) for applicant. *C. K. Royce*, for respondent.

BEATTY, C. J. This is an action brought under section 509 et seq. of the Code of Civil Procedure, for the recovery of certain personal property, consisting of the furniture of a lodging-house. The plaintiff, at the commencement of the action, filed the necessary affidavit and undertaking, and demanded the delivery of the property to him. The defendants are husband and wife, but they appeared separately in the action, and the husband made no defense. The wife, Mrs. O. Adair, filed an answer, claiming the property as her own, and gave a bond conditioned as required by law, whereupon the property was redelivered to her. At the trial she and her husband both failed to appear, and judgment was entered against them jointly for the return of the property, or its value, $2,500, and for costs. Subsequently, upon her motion, the judgment against her was set aside, and a new trial granted to her; but, apparently, the judgment as against her husband was allowed to stand. The case was thereafter tried upon the issues made by her answer to the complaint, and a second and separate judgment rendered against her for the return of the goods, or their value, fixed at $2,000, and for costs. From this judgment, and from an order denying her motion for a new trial, she has appealed to this court, giving the ordinary undertaking for $300, but no undertaking to stay proceedings. The plaintiff and respondent has caused execution to be issued, not upon the judgment appealed from, but upon the first judgment, entered, as above stated, against the appellant and her husband, and left to stand against him when set aside as to her. Under this execution the sheriff is threatening to take the property in controversy from the possession of a Mrs. Shaeffer, who claims it as a vendee of a party to whom it was sold and delivered by the appellant after its redelivery to her. Upon a verified petition showing these facts appellant now moves this court for a writ of *supersedeas* directing the sheriff to return said execution, and commanding a stay of all proceedings on said judgment pending the determination of her appeal. The case presents some anomalous features. There are two separate judgments in favor of the plaintiff for the return of the same goods, or their value, fixed in one judgment at $2,500, and in the other at $2,000; one judgment being against C. H. Adair, the husband, and the other being against the appellant, Mrs. O. Adair, his wife. Execution is issued on the judgment against the husband, and under it the sheriff is threatening to take the goods in controversy from the vendee of the wife, to whom they were sold after redelivery to her upon her giving the statutory undertaking. Code Civil Proc. § 514. In aid of her appeal from the judgment against her, and for the protection of her vendee, appellant asks us to stay proceedings upon the judgment against her husband, from which there has been no appeal. Several questions arise upon this state of facts, but we shall confine ourselves to a discussion of those which we deem essential in the disposition of the motion before us. It seems impossible that the sheriff could rightfully take the goods from appellant's vendee under an execution issued upon a separate judgment against C. H. Adair, between whom and said vendee there is no sort of privity; but whether we can, on this appeal, interfere with the proceedings on that judgment, is a question not free from difficulty, and one which we do not care to decide unless it is clear that the appellant is entitled to a stay of proceedings on the judgment from which she has appealed. Is she, then, entitled to such a stay without having given a stay-bond? It is contended that in this respect the action of replevin differs from other actions, and that the defendant, having given the redelivery bond prescribed by section 514 of the Code of Civil Procedure, is entitled to retain the property until the final determination of the case on appeal without other security. In support of this proposition we are referred to the language of said section to section 1247 of Cobbey on Replevin, and to Bank v. Blye, 102 N. Y. 305, 7 N. E. Rep 49; but we find nothing in either of the citations to support the contention of appellant. The language of section 514 of the Code of Civil Procedure is not at all inconsistent with the proposition that a judgment for plaintiff, in an action for the recovery of personal property, is immediately enforceable by a return of the property *in specie*, unless the defendant gives an additional bond to stay proceedings pending his appeal. On the other hand, section 943 of the Code of Civil Procedure expressly provides that "if the judgment appealed from direct the delivery of * * * personal property, the execution of the judgment cannot be stayed by appeal unless the things directed to be delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant * * * to the effect that the appellant will obey the order of the appellate court upon the appeal." For these reasons we think the appellant is not entitled to an order of this court for a stay of proceedings on the judgment from which she has appealed. In other words, we consider that we can grant such relief on the mere motion of an appellant, and as an incident of our appellate jurisdiction, in these cases only where the appeal has been so taken and perfected as to operate a stay according to the provisions of the statute. There are, of course, other grounds besides the taking of an appeal for staying execution of a judgment, and several other grounds are presented in this motion. But these, we think, should be presented in the superior court by some proper motion or proceeding there, and brought here, if at all, by appeal from the orders of the superior court It is contended, for instance, that the redelivery bond given by the appellant extinguished plaintiff's property in the goods, and that it is a bar to a judgment for their return *in specie*. It is further alleged that suit has been commenced against the sureties on that bond, and that this estops the plaintiff from reclaiming the goods. It is contended that the judgment against C. H. Adair is no longer in force, being necessarily set aside by the order vacating it as to the appellant. But, whatever merit there may be in these propositions, we do not think they can be made the ground of an original motion in this court. The motion of the appellant for a writ of *supersedeas* is denied, and the order heretofore made for a temporary stay of proceedings is hereby vacated and annulled.

We concur: DE HAVEN, J.; MCFARLAND, J.; HARRISON, J.; SHARPSTEIN, J.; PATERSON, J.; GAROUTTE, J.

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88 Cal. 217

GRIMSHAW v. BELCHER *et al.* (No. 14,078.)

(*Supreme Court of California*. March 4, 1891.)

LICENSE—REVOCATION.

A license under which the licensee has constructed a levee on the licensor's land cannot be revoked, where the revocation would cause great and irreparable injury to the licensee's land; and a court of equity, on the ground of equitable estoppel, will enjoin the licensor from subsequently tearing down the levee.

In bank. Appeal from superior court, Sacramento county; J. M. WALLING, Judge.

J. C. Tubbs and *A. L. Hart*, for appellants. *C. S. Denson* and *C. H. Oatman*, for respondent.

DE HAVEN, J. The findings of the court below show that the plaintiff is the owner of a tract of land situate on the bank of the Cosumnes river, and adjoining it is another tract, owned in common by the defendants Alice J. and Lucy E. Belcher, and the estate of J. M. Belcher, of which the defendant Sarah W. Belcher is the executrix; that to protect both of said tracts from overflow it is necessary to maintain a levee in front of both tracts; that just above the line dividing said lands, and on the land of the defendants, there is a depression, which renders it necessary that the levee there should be of greater height and strength than at other points. The plaintiff had completed her line of levee, and the defendants were engaged in the repair of their levee, the line of which connected with that of plaintiff, and, "it being feared that the floods would come and inundate the lands to be protected by said levee before the same could be finished, the plaintiff applied to the defendants for leave to enter upon their said land, and enlarge and repair that portion of the levee upon defendant's said land which extends across the said depression." The defendants consented, and gave permission to the plaintiff to repair, enlarge, and reconstruct the said section of levee at her own cost and expense. This the plaintiff did, the same being constructed mostly of earth hauled from the plaintiff's own land, and thus connected her own levee with that of the defendants, forming a continuous barrier against the waters of the river. The court further found that the defendants threatened and intended to tear down, remove, and dig away a portion of the said levee, and if they should do so it would subject the land of plaintiff to overflow, and would cause great and irreparable damage to her land. The court below gave judgment enjoining the defendants from doing the threatened acts. From this judgment, and an order denying their motion for a new trial, the defendants appeal.

The permission given plaintiff to construct the section of levee referred to in the findings was verbal. The appellants urge that the license, if ever given, is one which they have a right to revoke; that a license is always revocable when the act licensed is of such a nature that, if granted by deed, it would amount to an easement. To sustain this position the case of Potter v. Mercer, 53 Cal. 667, is cited, in which case it is said: "But the effect of an executed or partly executed license, though revoked, is to excuse the licensee from liability for acts done properly in pursuance thereof, and their consequences; but the revocation puts an end to the license, and no further act can be justified under it." This is undoubtedly true as a general rule, and was properly applied to the facts in that case. But the judgment in this case does not authorize the plaintiff to do any further act upon the land of appellants. It only restrains the appellants from removing or injuring a levee built by respondent at her own cost upon the land of appellants, and with their permission, such levee so constructed being necessary in order to protect the land of respondent from overflow and irreparable damage. Such a judgment does not, as supposed by appellants, confer upon "the respondent a permanent right in the property" of appellants. It gives her no right to enter upon the land of appellants for the purpose of repairing the levee, or to rebuild it in the event of its destruction. The distinction between the right of respondent, as fixed by this judgment, and a permanent right to maintain the levee in question, is clearly pointed out in the case of Carleton v. Redington, 21 N. H. 307. It is there said: "The authorities would seem to show that a license to erect a dam will give no right to repair and restore the dam when it has become ruinous and decayed. * * * But if it be holden that a license to erect a dam implies also a license to repair the same at pleasure, it would seem, from many authorities, that the license cannot be sustained." As to the right of the respondent to maintain this action upon the facts found by the court, there is a conflict in the decisions in the different states, many courts holding to the contrary. There are cases, however, which hold that such an action is maintainable, and we think these state the rule which is most in consonance with principles of equity. In Veghte v. Water-Power Co., 19 N. J. Eq. 142, the court say that "in cases where the revocation would be a fraud, courts of equity give a remedy, either by restraining the revocation, or by construing the license as an agreement to give the right, and compelling specific performance by deed, as of a contract in part executed." In the case of Clark v. Glidden, 60 Vt. 702, 15 Atl. Rep. 358, it is held that "a license to lay an aqueduct to a spring of water on one's land is irrevocable during the existence of the aqueduct; and a court of equity, on the ground of equitable estoppel, will protect the licensee in the use of the aqueduct, and will grant and continue an injunction restraining the owner of the spring from interfering with the aqueduct until its decay; for a revocation of the license would operate as a fraud." And this same principle has been affirmed in the case of Lee v. McLeod, 12 Nev. 284. Appellants further insist that the findings are not sustained by the evidence, but we cannot say from the record that the court committed any error in this respect. Judgment and order affirmed.

We concur: PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.

MCFARLAND, J. I concur in the judgment, but I base my concurrence upon the particular facts of this case. A rule which applies to two coterminous owners of land, who unite in a continuous line of levee for the protection of both, would not apply to many other instances of parol license.

HARRISON, J. I concur in the judgment.

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88 Cal. 207

WILSON v. MORIARITY. (No. 13,921.)

(*Supreme Court of California.* March 4, 1891.)

LANDLORD AND TENANT—REFORMATION OF LEASE—MISTAKE—EVIDENCE.

1. In an action by the lessor to reform a lease for 10 years the evidence showed that plaintiff was unable to read or write, while defendant was a shrewd business man, on terms of friendship with plaintiff and her husband; that defendant drew the lease himself, but did not read it to plaintiff, though it was read to her by the notary before acknowledgment. Several witnesses testified that defendant has sent them to plaintiff to negotiate the lease, but she refused to make it for more than five years. Defendant testified, but was contradicted by plaintiff's husband, that he drew the lease under an agreement with him, and that he promised to notify plaintiff. Plaintiff testified that she intended to make a lease for five years only, and had refused to make it for a longer time. *Held*, that the lease should be reformed so as to run for five years.

2. Though the complaint alleged the weakness of plaintiff's mind, and inadequacy of consideration, it was only necessary to show the mistake of plaintiff, and that defendant knew of it, since Civil Code Cal. § 3399, provides for reformation of a contract made through the mistake of one party, which the other party at the time of execution knew or suspected.

3. Under such section a suit to reform a contract cannot be defended on the ground that the mistaken party was negligent in not reading the contract, if it appears that the other party at the time of its execution knew of the mistake.

4. In an action by a landlord to reform a lease, the court's action, after reforming the lease, in dismissing the complaint in so far as it asked additional rent on account of improvements under an agreement subsequent to the lease, is not reversible error.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Stephen M. White and *R. H. F. Variel*, for appellant. *Anderson, Fitzgerald & Anderson* and *Smith, Winder & Smith*, for respondent.

VANCLIEF, C. This is an action to rescind a written lease by plaintiff to defendant of a house and lot thereon in the city of Los Angeles, on the ground of alleged fraud on the part of the defendant in procuring the lease; or, if a rescission thereof cannot be had, that the lease be reformed on the ground of alleged mistakes of the plaintiff, which the defendant knew at the time the lease was executed. The court denied a rescission of the lease, but reformed it. From the judgment reforming the lease, and from an order denying his motion for a new trial, the defendant brings this appeal.

The lease, as executed, was for the term of 10 years, at a rental of $150 per month, with the privilege of a renewal for another term of 10 years at the same rent. As reformed, the lease is for the term of only five years, and without the privilege of renewal for any term. The ultimate facts upon which the revision of the lease was based are expressed in the sixth finding of the court, as follows: "That, when plaintiff executed said lease, she did not understand said lease to be a lease for ten years, with the privilege of ten years more, but she understood said lease to be for a single term of five years. And the defendant then and there, at the time of the execution of said lease by plaintiff, well knew that the plaintiff did not understand the same to be for ten years, with privilege of renewal, and well knew that she understood the same to be for a single term of five years; and the defendant fraudulently induced the plaintiff to so understand said instrument, and to execute the same under such misunderstanding." These facts, if justified by the evidence, undoubtedly support the judgment. Section 3399 of the Civil Code provides that "when, through * * * a mistake of one party, which the other, at the time, knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done, without prejudice to rights acquired by third persons in good faith and for value." But counsel for appellant contend that the finding of the facts above quoted is not justified by the evidence.

The court found as evidentiary facts, which are not disputed, that the plaintiff is unable to read or write; that the defendant is a shrewd merchant and business man of plausible manners, and was on terms of friendship with the plaintiff and her husband, John Wilson; that the defendant drew the lease; and that the lease was not read to or by the husband, or read to the plaintiff, except by the notary at the time she acknowledged it. The testimony of the plaintiff and her husband was to the effect that during three or four months before the execution of the lease the defendant had been importuning them for a lease of the property for a term of five years. That plaintiff was unwilling to lease the property for a longer term than two years. That the defendant finally persuaded the husband to advise the plaintiff to execute a lease for the term of five years, which he did, on the ground that the defendant would be a good tenant, with whom they would have no trouble in collecting rent. Thereupon the plaintiff consented to the term of five years. That after the defendant drew up the lease he met the plaintiff on the street near her husband's blacksmith shop, and requested her to go with him to the notary's office and acknowledge it, and her husband then told her to do so, but did not accompany them. When they arrived at the notary's office the defendant offered to read the lease to her, saying it was in his handwriting; but the notary said the law made it his duty to read the instrument to her, as she was a married woman, and he did then read it to her; but, believing that the defendant had drawn the lease according to the agreement, and that she already knew that it was a lease for the term of five years only, she did not give sufficient attention to the reading by the notary to discover, and did not discover that it was a lease for ten years, or that it differed from the lease theretofore agreed upon; and that, when she acknowledged the execution, she understood and believed it to be a lease for the term of only five years, without any privilege of renewal. Thomas Leahy testified that about two years before the trial the defendant requested him to go to John Wilson and try to get a lease of the property to defendant for the term of five years; that witness went to Wilson, and tried to persuade him to give the lease for five years, but Wilson said: "No, I will not give it for five years; I will give it for three." Witness reported Wilson's answer to defendant. Michael Leahy testified that he "went, at Moriarity's request, to Mr. Wilson, to see if he could get a lease for ten years, and Mr. Wilson said he would not give it for so long. I took that answer back to him." H. Boettcher testified that in March, 1887, the rental value of the property, as leased to defendant, was $250 per month. G. F. Conant testified that he had been a collector of rents for about six years, and knew the rental value of the property, and that the rental value of the building in March, 1887, "would be something like $350. After the building was remodeled and put in shape as it is now, the store-room would have brought about $200 per month at least. I don't know how many rooms there are in the two upper floors, but they would have brought from $8 to $10 a room, taken as a whole." (It is stipulated that there are 21 rooms on the two upper floors.) There is no other evidence as to the rental value of the property than that of these two witnesses. This testimony as to the rental value of the property is cited and considered relevant for no other purpose than so far as it may tend to show defendant's motive for desiring a long term at the rent reserved in the lease. The defendant testified that he had never represented to plaintiff or to her husband that the lease drawn by him was for the term of five years, but that he drew the lease according to an understanding or agreement had with the husband, which the husband was to advise the plaintiff to accept; but he does not testify that the plaintiff ever agreed to a term of ten years, or that she was ever informed that the lease drawn by him was for a term of ten years, unless she understood the reading thereof by the notary. Nor does he testify that the husband ever read or saw the lease drawn by him, or that he ever informed the husband that it was for a term of ten years, but merely that he drew the lease according to a previous agreement with the husband, which agreement the husband, in his testimony, denies. Under the settled rule of this court as to conflicting evidence in cases of this kind, I think the finding as to plaintiff's mistake should not be disturbed. The mistake being established, I think the circumstances tend to prove that the defendant "knew or suspected" it; and that the finding to this effect should also be sustained. The alleged fact that the defendant knew or suspected the plaintiff's mistake was not susceptible of direct proof, except by the testimony of the defendant; and it may be of some significance that defendant failed to testify, on his own behalf, that he did not know or suspect the alleged mistake at the time of the execution of the lease.

2. Counsel for appellant contend that it is essential to the support of the judgment that the averments of the complaint to the effect that the plaintiff was of weak mind, that the consideration was inadequate, and that the defendant fraudulently concealed from the plaintiff a material part of the contents of the lease, or prevented her from understanding it, should have been proved and found. The only fraud necessary to sustain the judgment is such as may be inferred from the failure of the defendant to correct the mistake of the plaintiff known to or suspected by the former at the time of the execution of the lease. This is all that is required by section 3399 of the Civil Code. Higgins v. Parsons, 65 Cal. 280, 3 Pac. Rep. 881; Cleghorn v. Zumwalt, 83 Cal. 156, 23 Pac. Rep. 294. There is nothing inconsistent with this in the law of the case as laid down on the former appeal. 77 Cal. 596, 20 Pac. Rep. 134. That appeal was from a judgment for defendant on demurrer to the original complaint, which prayed for only a rescission of the lease; and it was merely decided that the complaint was

sufficient. After the cause was remitted the plaintiff amended her prayer by asking the alternative relief of revision of the lease, in case a rescission should be denied. The complaint contains several averments not essential to this alternative relief, and, among them, inadequacy of consideration, and weak-mindedness of the plaintiff. If plaintiff only intended to lease her property for a term of 5 years, instead of 20 years, and the defendant knew or suspected her true intention, it is quite immaterial, for the pupose of merely reforming the lease on the ground of mistake, that the plaintiff was not weak-minded, and that the monthly rent reserved was an adequate consideration for a lease of 20 years. Higgins v. Parsons and Cleghorn v. Zumwalt, supra. For the purpose of testing the sufficiency of the findings the case should be regarded simply as a case to reform the lease under section 3399 of the Civil Code, on the ground of a mistake of the plaintiff, known or suspected by defendant. In this view of it, all the objections on the ground of insufficiency of the findings not heretofore considered appear to be irrelevant.

3. Appellant's counsel contend that "the Code provision (section 3399, Civil Code) was not framed to benefit the indifferent, or those who are grossly careless, and must be construed as requiring the exercise of at least ordinary care;" and, therefore, that relief should be denied the plaintiff on the ground of her neglect to give such ordinary attention to the reading of the lease by the notary as would have enabled her to understand its contents. In support of this point the cases of Hawkins v. Hawkins, 50 Cal. 558, and Association v. Esche, 75 Cal. 513, 17 Pac. Rep. 675, are cited. Neither of these cases is in point. The former was an action to avoid a written contract on the ground that the plaintiff was induced to sign it by false representations of the defendants that "it was like the verbal agreement" which preceded it, and which it was intended to replace, the defendants knowing that the written contract was not like the verbal agreement; and the plaintiff, believing such representation of defendants to be true, signed the written contract without reading it, although he had full opportunity to do so. The lower court sustained a general demurrer to the complaint, and this was affirmed on appeal. The complaint made neither a case of mutual mistake, nor a case of mistake of one party which the other knew or suspected. The defendants were not mistaken, and it was not alleged that they knew or suspected any mistake on the part of the plaintiff. The object of the action was to annul a contract simply on the ground of such actual fraud as induced a mistake on the part of the plaintiff, which the defendants were not alleged to have known or suspected. So, in the latter case, when the defendants by cross-complaint sought to reform the bond on which the suit was brought, on the ground of mutual mistake of the parties, it was found that there was no mistake on the part of the plaintiff; neither was there any averment, finding, or pretense that the plaintiff knew or suspected any mistake on the part of the defendants.

4. As another distinct cause of action the plaintiff alleged that some time after the execution of the written lease, and while she was still ignorant that it was a lease for ten years, instead of five years, she was induced by defendant to add an additional story to the leased house, and to make other improvements, at a cost of $13,200, in addition to the improvements required by the lease; that defendant verbally promised to pay a reasonable rent for such improvements, in addition to rent reserved by the lease; and that, when these improvements were completed, on or about January 5, 1888, the plaintiff endeavored to agree with defendant as to the increase of rent on account of said improvements, but defendant refused to agree upon or to pay any additional rent for said improvements, although the rental value of the property was thereby increased $150 per month. The prayer as to this cause of action is that the lease "be so amended and reformed as to carry out the subsequent agreement with reference to the additional improvements put upon the premises, and to provide that the amount of monthly rental shall be increased so as to include a reasonable rental on account of said improvements, to-wit, the sum of $150 per month." The defendant denied that he induced the plaintiff to make these additional improvements, or that he promised to pay any additional rent therefor. The court expressly declined to find upon the issues of fact as to these improvements, "for the reason that this court considers and adjudges the same to be immaterial, and not proper matter for adjudication in this case;" and, as a conclusion of law, further said: "The court does not decide whether or not the plaintiff is entitled to recover from the defendant any additional rental for additional improvements made upon said premises by the plaintiff after the execution of said lease described in the complaint, and the court decides this case without prejudice to the rights of either plaintiff or defendant in the matter of said additional improvements." Counsel for appellant insist that the court erred in thus disposing of that branch of the case relating to the additional improvements. It will be observed that this branch of the case has no connection with the lease, or with the cause of action to reform the lease, as it is founded upon an alleged subsequent parol agreement to pay reasonable rent for improvements additional to those required by the written lease, and not upon any agreement or promise to reform or alter the written lease. Nor does the judgment reforming the written lease in any degree depend upon the alleged subsequent agreement as to additional improvements and rent therefor, nor upon any fact alleged or denied in relation thereto. Therefore it would not be necessary or proper to reverse the judgment reforming the written lease for any error (conceding there was error) in disposing of the distinct cause of action resting solely upon the alleged subsequent agreement. It would seem that the effect

of the action of the court was a dismissal of the alleged cause of action based on the subsequent agreement, without prejudice to the rights of either party, for the reason that the court considered "the same to be immaterial, and not proper matter for adjudication in this case." It is not quite clear why the court so considered it. It may have been because it was thought to be improperly joined with the other cause of action, or, possibly, because the facts stated did not constitute a cause of action. If so, the court should have sustained defendants' demurrer on one of these grounds. But no point is made here on the overruling of the demurrer. If the plaintiff was entitled to any relief upon the alleged subsequent contract, it is clear that she was not entitled to the specific relief prayed for, viz., that the written lease "be so amended and reformed as to carry out the subsequent agreement with reference to the additional improvements;" for surely the lease could not have been amended or reformed by incorporating into it a distinct subsequent agreement. But, whatever may have been the ground upon which the court based its action in substantially dismissing this branch of the case without prejudice to the parties, and whether or not it erred in so doing, I think that it appears that the defendant was not thereby injured. I therefore think the judgment and order should be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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88 Cal. 300

EMERY *et al.* v. SVEA FIRE INS. CO. (No. 13,373.)

(*Supreme Court of California.* March 16, 1891.)

FIRE INSURANCE—ACTIONS ON POLICY—PROOF OF LOSS—WAIVER.

1. In an action on an insurance policy, where there is an allegation that plaintiffs performed all the conditions of the contract, defendant cannot object that the complaint does not allege that there was a notice of loss as required by the policy.

2. Where an insurance company accepts the premium after notice of loss, it cannot, in an action on the policy, complain that plaintiffs did not give them the notice of the loss required by the policy.

Department 2. Appeal from superior court, city and county of San Francisco.

T. C. Van Ness, for appellant. *Gray & Haven*, for respondent.

DE HAVEN, J. This is an appeal from a judgment in favor of the plaintiffs against the defendant, for the sum of $2,000, and legal interest thereon from December 8, 1885, and costs. The appeal is upon the judgment roll alone. The contention of the appellant is that the judgment should be reversed, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, because it appears therefrom that notice of the loss sustained by plaintiffs was not given forthwith, as required by the terms of the policy of insurance upon which plaintiffs seek to recover. The complaint alleges that the building insured was destroyed by fire on July 25, 1885, and that upon October 8, 1885, the plaintiff gave to defendant due notice and proof of such fire and loss. The appellant insists that, as the notice was not given forthwith, the defendant is not liable; but there is also an allegation in the complaint "that the plaintiffs duly performed all the conditions of the said contract of insurance on their part," and if giving notice of the fire and loss forthwith was a condition of said policy to be performed by plaintiffs, then the complaint, in this general statement, alleges the due and timely performance of this condition. Ferrer v. Insurance Co., 47 Cal. 416. If the other allegation, as to the exact date when such notice was given, is inconsistent with the general statement just quoted, then the most that can be said is that the complaint in that respect might be considered as ambiguous; but no such objection was pointed out in the demurrer which the appellant filed. But a conclusive answer to the position assumed by appellant is this: The complaint alleges that the appellant did have notice of the loss within five days after it occurred, and with full knowledge of said fire demanded and received from respondents the premium of $50 due upon the policy sued upon, a credit therefor having been previously given by the appellant Under these circumstances the appellant cannot be heard to say that the contract of insurance was not in full force on that day, and as it then knew of the fire and the loss of respondents nothing further was required of respondents in the way of giving notice, except to furnish, within a reasonable time thereafter, the preliminary proofs as to the particulars of the loss, and the complaint shows that this was done, even if not furnished before October 25, 1885. Judgment affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

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88 Cal. 233

PEOPLE v. TRAVERS. (No. 20,750.)

(*Supreme Court of California.* March 5, 1891.)

HOMICIDE—GRAND JURY—CHALLENGES—INSTRUCTIONS—EVIDENCE.

1. A discharged grand jury cannot be summoned into court on trial of an indictment, and challenged and examined on their *voir dire*, on the ground that defendant was not called to answer before them when the indictment was found, and given an opportunity to challenge them.

2. In such case defendant has a remedy under Pen. Code Cal. § 995, which provides that an indictment may be set aside, when defendant was not called to answer when it was found, "on any ground which would have been good ground for challenge;" but the fact that he had ground for challenge must be shown either by examination of the jurors as witnesses or by other competent evidence.

3. On indictment for murder it is error to charge that the jury must not consider the fact that innocent men have been convicted of crime in determining the guilt or innocence of defendants. GAROUTTE, J., dissenting.

4. On indictment for murder the court charged the jury: "During the argument your attention has been called to cases in which it was claimed

that juries had improperly convicted the defendants. While it is true that innocent persons have been convicted in the past, there is no proof in this case of any such fact, and you are not justified in considering such matters. * * * The guilt or innocence of this defendant must be determined from the evidence admitted in the case, and not from sympathy or prejudice. If all criminals must go free because there is a possibility of jurors making mistakes, society might as well disband." *Held*, that the instruction was objectionable because of its apparent hostility to defendant, and because it usurped the functions of the jury as the sole judges of the weight of the evidence. GAROUTTE, J., dissenting.

5. On indictment for murder the burden of showing insanity, relied on as a defense, is on defendant.

6. To constitute insanity caused by intoxication a defense to an indictment for murder it must be settled insanity, and not a mere temporary mental condition.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Thos. S. Ford, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

MCFARLAND, J. The appellant was convicted of murder, and appeals from the judgment on the judgment roll and a short bill of exceptions, which shows certain proceedings had on a motion to set aside the indictment.

1. Appellant, upon his arraignment, moved to set aside the indictment upon the ground that he had not been held to answer when the grand jury which indicted him was in session, and that the grand jurors were prejudiced against him, and had unqualified opinions that he was guilty. He introduced on the motion an affidavit made by the county clerk, and one made by himself, which showed that he had not been held to answer when he was indicted, and had no opportunity to challenge the grand jury. No other evidence was introduced. The bill of exceptions states that "defendant then offered to leave the challenge to the said grand jurors who indicted him to prove the challenge good, and moved the court for reasonable time and opportunity to examine each juror on his *voir dire* in support of said challenge. The court overruled said motion and challenge, and defendant excepted." The first part of the language above quoted is obscure. It probably was intended to state that defendant moved for leave to challenge the grand jurors, and thus "prove the challenge good." At all events, the idea of appellant seems to have been that he had the right to have the discharged grand jurors reassembled in court, and to proceed to challenge them formally, and to examine them on their *voir dire*, just as he might have done before the indictment was found. But this is evidently a mistaken notion of the law. A challenge to a grand juror is a preliminary objection to the qualification of the juror, and its purpose is to prohibit the juror from sitting and inquiring into the charge against the party interposing the challenge; and, if the challenge be allowed, the juror "cannot be present or take part in the consideration of the charge against the defendant who interposed the challenge, or the deliberation of the grand jury thereon." Pen. Code, § 900. It is clear that, after a grand jury has completed its work and been discharged, the conditions which make a challenge possible no longer exist. But a defendant who has been indicted without an opportunity to challenge the grand jury is not without remedy. Section 995 of the Penal Code provides that an indictment may be set aside, "when the defendant has not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror." This language clearly contemplates that the time for challenges has passed, and provides that a defendant may still prove any fact which "would have been good ground for challenge" if he had had an opportunity to interpose it at a time when a challenge was possible. But the fact which would have been good ground for challenge must be proved in the ordinary way in which other facts are proven,—by the introduction of evidence,—either by the examination of the jurors, or by other competent evidence. For this purpose, of course, defendant is entitled to the process of subpœna to compel the attendance of his witnesses; but there is no process by which discharged grand jurors can be reassembled in their official character, and subjected to the original process of challenging. For the purpose of producing his evidence a defendant would, no doubt, upon a proper showing, be entitled to a continuance; but in the case at bar there is no such showing. The appellant did not make any affidavit of merits or diligence; nor did he, by affidavit or otherwise, show that he could produce a single item of evidence tending to show the disqualification of any grand juror. Indeed, he did not make a regular motion for continuance, but seemed to rely upon the supposed right to have the court reassemble the jury. In People v. Beatty, 14 Cal. 567, relied on by appellant on this point, the only question was whether a grand jury could indict at all for a crime committed during their session, and after they had been impaneled; and the remark of the justice who delivered the opinion about the right of challenge upon arraignment was evidently mere *dictum* used in the progress of his reasoning, and was not intended as the grave determination of a question not before him. There is nothing in the other two cases cited (People v. Turner, 39 Cal. 376; and People v. Geiger, 49 Cal. 650) which determines anything adversely to the views above stated. We therefore think that the court below did not commit any error in the matter of the motion to set aside the indictment.

2. The other points made by appellant relate to instructions to the jury, and the first one objected to is as follows: "(4) During the argument of this case your attention has been called to a number of cases in which it was claimed that juries had improperly convicted the defendants. While it is true that innocent persons have been convicted in the past, there is no

proof in this case of any such fact; and you are not justified in considering such matters in determining the guilt or innocence of this defendant. The guilt or innocence of this defendant must be determined from the evidence admitted in the case, and not from sympathy or prejudice. If all criminals must go free because there is a possibility of jurors making mistakes, society might as well disband." This instruction was clearly erroneous. In the first place, it is objectionable—although, perhaps, not fatally so—on account of its apparent hostility to the defendant. The jury would be very apt to get the impression from it that the court considered the defendant as one of the "criminals" alluded to, and feared that the jury would fail to convict him on account of "sympathy or prejudice." In the second place, it is objectionable as an argument in favor of the prosecution on the weight of evidence, and thus was an invasion of the province of the jury; for "to weigh the evidence and find the facts is in this state the exclusive province of the jury, and with the performance of that duty the judge cannot interfere without a palpable violation of the organic law." People v. Dick, 34 Cal. 666; People v. Fong Ching, 78 Cal. 173, 20 Pac. Rep. 396. In the third place, if it can be considered as a direction about law, and not an argument about facts, it is still clearly erroneous. It was probably founded on People v. Cronin, 34 Cal. 191; but the instruction which was approved in that case, although itself somewhat extreme, was far different from the one given in the case at bar. In the Cronin Case the court, in its instruction on this point, after stating the fact that counsel for defendant had—as in the case at bar—alluded to cases where, upon circumstantial evidence, innocent men had been convicted, told the jury, among other things, that "the quotation of such cases is proper in order to make the jury careful in arriving at a proper conclusion from such (circumstantial) evidence." But in the case at bar the court told the jury, "You are not justified in considering such matters." But the jury had the right to consider that innocent men had been convicted; for the difference in the weight of evidence required in civil and criminal cases, and the doctrine of reasonable doubt itself, are founded upon the danger of destroying life or liberty upon evidence that does not produce thorough conviction, and that danger is based, in great part, upon human experience. The court seemed to think that the fact of former unjust convictions could not be considered because "there is no proof in this case of any such fact;" but that such cases have occurred is a matter of common knowledge, which the court itself admitted when it said, "It is true that innocent persons have been convicted in the past." If the court had simply told the jury that, if they were satisfied beyond a reasonable doubt, by the evidence before them, that the defendant was guilty, they should not be deterred from so finding merely because there had been some innocent man convicted, the instruction might not have been objectionable; but to tell them that in coming to their conclusion they should not consider the danger of convicting an innocent man was clearly erroneous. And it certainly does not appear that the whole instruction was not prejudicial to appellant. We think, therefore, that for the giving of this instruction the judgment should be reversed. (It may be remarked that the propriety of counsel reading to a jury from law books is not here involved. It does not appear whether that was done, or whether counsel merely alluded to the subject orally; but if there was such reading it occurred without objection.) As the case must be retried it is necessary to notice one or two other matters.

3. In the instructions given upon the subject of insanity there was no error prejudicial to appellant. They are somewhat voluminous; but the main proposition contained in them was that a person is presumed to be sane until the contrary is shown, and that the burden is on a defendant of showing insanity by a preponderance of evidence. This rule has been established in this state by a long line of authorities. People v. Meyers, 20 Cal. 518; People v. Coffman, 24 Cal. 237; People v. McDonell, 47 Cal. 134; People v. Wilson, 49 Cal. 13; People v. Messersmith, 61 Cal. 246; People v. Hamilton, 62 Cal. 377; People v. Kernaghan, 72 Cal. 609, 14 Pac. Rep. 566; People v. Eubanks, (Cal.) 24 Pac. Rep. 1014. And this long line of decisions cannot be held to have been overruled by People v. Bushton, 80 Cal. 160, 22 Pac. Rep. 127, 549, where the defense was accident; and People v. Elliott, 80 Cal. 296, 22 Pac. Rep. 207, where the defense was self-defense. In those cases the court was dealing entirely with those "circumstances" referred to in section 1105 of the Penal Code, which mitigate or justify or excuse an act done by a sane man who might commit a crime; and its attention was not called in any way to that unusual and peculiar mental condition called "insanity," which renders a man utterly incapable of committing crime at all. In the opinion of the court in People v. Bushton reference is made to People v. Smith, 59 Cal. 607, and People v. Flanagan, 60 Cal. 3, in which the very doctrine of the Bushton Case was stated; but in those cases—where the defenses were self-defense and defense of property—the court certainly did not intend to overthrow the settled rule of the court on the subject of insanity. We are clear, therefore, that the undisturbed law of this state still is that the burden of showing insanity is upon a defendant who seeks shelter under it as a defense. In an instruction asked by defendant and given, there occur these words: "Or, if you have a reasonable doubt as to his sanity, you cannot convict him of any degree of crime, but should acquit him." This, of course, is conflicting with the other instructions on the subject of insanity; but, as it was favorable to defendant, the conflict would not, of itself, be good for reversal. At another trial this conflict can be avoided.

4. We see no error in the instructions given on the subject of intoxication. As to the instructions asked by appellant on the subject of *delirium tremens*, etc., it is sufficient to say that settled insanity produced by a long-continued intoxication, affects responsibility in the same way as insanity produced by any other cause. But it must be "settled insanity," and not merely a temporary mental condition produced by recent use of intoxicating liquor. And an instruction to that effect should be given on another trial, if asked, provided there be evidence to which such an instruction would apply. There are no other points necessary to be noticed. It may be remarked, in conclusion, that in nearly every instance where this court has solved a doubtful proposition in favor of the affirmance of the judgment, the decision has been made the basis and pretext for further excursions in the same direction into the realm of unquestionable error. The judgment is reversed, and the cause remanded for a new trial.

We concur. BEATTY, C. J.; DE HAVEN, J.; SHARPSTEIN, J.; HARRISON, J

GAROUTTE. J., (*dissenting*.) The practical administration of justice should not be defeated by a too rigid adhesion to a close and technical analysis of the instructions of the court; and, conceding this instruction to be obnoxious to criticism, (of which fact I have some doubt) yet its weaknesses form too slight a basis for a reversal of the judgment in this case. I do not believe that the fact of innocent men having been convicted in the past was a matter to be considered by the jury in making up their minds as to the guilt or innocence of this defendant. Such fact could not add or take away one jot from the weight to be given every piece of evidence in the case. It was the duty of the jury to be convinced beyond a reasonable doubt from all the evidence in the case of the guilt of the defendant before they could convict, and the fact of innocent men having been convicted in the past should not and could not have impregnated itself into the question of reasonable doubt in any way. The jurors in this case, under their oaths, were bound to try this defendant in the same manner, under the same rules of law, and give him the full benefit of all the shields with which the law surrounds every defendant, whether as a matter of fact no innocent man ever had been convicted in the past, or whether such convictions by our courts of justice were an ordinary occurrence. I see nothing in the instruction to indicate hostility towards the defendant. The words "sympathy" and "prejudice," as used, applied equally as strongly in his favor as against him. If all "defendants" must go free I consider a more appropriate expression than if all "criminals" must go free; yet I do not think a jury would get the impression, and am sure that it ought not to get the impression, that by the use of the word "criminals," as used in the instruction, the court intended to refer to the defendant as one of that class. I think the judgment should be affirmed.

DEAN v. PARKER *et al.* (No. 13,338.)

(*Supreme Court of California.* March 10, 1891.)

COMMUNITY PROPERTY—ESTOPPEL—DEEDS—DELIVERY—EVIDENCE.

1. The statement by the husband in his petition for letters of administration on his deceased wife's estate, that certain land was her separate estate, does not estop the grantee of the husband from claiming that it was community property, in an action against the purchaser thereof as part of the wife's estate.

2. Delivery of a deed cannot be disproved by the testimony of a third person, with whom the grantor left it, that if he had afterwards called for it he would have given it to him, since it does not tend to show the grantor's intention.

Department 2. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

F. B. Ogden, for appellant. *C. G. Dodge* and *J. A. Johnson*, for respondents.

DE HAVEN, J. Action to determine conflicting claims to certain real property. In the court below the judgment was in favor of defendants, and from this judgment, and an order denying his motion for a new trial, the plaintiff appeals. The findings of the court show that the land in controversy was originally conveyed to the mother of the plaintiff,—that is, she was named as grantee in the deed conveying it,—but that the property was paid for with the community funds and property of the mother and her husband, who was the father of plaintiff. The mother, Mary Dean, died January 26, 1877, leaving surviving her her said husband and three children. On October 3d following the father died, but prior to his death, he, on the 5th day of February, 1877, filed in the proper probate court a petition signed by him, praying for letters of administration on the estate of his deceased wife, in which it was stated that the land in controversy was her separate property. The findings further show that this same property was afterwards, in 1882, in the matter of the estate of said Mary Dean, sold to one Thomas O'Donnel, which sale was confirmed by the court, and said O'Donnel conveyed to defendants. The court also found: "That before the death of said John Dean, he, (the said John Dean,) on the 14th day of May, 1877, made and executed a deed of said property described in the complaint to James P. Dean, the plaintiff herein, for a consideration of one dollar, but that said deed was never delivered, no consideration was ever paid by the grantee therein named, the said deed was never recorded, and the defendants herein never were aware of or had any notice of the existence of said deed until after their purchase of the property in dispute in this action; nor did the said John Dean have or own any interest in said property at the time he executed said deed, or at any time thereafter, by reason of said action in filing said petition." As a conclusion of law the court found "that the said act of John Dean in filing said petition, setting forth therein that the said property was his wife's separate property, and causing the same to be sold thereunder, forever estops said John Dean, his heirs or successors, from claiming the same, and has the effect (even if it were community property) of making it the separate property of Mary Dean; that plaintiff neither has nor owns any right, title, or interest of any nature whatsoever in or to said property, but that the absolute title in fee thereto, and ownership thereof, is in the defendants."

1. If the latter part of what is termed the "conclusions of law" should be considered rather as the finding of an ultimate fact, the sufficiency of the evidence to justify it cannot be considered on this appeal, as there is no exception to it for this cause, or specification wherein the evidence fails to sustain it. But we think that, looking at the entire findings, this should be regarded simply as a conclusion, which the learned judge of the court below drew as one of law, from the specific findings of fact which preceded it, and that therefore we may review it, and if in law the conclusion is not properly drawn from such preceding facts, the error may be corrected.

2. It is apparent that the court, in its sixth finding, above set out, does not use the word "executed" in its strict legal sense, and the proper construction of that finding is that the deed referred to therein was signed, but not, in fact, delivered.

3. The facts found by the court do not support the judgment. The court finds in effect that the property in controversy was community property of the husband, John Dean, and his wife, Mary Dean, and that the husband survived the wife. This being so, upon the death of the wife the property belonged to the surviving husband, without administration, (Civil Code, § 1401,) and the estate of Mary Dean never had any title to or interest in this property to convey to any persons; and the facts alleged in the answer of defendants as matter of estoppel, and found by the court, are not such as to estop the plaintiff here from showing that the property in controversy was never the separate property of the said Mary Dean, under whom the defendants claim. The facts necessary to be shown, in order to call into exercise the principle of equitable estoppel, are stated by Field, C. J., in Biddle Boggs v. Mining Co., 14 Cal. 367, as follows: "*First*, that the party making the admission by his declarations or conduct was apprised of the true state of his own title; *second*, that he made the admission with the express intention to deceive, or with such carelessness or culpable negligence as to amount to constructive fraud; *third*, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, *fourth*, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved." In referring to this quotation the court in Smith v. Penny, 44 Cal. 166, says: "This specification of the facts which are essential to the operation of the estoppel was approved in Davis v. Davis, 26 Cal. 23, and in many other cases in this court, except that in some of the cases the third specification was modified in one particular, it not being deemed requisite that the other party should be shown to be destitute of all possible means of knowledge of the true state of the title, but only of convenient or ready means to that end." See, also, Bigelow, Estop. p. 437.

4. One of the questions to be determined was whether a certain deed, signed by the father of plaintiff and purporting to convey to plaintiff the land in controversy, was ever delivered, the evidence showing that it had been placed by the father in the custody of one Daniel O'Keefe, who was a witness upon the trial. While giving his testimony, the defendants put to O'Keefe this question: "Supposing the father had come in a year after he left the deed with you, or two or three weeks afterwards, and asked you for the deed again, would you have given it to him?" This question was objected to upon the grounds that it was immaterial, irrelevant, and incompetent. The objection was overruled, the plaintiff excepting to such ruling, and the witness answered, "Yes, sir." The objection to this question should have been sustained, as the evidence sought by it was clearly irrelevant. The matter to be determined was, what was the intention of plaintiff's father in leaving this deed with the witness? and for the purpose of arriving at this intention evidence of any declarations made or conversations had in relation to that subject by the said John Dean, at that or any subsequent time, would have been competent; but what the witness would have done if the deed had been afterwards called for can have no tendency to show whether the father did or did not intend in what he did to make a delivery of the deed for the benefit of his son.

5. The cause must be remanded for a new trial, and, as we cannot know that the evidence upon another trial, in relation to the delivery of the deed referred to, will be in all respects the same as appears in this record, we do not deem it proper to pass upon the question whether the sixth finding of the court is supported by the evidence. Whether there was a delivery for the benefit of the plaintiff is a question of fact to be determined by ascertaining the intention of the father in what he did, in signing it and leaving it with the witness O'Keefe. Any declaration made by him at the time of the alleged delivery, or at any subsequent time, as to his intention, is relevant to this inquiry. The evidence in this record, as to what he said during his last sickness in giving a reason for not making a will, is relevant. Judgment and order reversed.

We concur: Sharpstein, J.; McFarland, J.

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87 Cal. 483

MOORE v. LONG BEACH DEVELOPMENT CO.
(No. 13,789.)

(*Supreme Court of California.* Jan. 19, 1891.)

APPEAL—TRANSCRIPT—INNKEEPERS—BOARDERS.

1. Where there is but one notice of appeal, which is taken both from the judgment and the order denying motion for a new trial, and there is appended to the transcript a stipulation that it contains a full and true copy of all papers "necessary and proper to be used on this appeal," and that "the appeal may be heard thereon," the statement of facts on motion for new trial contained in such transcript may be considered

without any further identification as having been used at the hearing of the motion.

2. Plaintiff, who had no fixed home, with his family went to an hotel, expecting to remain there as long as his wife's health permitted, and in consideration of the probable length of his stay he was furnished board and lodging at a large reduction from the regular rates. He did not put any of his valuables in charge of the hotel-keeper. Soon afterwards a fire occurred, without any negligence on the part of the hotel-keeper or his employes, in which plaintiff's personalty was destroyed, and he sued the hotel-keeper therefor. *Held*, that plaintiff and his family were boarders, as to whose property defendant is not liable as an innkeeper and an insurer, and hence plaintiff cannot recover.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county, W. H. CLARK, Judge.

This was an an action against the Long Beach Development Company, as an innkeeper, to recover damages for property of H. Edwin Moore and his family destroyed by a fire in defendant's hotel. The fire was shown to have occurred without any negligence on defendant's part, and the court found that plaintiff and his family were not guests as to whom defendant occupied the relation of innkeeper, but that they were boarders of whose goods defendant was not an insurer. There was judgment for defendant, and plaintiff appeals.

Scarborough & Waterman and *Chapman & Hendricks*, for appellant. *Lee, Gardiner & Scott*, for respondent.

FOOTE, C. The respondent contends that the statement upon motion for a new trial, which appears in the transcript, cannot be looked into, for the reason that it is not identified as having been used upon the hearing of the motion. There is but one notice of appeal, and that is both as to the judgment and the order denying a new trial. The stipulation at the end of the transcript is to this effect: "It is hereby agreed that the foregoing transcript contains a full, true, and correct copy of all papers necessary and proper to be used on this appeal; that the appeal herein was duly perfected, and the requisite deposit in lieu of an undertaking was given within the time prescribed by law; that the foregoing is a full, true, and correct transcript of the record on appeal; and that the appeal herein may be heard thereon." If the word "appeal," as used in the stipulation, was intended to apply to both the order denying a new trial and the judgment, then it covers the statement of the case which appears in the transcript, which is in due form, and appears to have been settled by the judge, and filed on February 3, 1890. The order denying a new trial was made on the 17th of February, 1890. It is plain that the appeal was taken from both order and judgment, and the stipulation evidently refers to them both where the word "appeal" is used. Since the stipulation states that the "appeal herein may be heard" upon the record on appeal in the transcript, it is proper that the statement here, under all the facts appearing in the record, should be held as being one that can be looked into on the appeal from the order denying a new trial. The main argument for the reversal of the judgment and order, by the appellant, seems to be that the evidence is insufficient to show that the plaintiff was a boarder and not a guest of the innkeeper who was sued, and the former contends that, if a guest, he is entitled to recover, but not as a boarder. The case, as stated in the complaint, is that of an individual who goes to an inn, as a guest or transient traveler, and while he is there the inn burns down and he loses his baggage, containing wearing apparel, jewels, and other personal valuables, occasioned by the negligence of the defendant and his servants, and seeks to make the innkeeper responsible for the loss. The fire appears to have been purely accidental, and there is nothing to show that the goods lost were not under the control of the owner, kept in his rooms, or that they were ever in the manual possession of the innkeeper. Nor is it proved or found that the fire or loss occurred by any negligence of the defendant, its servants or agents. But the plaintiff contends that an innkeeper is an insurer of the goods of his guests placed in the inn, even as against loss by fire, as well as robbery and theft, and that, if they are lost or injured while there, by any of these agencies, that the innkeeper must make good the loss. It does not seem that any case as to such a loss by fire has been adjudicated by the appellate court of this state. But in Mateer v. Brown, 1 Cal. 221, and in Pinkerton v. Woodward, 33 Cal. 600, cases where the loss to the guest seems to have been occasioned by robbery, it was held that the innkeeper was an insurer of the property committed to his care against everything but the act of God or the public enemy, or the neglect or fraud of the owner of the property.

Conceding, therefore, without deciding, that the view urged by the appellant is the law of this state upon the matter in hand, the real question for determination here is whether the evidence shows the plaintiff to have been a guest or a boarder. Each case, as to this point, turns upon its special state of facts. There is no doubt in our minds, upon the facts here, that the plaintiff and his family were boarders whose time of remaining at their place of sojourn depended upon their own volition. They went to the inn to ascertain if it was a place where the health of the wife of the plaintiff would be benefited, with the determination to remain there indefinitely, perhaps for a very long time, if such should be the case; but with a view, if her health did not improve, to leave at any time. It was also shown that the plaintiff, before going there with his family, had made an arrangement for terms of entertainment at a great deal less than those for a transient traveler, and by the month, and they went prepared to stay, if they desired, for a considerable time, and to enjoy all the gayeties that might take place. They had no other place of residence, and for the time being this inn was to be such, subject, as to time of stay, to their volition, but at reduced rates of board by the month. It was evidently the hope and the expectation of the plaintiff and wife that her health would be benefited at this inn, which was a pleasure resort, its principal business season being that of the summer. And it is fair to presume that they thought it would benefit her, and went prepared to stay as permanent boarders, rather than transient travelers. These facts were known to the defendant, and with this idea in the minds of both the contracting parties, together with the fact that the plaintiff had just been boarding at another inn at another place and had left there some of his goods, such as he did not expect to need at the defendant's inn, and had no fixed home, and that he got reduced terms of board, and did not place his valuables in the care of the innkeeper, are very persuasive that it was the intention of all the parties that he should be a boarder, and not a mere transient traveler or guest, and for the time being a resident in the place where he was intending to board. Under these facts and others appearing in the record, we cannot say that the findings of the court below are not sufficiently supported by the evidence. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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88 Cal. 290

FOREMAN *et al.* v. BOYLE *et al.* (No. 13,764.)

(*Supreme Court of California.* March 10, 1891.)

JOINDER OF ACTIONS—INJURIES TO WATER-RIGHTS.

The proprietors of two different tracts of land, who each own a separate irrigating ditch by means of which the waters of a creek, in different amounts, are conveyed to their land, cannot unite in an action for damages against one who, at a point above their lands, has wrongfully diverted the waters of the stream, as they have no common interest in the damages, and there is no legal basis on which they can be apportioned between them.

In bank. Appeal from superior court, Butte county; P. O. HUNDLEY, Judge.

Gray & Sexton, for appellants. *Lewis Freer* and *Jo. D. Sproul*, for respondents.

GAROUTTE, J. This is an action for damages for diverting the waters of plainiffs, and for an injunction to restrain the defendants from the further diversion thereof. Among other things, the complaint in effect alleges that the West Branch of Canon creek and Canon creek were natural water-courses; the waters of the former flowing into the latter. That the plaintiff Foreman owns a tract of land situated upon the west branch of Canon creek, and also 15 inches of the waters of said creek for the purpose of irrigating her said tract of land. That the plaintiff Rogers owns a tract of land situated upon Canon creek, and also 35 inches of the waters of said creek, for the purpose of irrigating his said tract of land. That plaintiffs, by means of ditches erected by them, respectively, carried said waters from the aforesaid creeks over and upon their said tracts of land. That the defendants, at a point above the lands of plaintiffs, diverted the said waters from their natural channel, depriving said owners thereof; and by such diversion plaintiffs suffered damages in the sum of $1,000. A demurrer to the complaint was filed upon the ground that there was a misjoinder of parties plaintiff and a misjoinder of causes of action. The demurrer was overruled, issue was joined, and upon the trial the findings of the court were in consonance with plaintiffs' complaint, except as to the allegation of damages, and as to that allegation the court found that the plaintiffs had suffered damages in the sum of five dollars. The case comes before us upon the judgment roll.

It will be observed that the plaintiff Foreman owns a tract of land, 15 inches of water, and the ditch which carries the water from West Canon creek upon her land. Her co-plaintiff, Rogers, has no interest whatever in the land, the water, or the ditch. Likewise plaintiff Rogers owns a tract of land, (some distance from Foreman's land,) 35 inches of water, and the ditch which carries the water from Canon creek upon his land; and his co-plaintiff has no interest in such land, water, or ditch. These plaintiffs claimed in their complaint, and obtained by decree of the court, a joint judgment for damages against the defendants. It is impossible to see how the plaintiffs have any joint or common interest in the damages recovered, or upon what legal basis such damages could be apportioned between them. Respondents' counsel suggest that the plaintiffs are tenants in common, and the damages should be apportioned in proportion to the inches of water each owns. This cannot be the true rule, for it readily can be seen that for many reasons the diversion of the waters by defendants may have caused plaintiff owning 15 inches of water far greater damage than would be entailed upon plaintiff owning 35 inches of water. Tenancy in common in ditches and water-rights is no unusual estate, but the cases relied upon by respondents to establish a tenancy in common between the plaintiffs in this action in the waters of a natural channel, under the surrounding circumstances as depicted by the record in this case, are not in point, for the facts are essentially dissimilar. It seems to us that the demurrer to the complaint should have been sustained upon both of the grounds stated. There was a misjoinder of parties plaintiff; the plantiffs seek a joint recovery of damages in which they have no joint interest. "Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the down flow of the water, and may unite in its restraint or abate it as a nuisance, but they cannot hence unite in an action for damges, for as to the injury suffered there is no community of interest." Bliss, Code Pl. § 76. There is a misjoinder of causes of action, and it is so held in Barham v. Hostetter, 67 Cal. 274, 7 Pac. Rep. 689. This question is carefully considered in Blaisdell v. Stephens, 14 Nev. 17, and in the case of Miller v. Ditch Co., (Cal.) 25 Pac. Rep. 550. But, conceding the judgment for damages to be erroneous, the amount is merely nominal, and too trifling to justify the reversal of the entire judgment. Let the judgment be modified by striking out the damages, without costs to appellant, and in all other respects let the judgment be affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; MCFARLAND, J; HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.

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88 Cal. 114

PEOPLE v. WHEATLEY. (No. 20,708.)

(*Supreme Court of California.* Feb. 25, 1891.)

BURGLARY—PRIOR CONVICTION—TRIAL—PLEADING—JURY—JUDGMENT.

1. An information charging burglary and prior conviction was assigned by the presiding judge of the superior court of the city and county of San Francisco to department 6 for trial, where defendant was arraigned, and pleaded not guilty. The record, without showing objection by defendant, simply shows that the cause was transferred to department 12, where, on arraignment, a plea of guilty of the prior conviction was entered. Afterwards a trial was had in department 12, resulting in a verdict of guilty of burglary. *Held*, that it will be presumed that the cause was properly transferred by the presiding judge.

2. In such case defendant will be considered as having pleaded not guilty in department 6 to both the burglary and prior convictions, and, on transfer to department 12, of having withdrawn his former plea as to the former convictions, and pleaded guilty thereto.

3. Where the oral charge of the court appears in full in the transcript of the record, it will be presumed that it was taken down by the shorthand reporter.

4. On trial for burglary, the fact that a juror left the others and went to the water-closet for a few minutes in company with the bailiff is no ground for a new trial if it appears that he conversed with no one, and heard nothing about the case, and that there was no discussion about the case in his absence.

5. A judgment of conviction of burglary and prior conviction, which recites that defendant, when called for sentence, was informed by the court of the information charging him with the crime of burglary and prior conviction of burglary, of his arraignment and pleas of not guilty as charged in the information, and guilty of the prior conviction, of the trial, and verdict of guilty of burglary, and that he was then asked if he had any legal cause to show why judgment should not be pronounced, is sufficient under Pen. Code Cal. § 1200, requiring that defendant, before judgment, must be informed of the nature of the charge, and of his plea, and the verdict, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him; and section 1207, requiring the clerk to enter the judgment on the minutes, stating briefly the offense for which the conviction was had, and the fact of prior conviction, etc.

6. On appeal in a criminal case it will be presumed that before proceeding with the trial the clerk read the information, unless the contrary appears from the record.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Section 1200 provides: "When the defendant appears for judgment he must be informed by the court, or by the clerk under its direction, of the nature of the charge against him, and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him." Section 1207 provides: "When judgment upon a conviction is rendered the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction, (if one,) and must within five days annex together and file the following papers, which will constitute a record of the action: (1) The indictment or information, and a copy of the minutes of the plea or demurrer; (2) a copy of the minutes of the trial; (3) the charges given or refused, and the indorsements thereon; and (4) a copy of the judgment."

Carroll Cook, for appellant. *The Attorney General*, for the People.

BELCHER, C. The defendant was charged with the crime of burglary, and with having suffered prior convictions of burglary and petit larceny. The information was filed in the superior court of the city and county of San Francisco on September 19, 1889, and on the same day the presiding judge of the court assigned the case for trial to Hon. W. T. WALLACE, judge of department No. 6. The defendant was arraigned in department No. 6, on September 27th, and "pleaded not guilty of the crime charged in the information." The record then shows the following "[Title of court and cause.] Oct. 3, 1889. Cause transferred to department No. 12." "[Title of court and cause.] Department No. 12, October 9, 1889. Present, Hon. D. J. MURPHY, Judge. The defendant, having heretofore been arraigned and pleaded not guilty, came into court, and having been called upon and arraigned upon the prior convictions herein, now pleads guilty thereto." Subsequently, as the record states, the cause came on regularly for trial in department No. 12, the defendant and his counsel being present in court, and at the conclusion of the trial a verdict was returned by the jury, finding the defendant guilty of burglary in the second degree. Judgment was then entered that he be punished by imprisonment in the state-prison for the term of eight years. From this judgment and the order denying him a new trial he appeals.

1. The first point made for a reversal of the judgment is that the case was not properly tried in department No. 12. It is claimed that, inasmuch as the minutes of the court show that the cause was assigned to Judge WALLACE for trial, Judge MURPHY had no authority to try it, in the absence of a showing in the record of a reassignment by the presiding judge, and of consent on the part of Judges WALLACE and MURPHY that it be reassigned. But the minutes of the court do state that the cause was transferred to department No. 12; and they do not state that any objection was made by the defendant to the transfer or the place of trial. Under these circumstances it must be presumed, nothing appearing to the contrary, that the transfer was properly made by the presiding judge.

2. It is contended that when the defendant was arraigned in department No. 6, and pleaded "not guilty," his plea put in issue the prior convictions, and that, hav-

ing once pleaded, no other plea could be made or have place in the record, until the first was withdrawn or set aside. And it is said that the first plea was not withdrawn, and hence, as there was no verdict as to the prior convictions, the punishment imposed was greater than the law authorized. There can be no doubt at this time that one may be charged in an indictment or information with some particular offense, and with having suffered previous convictions of other offenses, and may be arraigned thereon under section 988 of the Penal Code. He may plead simply not guilty, and thus put in issue every material allegation of the indictment or information, (Pen. Code, § 1019,) or he may plead not guilty of the principal offense charged, and confess the previous convictions, (People v. Lewis, 64 Cal. 401, 1 Pac. Rep. 490; People v. Brooks, 65 Cal. 295, 4 Pac. Rep. 7; Ex parte Young Ah Gow, 73 Cal. 438, 15 Pac. Rep. 76.) If he confesses the previous convictions, then the clerk, in reading the indictment or information to the jury, must omit therefrom all that relates to such previous convictions, and no testimony in regard to them can be offered, or reference to them be made, during the trial. Pen. Code, § 1093, subd. 1; People v. Meyer, 73 Cal. 548, 15 Pac. Rep. 95; People v. Sansome, 84 Cal. 449, 24 Pac. Rep. 143. And there can also be no question that, when one is charged with a prior conviction, and has pleaded simply not guilty, he may be permitted afterwards, in the discretion of the court, to withdraw his plea as to that charge, and enter a plea of guilty thereof. In People v. Lewis, supra, the defendant was indicted for grand larceny, and charged with a previous conviction of a like offense. He was arraigned, and pleaded not guilty of the offense charged. On the trial he offered to plead guilty to the charge of previous conviction, and the court denied the offer. Speaking of this ruling, this court, by Mr. Justice THORNTON, said: "Having then regularly pleaded, the court was not bound afterwards on the trial to accept the plea of guilty of the previous conviction. It may be in its discretion to do so or not; not a discretion, however, to be arbitrarily exercised, but one in accordance with law and its analogies. If the court abuses its discretion in so ruling, a reversal would follow; but we cannot see that it went beyond what the law permitted." Here the record shows that the defendant, after pleading not guilty, came again into court, and pleaded guilty of the prior convictions. He had a right to do this, with the court's consent; and his action, so far as we can see, was voluntary, the object, doubtless, being to keep from the jury on the trial all knowledge of the prior convictions, and thus secure a better chance for an acquittal of the main charge. The case of People v. King, 64 Cal. 338, cited by appellant, cannot aid him. That case was decided upon the theory that, since the repeal of sections 969 and 1025 of the Penal Code, when a person is charged with a criminal offense and a previous conviction, his admission of the previous conviction is not sufficient, but he must plead to both charges, and both must be proved on the trial and passed upon by the jury. That theory has not since been accepted by the court, and, in effect, the case has been overruled. See cases above cited.

3. It is said that the record shows affirmatively that the court charged the jury orally, and fails to show that the charge was taken down by the phonographic reporter. This is assigned as error, and urged as cause for a reversal of the judgment. But the presumption is that the reporter performed his duty, and took down the charge in shorthand; and that he must have done so very clearly appears from the fact that the full charge is brought here in the transcript, covering 10 printed pages.

4. It is claimed that defendant's motion for a new trial should have been granted, because the jury, after retiring to deliberate upon their verdict, separated without leave of the court. It appears from the affidavits read on the hearing of the motion for a new trial that when the jury left the jury-box and started for the jury-room, eleven of them went into the room, and one went into a water-closet adjacent to the court-room, accompanied by the bailiff, He was gone about five minutes, and, while absent from the other jurors, held no conversation with any person, and nothing was said about the case in his hearing. During his absence no discussion upon the case was had among the other jurors, and no ballot was taken. On his return he participated in all the deliberations of the jury and in finding the verdict. Upon this showing we see no error in the refusal of the court to grant the defendant's motion. People v. Symonds, 22 Cal. 349. But it is urged that the court could not consider the counter-affidavits read and filed on behalf of the people, because the deputy-clerk, before whom they were worn to, did not sign his principal's name to the jurat. It was not necessary for him to do this. Touchard v. Crow, 20 Cal. 150; Muller v. Boggs, 25 Cal. 175.

5. It is contended that the court had no right to pronounce judgment of imprisonment for eight years, because "there is not a word said in the judgment about any prior convictions, nor does the verdict say aught concerning the same." But the judgment recites that, when the defendant was called up to be sentenced, he was duly informed by the court of the information, charging him "with the crime of burglary and prior conviction of burglary in the first degree; of his arraignment and plea of not guilty as charged in said information, and guilty of said prior conviction; of his trial, and the verdict of the jury, on the 17th day of October, 1889, 'guilty' of burglary in the second degree. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him." This was sufficient to meet the requirements of sections 1200 and 1207 of the Penal Code; and imprisonment for the term of eight years was authorized. Pen. Code, §§ 461, 666. It is also objected that the judgment is insufficient in form, because it orders and adjudges that the defendant be

punished by imprisonment in the state-prison, etc. In our opinion the judgment was sufficient in this regard, and the objection is without merit.

6. The point is made that it was error to proceed with the trial without the reading of the information by the clerk. But there is nothing in the record to show that the information was not read by the clerk to the jury, and we must therefore presume that it was.

7. It is earnestly contended that a new trial should have been granted the defendant on the ground that the verdict was contrary to law and to the evidence. It must be admitted that the evidence, as brought up in the record, does not seem to us to be very strong and convincing; and yet the jury, under proper instructions, which were very full and clear upon every point involved, found the defendant guilty. And the learned judge of the court, who saw the witnesses, and heard them testify, denied defendant's motion. Under the circumstances, we do not feel at liberty to say that the evidence was so insufficient as to justify a reversal on this ground.

8. In one part of its charge the court told the jury that under the allegations of the information, and under the proofs in the case, they must be satisfied of two things in order to warrant them in convicting the defendant, viz., entry into the building, and intent to commit larceny. It is claimed that another fact, viz., the ownership of the building as alleged, was equally necessary, and that the instruction as given was therefore misleading. But the court afterwards fully instructed the jury on this point, telling them that, of course, they must find the ownership of the building to be as set forth in the information. This was certainly sufficient, and it takes away appellant's last ground of complaint. It results that the judgment and order appealed from should be affirmed, and we so advise.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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88 Cal. 140

PEOPLE v. McGREGGOR. (No. 20,775.)

(*Supreme Court of California.* Feb. 28, 1891.)

BURGLARY—FORMER CONVICTIONS—INSTRUCTIONS—VENUE.

1. On the arraignment of one informed against for burglary it is not error for the court to ask him whether he had suffered the prior convictions charged against him in the information.

2. Where defendant has confessed the former convictions the presumption is that the clerk, on reading the information to the jury, omitted that part relating to the prior convictions, as he is required to do by Pen. Code Cal. § 1093; and this presumption is not overcome by a statement in the record that the information charging defendant with the "crime" (not crimes) was read, and "plea" (not pleas) of not guilty stated to the jury.

3. The presumption is that the oral charge of the court was taken down by the short-hand reporter, as required by Pen. Code, § 1093, unless the record affirmatively shows the contrary.

4. Where the undisputed evidence shows that defendant committed the burglary in the nighttime, a remark by the judge in charging the jury that the testimony showed the crime to have been committed at 3 or 4 o'clock in the morning could not have prejudiced defendant; and hence the supreme court will not determine whether this language was the mere exercise of the constitutional power of the judge to "state the testimony," or a violation of the mandate that "judges shall not charge juries with respect to matters of fact." Const. Cal. art. 6, § 19.

5. On a trial for burglary, alleged in the information to have been committed in the city and county of San Francisco, evidence that the crime was committed in a house on "Grant avenue," which is in fact one of the principal streets of said city, is sufficient proof of the venue, without direct testimony that the avenue is in the city of San Francisco.

Department 2. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

Carroll Cook and *J. E. Foulds*, for appellant. *W. H. Harr*, Atty. Gen., for the People.

McFARLAND, J. The defendant was convicted of an attempt to commit burglary in the first degree, and appeals from the judgment and an order denying a new trial. Several points are relied on for a reversal of the judgment.

1. It was not error for the court to ask the defendant, upon his arraignment, whether he had suffered the prior convictions charged against him in the information. People v. Wheatley, ante, 95, (No. 20,708,) filed February 25, 1891, and cases there cited.

2. It does not appear that the clerk read to the jury that part of the indictment which charged defendant with prior convictions. As the defendant had confessed the former convictions, the presumption is that the clerk performed his duty as prescribed in section 1093 of the Penal Code, and omitted that part of the indictment which related thereto; and this presumption is not overcome by anything in the record, which merely states that "the information charging the defendant with the above crime [not crimes] was read, and plea [not pleas] of not guilty stated to the jury." No objection was made at the time; and it is quite clear that there is no affirmative showing of error on this point.

3. The sentence—10 years—does not exceed the maximum term of imprisonment, for the record shows that the defendant had suffered former convictions.

4. Assuming that the record must show a recital of the matters referred to in section 1200 of the Penal Code, and that the section is not merely directory, still it appears from the record in this case that the directions of said section were quite fully complied with.

5. It does not appear that the oral charge of the court was not taken down by the reporter; and where the contrary does not appear it will be presumed that the law[1] was obeyed.

6. The jury having first returned a verdict of "guilty as charged," the court informed them that it would be necessary to find the degree of the crime, and that, if the attempt was made in the night-

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[1] Pen. Code, § 1093, requires oral instructions to be taken down by the phonographic reporter.

time, it would be an attempt to commit burglary in the first degree; and, in that connection the court told the jury that "the testimony was it was 3 or 4 o'clock in the morning." It is contended that this language last quoted was erroneous. It is not necessary to determine whether the use of this language was the mere exercise of the constitutional power of a judge to "state the testimony," or a violation of the mandate that "judges shall not charge juries with respect to matters of fact," (Const. art. 6, § 19,) for the only evidence upon which defendant could have been convicted at all showed without conflict that the attempt was made in the nighttime. Defendant, therefore, coul not have been prejudiced by the remark of the court.

7. The gravest point made by appellant is the one based upon the alleged failure to prove the venue. Of course, there must be sufficient proof of the venue in every criminal case, and experienced prosecuting attorneys are generally careful to make such proof at an early stage of the trial. In the case at bar the prosecution seem to have entirely overlooked the necessity of asking any questions on that subject. But notwithstanding that oversight there was, we think, sufficient evidence to warrant the jury in finding that the crime charged was committed in the city and county of San Francisco, there being no evidence tending to show the contrary. The information was entitled in the superior court of said city and county, and charged that the crime was committed "at the said city and county of San Francisco, state of California," at a certain house on "Grant avenue." The jurors were citizens and residents of San Francisco, and the court-house in which they sat while defendant was being tried was near the center of the city. The principal witness for the prosecution testified that on the night of the alleged crime he was a police officer "on regular force;" that on said night he was on duty "on Grant avenue, from Market to Bush," and that territory was his "regular beat;" and that when he first saw defendant that night he was in an alley called "Stockton Place," "off Grant avenue, between Post and Sutter." And it was shown that the crime, if committed at all, was committed on said Grant avenue, at a certain house adjacent to said Stockton place. Thus a half dozen of the principal and best known streets of the city of San Francisco were named, between or upon which the crime was committed; and although, from a failure to ask them, the witnesses did not testify directly that these streets were in the prominent city of San Francisco in which the court was sitting, still we think that the evidence, taken in connection with the surrounding circumstances, was sufficient to justify the jury in finding as jurors what they well know as men, that the streets named by the witnesses meant the well-known streets so named in San Francisco. In Brady v. Page, 59 Cal. 52, and Whiting v. Quackenbush, 54 Cal. 306, this court seems to have held that judicial notice would be taken of the streets of San Francisco, although there may be some points of distinction between those cases and the one at bar. In People v. Manning, 48 Cal. 335, the court says: "Another point made is that the venue was not proved. No witness testified in so many words that the killing occurred in the city and county of San Francisco; but the whole testimony, taken together, left no room for a reasonable doubt on this point. We think the venue sufficiently proved." In that case the killing was shown to have been done on Clay street, without any direct evidence that Clay street was in San Francisco; but it may be claimed that Clay street could have been located by reference to other named streets which were shown to be in the city. In State v. Burns, 48 Mo. 438, the witness spoke of the murder as taking place on Mullanphy street, but it was not expressly stated anywhere that Mullanphy street was in the county or city of St. Louis; and the supreme court of Missouri say: "If there was evidence to reasonably satisfy the jury that the crime was committed in the city, that was sufficient. * * * The question of venue or jurisdiction is always a question of fact, and may be proved like any other fact. If the evidence raises a violent presumption that the offense for which the person is indicted was committed in the county where he was tried, it is sufficient. 1 Whart. Crim. Law, § 601." In State v. Ruth, 14 Mo. App. 226, it was testified that the stolen property was taken from a boarding-house, No. 1203 Washington avenue, and that defendant was seen with it in a shop on Christy avenue, and the court say: "It is true that no witness says, in so many words, that the offense was committed in the city of St. Louis. But this is not necessary. It is enough if the testimony was such as to satisfy the trier of the fact that the place of the offense was that laid in the information." And, speaking of certain cases referred to, the court continues as follows: "In neither case could there be any doubt in the minds of the triers of the fact, or of the judges of the appellate court, that the streets spoken of by the witnesses were St. Louis streets. We will not take judicial notice of all the streets of the city in which this court holds its sessions. But we need have no difficulty in judicially recognizing the fact that Washington avenue, Morgan street, and Christy avenue, are old, established, and well-known streets of St. Louis,—the city in which we sit as a court,—and that this knowledge prevails generally throughout the city, and must have been possessed by the trier of fact in the present case." Bland v. People, 3 Scam. 364, Beavers v. State, 58 Ind. 530, and Com. v. Costley, 118 Mass. 3, are all to the point that inferential evidence is sufficient to establish venue. The foregoing cases are authorities which fortify the conclusion on this point which we have above stated. The question here is not a strict question of judicial knowledge. The question is whether, under all the circumstances of the case, there was sufficient evidence to warrant the jury in concluding that the crime was committed in San Francisco, and, as before said, we think that it was sufficient.

8. We do not think that the evidence was insufficient to sustain the verdict upon the merits; nor do we think that the court abused its discretion in refusing to grant a new trial on the ground of newly-discovered evidence. The judgment and order appealed from are affirmed.

We concur: De Haven, J.; Sharpstein, J.

88 Cal. 245

Preble *et al.* v. Abrahams. (No. 13,710.)

(*Supreme Court of California.* March 6, 1891.)

Vendor and Vendee—Contracts—Specific Performance—Evidence.

1. A contract, signed by both parties, reciting that the vendor agrees to sell land, is also an agreement by the vendee to purchase.

2. Plaintiffs sued for specific performance of a written contract to purchase "40 acres of the 80-acre tract at Biggs," and offered evidence that defendant agreed to purchase the east half of the tract if plaintiffs would agree to sell the west half to one B., and that the west half had been sold to B. under a contract made at the same time as defendant's. *Held*, that the evidence was admissible, and showed an agreement by defendant to purchase the east half of the tract.

3. In such case defendant cannot object to a decree of specific performance on the ground that the land is incumbered, where the decree only authorizes a judgment against him on deposit by plaintiffs with the clerk of a deed free of incumbrance.

Appeal from superior court, Butte county; P. O. Hundley, Judge.

R. H. Lindsay and *Gray & Sexton*, for appellant. *John Gale*, for respondents.

Sharpstein, J. The plaintiffs in their complaint allege that on the 13th day of January, 1888, they and the defendant entered into an agreement of which the following is a copy: "Biggs, January 13, 1888. This agreement, made and entered into by C. S. Preble and C. S. Young, of Reno, Nevada, and A. Abrahams of the same place. Said Preble & Young agree to sell to A. Abrahams of Reno, for one hundred and twenty-five dollars per acre, for forty acres of the eighy-acre tract at Biggs, and upon the payment of the said sum said parties of the first part shall make, execute, and acknowledge, and deliver unto the said party of the second part a good and sufficient deed, vesting the title of said property in party of second part. Preble & Young. A. Abrahams. Witness: M. Biggs, Jr." Plaintiffs further allege that, when said agreement was written, it was understood between all the parties thereto that the same should contain a clause obliging said defendant to buy said land at said price of $125 per acre, and the omission of said clause therefrom was wholly accidental and unintentional; that between the words, "said Preble and Young agree to sell to Abrahams of Reno," and the words, "for one hundred and twenty-five dollars per acre for forty acres of the eighty-acre tract at Biggs," in said contract, there should have been inserted the words, "and said Abrahams agrees to purchase;" that the omission was the result of a mutual mistake, etc. Plaintiffs further allege that they have kept and performed all the terms, covenants, and conditions on their part to be performed, and that defendant refuses to keep or perform any of the terms, covenants, or conditions of said contract on his part, and refuses to purchase said land or pay plaintiffs therefor. Wherefore plaintiffs pray to have said contract reformed so as to make it obligatory upon defendant to purchase said land at the price agreed upon, and that, as so reformed, it be construed and enforced. In his answer the defendant denies all the material allegations of the complaint, except the making of the memorandum in writing, a copy of which is contained in the complaint. Evidence was introduced by the plaintiffs tending to prove the alleged mistake in the memorandum in writing of the agreement between the parties, and by the defendant tending to prove that there was no mistake. Upon all the material issues the court found in favor of the plaintiffs, and decreed the reformation of the contract, and a specific performance of it as prayed in the complaint. Defendant moved for a new trial upon a statement. The motion was denied, and from the judgment, and from the order denying the motion for a new trial, defendant appeals. Everything relating to the reformation of the contract may be eliminated from the case, because the contract, as reformed, means just what it did before it was reformed. Without any reformation, it obligated the defendant as strongly to buy and pay the price specified for the land as it did the plaintiffs to sell it for that price. Appellant contends that the agreement which it is sought to have specifically performed is "an agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable," and therefore cannot be specifically performed. Civil Code, § 3390.

The contention is that the agreement to sell "forty acres of the eighty-acre tract at Biggs" is not sufficiently certain to make the precise act which is to be done clearly ascertainable. This is the only agreement in writing between the parties for the sale or purchase of any real estate; and an agreement not in writing, for the sale or purchase of real estate, is void. And the description of the property in the written agreement is so entirely uncertain as to render the instrument inoperative and void, unless we can go beyond the face of it to ascertain its meaning. Parol evidence is always admissible to explain the surrounding circumstances and situations and relation of the parties, at and immediately before the execution of the contract, in order to connect the description with the thing intended, and thereby to identify the subject-matter, and to explain all technical terms and phrases used in a local or special sense. Pom. Cont. § 152. It appears by the written agreement that the parties intended a sale and purchase of land, and that it was "forty acres of the eighty-acre tract at Biggs." If the vendors owned an 80-acre tract at Biggs we would assume that they intended to sell 40 acres of the 80-acre tract owned by them at Biggs. Evidence was introduced which tended to prove the location and description of the 80-acre tract at

Biggs, and in what part of the tract the 40 acres which the plaintiffs agreed to sell to defendant were situated. The court, in effect, found that, at the date of said agreement, one Mrs. Biggs was desirous of purchasing one-half of said 80-acre tract, *i. e.*, the western half, upon which there were valuable improvements. She offered to pay for that half $5,000. Plaintiffs would not accept her offer, but offered to sell the entire 80-acre tract for $10,000. Thereupon defendant agreed with plaintiffs that, if they would sell to Mrs. Biggs the western half of said 80-acre tract for $125 per acre, he, the defendant, would purchase the other half of said 80-acre tract, and pay $125 per acre therefor. The finding is justified by the evidence, and there is no specification of the particulars in which the evidence is insufficient to justify that finding. The contracts to sell to Mrs. Biggs one-half of said 80-acre tract, and to the defendant the other half thereof, were made at the same time and place. We think the evidence makes the subject-matter sufficiently certain, and that is all that is necessary. Prof. Pomeroy says: "It is not strictly accurate to say that the subject-matter must be absolutely certain from the writing itself, or by reference to some other writing. The true rule is that the situation of the parties and the surrounding circumstances, when the contract was made, can be shown by parol evidence, so that the court may be placed in the position of the parties themselves; and if then the subject-matter is identified, and the terms appear reasonably certain, it is enough." Pom. Cont. p. 227. This is in consonance with the maxim, *certum est quod certum reddi potest*. The evidence clearly shows that the parties perfectly understood that the sale and purchase was not of an undivided interest of 40 acres in a tract of 80 acres, but of 40 acres in severalty. The defendant does not claim in his answer, nor in his evidence, that he intended to purchase an undivided interest in the 80-acre tract. He denies that he intended or agreed to purchase any interest whatever. Nothing is made more clear by the evidence than that Mrs. Biggs, with the full knowledge of all the parties, purchased the 40 acres of said 80-acre tract upon which the improvements were located. This is clearly specified in the written agreement between her and the plaintiffs. They agreed to sell her 40 acres, including the buildings and orchards on the 40 acres, to be taken by her where the houses and barns and orchards were at that time, and the same place on which M. Biggs, Jr., and his family were residing. This, and the agreement to sell to the defendant, were contemporaneous. The defendant, if he agreed to purchase anything, agreed to purchase the 40 acres remaining after the 40 acres purchased by Mrs. Biggs had been segregated from said 80-acre tract.

By the judgment of the court below the plaintiffs are required "to execute, duly acknowledge, and deliver to said defendant a good and sufficient deed of conveyance in fee, and free and clear of all incumbrances, the form of the same to be settled and approved by the judge of said superior court, if the parties differ respecting it, of the following described premises, to-wit: Forty acres of land, being the eastern half of said eighty-acre tract described in said complaint, and the part thereof not heretofore conveyed to M. Biggs, Jr., said eighty-acre tract being one of the tracts into which the ranch known as 'Biggs' Upper Ranch' is divided, and upon the western half of which the dwelling-house and buildings used in connection with said ranch are situated, all being situated near Biggs, in Butte county." And it is further adjudged that, if said defendant refuse to receive said deed, the plaintiffs file the same with the clerk of the court, and that upon such delivery or filing of said conveyance the defendant pay to the plaintiffs, or their attorney, the sum of $5,000, the purchase price named in said agreement. It is urged on behalf of defendant that said premises are incumbered, and therefore he ought not to be compelled to accept a conveyance of them. He is not compelled to accept a conveyance which does not vest in him the fee free of all incumbrances. He was once tendered a conveyance, which he did not refuse to accept on the ground that it did not convey the premises free of all incumbrances, but on the ground that he had never agreed to purchase the premises. He is amply protected by the judgment against any incumbrances, and, until he is tendered a conveyance free of all incumbrances, he is not compelled to accept it, or to pay anything to the plaintiffs. The errors of law specified are such as could not have affected the substantial rights of the parties, and therefore must be disregarded. Judgment and order affirmed.

We concur: Harrison, J.; McFarland, J.; De Haven, J.; Garoutte, J.

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88 Cal. 274

Wren v. Mangan *et al.* (No. 13,424.)

(*Supreme Court of California.* March 7, 1891.)

Public Lands—"Swamp and Overflowed"—Application to Purchase.

Pol. Code Cal. § 3441, prohibits the surveyor general from approving applications, for swamp and overflowed lands, until six months after they have been segregated. Section 3443 provides that a person desiring to purchase such lands must file his affidavit that there are no settlers on the land, or, if there are, that the same have been segregated for six months. *Held*, that an application to purchase "swamp and overflowed" land is void, if made before the lands have been segregated to the state as such.

In bank. Appeal from superior court, Tulare county; William W. Cross, Judge.

Pol. Code Cal. § 3441, provides: "The surveyor general of the state must not approve any application, nor must the register issue evidence of title, for swamp and overflowed land, until six months after the same has been segregated by authority of the United States." Section 3443 provides: "Any person desiring to purchase swamp and overflowed or tide lands above low tide must make an affidavit * * * that he does not know of any valid claim to the same, other than his own, and, if the land is swamped and overflowed, that he knows the land applied for, and the exterior bounds thereof, and knows of his own knowledge that there are no settlers thereon; or, if there are, that the land has been segregated more than six months by authority of the United States. * * *" Section 3445 provides: "Any person desiring to purchase lands as provided in section thirty-four hundred and forty-three of this Code, which have been segregated by authority of the United States, but which have not been sectionized by the same authority, must apply to the surveyor of the county in which the land is situated to have the land which he desires to purchase surveyed. * * *"

Justine Jacobs, for appellants. *W. B. Wallace*, for respondent.

PER CURIAM. When this cause was pending in department an opinion was prepared by Commissioner BELCHER. After hearing in bank, and due consideration of the case, we are satisfied with that opinion, and with the conclusion therein reached. The opinion is as follows:

"This action was brought to determine a contest as to the right to purchase from the state a certain half-section of swamp and overflowed land, situate in Tulare county. The trial court gave judgment for the plaintiff, from which, and from an order denying him a new trial, the defendant Hyde appeals. The material facts of the case are as follows: On the 2d day of July, 1879, the defendant Mangan filed in the state surveyor general's office his application to purchase a section of land under the law providing for the sale of swamp and overflowed lands. At that time the township, in which the section applied for was situated, had not been surveyed, and the section had not been segregated as swamp and overflowed land by authority of the United States. In 1880 the township was surveyed in the field, and on the 9th day of February, 1881, the township plat was approved by the United States surveyor general, and filed in his office. On this plat the section was marked and designated as swamp and overflowed. At the time of filing his application Mangan was qualified to purchase swamp land from the state, and the application was verified, and stated all the facts required by law for that purpose. It also had attached to it a certificate of the county surveyor that he had surveyed the section, and a certificate of the register of the United States land-office of the district in which the land was situated that there was no pre-emption, homestead, or other filing of record in his office on the said section. The application remained unacted upon until the 22d day of September, 1883, when it was approved by the surveyor general, and thereafter, on the 24th of November following, a certificate of purchase for the land was issued to Mangan. Afterwards, by mesne conveyances and assignments, defendant Hyde became the successor in interest of Mangan in the land and certificate. In February, 1888, the plaintiff settled on the north half of the section, applied for by Mangan, and on the 17th day of March following he filed in the state surveyor general's office his application to purchase the half section so settled upon. The application was properly verified, and stated, among other things, that the land applied for was suitable for cultivation, and that there were no settlers thereon other than the applicant, and that he was an actual settler thereon. Plaintiff also filed at the same time his verified protest against the issuance of any further evidence of title to the said half-section to Mangan or his successor in interest, on the grounds that the said land was not segregated by authority of the United States until the year 1881, and that the same was suitable for cultivation, and neither Mangan nor his successor in interest had ever been a settler thereon. The contest thus raised was referred for determination to the superior court of Tulare county, and this action was thereafter commenced in proper time. As conclusions of law from the facts, the court below found, as to the plaintiff, that he was entitled to purchase the land applied for by him, and to have his application approved by the surveyor general; and as to the defendants, that the application of Mangan and the certificate of purchase issued thereon, in so far as they relate to the lands in controversy, were illegal, null, and void, and that neither of the defendants had any right to purchase the said land, or any right, title, interest, or estate therein.

"1. The first point made for a reversal of the judgment is that the evidence was insufficient to justify the findings, that the land in controversy, and each legal subdivision thereof, was suitable for cultivation, and that the plaintiff was an actual settler thereon when he filed his application. This point cannot be sustained. It is unnecessary to recite the testimony, but, in our opinion, it was amply sufficient to establish both propositions.

"2. The only other point presented is that one seeking to purchase swamp land may make his application to purchase the same before the land is segregated to the state as swamp and overflowed by authority of the United States, and that Mangan's application was therefore not prematurely filed. But in Garfield v. Wilson, 74 Cal. 178, 15 Pac. Rep. 620, this court held otherwise. In that case it was said that 'since 1874 no application to purchase swamp land has been authorized until after the land has been segregated as such, by authority of the United States;' citing sections 3441, 3443, 3445, Pol. Code. That decision, if correct, and we think it is, is decisive of the question. See, also, Tubbs v. Wilhoit, 73 Cal. 61, 14 Pac. Rep. 361."

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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88 Cal. 262

In re VANCE. (No. 13,594.)

(*Supreme Court of California*. March 7, 1891.)

CONTEMPT—APPEAL.

By the provision of Code Civil Proc. Cal. § 1222, that "the judgment and orders of the court or judge, made in cases of contempt, are final and conclusive," no appeal lies from a judgment of the superior court imposing a fine of more than $300 for contempt. Following Tyler v. Connolly, 65 Cal. 30, 2 Pac. Rep. 414.

In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Amos H. Carpenter, for appellant. *Wilson & Wilson* and *A. L. Rhodes*, for respondent.

SHARPSTEIN, J. This appeal is from a judgment in a case of contempt, and the respondent moves to dismiss the appeal on the ground that an appeal does not lie in such case, because it is provided by the Code of Civil Procedure that "the judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." In Tyler v. Connolly, 65 Cal. 30, 2 Pac. Rep. 414, the question is carefully considered, and the conclusion reached that no appeal lies from a judgment imposing a fine of more than $300 for a contempt of court, expressly overruling People v. O'Neil, 47 Cal. 109. Tyler v. Connolly was followed in Sanchez v. Newman, 70 Cal. 210, 11 Pac. Rep. 645. We see no grounds for disturbing the rule laid down in Tyler v. Connolly, supra. Appeal dismissed.

We concur: BEATTY, C. J.; MCFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.; HARRISON, J.; PATERSON, J.

(3 Cal. Unrep. 393)

BURKE v. BOURS *et al.* (No. 13,912.)[1]

(*Supreme Court of California.* March 9, 1891.)

PURCHASE OF PRINCIPAL'S LAND BY AGENT—CONCEALMENT—ESTOPPEL.

1. An agent, having charge of certain property for an absent firm, was directed to sell it for about $5,000, and, wishing to purchase for himself, reported his acceptance, subject to approval of an offer of $4,500 net, and sent a deed of the property with the grantee's name omitted. The owner executed the deed, and, returning it to the agent through the firm, accepted the agent's check for $4,500, which was the full value of the land. The agent did not understand himself to be in the owner's employ, nor that a selling agent's name could not be written in a deed as grantee without the grantor's consent, but, intending no fraud, entered into possession. *Held*, that the heirs of the grantor could not set up fraudulent concealment as a ground for ejectment.

2. In any event, the grantee's possession could not be attacked without tendering back the purchase money.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

George D. Collins, for appellant. *Jas. H. Budd*, for respondent.

FOOTE, C. This action in ejectment was instituted to recover certain real property in the city of Stockton. The cause has been here before, (67 Cal. 447, 8 Pac. Rep. 49,) and it was then decided, among other things, that a certain deed made by one Arguello (whose wife's administrator is now the plaintiff here) to Bours, the defendant, was void and of no effect to convey title from Arguello, because at the time it was executed and acknowledged the name of Bours, the intending purchaser, was not inserted in the deed, and that instrument was a blank as to any grantee. The defendant in possession set up, in defense to the apparent legal title of the plaintiff, facts which were claimed to constitute a perfect equitable title in the former. The court below, by its findings and decision, coincided with the defendant, and rendered judgment that the plaintiff take nothing by his action, and that the defendant recover costs. From that judgment this appeal is taken upon the judgment roll, and a bill of exceptions showing such of the evidence as is necessary, upon which is based the findings and decision which are attacked. It seems to be conceded by all the contestants that the property in dispute was owned and held by Jose Arguello at the time he signed the deed. The respondents claim, however, that on the 14th day of September, 1876, Arguello agreed to, and did afterwards, sell and convey the property to defendant Bours, on the 15th day of September, 1876. The appellant takes the position that no sale or conveyance ever took place; that the deed made in blank, as to the grantee therein, by Arguello, was void; and that there was no agreement or contract on the part of Arguello to sell to the defendant Bours, and that he never did sell to him.

The basis on which the appellant argues his theory of the case is that Bours was the agent of Arguello to find a purchaser for the property in dispute; that he informed Arguello that he had found a purchaser at the price Arguello was willing to take for the property, but that he did not inform Arguello that he, the agent, was the purchaser, and therefore both the deed and the attempted purchase of Bours was void; that the court below was in error in finding, against the evidence, that Bours was not the agent of Arguello, as also in other findings respecting the "material facts of agency and notice to the principal." The facts, as disclosed by the letters in evidence, appear to be about these: Arguello was the owner of this property on the 19th of August, 1876. Bours never knew him at all, but Falkner, Bell & Co., of San Francisco, seem to have been the agents for Arguello in the collection of rents and general management of the property here involved. Upon that day they wrote to Bours, who lived at Stockton, in which place the property, as we have seen, was situated, that Arguello thought of selling his real estate in that town, and had requested them to ascertain the price it would probably realize. At that time, according to the evidence of Bours, which is not contradicted, he was looking after the property at the instance and request and as the agent of Falkner, Bell & Co., "and for nobody else," as he had been doing before Arguello purchased it for one Mazes, the seller to Arguello. After Bours took charge of the property for Mazes he was instructed by him to make his returns to Falkner, Bell & Co. After Mazes sold to Arguello, Falkner, Bell & Co. sent the deed, showing that sale, to Bours, that it might be recorded and returned to them. Afther that he looked after the property for Falkner, Bell & Co., who instructed him to take charge of it, pay the taxes, and make returns to them. But he never received any instructions from Arguello respecting the property, or had any communication by word or letter with him. In this state of affairs, Bours replied by letter to this inquiry of Falkner, Bell & Co., that he did not think the property would sell for over $5.000; that the tenant of it was dissatisfied with the present rents, which he, however, declined reducing. Falkner, Bell & Co. sent this letter of Bours to Arguello, at Santa Clara. Several days after that the latter wrote to Falkner, Bell & Co. that he agreed with Bours in his opinion of the property, and requested them "to communicate with Mr. Bours, and try to sell the property at a price as near as possible to $5,000." This letter was sent to Bours by Falkner, Bell & Co., stating that it authorized the sale of Arguello's property "at or about your figures, namely, $5,000." Bours replied to Falkner, Bell & Co.'s letter, stating that he had ordered an abstract of title to the property to be prepared, and had "placed the same in the hands of a competent broker," and hoped soon to report a sale of it. Bours testified in this connection that Mr. Cutting, the broker in whose hands he had placed the property, had been in the real estate business for about 25 years, etc. Cutting testified that he tried for several weeks to sell the property, but could not. The purport of the letter of Bours just mentioned was communicated by letter to Arguello by Falkner, Bell & Co. At or about this time Bours wrote to Falkner, Bell & Co. that the only offer he had received for the property, free of broker's commissions or costs of deed, was $4,500, "which offer I have accepted, subject to the approval of the owner." He inclosed in that letter a deed for signature, with name of purchaser and amount blank. The letter of Bours was sent to Arguello by Falkner, Bell, & Co., with the deed for Arguello's signature, should he approve of the terms mentioned. Falkner, Bell & Co. declined to advise as to the matter, because they knew nothing of the value of the real estate, but stated that they considered Bours a competent and reliable man. Closing, they wrote: "It remains for you to decide as to the price." Falkner, Bell & Co., after receiving the deed signed and acknowledged by Arguello, with the blank filled in by him as to the amount of the purchase price, $4,500, but the name of the grantee omitted, sent the instrument to Bours, with a letter requesting, "Please advise us when the matter is settled." After that Bours sent to Falkner, Bell & Co. a check for the amount of balance due for rents, etc., and also a check for the $4,500 "proceeds of the sale of the property, but did not state who was the purchaser of the property." Falkner, Bell & Co. acknowledged the receipt of the checks, and stated that they had placed them to the account of Arguello. They informed Arguello of these facts by letter also. Arguello acknowledged receipt of this letter, and appeared to approve of their acts in receiving the money and putting it to his credit. About two months after this it seems that Arguello died, and about two years and eleven months after that this action was brought.

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[1] Reversed in banc. See 28 Pac. 57, 92 Cal. 108.

The administration of the estate of Arguello was closed, and the estate distributed, but the money paid by Bours to Falkner, Bell & Co. placed to the credit of Arguello, and known and approved by him to have been received and placed there, has never been returned, or offered to be returned, to Bours. He went into possession as soon as he got the deed, and paid his money. The evidence shows that he paid all the property was worth; that he had no intention of committing any fraud whatever. The most that can be said is that he did not understand that the law would not authorize him, as he did, to have his name inserted by one Inglis, a clerk, in the blank deed, and that he did not understand if he was really the agent of Arguello; that he could not be agent and purchaser without Arguello knowing it, or unless afterwards, when informed of the real facts, Arguello made no objection. It is plain that what Arguello wanted was to obtain his price for the property, and that he would not have objected to Bours as a purchaser at a fair price. It is manifest from the letters, and from the acts of Arguello in signing, acknowledging, and filling in the deed with the purchase price, and the acceptance of the money after it was sent by Bours to Falkner, Bell & Co., and placed to Arguello's credit, that the latter agreed to sell this property for $4,500 to any one who would pay that amount of money for it. It further appears from the evidence that this amount of money was the full and fair value of the property; and that the agreement made by Arguello to sell this property for the sum of $4,500, to any one who would pay that amount for it, was partially performed by Bours paying the money therefor, and entering into possession thereof. Conceding that Bours was Arguello's agent, and had no right to sell to himself, the evidence tends to show that Arguello knew, after he received the money by the check of Bours, that the purchaser who had gone into possession was Bours, and that Arguello did not object, but ratified his agreement to sell after the disclosure of the name of the intended purchaser, who was Bours, his agent. This being the case, and the sum paid having been the full and fair price for the land, the contract is not open to objection on the ground of fraudulent concealment. Certainly it could not be avoided by Arguello or his heirs, unless they return or offer to return the money paid, which they have not done. We therefore advise the judgment be affirmed.

We concur: HAYNE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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88 Cal. 152

NOONE v. TRANSATLANTIC INS. CO. (No. 12,928.)

(*Supreme Court of California.* March 2, 1891.)

INSURANCE—APPLICATION—PROOF OF LOSS.

1. In an application for insurance, covenanting that the representations therein were true so far as "known to the applicant and material," plaintiff represented her building as 90 feet from

the next nearest, without knowing the exact distance to be 72 feet. *Held*, that such statement was not a warranty, although the policy provides that the application shall be considered a part thereof, "and a warranty by the assured."

2. Where the nearest notary was in the employ of the company, and refused to furnish a certificate of actual loss without fraud, as required by the policy, and the certificate was furnished by another notary, Civil Code Cal. § 2637, providing that the insured should "furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified," did not require plaintiff to send, to the company, evidence that the nearest notary was in their employ.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

T. C. Van Ness, for appellant. *R. M. Fitzgerald*, for respondent.

Belcher, C. This was an action upon a policy of insurance. The plaintiff had a verdict and judgment for $3,717.50, and the defendant appeals from such judgment, and from an order denying its motion for new trial. The grounds which are relied upon for a reversal are the following:

1. It is argued that there was a breach of warranty in relation to the distance of neighboring buildings from that which was covered by the insurance. The policy contained the following provisions: "*Fourth.* The application and survey upon which the issuance of a policy is predicated shall be considered a part of it, and a warranty by the assured. If the assured, by a written or verbal application for insurance, or by survey, plan, or description or otherwise, makes any erroneous representations, or omits to make known any fact material to the risk, * * * then, and in every such case, this policy shall be void." The application upon which the policy was issued stated that the building insured was 90 feet from other buildings, but, after answering the various questions, contained the following: "And the applicant hereby covenants that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant and material to the risk." The evidence showed very clearly that the building insured was not 90 feet from other buildings, but was somewhat under 80 feet therefrom. And in relation to this the judge instructed the jury as follows: "The defendant in this action seeks to avoid its liability under this policy upon the ground, among others, that in the application originally made the applicant stated that the building nearest to the one destroyed was ninety feet away, whereas defendant now claims that it was but seventy-two feet distant, and that there was another building only seventy-four feet away. It is for you to determine from the evidence whether the distance was or was not ninety feet. If you find it was not, it is for you to determine whether such misrepresentation was or was not material, and upon this point you must consider all the evidence relating to the materiality of the statement. If you find that the nearest building was not ninety feet away and that this was a material statement, it rendered the policy void, and the plaintiff could not recover unless the defendant waived its right to declare the policy void." If the provisions of the policy and application taken together amounted to a warranty that the building insured was 90 feet away from other buildings, the above instruction was both erroneous and injurious to the appellant. But in our opinion, although at first view there is some want of harmony between such provisions, they do not show that there was any such warranty as is contended for by the appellant. The application first states that the building insured was 90 feet from other buildings, but concludes with a covenant or agreement that the statements therein contained are true, "so far as the same are known to the applicant." The different provisions must be read together; and, when so read, we think it clear that there was no warranty that the building insured was 90 feet from other buildings. The case of National Bank v. Insurance Co., 95 U. S. 673, is precisely like this case, except that the statement which was claimed to be untrue was as to the value of the property. It is true, as claimed by the appellant, that value depends a good deal upon opinion and probability, and is not, like distance, a matter which can be accurately ascertained. But the court expressly stated that its opinion did not proceed upon such a construction of the policy. It said: "We rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty." If there was no such warranty as is claimed by the appellant, the charge was more favorable than it had a right to expect, and it could not have been injured thereby. There is nothing in the evidence tending to show that the plaintiff knew exactly what the distance was. The difference between 90 feet and 74 or 72 feet is not one which the plaintiff would be apt to know; and what evidence there is on the subject tends to show that she did not know it.

2. The policy provided that the loss, if any, was "to be paid within sixty days (if this company shall so elect) after due notice and proof thereof made by the assured, and received at the office in accordance with the terms of this policy hereinafter mentioned." It also contained a provision that in case of loss the assured should forthwith give notice of such loss, "and shall also produce a certificate under the hand and seal of a magistrate or notary public, (nearest to the place, not concerned in the loss as a creditor or otherwise, nor related to the assured,) stating that he has examined the circumstances attending the loss, knows the character

and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or notary public shall certify." In this connection it may be stated that the Civil Code has the following provision, viz.: Section 2637: "If a policy requires, by way of preliminary proof of loss, the certificate or testimony of a person other than the insured, it is sufficient for the insured to use reasonable diligence to procure it, and, in case of the refusal of such person to give it, then to furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified." The plaintiff produced to the company the certificate of one Ramage to the facts required to be stated. But it is conceded that he was not the nearest magistrate or notary, and that the person who was such (one Turner) had been applied to, and had refused to give the certificate. In connection with this refusal the plaintiff introduced evidence tending to show that her attorney had informed the company's adjuster that "the reason why the certificate was not signed by Mr. Turner was that he had been engaged by the companies or had been employed by the companies to take some affidavits for them, and for that reason, as I had been informed by Mrs. Noone, he had refused to sign them." There was also evidence tending to show that a few days after the fire Turner had given instructions to have measurements taken of the distance of the building insured from other buildings. And we do not see why he should have done so, unless he was acting in the interest of the company. The inference that he was so acting is not rebutted by any evidence; and, if he was employed by the company, it was not necessary for the plaintiff to produce evidence to the company of such fact. In relation to the foregoing, the court charged the jury as follows: "Evidence has been offered to show that at the time plaintiff furnished proofs of loss to the company the attorney for plaintiff stated that the reason why the certificate attached to the proofs was not made before the nearest notary was because Mr. Turner, the nearest notary, had refused to sign it, stating to the plaintiff that he had been engaged for the company, and could not do it. It is the duty of the court to determine whether by so doing the plaintiff furnished to the company reasonable evidence that the refusal of Mr. Turner was not induced by any just grounds of disbelief in the facts necessary to be certified. If you believe this evidence, the court instructs you that the reason given to the company for not producing the certificate of Mr. Turner, the nearest notary, was sufficient, and that the certificate furnished was a sufficient compliance with the requirements of the policy as modified by the law." There may have been a slight inaccuracy in the statement of the testimony in this instruction. But, as above stated, if Turner was employed by the company to take measurements, etc., as is to be inferred from the evidence, we think that of itself was a reason why the plaintiff was relieved of the necessity of getting his certificate to the justice of her claim, and that it was not necessary to inform the defendant of the fact. In this view there was nothing to be waived, and all that part of the case relating to waiver may be regarded as surplusage. We do not see any conflict in the instructions, or any material error in relation thereto or in the record. Our opinion is that the judgment and order denying a new trial should be affirmed.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

(88 Cal. 277)

CALIFORNIA SOUTHERN HOTEL CO. v. RUSSELL. (No. 13,837.)

(*Supreme Court of California.* March 9, 1891.)

CORPORATIONS—ORGANIZATION—LIABILITY FOR SUBSCRIPTIONS.

Defendant and others agreed to organize a hotel company, with a capital of $100,000, divided into shares of $100 each, and that a meeting of stockholders should be called to organize the corporation and elect directors whenever $70,000 should be subscribed, the owners of a majority of the stock to constitute a quorum. One of a firm of general agents of a railroad and steam-boat company subscribed in the company's name, without authority, "for the amount of freight on furniture and material" shipped from certain ports, $10,000. He also subscribed in his own name a certain block "for a site for a hotel, if accepted and used for that purpose, $7,500, and in that case, cash $5,000." When $77,200 was subscribed, a meeting was had, and the agent voted those shares. *Held*, that since the agent's personal subscription was conditional, and the other unauthorized, the shares were illegally voted, and an independent subscriber, who did not take part in the organization, was not liable for his subscription, though the railroad and steam-ship company afterwards ratified the agent's subscriptions.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

J. M. Wilcoxon, for appellant. *Venable & Goodchild & Graves* and *Turner & Graves*, for respondent.

BELCHER, C. The facts of this case are as follows: Prior to August 17, 1887, the defendant and others signed a paper by which they agreed to and with each other that they would organize and form a corporation for the purpose of erecting and owning a hotel building in the city of San Luis Obispo, and of purchasing all real and personal property necessary to be used in connection with the said building; that the capital stock of the said corporation should be $100,000, divided into 1,000 shares, of the par value of $100 each; that they respectively subscribed for each number of shares of the stock of the corporation as were set after their respective names, and would pay for the same, up to the par value thereof, at such times and in such manner as might be determined by the board of directors of the corporation to be thereafter chosen. The paper then contains the following clause: "And we further agree that, whenever seventy thousand ($70,000) dollars of said capital stock has beeen subscribed for, a meeting shall be called for the purpose of electing a board of directors, and taking such steps as are required by law to form the said corporation, and that at such meeting the owners of a majority of said subscribed stock shall constitute a quorum; and are authorized to elect said board of directors, and transact any business necessary to fully complete the organization of said corporation." The defendant subscribed for 10 shares of the stock, and the paper showed subscriptions in the aggregate for 772 shares. The second and third subscriptions in the list were as follows: "Pacific Coast Steam-Ship Company, for itself and Pacific Coast Railway Company, for amount of freight on furniture and material shipped from ports south of Mendocino and north of San Diego, both inclusive. (This subscription is in place of and is a substitute for any and all other subscriptions made by or for or on account of the Pacific Coast Steam-Ship Company, or the Pacific Coast Railway Company, for stock of or in any proposed hotel company since the burning of 'The Andrews,' about April, 1886. Goodall, Perkins & Company, General Agents.) Estimated about ——; No. shares, 100. —Amount, $10,000." "Edwin Goodall,—the block of land bounded by Higuera, Johnson, Marsh, and Essex streets for a site for a hotel, if accepted and used for that purpose, $7,500; and in that case cash $5,000.—No. shares, 125.—Amount, $12,500." Subsequently Edwin Goodall, for himself and the Pacific Coast Steam-Ship Company, united with others in calling a meeting of the subscribers. The meeting was held, and Goodall was present and voted the full amount of stock subscribed for by himself and the steam-ship company, viz., 225 shares. The result was that on August 17, 1887, a corporation was organized in the name of the plaintiff with a capital stock of $100,000, divided into 1,000 shares, of $100 each. The defendant was not present at the preliminary meeting, and did not acquiesce in or agree that the corporation should be formed on the subscriptions which had been made, and he never at any time recognized the validity of the corporation. The articles of incorporation included the names of the Pacific Coast Steam-Ship Company for 100 shares of stock, and of Edwin Goodall for 125 shares, without conditions, and they left out the names of 5 of the subscribers, whose aggregate subscriptions were for 50 shares. The corporation proceeded to erect a hotel building, and has since opened and conducted the same as a hotel. The board of directors of the corporation made calls for the payment of the full amount of the subscriptions, in installments of 20 per cent. each. The defendant refused to pay the amount subscribed by him, or any part thereof, and this action was brought to recover the same. The case was tried by the court without a jury, and, among other things, the court found that the "subscription of the Pacific Coast Steam-Ship Company and Pacific Coast Railway Company was made by Edwin Goodall, a member of the firm of Goodall, Perkins & Co., general agents for said companies, and was not authorized by said companies." Judgment was then entered that the plaintiff take nothing by its action. From that judgment the plaintiff appealed, and has brought the case here on the judgment roll.

It is claimed for appellant that judgment should have been entered in its favor on the findings. We do not think so. Under the agreement the subscription of $70,000 was a condition precedent to the calling of a meeting and forming a corporation. And until that condition was complied with the defendant incurred no obligation to pay his subscription. Railroad Co. v. Schwartz, 53 Cal. 106. See, also, Amer. Law Reg., No. 7, and cases cited. But it very clearly appears that the condition was not complied with for two reasons: *First.* The second subscription for $10,000, having been made without authority, was invalid, and could not be counted in making up the $70,000. And, if the unauthorized act was afterwards ratified, still the rights of the defendant were not thereby affected, and could not be, without his consent. Civil Code, § 2313. *Second.* The second and third subscriptions, amounting to $22,500, were both conditional and not absolute. Under these circumstances, we think that the proper judgment was entered, and we advise that it be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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88 Cal. 263

LOGAN *et al.* v. ROSE *et al.* (No. 13,922.)

(*Supreme Court of California.* March 7, 1891.)

DEDICATION OF STREETS—ACCEPTANCE BY USER.

1. The owner of a tract of land platted it and conveyed the lots with reference to the plat. The plat showed that the streets were 80 feet wide, except C. street, which occupied a space 150 feet wide. A part of C. street, comprising a strip 80 feet wide, had been used as a public street for 11 years, when the owner conveyed a portion of said strip. *Held*, that there had been such an acceptance of the dedication as to the part so used, that it could not be revoked by such conveyance.

2. Where one holds lands by a deed absolute, and sells part thereof with reference to a recorded plat with streets marked upon it, parol evidence that he took the land subject to a trust, but not showing the nature thereof, is insufficient to rebut the presumption that he had authority to thus dedicate the streets to the public.

Commissioners' decision. In bank. Appeal from superior court, Butte county: PHIL W. KEYSER, Judge.

A. F. Jones, for appellants. *Lewis Freer*, for respondents.

FOOTE, C. This action was for damages against Rose, as road-master, and the other defendants as his employers, advisers, etc., for the removal of embankments or approaches to the plaintiffs' warehouses. At the trial, on the conclusion of the plaintiffs' case, it appeared that neither Gray, Streeter, nor Smith, three of the defendants, had anything to do with the matter, so that a nonsuit was granted to them. After the argument and submission of the case, the court, sitting without a jury, gave judgment in favor of the defendant Rose for costs, and dismissed the plaintiffs' complaint on its merits. From the judgment, and an order denying a new trial, the plaintiffs appeal. They claimed the right to use and possess the land in controversy under a lease from the Central Pacific Railroad Company, who had derived its title by deed from Charles Crocker, and he by deed from the Contract & Finance Company. The defendants claimed that the land was dedicated to the use of the public as a street in the town of Biggs, in Butte county, before the plaintiffs obtained their lease.

The main question at issue here is whether the tenth finding of fact in reference to that dedication is sustained by the evidence. The plaintiffs claim that the street was dedicated only to the extent of 60 feet in width, but admit that if the dedicated width was of as much as 80 feet, then the judgment and order should be affirmed. The theory of the case as presented by the appellants seems to be that Charles Crocker (in whom the legal title was vested by the Contract & Finance Company on October 26, 1875) by his deed of April 28, 1886, conveying to the Central Pacific Railroad Company a strip of land 90 feet wide, which was a part of the land he acquired by his deed from the Contract & Finance Company, revoked any offer of dedication of the land in controversy as a street which had been before made, and that this revocation took place prior to any acceptance by the public of the street. There was evidence which tended to show that as early as 1870-71, there was a map made of the town of West Biggs, by the then owner of the land, upon which there were laid out blocks and streets, which last were all indicated to be 80 feet wide, except the one in controversy, here called "California Street." Between the east line of the blocks of land, as laid out, and the track of the Central Pacific Railroad, that map shows a space of 150 feet wide, in which is written the words "California Street." While the Contract & Finance Company owned land in Biggs, they made deeds to V. Bunnell, J. R. Buffington, M. Rosenberg, T. R. Fleming, of certain portions of it described as being in certain "blocks" as laid down on that map. When Crocker became the owner he made deeds of other lands so described, with reference to that map, to T. R. Fleming, Benjamin McVay, Sylvanus Shurtleff, S. Stockwell, William Bolt, and Barney Mushholt. The map as originally made contained the words, between the front of blocks on the west side of the railroad track, "California Street." A line in pencil running along the space between the front row of blocks on the west side and the railroad track, and running through the written words "California Street," indicated the street as 60 feet wide. This line was run in pencil just before the deed of Charles Crocker to the Central Pacific Railroad Company, which deed was not made until April 28, 1886, many years after the map was made, and the deeds to the various parties to whom Mr. Crocker and the Contract & Finance Company had sold blocks or parts of blocks of land with reference to the map; the first deed of the latter having been made as early as August 18, 1873, and the earliest of the former having been May 15, 1878, the last of these deeds to individuals having been made by Mr. Crocker on October 11, 1884. The evidence introduced by the defendant tended to show that the public had used this strip marked "California Street" as a highway or street for about 15 years before the commencement of this action, to the extent of 80 feet wide, and that the encroachments removed by the defendant were upon the line of the street, taking it at 80 feet. It is apparently claimed by the plaintiffs that even if a dedication of the street at 80 feet wide had been offered by the making of the map and the sale of the land with reference thereto, when Charles Crocker, in 1886, deeded the 90-feet wide strip to the Central Pacific Railroad Company, this was a revocation of the offer, and up to that time the public had never accepted the dedication by user. It was said in People v. Reed, 81 Cal. 79, 22 Pac. Rep. 474: "Conceding that a platting of property and sale of lots constitutes a dedication, as between the owner and purchasers under him, of the streets delineated on the map, in order to constitute a dedication which can be taken advantage of by the public authorities of a city the offer of dedication must have been accepted by such authorities, either by user or some formal act of acceptance." And at page 80, 81 Cal., and page 477, 22 Pac. Rep., it is said: "Such acceptance must be within a reasonable time after such offer of dedication, and, if not accepted, the owner may resume the possession of the property, and thereby revoke his offer." Tested by these rules, (which seem to have been approved in City of Eureka v. Croghan, 81 Cal. 527,[1] and City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. Rep. 928 and 23 Pac. Rep. 1085,) it appears to us that in this case there existed a sufficient offer of dedication by the making of the map and the sale of lands with reference thereto. The user by the public for a long time prior to what is claimed to have been a revocation by the deed of Charles Crocker to the Central Pacific Railroad Company, under whom the plaintiffs claim by lease of the premises, is a sufficient acceptance of such offered dedication to make it complete before the attempted revocation, at least to the extent of a street 80 feet in width, which is enough for the purposes of this matter.

The further point is made that Charles Crocker, as trustee of the Central Pacific Company, had no authority to dedicate the land for a street. It does not appear distinctly from the record whether the Contract & Finance Company, or Mr. Crocker, first made the map, but they both sold land with reference to it, and the land was accepted by the public in using it as a street and highway as against both of them. But, in addition to this, there is nothing in the record to show any trust expressed in the deed from the Contract & Finance Company to Crocker. On the face of the deed, it must be presumed that he took the fee-simple title to the land. Code Civil Proc. § 1105; Mabury v. Ruiz, 58 Cal. 11-15. There is nothing in the evidence sufficient to rebut this proposition, or to show any kind of a trust capacity which Crocker bore inconsistent with the right to dedicate the land. At the most, the parol evidence was a declaration or opinion of the witness that Crocker held the land in a trust capacity; but as to the character of that trust no evidence whatever is given. We think the evidence sufficient to sustain the finding, and advise that the judgment and order be affirmed.

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[1] 22 Pac. Rep. 693.

I concur: Vanclief, C.

Hayne, C. I concur in the conclusion.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(88 Cal. 230)

Townsend v. Briggs. (No. 13,727.)

(*Supreme Court of California.* March 5, 1891.)

New Trial—Discretion of Court—Inadequate Damages.

In an action for personal injuries, where plaintiff recovered a verdict for $500, it was not an abuse of discretion to grant a new trial, where he was wrongfully assaulted by defendant, was then 46 years old, and in good health, and able to earn $60 per month, and the injury inflicted resulted in the loss of his arm, and the verdict was wholly inadequate to compensate him for the damage sustained.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county; B. F. Williams, Judge.

Broussean & Hatch, (*Blackstock & Shepherd*, of counsel,) for appellant. *Barnes & Selby* and *H. L. Poplin*, for respondent.

Belcher, C. The plaintiff brought this action to recover damages in the sum of $20,000 for personal injuries alleged to have been wrongfully, wantonly, and maliciously caused by the defendant. The case was tried by a jury and a verdict returned in favor of the plaintiff for $500, on which judgment was entered. In due time the plaintiff served notice of his intention to move for a new trial upon the following grounds: "(1) Insufficiency of the evidence to justify the verdict; (2) that the verdict is against law; (3) errors in law occurring at the trial, and excepted to by the plaintiff." The notice stated that the motion would be made upon a bill of exceptions to be thereafter settled, and such a bill was thereafter settled and filed. The court granted the motion, but upon what ground does not appear, and the defendant appeals from the order. It is claimed for appellant that the bill of exceptions shows no errors in law committed at the trial, and contains no sufficient specification of the particulars in which the evidence is alleged to be insufficient to justify the verdict, and hence that the new trial was improperly granted. The bill of exceptions states that the plaintiff excepted to the verdict of the jury upon the ground of the insufficiency of the evidence to justify it, and it contains specifications to the effect that, as shown by the evidence, plaintiff was wrongfully assaulted and beaten by the defendant; that he was then 46 years of age, and up to that time in good health, and able to earn $60 per month; that the injuries so inflicted resulted in the loss of his left arm, causing him great physical and mental pain, and in rendering him unable to earn his support; that "the verdict of five hundred dollars returned will not compensate plaintiff for the detriment proximately caused by said injury, and is not equivalent to the amount plaintiff will lose in one year as wages in earning capacity alone;" and that "the amount of the verdict, five hundred dollars, is wholly inadequate and insignificant as compensation for the damage sustained from said injury." We think the specification sufficient. Du Brutz v. Jessup, 54 Cal. 118; Bennett v. Hobro, 72 Cal. 178, 13 Pac. Rep. 473. The evidence showed very clearly that, without any sufficient cause, defendant struck plaintiff on the head with a mallet several times; that plaintiff was knocked down, and fell on a cutting-machine; that his left elbow joint was badly cut, and the principal arteries, veins, and nerves of the arm severed; that he had one scalp wound, an inch and a half long, cut through to the bone; that to save his life it was necessary to amputate his arm above the elbow, and that he suffered great pain both before and after the amputation. Under such a showing of the facts, the court may well have thought that $500 was a grossly inadequate sum to compensate the plaintiff for the injuries received, and may have granted the motion on that ground. And the rule is well settled that an order granting a new trial will not be reversed on appeal, if it can be justified on any of the grounds upon which the motion was made. Nally v. McDonald, 77 Cal. 284, 19 Pac. Rep. 418; Harnett v. Railroad Co., 78 Cal. 31, 20 Pac. Rep. 154; Curtiss v. Starr, 85 Cal. 376, 24 Pac. Rep. 806. We are unable to see that the court abused its discretion in granting the new trial, and we therefore advise that the order be affirmed.

We concur: Foote, C.; Hayne, C.

Per Curiam. For the reasons given in the foregoing opinion the order is affirmed.

Adams v. Andross. (No. 13,006.)

(*Supreme Court of California.* March 10, 1891.)

Department 1. Appeal from superior court, city and county of San Francisco; W. F. Van Reynegom, Judge.

Whittemore & Sears, for appellant. *Roger Johnson*, for respondent.

Per Curiam. This cause was submitted without argument, and there are no briefs on file. We do not know, therefore, upon what points appellant relies for a reversal. The ruling of the court below in sustaining the demurrer appears to be right. The judgment is affirmed.

88 Cal. 273

Moore v. Moody. (No. 13,618.)

(*Supreme Court of California.* March 7, 1891.)

Review on Appeal—Sufficiency of Evidence.

A judgment depending upon a finding which is fully sustained by the evidence will not be disturbed.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; F. T. Baldwin, Judge.

Joshua B. Webster and *L. W. Elliott*, for appellant. *Davis & Hill*, for respondent.

Belcher, C. This is an action to recover the sum of $450.80, balance of account, for goods alleged to have been sold and delivered by C. E. Williams & Co., plaintiff's assignors, to defendant. The answer denied all of the material averments of the complaint. The court below found upon all the issues against the plaintiff, and gave judgment for the defendant, from which, and from an order denying a new trial, plaintiff appeals. It is claimed for appellant that the findings of fact were not justified by the evidence, and that the judgment should therefore be reversed. No brief has been filed on behalf of respondent. The seventh finding reads as follows: "The said C. E. Williams & Co. did not sell to the defendant any of said merchandise, and defendant did not purchase the same, and the defendant was not at the time of the commencement of this action and is not indebted to the plaintiff in any sum." This finding, if justified, is conclusive of the case; and, after carefully reviewing the testimony brought up in the record, we think it is justified, and must be sustained. No useful purpose would be accomplished by stating the probative facts at length, and we therefore omit to do so. We advise that the judgment and order appealed from be affirmed.

We concur: Vanclief, C.; Foote, C.

Per Curiam. For the reasons given in foregoing opinion the judgment and order appealed from are affirmed.

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88 Cal. 253

Ellen v. Lewison *et al.* (No. 13,601.)

(*Supreme Court of California.* March 6, 1891.)

Gifts—Amendment of Pleading—Evidence.

1. In an action by the guardian of a person claimed to have been *non compos mentis* to recover a gift, an amendment of the complaint to allow evidence of undue influence is not a surprise entitling defendants to a continuance, if it reasonably appeared from the complaint that undue influence was relied on.

2. An objection that the court required an amendment to the answer to be filed at once is without merit, where it appears that it was easily made.

3. Where defendant in such case seeks to show that the gift was made by her father because her brother-in-law had previously stolen a large sum of money from him, evidence that a large sum was carried to her father's house is inadmissible without proof of the time it was taken there.

In bank. Appeal from superior court, Nevada county; J. M. Walling, Judge.

Fred. Searls and *H. L. Gear*, for appellants. *Thos. S. Ford*, for respondent.

Per Curiam. This action was brought by the plaintiff against the defendants as the administrators of the estate of Emma J. Regli, deceased. The plaintiff obtained a verdict and judgment against the defendants in their representative capacity as prayed for, and from that judgment this appeal is taken, on the judgment roll and a bill of exceptions.

The facts set up in the complaint were, in brief, that Elie Ellen, an incompetent person, who sues by his guardian, had been induced by his daughter, Mrs. Regli, to make her a gift of $15,850, which gift, "by reason of the premises, is utterly void, and the conversion of the said money was wrongful, and without consideration." The grounds which the plaintiff claims that he relied on to sustain his contention are that the gift was made by an incompetent person while being unduly influenced. Upon the trial, when evidence was sought to be introduced as to the fraud and undue influence claimed to have been exercised by Mrs. Regli, in her life-time, and to have induced the gift, the defendants objected that such evidence was inadmissible under the pleadings; that no such issue was tendered by the complaint; and that the only issue tendered was "that of mental incompetency to make the alleged gift." The court agreed with the defendants, and allowed the plaintiffs at once to amend the complaint, which was done in a few lines. Counsel for defendants insisted on being allowed 10 days in which to answer, but did not ask for any less number of days. The court ruled them to an immediate answer, which was made at once, and briefly, though sufficiently; and, as appears to us, this was easily done, and without any inconvenience. Whereupon they moved for a continuance on an affidavit alleging surprise, and that they must now adopt a different line of defense by reason of the amendment, and stated that they expected to be able to obtain proof upon "all of said new issues now tendered which is not now at their command," and that they needed further time, etc. The court refused to grant the continuance, and the trial proceeded, against the objection of the defendants. It is claimed that the court below was guilty of an abuse of discretion in not allowing time to file the amendment to the answer, and in refusing to grant a continuance. As to the first matter, it is plain that the amendment was easily made and filed as requested, and there certainly was no abuse of discretion in requiring this to be done. As to the other point, it is clear to us, from an inspection of the complaint, that it was the intention of the pleader to charge both that the gift was made when Elie Ellen was incompetent to make it, and also that he was induced to make it by the fraudulent acts and undue influence of Mrs. Regli. It is true that the pleading is not to be commended as a model in this respect, but we think it was sufficient. Out of abundant caution, apparently, the trial judge had the complaint amended and answered; but he was evidently of the opinion that there was no surprise sprung upon the defendants, and we agree with him.

It is further assigned for error that the court erred in refusing to allow the witness Schaffer to testify that Ellen, since the year 1868, and before his stroke of paralysis, was in the habit of keeping large sums of money in his house, and that the witness helped Ellen to carry $15,000 there. The purpose of this, we suppose, was to show that when Mrs. Regli, as testified to by Graham, had in the fall of 1886 upbraided her father with having willed his property to her sister, and that her sister's husband had come up to the father's place, after his attack of paralysis in the spring of that year, opened his safe, and carried "down his papers and money, and they had stolen $21,000," that she was speaking the truth, and that Joseph Sanders, the husband of her sister, had in his account of the matter sworn falsely. The evidence on this head sought to be elicited, just alluded to, as well as that the witness had helped "Mr. Ellen to carry $15,000 over to his house in gold coin," was not admissible, for the reason, if no other, that it does not appear at what definite time it would be shown that such money was kept or carried to Ellen's house. It might have been, for all that the evidence would have shown to the contrary, many years before the time when Sanders had gone to Ellen's house and taken away the money, as he is claimed to have done. It might have been in the year 1869, and Sanders took what money he carried to San Francisco in 1886. It is further objected that the witness was not allowed to state in contradiction of Sanders' statement (that he had taken away only about $5,080.50 in gold coin from Ellen's safe in 1886, and that he had the money in a hand-satchel, and the books and papers in a large satchel) "that Sanders was weighed down by two large satchels, which appeared to weigh 75 pounds each." The witness had just stated, without objection, that "when Sanders went to San Francisco he had two big valises, about 18 inches in length, and a foot in diameter, and they appeared to be very heavy." This was substantially what it was proposed he should again testify to, with a guess as to the weight of the satchels added. We do not think the action of the court resulted in prejudicial error. It was proposed, with a view to lay a foundation for Sanders' impeachment, to ask him whether, in the month of July, 1887, in the presence of various parties, Mr. Ellen had not used language to him indicating that Ellen believed Sanders and his wife had taken the money of the former. We suppose that if the witnesses had declared, as was evidently expected, that such had not been the case, the defendants would have introduced evidence to show that Ellen was angry with Sanders and wife, and that the cause of this anger was his belief that they had stolen his money. Admitting that the question had been answered by Sanders in the affirmative, or that, if he had not so answered, the defendants could have shown, as they proposed, that Ellen was angry at Sanders and wife, and because he believed that they had stolen from him, still the evidence could not have aided the defendants. There was nothing in it or the record which tended to show that Ellen had any belief as against the honesty of Sanders and wife, or anger at them on that account, except as derived from the statement of Mrs. Regli to him that they had stolen money from him. It was already proved that he was angry with them on that account, and further proof of the existence of such anger or bias would not have helped the defendants unless there was something to show that it had proceeded from some cause independent of Mrs. Regli's statements to him. So that, if the evidence was admissible, it was immaterial.

Admitting that the question put to Kruger was objectionable, yet the answers of the witness in reference to that and other questions on that line did not tend to support, but rather to negative, the counsel's theory of the plaintiff's mental incompetency, and no harm was done, nor do we think there was any misleading of the jury by the court allowing the question to be put.

McGlashan, a witness for defendants, who had testified to the check given by Ellen to Mrs. Regli, was asked this question: "Did he deliver that as his own voluntary act?" and an objection by plaintiff was sustained. Defendants then offered to prove by the witness that the check was signed and delivered voluntarily, and an objection to the offer was sustained. These rulings are assigned as reversible error. The objections were that the witness was attorney for Ellen at the time, and for that reason should not be allowed to testify; and that the testimony sought was mere expression of opinion about a matter which was for the determination of the jury, and was irrelevant, immaterial, etc. We doubt whether the question was admissible as a strict question of law. Certainly neither People v. Sanford, 43 Cal. 29, nor People v. Monteith, 73 Cal. 7, 14 Pac. Rep. 373, (relied on by appellants,) is closely in point. In the former case it was merely held proper for a witness to testify to the condition of the mind of a person at the time he made a dying declaration,—that is, "whether it was clear or confused;" and in the latter case, where there was a question as to the intoxication of the defendant, it was merely held proper for a witness to testify "what appeared to be his condition as to sobriety." But in the case at bar it was sought to prove by the opinion of the witness what the motive was which induced the third party to do a certain act, that is, whether he did the act "voluntarily." Such evidence might be admissible under peculiar circumstances, but we doubt if it was admissible in the case at bar. But if it be admitted that the court erred on this point, the error was not of sufficient importance to work a reversal of the judgment. When a case like this one has been upon the whole fairly submitted to a jury, a mere abstract error doing no injury will be disregarded. The witness McGlashan had testified very fully to the condition of Ellen's mind at the time the check was given. He had said "that his mental condition was as sound as he ever knew him to be, as he had every opportunity of testing it; that he talked very intelligently on business matters; that he was present when the check was given to Emma Regli, about the 25th of March; that Ellen signed the check in his presence, and stated his reasons for making the gift, and he saw the check delivered to Mrs. Regli by Mr. Ellen; that others were present at the time; and that he himself drew the body of the check at Mr. Ellen's request; and [testified] to all the circumstances that occurred at the time." Now, this testimony was just as clearly to the point —and must have been so understood by the jury—that, in the opinion of the witness, the check was signed and delivered voluntarily, as if the word "voluntary" or "voluntarily," had been expressly used by the witness; and it would be an unjust thing to reverse the case because the witness was not allowed afterwards to add the word "voluntary." It is quite clear that no substantial injury was done by the ruling of the court on this point. The judgment is affirmed.

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88 Cal. 184

WOODROOF *et al.* v. HOWES *et al.* (No. 13,939.)

(*Supreme Court of California.* March 2, 1891.)

CORPORATIONS — STOCKHOLDERS — FRAUDS OF MAJORITY—RIGHTS OF MINORITY—PLEADING.

1. A purchase of lands from a corporation by one of the directors, at one-tenth of its real value, raises a presumption of fraud against him, and he must show affirmatively that the transaction was perfectly fair.

2. The owners of a majority of the stock of a corporation, who persuade their "implements and representatives" on the board of directors to convey to them the property of the corporation for a grossly inadequate consideration, in fraud of the minority stockholders, must be held to have participated in the fraud of the directors.

3. A complaint which alleges that plaintiffs and defendants are stockholders in a corporation; that the directors are the "implements and representatives" of defendants, who own a majority of the stock; and that the directors conveyed to defendants land of the corporation at one-tenth of its real value, in fraud of the other stockholders, —states facts constituting actual fraud, and is sufficient on demurrer.

4. Defendants acquired a large tract of land, agreeing to pay the deferred purchase money in annual installments, but reserving to themselves the right to pay the whole of it "at any time before maturity." They then organized a corporation, conveyed the land to it, received stock in exchange, and agreed with the corporation to pay the unpaid purchase price of the land "at maturity." To secure the performance of this agreement, 10,000 shares of the stock issued to defendants were placed in escrow, but subsequently the corporation permitted such stock to be delivered to defendants, on condition that it should be sold by them at a specified rate, and that the proceeds, "as received," should be applied by them to the extinguishment of the debt. *Held*, that a complaint which alleges that defendants applied the cash proceeds to their own use, in violation of the conditions on which the stock was delivered to them, is not demurrable for its failure to allege that the deferred purchase price of the land had become due, as defendants had it in their power to pay at any time before maturity, and the conditions on which the stock was delivered to them made it their duty to so apply the proceeds "as received" by them.

5. The allegation in the complaint that defendants applied the cash proceeds of the stock to their own use, and did not pay the debt, is a sufficient showing of the non-performance of their contract, as the court will not presume that some third person paid the debt, or that the corporation was substituted as the debtor on the transfer of the land to it.

6. The fact that defendants, on the sale of the stock, received only part of the purchase price in cash, and that the complaint contains no allegation that they converted to their own use the notes given for the balance, does not give rise to the presumption that they turned such notes over to the corporation in satisfaction of the agreement, as such agreement provides that the proceeds shall be applied by defendants in extinguishment of the debt to the original owners of the land, and not that they shall be turned over to the corporation.

7. The complaint is not rendered defective by its failure to allege that the corporation has paid out any money or sustained any damage by defendant's failure to perform their agreement to pay the deferred purchase price of the land, as such payment is essential to the protection of the corporation's right to the property.

8. After selling the stock, and converting the cash proceeds to their own use, defendants induced the corporation, without consideration, to assume the debt for the deferred purchase money of the land. They then purchased back the stock, which had greatly depreciated in value, and by means of their control over the corporation sold to it the stock at a price greatly exceeding its market value. *Held*, that the approval of such sale at a stockholders' meeting will not affect the rights of the minority stockholders, who did not consent thereto.

9. The right of the minority stockholders to attack these various transactions between defendants and the corporation is not affected by the fact that they are completely "executed," as such transactions were not merely beyond the powers of the corporation, but procured by the fraud of defendants, who controlled it; nor need the minority stockholders offer to place defendants *in statu quo*.

10. The fact that the stock transferred by defendants to the corporation had originally been regarded as sufficient security for the performance of defendants' agreement to pay the deferred purchase price of the land is no defense to an action for their fraudulent sale of it to the corporation, where it is shown that such stock had greatly depreciated in value in the mean time.

11. Since the directors of the corporation were only defendants' "implements and representatives," and since it was not shown that they received or had any interest in the fruits of defendants' transactions, it was not necessary to join them as defendants.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Wicks & Ward, for appellants. *Wilson & Lamme*, *M. T. Allen*, and *Barclay, Wilson & Carpenter*, for respondents.

HAYNE, C. This was a suit in equity by three stockholders of the Semi-Tropic Land & Water Company for relief against certain transactions of the company with the defendants, F. C. Howes, George H. Bonebrake, and Samuel Merrill. The trial court gave final judgment for the defendants upon demurrer to the complaint, and the plaintiffs appeal. The complaint consists of 75 printed pages, and is exceedingly prolix and involved. It contains three causes of action separately stated. The demurrer was to the whole complaint and to each separate cause of action.

1. The substance of the material facts alleged in the first division of the complaint is as follows: At the period in question two of the plaintiffs and the defendants, Howes, Bonebrake, and Merrill, were stockholders of the corporation. The third plaintiff acquired his stock somewhat later than the others, but this is not material, in the view we have taken. The defendant Howes was a director of the company, and it is alleged that the other members of the board "were only nominal directors thereof for the purpose of carrying out the plans and subserving the individual interests of the defendants, Howes, Bonebrake, and Merrill, and had no interest in the management and conduct of its affairs, except as the implements and representatives of the interests and wills of defendants, Howes, Bonebrake, and Merrill." In this condition of affairs the "said board of directors, disregarding the interests and rights of all stockholders of said company other than said Howes, Bonebrake, and Merrill, and for the purpose of defrauding such stockholders, and through the connivance of said Howes, Bonebrake, and Merrill, and for the purpose of subserving the individual interests of said Howes, Bonebrake, and Merrill," sold to them for the price of $30 per acre certain specifically described lands, which "carried with them, as incident or appurtenant thereto, their *pro rata* proportion of all the waters owned by the Semi-Tropic Land & Water Company." At the time of this transaction the land sold was worth the sum of $300 per acre, which was known to all the parties. Subsequently the three defendants named became directors of the company, and were so at the commencement of the suit. The plaintiffs demanded that a suit be commenced in the name of the corporation; but, this demand not having been complied with, the plaintiffs brought the present suit on behalf of themselves and the other stockholders, joining the corporation as a defendant.

In addition to the foregoing facts much unnecessary matter is alleged, as, for example, the representations which the defendants made to the plaintiffs at the time the latter acquired their stock. The suit is not for relief against the contract under which they acquired said stock, and hence the representations referred to are immaterial. So, too, it is immaterial to the case stated in this division of the complaint how the corporation acquired its rights to the property, though it may be permissible to state such facts to show that the three causes of action grew out of the same set of transactions. In support of their demurrer to this part of the complaint the defendants make the following points:

(*a*) It is said that a main foundation of this part of the case is inadequacy of price, and that "inadequacy of price does not even raise a presumption of fraud." This may be true as to persons who do not stand in a fiduciary relation towards each other; but it is not true as to persons whose relations are fiduciary. A trustee is not ordinarily allowed to make money out of his *cestui que trust*. If he does, the presumption is against him, and he must show affirmatively that the transaction was perfectly fair. Inadequacy of consideration in such a case is one of the facts constituting the fraud. Golson v. Dunlap, 73 Cal. 157, 14 Pac. Rep. 576. And it is hardly necessary to say that the relation which a director sustains to his corporation is fiduciary within the meaning of the rule. In the present case it is not necessary to consider whether the inadequacy of consideration alleged is sufficient to make a case of constructive fraud, because, as will be shown below, there are other allegations, which, in connection with the one mentioned, make a case of actual fraud.

(*b*) It is urged at this time Howes only was a director, that the other four constituted a majority of the board, that it is not shown that Howes took any part as director in the act complained of, and that the mere fact that the three defendants persuaded the disinterested majority of the board to do the act complained of does not amount to fraud. "Persuasion," say the learned counsel, "is never fraudulent." In one sense it may be true that persuasion is not fraudulent. In the same sense it may be said that persuasion is not theft. Yet if a man persuades his "implements and representatives" to steal, and knowingly shares the booty, he is certainty guilty of theft; and so, if he persuades his implements and representatives to commit a fraud, and knowingly takes the fruits thereof, he is guilty of fraud. In the case before us it is admitted for the purposes of the demurrer that the directors were the implements and representatives of Howes, Bonebrake, and Merrill, and acted with their "connivance," for the purpose of defrauding the other stockholders in the interest of said defendants. Such conduct was clearly fraudulent on the part of the directors; and, as said defendants connived at such fraud, and received the fruits thereof, they must be held to have participated therein.

(*c*) It is contended that the charges of fraud are too general. All that is necessary for the pleader to do in this regard, however, is to set forth the facts constituting the fraud in ordinary and concise language. Now, what are the facts constituting the fraud? In the first place, there is the fact of the relation of the parties, viz., that the plaintiffs and defendants were stockholders of the corporation, and that the directors were the implements and representatives of Howes, Bonebrake, and Merrill. This is set forth with sufficient particularity. It was not necessary to state the means by which said defendants induced the directors to act as their implements and representatives. It is sufficient to the case made by the complaint that they did so act. In the second place, there is the fact that the land was worth $300 per acre, and was sold to said defendants for $30 per acre. It was surely sufficient to allege this in terms; and the criticism made upon it does not seem to be that the fact is not stated with sufficient particularity, but that it is not true. "An allegation," say the learned counsel, "may be so absurd that not even a demurrer will admit it, and in this case the court is presumed by the counsel for the appellants to assume that this property had increased in value from April to August, 1887, something like two thousand per cent. There are some things that even courts are presumed to know, one of which is that unimproved property in such vast tracts does not increase in value from four to five thousand per cent. per annum." The basis of this position is stated by counsel to be that the land was purchased from Howes, Bonebrake, and Merrill at $15 per acre in April, 1887. The allegation of the complaint, however, is that it was purchased for 29,995 shares of stock of the par value of $100 per share. It does not appear what the actual value of the stock was at said time, nor even what was the price agreed to be paid to the original owners of the property. Nor does this division of the complaint show what was the size of the tract. But, aside from all this, the value of the land at the time of the sale complained of is alleged to have been $300 per acre. This is the allegation of a fact, and, being such, was admitted by the demurrer; and after having been so admitted its truth cannot be questioned for the purposes of the demurrer. Finally, the complaint alleges that this transfer to Howes, Bonebrake, and Merrill for one-tenth of the value of the property was made knowingly, and for the purposes of defrauding the other stockholders. In Moss v. Riddle, 5 Cranch, 357, Chief Justice MARSHALL says: "Fraud consists in intention, and that intention is a fact which ought to be averred, for it is the gist of the plea, and would have been traversable." The fraudulent intent or purpose, therefore, is one of the facts constituting actual fraud; and we think that an allegation of such fact in terms is sufficient. No amount of circumlocution or amplification can convey the meaning better than to say that a transfer by the directors of a corporation for one-tenth of the value of the property was for the purpose or with the intent of defrauding the stockholders. It may be necessary to add other facts. But, so far as this fact is concerned, the mode of statement is sufficient. All that the Code requires is to state the facts in ordinary and concise language.

The foregoing facts, taken together, constituted actual fraud, and were sufficiently alleged. It may be added that it was not necessary to specify the particular water-rights which were attached to the land conveyed. The several tracts were sufficiently described. And it was not material to the case to specify what rights were "carried with them as incident or appurtenant thereto."

2. The second cause of action begins by stating in detail how the corporation acquired its rights to the property, and shows, in substance, the following facts: Before the corporation was organized, Howes, Bonebrake, and Merrill had a contract of purchase from one Henry Pierce and associates for 28,414.63 acres of land for the sum of $426,219.45. This contract was executed on October 15, 1886, and $50,000 was paid thereon in cash. The remainder of the price was to be paid in annual installments of $50,000 each, bearing interest at 5 per cent. per annum. But it was provided by said contract that "said Howes, Bonebrake, and Merrill might pay the whole or any part of the purchase money at any time before maturity." It is not expressly stated when the conveyance was to be made, but the presumption from what is stated is that it was not to be made until the price was fully paid. The said defendants also acquired a smaller tract, known as the "Morse Place." But it is not necessary to dwell upon that. In February, 1887, the defendants, Howes, Bonebrake, and Merrill, caused the Semi-Tropic Land & Water Company to be incorporated, and on April 16, 1887, they conveyed to it "the properties" above referred to, and agreed to "pay off and satisfy at maturity the debts then existing against the property, * * * such debts being then owing by Howes, Bonebrake, and Merrill upon the above-described land and water-rights purchased from Pierce and associates, and from Morse, on account of the unpaid purchase price of said properties." In consideration of the foregoing transfer and agreement the corporation transferred 29,995 shares of its stock; but only 19,995 were transferred directly to Howes, Bonebrake, and Merrill. The remaining 10,000 shares were transferred to one S. B. Hunt, to be held as security for the performance by said Howes, Bonebrake, and Merrill of their agreement to pay off said unpaid purchase money. After this the plaintiffs acquired their stock, and it is alleged that certain representations were made to them by defendants; but we do not consider such repesentations material in the case. This division of the complaint goes on to allege that "the directors of said corporation other than said Howes owned only one share of the stock of said company, and were only nominal directors thereof, and had no interest in the management and conduct of its affairs, except as the implements and representatives of the interests and wills of defendants, Howes, Bonebrake, and Merrill." In this condition of affairs it is alleged that said defendants effected an arrangement with the directors whereby the 10,000 shares held by the trustee as security for the performance by said defendants of the agreement to pay off the unpaid purchase money above mentioned was allowed to be withdrawn by them upon condition that the same should be sold at not less than $40 per share, and the proceeds (less 5 per cent. commission) applied "as received" to the extinguishment of the debts affecting the property. The statement of this agreement or condition is somewhat loose; but the counsel for the defendants have not made any criticism upon it, but have assumed that it is a sufficient statement of the condition or agreement upon which the stock was given up to said defendants; and, following the lead of counsel, we have so assumed for the purposes of this opinion This arrangement was made on August 27, 1887. Previously to that date Howes, Bonebrake, and Merrill had negotiated a sale of said stock at $42.50 per share, and it was finally sold at that price, making an aggregate of $425,000 for the 10,000 shares. Of this sum said defendants re-

ceived $125,000 in cash on October 15, 1887. The remainder was to be paid in installments, drawing interest at 8 per cent. per annum. It does not appear whether these installments were ever paid, or what was done with the evidences of the indebtedness. Howes, Bonebrake, and Merrill did not comply with the condition upon which they obtained said stock. Prior to the receipt by them of the $125,000 they had made the following payments on account of the purchase money of the property transferred to the company, viz., $50,000 on the execution of the contract of purchase from Pierce and associates, $42,000 on August 31, 1887, and $34,800 on September 19, 1887. On the day of the receipt of the $125,000 they made a further payment of $29,189.48. Now, as the first three payments were made before the $125,000 was received, it is manifest that they could not have come out of that sum. And it is expressly alleged that "all of said $125,000 received by said Howes, Bonebrake, and Merrill, saving and excepting the said $29,189.48, or thereabouts, has been appropriated and used by said Howes, Bonebrake, and Merrill for their own individual use and benefit, in violation of the rights of said corporation and the stockholders thereof." And it is further alleged that "no other or further sums of money than those above mentioned have ever been paid by said Howes, Bonebrake, and Merrill, or either of them, to said Pierce and associates on account of the purchase price of said premises." The plaintiffs further allege the refusal of the corporation to sue, etc., and that the suit is commenced by them on behalf of all the stockholders.

In support of their demurrer to this division of the complaint, the defendants make the following points:

(*a*) It is said that the sums which are admitted to have been paid on account of the purchase money on the property were sufficient to pay the first two annual installments thereof; that it is not alleged that the other installments were due at the time of the commencement of the action; and that the court will not compel the defendants to pay them before maturity. But the defendants had the privilege of paying all of such installments "at any time before maturity," and the condition on which they received the stock was that they would apply the proceeds in the way mentioned, "as received."

(*b*) It is said that the plaintiffs have not alleged that any installment of the purchase money remains unpaid; and that, under the rule that pleadings are to be construed against the pleader, it must be presumed that such installments have been paid, or satisfied in some collateral way. It is to be observed that it does not appear that the corporation was legally bound to pay the unpaid purchase money, although its rights would be impaired by non-payment; and it is to be further observed that Howes, Bonebrake, and Merrill were not guarantying to pay the debt of another. They were the persons—and the only persons—who were bound to pay said purchase money. They agreed with the corporation, in the first instance, that they would pay their own debt; and in the second, that they would apply the proceeds of the stock to such payment. They did not so apply said proceeds, but converted them to their own use; and it is alleged that they did not pay the debt. This is sufficient showing of non-performance of their obligation. The court will not presume that some benevolent third person has paid the debt. And if, on the failure of the defendants to apply the proceeds of the stock to the debt, as agreed, the corporation paid it, that would not relieve said defendants from liability. Nor will the court presume that there has been any novation or accord and satisfaction by which the debt to the original owners of the property has been satisfied. If any such arrangement has been had it is matter to be set up by way of defense. The presumption against the pleader applies in certain cases; as, for example, where the pleading is silent as to an essential fact which must have occurred one way or the other, or where the language used is fairly susceptible of two constructions. But it is not carried to such an extent as to require the pleader to anticipate matters of defense, or to negative the existence of all other facts whatever. Even at common law that was not required; and much less is it required under a system where pleadings are required to be liberally construed with a view to substantial justice. Code Civil Proc. § 452.

(*c*) It is said that it does not appear what was done with the evidence of debt representing the balance of the proceeds of the sale of the 10,000 shares of stock; and that it must be presumed either that they were turned over to the persons to whom the debt was due, (which is sufficiently answered by what we have just said,) or that they were turned over to the corporation itself, and received by it in satisfaction of the agreement of the defendants. But such agreement was not that the proceeds of the stock were to be turned over to the corporation. They were to be applied to the extinguishment of the debt to the original owners; and the court will hardly presume that some entirely new arrangement was made.

(*d*) It is said that it is not shown that the corporation has paid any money on account of said debts, or that it has sustained any damage by reason of the alleged non-performance by said defendants of their agreement. But the payment of the purchase money on the original contracts of purchase is essential to the protection of the corporation's right to the property, and if said defendants have not paid said money as they agreed to do, and have converted the cash proceeds of the stock to their own use, the corporation (or a stockholder, in a proper case) has the right to come into equity to compel the defendants to perform their agreement with the corporation.

3. The third division of the complaint contains the substance of the second division, and in addition thereto shows the following facts: Of the sum due to the original owners of the property the defendants, Howes, Bonebrake, and Merrill, paid no more than $155,989.48. But prior

to the transaction to be mentioned they had induced the board of directors to pay on account of said debt the sum of $25,000, which, it is alleged, "was paid on account of defendants, Howes, Bonebrake, and Merrill, and at their instance and request," which, if true, entitles the corporation to recover it back. These payments left due to the original owners of the property the sum of $272,441.63, for which said defendants were personally liable. In order to get rid of such liability, it is alleged that they induced their creatures in the board of directors to have the corporation assume the debt without consideration. The allegations in this regard are as follows: That the directors, "for the purpose of defrauding the other stockholders of said company other than said Howes, Bonebrake, and Merrill, and for the purpose of incumbering the property of said corporation with debt, without any consideration moving in favor of said corporation, or in favor of any other of the stockholders of said corporation other than said Howes, Bonebrake, and Merrill, and with the intent of relieving and releasing Howes, Bonebrake, and Merrill from their obligation to pay off and discharge the debts upon the lands and waters of said corporation, did, by connivance and collusion with said Howes, Bonebrake, and Merrill, and with their consent, and at their request and instigation," issue notes of the company to the original owners of the property in an aggregate sum of $272,441.63, bearing interest at 7 per cent. per annum, and mortgaged the property of the corporation to secure the payment of such notes, and that "such notes were given without any consideration in favor of said corporation, or of any of the stockholders thereof other than Howes, Bonebrake, and Merrill, and solely for the benefit of Howes, Bonebrake, and Merrill, and with the intent to relieve said Howes, Bonebrake, and Merrill from their obligations to pay off and satisfy at maturity the indebtedness upon the lands and waters of said corporation, for which debts said Howes, Bonebrake, and Merrill were bound and obligated." It is further alleged that in and about the above transaction the directors unlawfully paid an attorney's fee of $5,000, which sum "was paid for the sole benefit of defendants Howes, Bonebrake, and Merrill." The complaint goes on to allege that prior to September 20, 1888, Howes, Bonebrake, and Merrill bought up the 10,000 shares of stock which they had sold about a year previously, (the proceeds of which sale they had converted to their own use,) and sold the same to the corporation at a grossly exorbitant price,—the consideration being a credit of the $272,444 assumed by the corporation as above set forth, the conveyance by it of $50,000 worth of land, and the issuance of its promissory notes for the remainder of the price. In relation to this transaction it is alleged that about four months after the assumption by the corporation of the debt above mentioned it was proposed by Merrill, at a stockholders' meeting held September 20, 1888, that the corporation should buy said stock at $37 per share, payment to be made in the manner above stated, viz., that a credit of $272,444 should be allowed the company for having assumed the debt of Howes, Bonebrake, and Merrill; that the company should assume a debt of $14,440, due from said defendants on the Morse property, and another debt of $850; that "the sum of $50,000 be paid in lands of the company, to be deeded to three trustees representing the parties to whom the 10,000 shares of stock had been formerly sold." and that "the balance of said purchase price of $370,000 be paid in notes of the company;" that this proposal was accepted at said stockholders' meeting, and that a resolution to that effect was passed, said defendants and others voting in favor thereof; and that immediately thereafter the arrangement was carried out by the directors. It is further alleged that "such 10,000 shares of stock were then and there, at the time of such stockholders' and directors' meeting, the property of said Howes, Bonebrake, and Merrill, having been obtained by them from the former purchasers thereof," and that "at the time such stockholders' and directors' meeting was held, and such 10,000 shares of stock purchased by said corporation, the said stock was not worth in the open market, and could not have been sold for, more than $25 per share, all of which facts were well known to said Howes, Bonebrake, and Merrill;" that all of the acts in relation to the transaction above mentioned "were done while said Howes, Bonebrake, and Merrill were the owners of a majority of the corporate stock of said corporation," and while said Bonebrake and Merrill were directors of said corporation, and "at the actual instance, request, and instigation of defendants, Howes, Bonebrake, and Merrill, and for their own personal interest and benefit," and that at said stockholders' meeting "1,910 shares of the capital stock of said corporation were not represented either in person or by proxy; that the stock of plaintiffs herein named was not represented or voted at such meeting, and that plaintiffs did not appear or ratify such action of such stockholders' meeting." It is further alleged that the corporation has paid the sum of $17,150 as interest upon the debt assumed by it as above mentioned, and that subsequent to the transactions above set forth it has borrowed the sum of $250,000 from a third person, and mortgaged its property to secure the payment thereof, and with the moneys so raised, and its note for $50,000, it has paid off the debt to the original owners of the property, assumed by it as above stated. In support of their demurrer to this portion of the complaint the defendants make the following points:

(*a*) They renew the points as to the presumption of payment or satisfaction in some other way, made in relation to the second cause of action. These have been sufficiently considered.

(*b*) They urge that the corporation had power to purchase its own capital stock, and that the resolution at the stockholders' meeting was sufficient warrant for the terms of the purchase. It is not necessary to decide upon this appeal whether the corporation had power to purchase its own stock. Such a power even would not excuse the fraud of the defendants. That they were guilty of fraud is plain, if the allegations of the complaint are true. They were personally liable for the debt to the original owners of the property, and agreed with the corporation that they would pay such debt. They obtained the stock put up as security for their performance of said agreement, upon condition that they would apply the proceeds of such stock "as received" to the extinguishment of said debt. Instead of so doing they converted the cash proceeds to their own use, leaving the debt unpaid, and induced their creatures in the board to have the corporation assume the debt without consideration. This action on the part of the board was in the interest of said defendants, "and for the purpose of defrauding the other stockholders." Such conduct on the part of the directors was unquestionably fraudulent, and the persons who instigated such fraud and reaped the fruits thereof must be held to have participated therein. In order to cover up this fraud it is alleged that they committed another. About four months after the assumption of the debt by the corporation as above set forth, they bought up the 10,000 shares of stock which they had sold a year previously at $42.50 per share, (the cash proceeds of which they had converted to their own use,) and by means of their control over the corporation sold said stock to it at $37 per share,—it then being worth only $25 per share. At this time Bonebrake and Merrill were in the board, and the other directors were the mere creatures of the three defendants. We do not think that any argument is required to show that this transaction was fraudulent. It certainly does not help the fraud first mentioned. Nor is the resolution at the stockholders' meeting of any consequence; for, since the defendants held a majority of the stock and voted at the meeting, they controlled the meeting, and the resolution was in effect but their formal consent to their own fraud. It cannot affect the rights of the stockholders who did not consent.

(*c*) It is urged that the transaction was "executed," and therefore cannot be disturbed. But, whatever color of force this might have, if the objection was merely that the transaction was *ultra vires*, it has no application to a case where there is fraud.

(*d*) It is objected that there was no offer to place Howes, Bonebrake, and Merrill *in statu quo*. But the suit is not for a rescission of the contract whereby the plaintiffs acquired their stock, and therefore no such action on their part was required. So far as the 10,000 shares sold to the corporation are concerned, it is sufficient to say that, aside from any other reason, the three defendants constitute a majority of the board, and must be presumed to have control of such stock. So far as concerns the $300,000 evidences of debt (the balance of the proceeds of the first sale of the 10,000 shares of stock) which the counsel say "have vanished from view," it is sufficient to say that, aside from any other reason, such evidences of debt are not shown to have ever come to the possession of the corporation. If they did, it must be under the control of the defendants.

(*e*) It is argued that, if the theory of the plaintiffs be correct, the result is that the original contract of Howes, Bonebrake, and Merrill is still in force, and that it must be presumed that they will perform it; that is to say, it must be presumed that they will pay off the debts to the original owners of the property. As the corporation has mortgaged its property to raise money to pay off such debts, and has actually paid them off, this position is somewhat singular.

(*f*) It is said that "the whole effect of the transaction mentioned has been that the corporation is vested with a perfect title to the identical stock which it originally regarded as sufficient collateral, and taken by the corporation at a sum far less than the amount of the indebtedness to which it was originally regarded as a sufficient security. There is no damage shown, and there could be no action without damage." That is to say, that because the corporation originally regarded the 10,000 shares of stock as sufficient security for the performance of the defendants' agreement, they could sell the stock at $42.50 per share, and convert the cash proceeds to their own use in direct violation of their agreement to apply it to the debt affecting the corporation's property, and about a year afterwards buy up the same stock, and by fraudulent means induce the corporation to purchase it at $37 per share when it was only worth $25 per share in the market, and then say to the other stockholders: "Well, the corporation has the stock, which it originally regarded as sufficient collateral. How is it injured?"

(*g*) It is said that "all the parties have permitted the transaction to rest for more than a year, and that to permit a rescission would be to do a violence to every principle of law and equity." But we do not think that the doctrine of laches applies.

4. The demurrer takes the ground that there is a defect of parties defendant, a misjoinder of parties, and a misjoinder of causes of action. The first ground is the only one which is argued. It is said that the other members of the board of directors should have been joined as defendants. So far as the corporation's interests are concerned, it is itself a defendant. As to the rest, Howes, Bonebrake, and Merrill are the only persons interested in the transactions complained of. The other directors were only their "implements and representatives," and are not shown to have received or to have any interest in the fruits of said transactions. It was not necessary to join them as defendants. The other grounds mentioned have not been argued. The fact that there was a demurrer on these grounds is mentioned in the statement of facts; but there is not a word of argument in either of the briefs for respondents in relation to the grounds, or anything to give rise to the inference that they are relied upon. Under these circumstances, the grounds mentioned should be considered as waived.

5. We do not think that it is necessary for the court to determine at this stage of the case the precise measure of equitable relief to be awarded. A court of equity molds its relief according to the particular circumstances of the case. Heinlen v. Martin, 53 Cal. 342, 343. And it is better to reserve the question mentioned until all the circumstances shall have been disclosed by the evidence. It is sufficient for the disposition of the demurrer to say that in our opinion each division of the complaint states a cause of action, and requires an answer to the charges made. We therefore advise that the judgment be reversed, and the cause remanded, with directions to overrule the demurrer, with leave to the defendants to answer.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to overrule the demurrer, with leave to the defendants to answer.

88 Cal. 241

WOODY *et al.* v. BENNETT *et al.* (No. 14,070.)

(*Supreme Court of California.* March 6, 1891.)

SALES—BREACH OF WARRANTY—DAMAGES—EVIDENCE.

1. Defendants sold plaintiffs a horse, and agreed to exchange him for any other horse they might have, if certain blemishes, which they guarantied would disappear on the use of proper remedies, did not do so. *Held* that, in an action for breach of the contract in that the blemishes did not disappear, evidence of the expenses of plaintiffs in treating them is admissible to show their good faith.

2. In such case, evidence of the amount paid for the horse is admissible on the question of damages.

3. It is competent on the question of damages to show how the blemishes affected the value of the horse.

4. Where defendants told plaintiffs to use any ordinary simple remedies, they cannot show by a witness that the blemishes could have been removed by use of a remedy known only to himself.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

J. M. Damron and *Charles G. Lambertson*, for appellants. *Davis & Allen*, for respondents.

HAYNE, C. The defendants sold and delivered to the plaintiffs a stallion called "Lord Roxbury," for the sum of $3,000, and gave to them the following contract: "Tulare, Cal., Feb. 7, 1887. This is to certify that we, E. Bennett & Son, have this day sold Lord Roxbury (1) to J. H. Woody, James Twaddle, I. N. Wright & Irwin Brothers, and we guaranty that the two small thicknesses on the hocks shall go off if said parties use proper applications and rubbing, and, in the case said bunches do not disappear, we will exchange with said parties for any horse of the same price we may have. E. BENNETT & SON." The plaintiffs gave evidence tending to show that they used the applications recommended by the defendants, but that the bunches were hereditary and irremovable. On these points the evidence is conflicting. But there is no dispute about the fact that the bunches did not disappear. And after a time the plaintiffs requested that an exchange be made for another horse, as provided by the contract. The defendants at first expressed a willingness to make the exchange, and the plaintiffs thereupon selected a horse called Lord Roxbury, Second, then in Kansas. But, after some correspondence on the subject, the defendants annexed a condition to the right of exchange, which will be considered below. The plaintiffs thereupon brought the present action. The jury found a verdict in their favor for $1,500, and the defendants appealed.

We are somewhat inclined to think that the contract contains two separate and distinct undertakings, viz.: (1) That the blemishes should disappear if proper treatment was used, and (2) that if they did not disappear the defendants would exchange the horse for another of the same price; and that, since the undertakings were separate, it was not necessary to an action on the first to show that plaintiffs had offered to exchange, and not necessary to an action on the second to show that proper treatment was used. But we shall assume in favor of the defendants that it was necessary to any recovery by plaintiffs that they should show both that they had used proper treatment, and that they had made a proper offer to exchange.

1. There was evidence tending to show that the defendants told the plaintiffs "to use on these bunches any ordinary simple remedies that is usually used for that purpose," and that the plaintiffs used remedies which were ordinarily used for such purpose, and afterwards employed a veterinary. There was evidence contradicting the foregoing. But at this stage of the case the evidence in support of the verdict must be presumed to be true, and if true it was sufficient. It must be taken to be the fact, therefore, that the plaintiffs used proper treatment.

2. It is argued that in their letter announcing their selection of another horse (then in Kansas) the plaintiffs made it a condition that he "should arrive all right" at Tulare, and that they had no right to impose such a condition. It might, perhaps, be suggested in this connection that the defendants' senior partner admitted on the stand that it was his understanding that the exchange should be made at Tulare. But it is not necessary to express an opinion upon the merit of the above contention, for the reason that after some correspondence the defendants refused to consent to any exchange, except upon a condition which was entirely unwarranted. In a letter to the attorney in whose hands the plaintiffs had placed their claim, the defendants' senior partner says: "We are ready and willing to change, but those parties must take the imported English coach mare that we imported expressly for them, on their order, at $2,000. That was the price I told them she would cost them delivered at Tulare, and they ordered us to bring her at that price. We are ready and willing to live

up to our contract on the horse, and they must do the same on the mare; or, if they do not want to take the mare, they must relieve us from the contract to exchange the horse." And in his final letter on the subject he says: "We will most willingly exchange, but remember we will send the mare with the horse." Now, even if it were assumed that the defendants could make the performance by plaintiffs of a separate and distinct contract a condition of the right of exchange, the fact was that there was no contract on the part of the plaintiffs in reference to a mare, and this was admitted at the trial. This conduct on the part of the defendants amounted to a refusal to comply with their contract, and supersedes any question as to the place of delivery of the new horse.

3. The evidence justifies the amount of damages awarded. There was evidence tending to show that the plaintiffs purchased the stallion for breeding purposes, and that the defendants knew this; that without the blemishes mentioned he was worth the sum paid for him, viz., $3,000; but that the blemishes were hereditary, and injured his value for breeding purposes, and that with them he was worth under $500. A foundation was laid for this evidence in the complaint, and we think that it was admissible, and sufficient to justify the verdict.

4. There are several other matters which may be briefly disposed of:

(*a*) It was not error to admit evidence of the expenses incurred by the plaintiffs in treating the horse's legs. It was expressly stated by the court that such evidence was not admitted for the purpose of increasing the damages, but only for the purpose of showing an effort in good faith to remove the blemishes.

(*b*) There was no attempt to alter or add to the written contract by parol. The conversations proven bore upon the condition and value of the horse at the time he was sold.

(*c*) The evidence as to what plaintiffs paid for the horse was admissible upon the question of damages.

(*d*) It was proper to prove that the blemishes affected the horse's success for breeding purposes.

(*e*) Evidence as to the nature of the blemishes, their cause and probable duration, had relation to his value, and consequently was admissible on the question of damages.

(*f*) The defendants having told the plaintiffs to use any ordinary, simple remedies, and the plaintiffs having done so, it was immaterial whether the witness Dickenson thought he could have removed the blemishes by some remedies known only to himself.

(*g*) The evidence of the witness Edwards was more favorable to the defendants than otherwise.

(*h*) The instruction as to the propriety of the remedies recommended by the defendants was proper. (See first head of this opinion.)

(*i*) Evidence of readiness to make the exchange in Kansas was irrelevant, for the reasons stated in the second head of this opinion. We therefore advise that the judgment and order appealed from be affirmed.

We concur: Belcher, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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88 Cal. 281

Ex parte VANCE. (No. 20,812.)

Ex parte CARPENTER. (No. 20,811.)

(*Supreme Court of California.* March 14, 1891.)

CONTEMPT—WHAT CONSTITUTES—ADVICE OF ATTORNEY.

1. A defendant who interferes with the possession of plaintiff's tenant by driving his cattle from the land, and offering to lease to another, when a decree prohibits him or his attorneys from entering upon the land, or interfering with plaintiffs or their tenants in the possession, control, or ownership thereof, is guilty of contempt of court.

2. In such case, defendant's attorney is guilty of contempt in advising such interference.

In bank. Applications for *habeas corpus*. *C. H. Clement*, for petitioners. *A. L. Rhodes* and *Geo. Lezinsky*, for respondent.

Per Curiam. These two proceedings were heard on Monday, March 9, 1891, on returns of the sheriff of Sacramento county to the writs of *habeas corpus*. The conclusions of this court, remanding the petitioners to the custody of said sheriff, were on the same day announced; but through some inadvertence the proper orders were not delivered to the clerk, and were therefore not entered by him. The petitioners are in custody by virtue of an order of the superior court of Sacramento county,—Judge A. P. Catlin, presiding,—punishing them for contempt, which consisted in violating a decree rendered in said court—ex-Judge J. W. Armstrong then presiding—in a certain action in that court entitled "James C. Pennie, Administrator, et al. vs. Sebastian Fisher et al." The petitioner, Vance, was a party defendant in that action, and the decree enjoined and restrained him, and his agents, attorneys, employes, etc., from entering upon any of the lands described in the complaint therein, and from interfering with the plaintiffs in said action or either of them, or their tenants, grantees, or agents in the possession, control, or ownership, of such lands. The other petitioner, Carpenter, was Vance's attorney in said action. The findings of the superior court in the contempt matters are very full, and show that the petitioner Vance violated the decree by interfering with the possession of one Evans, who was a lessee of plaintiffs of part of said lands, by preventing the sheep of said Evans from grazing on said land and driving them away from said land, and assisting in the building of a fence on said land to prevent the grazing of said sheep thereon, and offering to lease said land in opposition to the lease thereof given by the successors in interest of the plaintiffs in said action; and that the other petitioner, Carpenter, had counseled and advised with and aided and abetted said Vance in so interfering with the said tenancy and occupation of said Evans. All the other facts necessary to the validity of said order punishing for contempt are fully found. We see nothing in the contention that the court had not jurisdiction in the said action of Pennie v. Fisher, and there is no reason why the petitioners should be discharged. Let an order be entered in each of said proceedings in *habeas corpus* that the petitioner be remanded to the custody of the sheriff of Sacramento county, and that the proceedings be dismissed.

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88 Cal. 294

PEERS *et al.* v. McLAUGHLIN *et al.* (No. 13,196.)

(*Supreme Court of California.* March 13, 1891.)

EQUITABLE MORTGAGE—MINORS.

Where a father, for himself, and as guardian for his minor children, purchases land, and takes a deed to himself and them, agreeing to give a mortgage for the purchase money, the mortgage is good in equity against the minors, who appear by guardian *ad litem*, and do not disclaim the title to the land vested in them.

Department 2. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

Chase & Chase and *C. Y. Brown*, for appellants. *J. B. Reinstein* and *J. M. Seawell*, for respondents.

DE HAVEN, J. The court below adjudged that defendant Thomas McLaughlin is indebted to the plaintiffs in the sum of $1,615.24, and that said indebtedness is a lien upon the land described in the complaint, and directed that it be sold to satisfy said lien. All of the defendants appeal from this judgment. There is no bill of exceptions in the record. The findings show the following facts: The defendants John Thomas Edward McLaughlin and Margaret McLaughlin are the minor chidren of the defendant Thomas McLaughlin. In March, 1884, the plaintiffs and the defendant Thomas McLaughlin made an agreement, the plaintiffs to convey to said Thomas McLaughlin and his said minor children the land described in the complaint for the sum of $2,500, and at the same time the defendant Thomas McLaughlin paid to plaintiffs on account of said purchase the sum of $1,300, and the balance of $1,200 was to be paid October 1, 1884. On October 10th following this balance was still unpaid, and it was then agreed between plaintiffs and the defendant Thomas McLaughlin, "for himself and his said children, * * * that plaintiffs should execute a deed * * * of said * * * land to Thomas McLaughlin and his said children, and that the said balance of said purchase price * * * should be secured by a mortgage upon said lot of land." Thereupon plaintiffs conveyed said land to the defendant McLaughlin and his said minor children, at the same time receiving back a note for $1,200 and a mortgage to secure it upon the land conveyed. The mortgage recited that "Thomas McLaughlin, John Thomas Edward McLaughlin, and Margaret McLaughlin" are parties thereto of the first part, and was signed: "THOMAS McLAUGHLIN, [Seal.] THOMAS McLAUGHLIN, [Seal,] Guardian of the persons and estate of John Thomas Edward McLaughlin and Margaret McLaughlin, minors." The note was also signed by Thomas McLaughlin for himself, and also below as guardian for the said minors. The court further finds "that said deed and mortgage were drawn by one Oliver Walcott, an attorney at law, who represented to said plaintiffs that said mortgage was sufficient to create a lien for said sum of $1,200 upon the interests of said children, as well as upon the interest of said Thomas McLaughlin in said lot of land, and that said plaintiffs, when they executed said deed and received mortgage, believed that said mortgage was sufficient and effective" for that purpose. It is claimed by the defendant minors that the judgment is erroneous, in so far as it makes the said indebtedness of the defendant Thomas McLaughlin a lien upon their interest in the land so conveyed to them. There is nothing in the case showing that any portion of the money paid by the defendant Thomas McLaughlin belonged to said minors, or whether he was or was not in fact the guardian of their estates.

We are of the opinion that, upon the facts appearing here, the mortgage referred to may be enforced as an equitable mortgage upon the whole land, and whatever interest the defendant minors may have acquired therein by virtue of the deed referred to is subject to its lien. The principle is well settled in equity that a mortgage defectively executed, or an imperfect attempt to create a mortgage upon specific property for the purpose of securing a debt, will create a specific lien upon the property so intended to be mortgaged. Daggett v. Rankin, 31 Cal. 327; Love v. Mining Co., 32 Cal. 652. In Remington v. Higgins, 54 Cal. 620, which was an action against husband and wife, the facts were that the husband bargained for land, agreeing that a mortgage should be given to secure the purchase price, and at his request the deed was made to his wife, and she executed the mortgage. This mortgage was, however, invalid, because, by the conveyance to the wife, the property became community property, and as such was not subject to mortgage by the wife. In dealing with that state of facts, the court uses this language: "Admitting that the transaction did not create a mortgage in law, and not deciding but that plaintiff may have waived his lien of a vendor, we are of the opinion that plaintiff has a lien upon the premises by way of equitable mortgage to recover the unpaid portion of the purchase money and interest. The husband, in bargaining for the premises, agreed that a mortgage should be given. A paper was executed in pursuance of that agreement, which was supposed by the parties to have accomplised that object. It now appears that that paper is invalid as a mortgage. Equity will treat that as done which the parties agreed to have been done." So in this case the father agreed that the balance of the purchase price should be secured by a mortgage of the land conveyed, and we presume that the one under consideration was executed by him in good faith to carry out that agreement, and the court below finds that the plaintiffs accepted it under the belief that it was a valid lien upon the whole land they were conveying, and it was because the plaintiffs so relied upon it that the defendants were enabled to acquire any interest in the land. We have not overlooked the fact that in all the cases above cited the persons against whom the imperfect instrument was enforced had the capacity to make a valid contract, while by the judgment here it is the land of minors who were and are incapable of contracting for land, and, in a general sense, of ratifying such a contract against which this mortgage is enforced. But this fact ought not, under the circumstances here disclosed, to prevent the application of the equitable rule which lays at the foundation of these cases. It must be borne in mind also that the agreement of the father and his assumed agency in accepting a deed in pursuance of the agreement is the source or foundation of all the right, legal or equitable, which these minors have in the land. The deed was made to them solely by direction of the father. That was the form which the transaction took, and in equity the agreement that the purchase price should be secured by a mortgage upon the land the conveyance and the mortgage must be regarded as one transaction, and no person, whether minor or adult, can be permitted to adopt that part of an entire transaction which is beneficial and reject its burdens. This commanding principle of justice is so well established that it has become one of the maxims of the law. The father acted for the children, and they must either accept or repudiate the entire contract which he made. They cannot retain its fruits and at the same time deny its obligations. "A party cannot apply to his own use that part of the transaction which may bring to him a benefit, and repudiate the other, which may not be to his interest to fulfill. Thus it has been held that an infant cannot avoid a mortgage and affirm a deed, when both are made at one and the same time, relate to the same property, and go to make up one transaction. If the mortgage be avoided under the plea of infancy, the deed becomes of no effect." Heath v. West, 28 N. H. 108. In this case the minors are before the court, and have filed an answer by their guardian *ad litem*. They have not disclaimed the title vested in them by the deed procured under the circumstances stated, but seek to defeat the lien of plaintiff's mortgage, so far as their title is concerned, by the plea "that they have not ratified any contract relating to the sale of said lot, and that they are incapable of ratifying the same." But what the rules of equity would not permit them to do if they had attained their majority they cannot be permitted to do now through their guardian *ad litem*. Judgment affirmed.

We concur: SHARPSTEIN, J.; McFARLAND, J.

88 Cal. 333

In re WIERBITSZKY *et al.* (No. 14,155.)

(*Supreme Court of California.* March 19, 1891.)

APPEAL—TRANSCRIPT—WANT OF CERTIFICATE.

In California an appeal will be dismissed where there is no certificate to the transcript.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

G. H. Perry, for appellant. *Pierson & Mitchell*, for respondent.

McFARLAND, J. This is an appeal by J. J. Rauer from an order declaring H. Wiebitszky & Co. insolvent debtors, and appointing an assignee. A motion was made by respondent on November 28, 1890, to dismiss the appeal on the grounds, among others, that there is no certificate to the transcript, and nothing to show that the papers in what is called the "transcript" are copies of the originals filed in the superior court. On the same day appellant suggested a diminution of the record, and moved this court for an order directing the clerk of the lower court to attach to the transcript a proper certificate, which motion was on the same day granted. Since then no such certificate has been furnished, and no further step has been taken by the appellant. There being no certificate to the transcript, the said motion of the respondent is now granted, and the appeal is dismissed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; PATERSON, J.; HARRISON, J.

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88 Cal. 360

CONGRAVE *et al.* v. SOUTHERN PAC. R. Co.
(No. 13,395.)

(*Supreme Court of California.* March 19, 1891.)

MASTER AND SERVANT—PERSONAL INJURIES—FELLOW-SERVANTS.

Under Civil Code Cal. § 1970, providing that an employer is not bound to indemnify his employe for losses suffered in consequence of the negligence of another person employed by the same employer "in the same general business," unless he has neglected to use ordinary care in the selection of the culpable employe, a railroad company is not liable for the death of a brakeman in a collision caused by the negligence of the conductor on the same train in running his train ahead of schedule time, unless the company was negligent in selecting an incompetent conductor.

In bank. Appeal from superior court, Placer county; B. F. MYERS, Judge.

D. M. Delmas and *Robert F. Devlin*, for appellants. *Hale & Craig*, for respondent.

MCFARLAND, J. This action was brought by the widow and infant son of James W. Congrave, deceased, to recover damages for the death of the latter, who was killed by an accident on a railroad train of the defendant. A demurrer to the complaint was sustained by the court below; and, plaintiffs declining to amend, judgment went for the defendant. From this judgment plaintiffs appeal.

The plaintiffs aver that said Congrave, deceased, was a brakeman in defendant's employ upon a train which left the town of Truckee on March 19, 1888, and started westward, destined for Sacramento city. It is averred, in general terms, that the deceased, as such brakeman, was "placed by said defendant under the control and direction and subject to the orders of the conductor of said train;" but it is not averred that the accident which resulted in the death was caused, in whole or in part, by any order or direction given by said conductor to said deceased, or that any order or direction whatever was given. On the other hand, it appears affirmatively that the accident was not caused by any order or direction given by the conductor to said deceased. The complaint proceeds to state in detail the circumstances, facts, and causes which produced the accident by which the deceased was killed, and they are briefly as follows: The train, proceeding westward, had to pass a certain station called "Tamarack." "According to the rules and regulations, time-tables and schedules, made by said defendant to govern and regulate the movements of its trains upon its aforesaid roads, and the times of the arrivals and departures of said trains from said stations, and for the instruction and guidance of its conductors," said train ought to have left Tamarack at the hour of 55 minutes past 12 o'clock noon of said day, and not earlier; and it was "the duty of said conductor" not to have allowed the train to start before said time. But the conductor, "in disregard of the aforesaid rules, regulations, time-tables, and schedules of said defendant," "negligently and recklessly ordered, caused, and permitted said train to leave said Tamarack station, in its westward bound course, a long time before the expiration of the proper and schedule time as aforesaid," viz., at 46 minutes past 12 o'clock. "By reason of said negligence, recklessness, and breach of duty by said conductor, and the departure of said train from said Tamarack station before its proper and schedule time as aforesaid," the train collided with another train, and by said collision the deceased was killed. It is stated by way of recital that he was killed "while at his post obeying the orders and directions of said conductor, and performing his duties as such brakeman;" but there is no averment that any particular order was given, or that any such order contributed in the slightest degree to the accident or the death. The demurrer contained the general ground of want of facts, and also special grounds,—one being that the complaint was uncertain, etc., because "it does not appear therefrom what were the duties, or any of them, required of or to be performed by James W. Congrave, mentioned in said complaint, as brakeman on the train mentioned therein." We think that the demurrer was properly sustained, and that the judgment should be affirmed.

It is entirely clear on the face of the complaint that the deceased and the conductor were co-employes of defendant. It is also clear that the death was caused by the negligence and breach of duty of the conductor in starting the train before schedule time; no other cause of the accident is intimated in the complaint. There is no averment that the defendant was negligent in the selection of the conductor. And the general rule (whatever exceptions there may be to it) is well settled in England and the United States, and particularly in this state, that a master is not liable to his servant for damages sustained by the negligent act of a fellow-servant, unless the master was negligent in the selection of the servant at fault. It is hardly necessary to cite authorities on this point, as we do not understand counsel for appellant to contend against the general rule as above stated. The earliest cases upon the subject in this country in which the principle was applied to railroad companies and their employes are Murray v. Railroad Co., (decided by the supreme court of South Carolina in 1841,) 1 McMul. 385, and Farwell v. Railroad Corp., (decided in 1842 by the supreme court of Massachusetts, Chief Justice SHAW delivering the opinion,) 4 Metc. 59. These leading cases were generally followed in the United States. Very few cases can be found which deny the general rule. They were also followed in England. Hutchinson v. Railroad Co., 5 Exch. 343; Wigmore v. Jay, Id. 354; Coal Co. v. Reid, 3 Macq. H. L. Cas. 266. We need not allude further to authorities in other jurisdictions, as this court has frequently approved the rule. In Yeomans v. Navigation Co., 44 Cal. 71, the point was directly involved, and the court, among other things, say: "The defendants excepted to these instructions, and contended that the case is within the reason of the rule that an employer is not responsible to his employe for injuries resulting from the negligence, carelessness, or unskillfulness of a fellow employe engaged in the same general business. The rule itself cannot be questioned. It has been settled by a uniform series of both English and American decisions. The question comes upon the application of the principle to the present case." In that case it was held that plaintiff, who was an express agent, was a passenger, and not an employe of defendant. In Hogan v. Railroad Co., 49 Cal. 128, the court say: "In Yeomans v. Navigation Co. we announced the rule of law on this subject, and referred to many of the authorities by which it was sustained. The cases are very numerous,—many of them being cited by defendant,—and they are to the effect that the master is not liable for injuries suffered by a servant through the negligence of a fellow-servant, unless the master was negligent in the selection of the servant in fault. The early cases in Wisconsin, Indiana, and Ohio, relied on by plaintiff as sustaining his view of the law, have since been overruled or disapproved." Other cases to the same point are Collier v. Steinhart, 51 Cal. 116; McLean v. Mining Co., 51 Cal. 256; McDonald v. Hazletine, 53 Cal. 35; Brown v. Railroad Co., 72 Cal. 523, 14 Pac. Rep. 138; Fagundes v. Railroad Co., 79 Cal. 97, 21 Pac. Rep. 437.

It is true, however, that there has been some difference of opinion as to the meaning of the phrase "fellow-servant;" and a few of the cases have recognized a distinction growing out of different grades of employment. There has also been recognized in a few instances what may be called the doctrine of "vice-principalship;" that is, where one general employe is held to have been given the entire and unlimited control of the whole business of the principal, so that he stands in all respects in his principal's place, and all his negligent acts are deemed to be the direct acts of the principal. And upon these asserted principles we understand appellant to mainly rest his case. It is contended that as the conductor was superior in grade to the deceased brakeman, and had certain authority over him, and as the conductor, with respect to the running of the train, was the vice-principal, therefore the general rule applicable to fellow-servants does not apply. In support of this position the case of Railroad Co. v. Ross, 112 U. S. Rep. 377, 5 Sup. Ct. Rep. 184, is cited.

The facts of the last-named case are not exactly like those in the case at bar. It may be assumed, however, that the opinion of the majority of the court in that case is favorable to appellant's contention. That seems to be the view taken by the four dissenting justices, BRADLEY, MATTHEWS, GRAY, and BLATCHFORD; for, in expressing their dissent, they say: "We think that the conductor of the railroad train in this case was a fellow-servant of the railroad company with the other employes on the train. We think that to hold otherwise would be to break down the long-established rule with regard to exemption from responsibility of employers for injuries to their servants by the negligence of their fellow-servants." But it is to be observed that the majority of the court were not governed or restrained by any statutory provision. They were at entire liberty to consider the philosophy of the subject, and to follow the direction of their own judgment as to what should be the rule. The decision was not given in view of the statutory law of California upon the point, or of any similar law of any other state. The Civil Code of California went into effect January 1, 1873, and under the head of "Obligations of the Employer" it provides as follows: "Sec. 1970. An employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of business in which he is employed, nor in consequence of the negligence of another person employed by the same employer, in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe." This section of the Code not only restates the rule first established by judicial decision as to injury received through the negligence of a fellow-servant, but it clears away to a great extent the difficulties which may have existed as to the meaning of "fellow-servants." It declares them to be those employed "in the same general business." And if the employes on a train of cars, including the engineer, the conductor, the fireman, and the brakeman, are not persons employed in the same business, it would be difficult to imagine a set of men who could be considered as so employed They are employed on the same train; their duties all appertain to the running of that train; each has his own work to do, and the joint work of all is necessary to the business; they are almost constantly in close relations and persona contact with each other; they have the fullest opportunities for knowing each others' qualifications as to carefulness and skill, and detecting any failure of duty; and to them applies peculiarly the reasoning upon which the general rule was originally founded. This clause of the Code has received judicial construction. In McLean v. Mining Co., 51 Cal. 255, plaintiff was employed to work in a hydraulic mine. One Kegan was "foreman of all the work" with "authority to employ and discharge hands." Through the negligence of Kegan plaintiff was injured by a blast. Judgment in the trial court went for defendant, and on appeal plaintiff's counsel contended, as an exception to the general rule, "that the employer is liable for injury to a subordinate servant by the negligence of a superior." The court affirmed the judgment, and in its opinion, after quoting section 1970, said: "The injury to the plaintiff was caused by the negligence of Kegan, the foreman of defendant, who was a fellow-servant with the plaintiff,—'another person employed by the same employer in the same general business,' that is, the business of working the mine of defendant,—Kegan being in the blasting, and plaintiff in the hydraulic, department of the 'general business.' * * * The law of this state respecting this subject, as set forth in the Code referred to, recognizes no distinction growing out of grades of employment of the respective employes; nor does it give any effect to the circumstance that the fellow-servant through whose negligence the injury came was the superior of the plaintiff in the general service in which they were in common engaged; and the alleged distinction in this respect insisted upon by the defendant's counsel, founded, as he claims, on the general principles of law and the adjudged cases, requires no examination at our hands. Collier v. Steinhart, ante, p. 116, (51 Cal.)" It is clear that in deciding this case the court determined that the Code swept away the distinctions which appear in some of the "adjudged cases" on the subject of fellow-servants. Collier v. Steinhart, referred to in the opinion, (51 Cal. 116,) is still stronger to the point decided. Both of these cases were approved in McDonald v. Hazletine, 53 Cal. 35, which was also a case where an employe was injured through the carelessness of a foreman. These cases were again followed and approved in Stephens v. Doe, 73 Cal. 26, 14 Pac. Rep. 378, where it was held that "the foreman of a mine and a miner employed to work under his directions are fellow-servants; and the owner of the mine is not liable for injuries caused through the negligence of the foreman, unless he failed to use ordinary care in the selection of the foreman." The same doctrine was announced in Brown v. Railroad Co., 72 Cal. 523, 14 Pac. Rep. 138, and Fagundes v. Railroad Co., 79 Cal. 97, 21 Pac. Rep. 437.

It is contended, however, that the principal may give an employe such authority as will constitute him a "vice-principal;" that in that instance such employe stands in the shoes of the principal, and the latter is liable for the employe's negligence by which another employe is injured; and that in the case at bar the conductor was such vice-principal. The authorities mainly relied on for this contention are Beeson v. Mining Co., 57 Cal. 20; Brown v. Sennett, 68 Cal. 225, 9 Pac. Rep. 74; Sanborn v. Trading Co., 70 Cal. 261, 11 Pac. Rep. 712; and McKune v. Railroad Co., 66 Cal. 302, 5 Pac. Rep. 482. In the Beeson Case the death of the deceased was caused by a defective pipe in a mine; and the only point decided was that a principal is liable for injury to an employe caused by defective machinery. The principle that it is the duty of an employer himself to provide safe materials and structures has never been disputed. There is some language used in the opinion which, perhaps, goes further, for which reason, probably, three justices dissented; but the case decides nothing more than as above stated. In Sanborn v. Trading Co. the plaintiff was injured by defective machinery used in a saw-mill; and the court decided, according to the well-settled rule, that "it is the duty of the owner of a saw-mill to furnish suitable and safe machinery for the use of his employes." Brown v. Sennett and Mckune v. Railroad Co. seem to recognize to some extent the doctrine of vice-principalship. In the former case it was held that "the foreman of a gang of men to whom a stevedore delegates the entire management of the work of unloading a vessel, with full direction to control and supervise it, is not a fellow-servant with his subordinate employes." The court says in its opinion that the "defendants abdicated the control and management of the entire work to the foreman, and gave him full discretion to control and supervise it." He employed the men; and the court holds that "the foreman was therefore in the performance of the 'job' in place of the master." The case is decided by a mere majority of the court, it makes no allusion to the language of the Code; and it is hard to reconcile with some former decisions, particularly with Collier v. Steinhart, above mentioned, (51 Cal. 116,) and McLean v. Mining Co., supra. But, assuming the case to be correctly decided, the facts were very different from those in the case at bar. In Mckune v. Railroad Co., a department decision, the defendant was engaged in constructing a railroad. The plaintiff was injured by the negligence of one Fisher, who "was material agent and train dispatcher for defendant, and had charge of the moving of trains." The negligence consisted in his carelessly sending out a special train which collided with a hand-car on which plaintiff and others were riding, and injured plaintiff. "A rule of the company declared that no extra engine, either with or without train, unless in company with a regular train, would pass over any portion of the road, except on an order from the material agent or train dispatcher." The court say: "He represented the defendant; was a vice-principal; he employed and discharged men, and directed the movements of the trains. When he directed the extra train to go up the road, the company directed it." Assuming this case not to be in conflict with the numerous decisions above noticed, it is clear that it is not authority for appellant in the case at bar. The material-man and train dispatcher seems to have had control of the entire business of constructing the railroad. He employed and discharged men, and moved all the trains at his own will, without any restraint. The defendant seems to have "abdicated" in favor of this general agent. But in the case at bar the conductor was merely an ordinary employe, who worked with other employes on a train, each having certain duties to perform. He had no power to "direct the movement of trains." He had no authority to direct the movement of the particular train on which he was employed, except in accordance with the regulations and schedules and time-tables by which the defendant directed the work to be done. He had no power to employ and discharge men. It cannot be said that when he started the train before the schedule time "the company directed it." He was not then acting for the defendant, but against its express orders. He did not, therefore, come within the doctrine of vice-principalship,—assuming that there may be cases to which that doctrine would apply. Moreover it was said, and we think it was clearly intended to be decided, in Brown v. Railroad Co., 72 Cal. 523, 14 Pac. Rep. 138, that the brakeman and conductor on a railroad train are fellow-servants. And in Fagundes v. Railroad Co., supra, it was held that a laborer, a track-worker, and a conductor were all fellow-servants. Our conclusion is that, on the facts of this case as presented in the complaint, the deceased and the conductor were persons "employed by the same employer in the same general business," within the meaning of section 1970 of the Civil Code, and that, therefore, the defendant is not liable for the death of the one caused by the negligence of the other. Judgment affirmed.

We concur: De Haven, J.; Harrison, J.; Paterson, J.; Sharpstein, J.

(88 Cal. 302)

In re Bauquier's Estate. (No. 14,080.)[1]

(*Supreme Court of California.* March 18, 1891.)

Executors—Issue of Letters—Objections on the Ground of Incompetency.

1. The fact that an executrix claims property as her own, which the other legatees insist belongs to the estate, does not, of itself, show a want of integrity, within the meaning of Code Civil Proc. Cal. § 1350, providing that no person is competent to serve as an executor who is wanting in integrity.

2. Code Civil Proc. Cal. § 1349, provides that the court admitting a will to probate must issue letters thereon to the persons named therein as executors, who are competent, who must appear and qualify, unless objection is made under section 1351, which provides that any person interested may file objections to granting letters testamentary to the persons named as executors, and the objections must be determined by the court. *Held*, that the objections must show that the applicant for letters is incompetent upon some ground specified in section 1350, which provides that no person is competent to serve as executor who is under the age of majority, convicted of an infamous crime, or adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

3. Where, on objections by the legatees to the issue of letters testamentary to the person named as executrix in the will, the court adjudges her incompetent, and denies her application for letters, an order denying her a new trial is appealable.

In bank. Appeal from superior court, Sacramento county; W. C. Van Fleet, Judge.

J. C. Tubbs and *A. L. Hart*, for appellant. *G. L. Johnson* and *James B. Devine*, for respondent.

De Haven, J. Mary C. Rode was named in the will of Joseph Bauquier, deceased, as executrix without bonds, and filed in the superior court of Sacramento county her petition for the probate of said will, and for the issuance to her of letters testamentary. Objections to her appointment as executrix were filed by her brothers, who were also legatees named in the will, upon the alleged ground that she, in the life-time of said Joseph Bauquier, "for the purposes of pecuniary gain, and to obtain an unjust and larger portion of the estate of said Joseph Bauquier, deceased, than she was legally or morally entitled to, and to defraud said Peter, Frank, and Joseph Bauquier of their just portion of said estate, did, by means of intimidation, falsehood, fraud, deceit, misrepresentation, and undue influence, compel, influence, and induce her said father, the said Joseph Bauquier, deceased, to assign, set over, and deliver" to her $12,543.88 in money and certain described real and personal property, and that the said petitioner claims adversely to the estate to be the owner of said property so fraudulently obtained. This is followed by the general allegation "that said Mary Rode is incompetent to act as executrix of the said last will and testament for want of integrity, as shown by the facts herein set forth, and that she is generally incompetent, by reason of the facts herein set forth, to act as such executrix." An answer was filed to these objections, and, after a trial upon the issues arising, the court made the following and only finding: "Mary C. Rode is incompetent to execute the duties of the trust of executrix of the said last will and testament of said Joseph Bauquier, deceased, for want of integrity; and that the said Mary C. Rode is antagonistic and hostile, and asserts claims adverse to the said estate, and that she wants integrity in that regard." The court thereupon denied her application to be appointed executrix. The petitioner moved for a new trial, which was denied, and from this latter order this appeal is taken.

1. Under section 1350 of the Code of Civil Procedure no person is competent to serve as an executrix who is wanting in integrity. The word "integrity," as here used, means soundness of moral principle and character, as shown by one person's dealing with others in the making and performance of contracts, in fidelity and honesty in the discharge of trusts. In short, it is used as a synonym for probity, honesty, and uprightness in business relations with others. The evidence in the record before us is not such as would justify a finding that the petitioner is lacking in integrity, as thus defined, and we are not certain, from the peculiar language of the finding quoted, that the learned judge of the court below intended to say anything more than that the adverse interests of the petitioner would prevent her from fairly, justly, and properly protecting the estate; and that this is a want of integrity within the meaning of the statute. We do not think, however, that the mere fact that the appellant claims property as her own, which the other legatees insist belongs to the estate, would of itself, and without some reference to the honesty of her claim, show a want of integrity.

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[1] Rehearing denied, post, 532.

2. The remaining inquiry is whether the court was justified in denying the appellant's application upon the ground that she "is antagonistic and hostile, and asserts claims adverse to the said estate of Joseph Bauquier, deceased, and to the heirs at law, and persons interested in said estate;" or, adopting the language of counsel for respondents, "can one who claims a hostile and adverse interest in property alleged to belong to an estate be appointed administrator of such estate?" The answer to this will be found in the provisions of the Code of Civil Procedure relating to the appointment of executors, and declaring who shall be incompetent to act in that capacity. These sections are as follows: "Sec. 1349. The court admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors who are competent to discharge the trust, who must appear and qualify, unless objection is made as provided in section thirteen hundred and fifty-one. Sec. 1350. No person is competent to serve as executor who, at the time the will is admitted to probate, is (1) under the age of majority; (2) convicted of an infamous crime; (3) adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity. * * * Sec. 1351. Any person interested in a will may file objections in writing to granting letters testamentary to the persons named as executors, or any of them; and the objections must be heard and determined by the court." The meaning of these sections is that at the time of admitting the will to probate the court must appoint as executor the person who is therein named as such, if he has petitioned therefor, and is not incompetent, unless written objections to such appointment have been filed, in which case the objections must be heard and determined; and the objections made must be such as show that the applicant is incompetent upon some one of the grounds specified in section 1350 of the Code of Civil Procedure. Under our law a man has the right to make such disposition of his property as he chooses, subject only to such limitations as are expressly declared by law; and within the same limitations he has the absolute right to select the executor to carry out the provisions of his will. In other words, any executor named in a will has the right to act, unless there is some express provision of law which declares that he shall not; and, as a consequence, the testator may lawfully select any person for this trust who does not fall within one of the classes expressly mentioned and declared to be incompetent. And, so far as our investigation has extended, this construction has been uniformly given to statutes relating to this subject. Thus, DENIO, C. J., in his opinion rendered in McGregor v. McGregor, *40 N. Y. 139, says: "The selection of executors is not committed to the surrogate's court. The testator is allowed to appoint such persons as he may see fit, provided they do not fall within the class of incompetent persons mentioned in the statute." The language of JOHNSON, J., in the same case, is equally explicit. He says: "The statute (2 Rev. St. p. 69, § 1) makes it the duty of the surrogate, when any will of personal estate shall have been admitted to probate, to issue letters testamentary thereon to the persons named therein as executors, if they are by law competent to serve as such. It then provides who shall be deemed incompetent to serve as executor. I am of the opinion that any person appointed or named as an executor in a will is to be deemed competent unless he is declared incompetent by statute, and that it is the duty of the surrogate to grant letters to every person named as executor in a will, upon his application, who is not declared incompetent to serve by statute. He has no discretion to exercise in the matter, but must obey the requirements of the statute, which is the sole source of his power." The court of appeals of Kentucky take the same view of this question. "It is sufficient for us to say that the law has declared who may and who may not be executor; and, if Berry be a man whom the law allows to be appointed as such, it follows that upon his motion to give bond and security, and to qualify under the will, it was the duty of the county court, if the security was sufficient, to permit him to give bond, and be qualified as executor, and to give him letters testamentary. * * * Whatever may be opinions of men as to the propriety or impropriety of a particular appointment, the very basis and foundation of the exercise of the right which society has granted to its members to appoint its own representatives after death is the special confidence reposed by the testator in the appointee; and men, it seems to us, would care but little for the high privilege of disposing of their estates to their own liking if they are to be denied the right of selecting those who are to carry out and effectuate the benevolent purposes of their wills. It is true, some persons are incapable of being executors. The law has pointed out who they are, and society has long been satisfied with the wisdom of the rules upon this subject." Berry v. Hamilton, 12 B. Mon. 191. That the courts have no right to say that a person is incompetent to be appointed as an executor unless he falls within one of the classes of persons expressly declared to be incompetent by statute, is further shown by the decisions in regard to administrators where the law designates the order of priority in which different persons shall be entitled to appointment, and also declares who are incompetent to act. It is held in such cases that the order of priority named in the statute must be followed, and that no person can be declared incompetent unless he is one of a class so declared by the statute. A leading case on that point is Coope v. Lowerre, 1 Barb. Ch. 45. In that case the chancellor said: "The Revised Statutes provide that administration in cases of intestacy shall be granted to the relatives of the deceased who would be entitled to his personal estate, if they or any of them will accept the same, in the order specified in the statute; and I think the surrogate has no dis-

cretion to exclude a person declared by the statute to be entitled to a preference, except for the causes specified in the thirty-second section of the title of the Revised Statutes relative to granting letters testamentary and of administration." This case has been approved and followed in our state in Estate of Pacheco, 23 Cal. 480. In that case it was said: "On the trial it was admitted that one of the applicants, Rosa Pacheo de Sibrian, cannot read, write, or speak the English language; that she cannot read or write the Spanish; that she is sixty-nine years old, a Californian by birth, and a daughter of the intestate. It is not claimed that the other applicant, Penniman, is subject to any of the disqualifications mentioned in section 55; nor is the other applicant included therein. The fact of her great age, and that she cannot read or write, and that she cannot speak English, do not show any want of understanding within the statute. It is true, they may render it difficult for her to perform some of her duties properly, yet they do not render it impossible. In the case of Coope v. Lowerre, 1 Barb. Ch. 45, it was held by the court of chancery of New York, in construing a similar statute, that the surrogate had no discretion to exclude a person declared by the statute to be entitled to a preference, except for some of the causes specified in the statute; and it was held that no degree of legal or moral guilt or delinquency was sufficient to exclude a person from the administration as the next of kin in the cases of preference given by the statute, unless such person had been actually convicted of an infamous crime. In that case the administration was granted to a person proved to be dishonest, and against whom a large judgment had been recovered in a case of *crim. con.* * * * We therefore hold that, under the admissions and evidence of this case, the daughter, Rosa Pacheco de Sibrian, was entitled to letters of administration." The decision in the case of Coope v. Lowerre, supra, will be better understood when it is stated that in that case objection was made to the appointment of the petitioner as administrator of the estate of his father upon the ground "that he was disqualified on account of his vices and his improvidence," and the statute of New York provided, among other cases of disqualification, conviction of an infamous crime and improvidence, and it was with reference to that particular statute that the court in that case said: "No degree of legal or moral guilt or delinquency, therefore, is sufficient to exclude a person from the administration as the next of kin, in the cases of preference given by the statute, unless such person has been actually convicted of an infamous crime." The principle underlying that decision and the cases which have followed it is that the courts have no right to add to the disqualifications prescribed by the legislature for such cases. In some of the states the courts are by law given a wide discretion in determining who are qualified to act in the capacity of executors and administrators. The decision in the case of Stearns v. Fiske, 18 Pick. 24, cited and relied on by respondent, was based upon a statute which authorized the court to deny the application of a person "evidently unsuitable" to discharge the duties of the trust, and it was held that this language vested a wide discretion in the probate judge. We feel entirely satisfied that the words "want of integrity," found in section 1350 of the Code of Civil Procedure, do not apply to a case where there is a simple conflict of interest in regard to the estate between the executor named in the will and the other legatees. We are also satisfied that, if the legislature had designed to make such a conflict of interest a cause for refusing to appoint an executor so named, such intention would have been manifested by language more apt for that purpose than is to be found in that section of the Code of Civil Procedure. We may add that, while the court is authorized to refuse to appoint an executor named in a will for want of integrity, yet for manifest reasons this power should not be exercised except upon clear and convincing evidence establishing such disqualifying fact. The executor may always be removed after appointment, unless he discharges the duty of his trust faithfully, and as directed by law.

3. The order denying the appellant's motion for a new trial in this proceeding is an appealable one. Order reversed.

We concur: HARRISON, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.

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88 Cal. 319

HYDE v. MANGAN *et ux.* (No. 13,767.)

(*Supreme Court of California.* March 18, 1891.)

EJECTMENT—DEFENSES—EQUITABLE TITLE.

Defendants, who were in possession of land under a contract to purchase, assigned the contract as security for a debt. The assignee assigned to plaintiff, who, with full knowledge of defendants' right, made payment to the vendor of the full purchase money, surrendered the contract, and received a deed for the land. He then brought ejectment. There was no evidence that defendants were in default under the contract. *Held*, that their equitable title should prevail over plaintiff's legal title, and he cannot recover.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge. *Justin Jacobs*, for appellant. *Lambertson & Taylor*, for respondents.

GAROUTTE, J. This is an action of ejectment, the complaint being in the usual form. The answer makes a general denial, and then alleges certain facts in the nature of a special defense. Judgment went for the defendants in the lower court, and the case is before us for consideration upon an appeal from the judgment and from the order denying plaintiff's motion for a new trial. The following are substantially the findings of the court, and they are supported both by the allegations of defendants' special defense, and by the evidence: That upon the 20th day of October, 1879, the Southern Pacific Railroad Company was the owner of a certain tract of land situated in Tulare and Fresno counties, and at said time Mary A. Mangan, who was the wife of J. M. Mangan, entered into a written contract with said company, whereby said company contracted to sell to her said real property for an agreed price; and said Mary A. Mangan at that time, from her separate property, paid a portion of said purchase price, and agreed to pay the balance on or before the 20th day of October, 1884, with interest at 10 per cent. per annum; and upon the payment of said purchase price and interest said company agreed to execute and deliver to her a deed in fee of said premises. That upon the execution of said agreement the defendants entered into the possession of said property, and ever since said time have been in the open, notorious, and exclusive possession and occupancy thereof, having valuable improvements thereon, and claiming to own the same; and the plaintiff, prior to his purchase, never made any inquiry from them, or either of them, as to their rights or claims in and to the premises. That about the 18th day of September, 1883, defendant Mary A. Mangan assigned her interest in and to the foregoing contract of sale to one Brownstone, to secure a promissory note given by defendant J. M. Mangan to said Brownstone; and said assignment was made with the understanding that said contract should be reassigned to her when said note and interest were paid. That said note was subsequently surrendered to J. M. Mangan, and he gave a new note to Brownstone for a larger amount, (including the amount of the first note,) without the consent or knowledge of Mary A. Mangan, and no part of said note has been paid. That upon the 22d day of November, 1883, Brownstone assigned an undivided one-half interest in said contract to B. Schwartz, and upon February 25, 1888, Brownstone and Schwartz assigned said contract to one Erlanger, who had actual knowledge of the claims and rights of defendants in and to said land. That upon the 7th day of March, 1888, Erlanger assigned said contract to plaintiff, who, upon the 14th day of March, 1888, made full payment to said railroad company for said land, surrendered said contract, and received a deed therefor. The court further found that the assignment of the contract of sale to Brownstone was a mortgage of defendants' interest in the land, and that the possession of defendants was sufficient to put plaintiff on inquiry as to their rights; and, having failed to make such inquiry, he is in no better position than if he had done so, and had been fully informed as to the defendants' claims and equities. The assignment of the contract by Mary A. Mangan was as follows: "I, Mary A. Mangan, the within-named purchaser, for and in consideration of the sum of six hundred dollars to me in hand paid, do hereby sell, assign, and transfer all my right, title, interest, and claim in and to the within-described tract or parcel of land, and the within contract No. 759, unto D. Brownstone, his heirs and assigns forever, subject to the stipulations and conditions therein contained, which are to be performed by said D. Brownstone, the assignee. MARY A. MANGAN. September 18, 1883."

Appellant relies upon two main propositions in this case, either of which, if maintained, he claims would entitle him to recover: *First.* That he is the owner and holder of the legal title to the premises, and in an action of ejectment the legal title must control. *Second.* If the assignment of the contract were to be held to be a mortgage, the debt for which it was given being barred, defendants are entitled to no consideration without offering to redeem. The first proposition, that "in an action of ejectment the legal title must control," is not the law of this state. The case of Willis v. Wozencraft, 22 Cal. 615, decides: "A mere equitable title to land, if it is of such a character as entitles the holder to possession in equity, is a sufficient defense, under our system of practice, to an action for the possession, brought even by the holder of the legal title." Railroad Co. v. Mudd, 59 Cal. 585; Whittier v. Stege, 61 Cal. 238; Hicks v. Lovell, 64 Cal. 17. As to the second proposition contended for by appellant, there is a line of authorities which supports such contention. Hughes v. Davis, 40 Cal. 120; Bruck v. Tucker, 42 Cal. 352; Pico v. Gallardo, 52 Cal. 206. This proposition of law, as laid down in the cases just cited, is based upon another principle of law, established for the first time in this state in Hughes v. Davis, supra, and which has since been discarded by section 2925 of the Civil Code. This principle, as announced by the court, was "that an absolute deed, which is shown by parol evidence to have been intended as a mortgage, conveys the legal title to the property." And our attention has not been directed to any authority since this principle ceased to be the law of this state, which has held to the doctrine laid down in those cases; but, upon the contrary, the later decisions of this court hold that under the general issue the defendant may be allowed to show that the deed by which the plaintiff claims title is a mortgage, and therefore gives him no title. In the case of Healy v. O'Brien, 66 Cal. 519, 6 Pac. Rep. 386, the language of the opinion is: "But when the court found that the deed was given only as security for money loaned, it found, in effect, that it was but a mortgage, and did not pass the legal title to plaintiff. If, therefore, defendants had rested only on their denial of plaintiff's alleged ownership of the property, judgment must have passed for the defendants." In the case of Smith v. Smith, 80 Cal. 329, 21 Pac Rep. 4, and 22 Pac. Rep. 186, 549, the court says: "The plaintiff contends that his motion to proceed first with the trial of the affirmative defense set up by the answer should have been granted for the reason that it was an equitable defense, and that the whole judgment should have been reversed upon this ground. The affirmative defense was, in substance, that the deed of 1876 was a mortgage, and that the debt secured thereby had been fully paid. But the allegation that the deed was a mortgage was merely another way of saying that the plaintiff had no title, which was fully covered by the denial of plaintiff's ownership. And so far as the plaintiff's right of possession was concerned, it was immaterial whether the debt had been paid or not. And while it may be possible that if the defendant had a title he would have been entitled to some affirmative relief in the nature of the removal of a cloud, yet he did not ask for such relief in terms, and no affirmative relief of any kind was awarded to him by the judgment." See Roberts v. Columbet, 63 Cal. 25.

In the case at bar the defendants have not relied upon the general issue simply, but by a special defense—not seeking any affirmative relief—have attacked the title of plaintiff, and set out a history of their own title and right of possession. This special defense counsel for the plaintiff did not see fit to attack in the lower court; and, indeed, it cannot be discerned upon what grounds an attack could have been successfully made. The plaintiff came into court in this action with full notice of all the rights and equities existing between the railroad company and the defendants, and between Brownstone and his assignees and the defendants; for the defendants were in the open, notorious, and exclusive possession of this land at all these times, and plaintiff made no inquiry to ascertain the rights or claims of defendants; and he is in no better position, and no more entitled to be regarded as a purchaser in good faith, than if he had so inquired, and ascertained the real facts of the case. Pell v. McElroy, 36 Cal. 268; Bank v. Baker, 82 Cal. 114, 22 Pac. Rep. 1037; Scheerer v. Cuddy, 85 Cal. 273, 24 Pac. Rep. 713. Neither could the plaintiff be recognized as a *bona fide* purchaser from his assignor, Erlanger, upon the additional ground that in the sale of equitable interests the principle of *bona fide* purchasers has no standing. Taylor v. Weston, 77 Cal. 534, 20 Pac. Rep. 62. The transfer of Mary A. Mangan's interest in the land (by the assignment of the contract to Brownstone) being a mortgage, Brownstone took no title; and his assignment to Erlanger, who assigned to plaintiff, gave the plaintiff no title, for, as we have already seen, he is deemed to have had notice of the character of the original assignment. The plaintiff does not even occupy the position of Brownstone, for he has an assignment of the security without the transfer of the indebtedness. The debt and security are inseparable; the mortgage alone is not a subject of transfer. Section 2936, Civil Code; Peters v. Bridge Co., 5 Cal. 334; Nagle v. Macy, 9 Cal. 426. Conceding that under the assignment of Mary A. Mangan to Brownstone she authorized him to procure from the railroad company the legal title, yet it is a matter of very serious doubt whether under the assignment Brownstone had the right to delegate that power to another; but that is a question unnecessary to decide. If we regard the plaintiff as the assignee of the railroad company, he then purchased the legal title, subject to the equitable title of the defendants under the contract, and his legal rights in maintaining this action are identical with those of his assignor; and, under the facts as disclosed by the record in this case, the railroad company could not prevail in this action. The record discloses that the defendants went into possession under the contract, paid a portion of the purchase price, paid the taxes and annual installments of interest for years. The plaintiff, before suit, made no demand for possession. There is no proof in the case of any special facts tending to show either an active or constructive ouster of the plaintiff; nor is there any evidence tending to show a demand and refusal to pay the purchase price, or any installment of interest after it became due, or that the railroad company had not given the defendants additional time in which to make the final payment, or that the defendants had abandoned the purchase, or refused to complete it according to the terms of the contract. There is nothing to indicate that the defendants were in default in the performance of the contract; and, being rightfully in possession under their equitable title, they could not be disturbed, even by the holder of the legal title. Let the judgment and order be affirmed.

We concur: HARRISON, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; DE HAVEN, J.

88 Cal. 437

SPECT v. SPECT. (No. 14,075.)

(*Supreme Court of California.* March 25, 1891.)

EJECTMENT AGAINST MORTGAGEE IN POSSESSION.

One claiming through a mortgagor who has placed his mortgagee in possession cannot maintain ejectment against the mortgagee while the mortgage debt remains unsatisfied, even though an action thereon by the mortgagee is barred by the statute of limitations.

In bank. Appeal from superior court, Colusa county; E. A. BRIDGEFORD, Judge.

B. F. Howard and *S. G. Tomkins*, for appellant. *H. M. Albery* and *W. G. Dyas*, for respondent.

HARRISON, J. The defendant in her answer to a complaint in ejectment, which was in the ordinary form, denied all its allegations, and, "for a separate and equitable defense to plaintiff's action, and for the purpose of obtaining equitable relief herein," alleged that in October, 1875, Jonas Spect, who was then the owner and in possession of the demanded premises, conveyed the same to one Montgomery; that in October, 1876, said Jonas Spect borrowed from the defendant the sum of $2,200, and executed to her his promissory note therefor; that on the 2d day of January, 1877, he procured said Montgomery to convey the demanded premises to her, and that at the same time, and as a part of the same transaction, an agreement was entered into between herself and said Jonas Spect declaring that said conveyance was made as security for the payment of said promissory note; "that by virtue of said conveyance from Montgomery, and said agreement, and by the consent of said Jonas Spect, defendant took possession of the demanded premises, and has ever since remained and is now in actual possession of the same, claiming them as her own; that no part of said $2,200 has ever been paid, principal or interest, but the whole thereof is now due and unpaid, amounting to $5,632;" and prayed judgment that plaintiff's complaint be dismissed. The action was tried by the court, and judgment rendered for the plaintiff. The court made findings of the facts alleged in the complaint, and incorporated therein the following statement with reference to the equitable defense set up in the answer: "The court declines to find on the fact whether or not defendant has a mortgage lien on the premises in controversy, for the reason that the court is of the opinion that it is not necessary for the disposition of the issues involved in this case to find upon that matter, this being an action of ejectment, and the only question involved being the right to the possession of the premises described in plaintiff's complaint." The defendant has appealed directly from the judgment, and presents as a ground for its reversal that the court failed to find upon the issues presented by her equitable defense.

Inasmuch as the court gives as its reason for not making findings upon these issues that such findings were immaterial, we must assume that evidence was introduced at the trial sufficient to support the allegations, and therefore the rule announced in Himmelman v. Henry, 84 Cal. 104, 23 Pac. Rep. 1098, had no application. If the facts alleged by the defendant constitute a defense to the cause of action set forth in the complaint, they presented material issues upon which the court should have made findings, and a failure to do so was error which will require a reversal of the judgment.

The court does not find by what means the plaintiff became the owner of the demanded premises, but, as it is alleged in the equitable defense above named that Jonas Spect was the owner at the time he made the conveyance to Montgomery, we must assume that the plaintiff's title is derived under him, and is therefore subject to whatever incumbrance was created by the foregoing facts in favor of the defendant, and that the plaintiff can assert no greater rights to the premises than could Jonas Spect himself, were he the plaintiff herein. It may also be assumed, although it does not appear in the record that such point was presented to the court below, that the defendant's right of action upon the debt for which this mortgage was given to her was barred by the statute of limitations. The question to be determined is, "Can a mortgagor, who has placed his mortgagee in possession of the mortgaged premises, maintain ejectment against him while the debt for which the mortgage was given remains unsatisfied, even though an action by the mortgagee for the recovery of the debt is barred by the statute of limitations?" Section 2927 of the Civil Code declares that "a mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage, but after the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration." The right of the mortgagee to take possession of the mortgaged premises does not depend upon the statute. The mortgagor could at all times, even by a parol agreement, give to his mortgagee this additional security. Fogarty v. Sawyer, 17 Cal. 589; Edwards v. Wray, 11 Biss. 251.[1] In taking such possession the mortgagee does not thereby acquire any estate in the land, or obtain for his mortgage any higher character or any different or greater protection than it would otherwise have possessed. In any action to enforce the mortgage, or to collect the debt for which it was given as security, the mortgagee has no additional rights by reason of the fact that he is in possession of the mortgaged premises with the consent of the mortgagor. Such possession does, however, give him rights in addition to those conferred by the mortgage. It is an additional security for the debt, which he is entitled to retain in accordance with the terms under which it was received. This right to retain the possession of the land is not coincident with a right to foreclose his mortgage, or dependent upon such right, but depends solely upon the existence of the debt. The possession of the land is a special security for the debt, distinct and separate from the mortgage, which has been conferred by an act of the debtor, and the right to retain the same is independent of and distinct from any right springing from the mortgage. A mortgage is defined by section 2920 of the Civil Code to be "a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." The use of the term "hypothecate" signifies that possession is not an incident of the mortgage, and that the fact of possession is entirely distinct from the contract of hypothecation. When, therefore, in addition to the contract of hypothecation, the debtor gives to his creditor the possession of the mortgaged premises, he thereby, in addition to the mortgage which he has executed, pledges to him the land also as security for the debt, and confers upon him such rights as are incident to a pledge.

The common law recognized this species of landed security. It was there called *vadium vivum*, as distinguished from the *vadium mortuum*. This is defined by Chancellor Kent to be: "When the creditor takes the estate to hold and enjoy it without any limited time for redemption, and until he repays himself out of the rents and profits. In that case the land survives the debt, and when the debt is discharged the land by right of reverter returns to the original owner." 4 Kent, Comm. 137; 2 Bl. Comm. 157; Co. Litt. 205*a*. The holding of the land in pledge is like the holding of any other pledge. Until the debt is repaid the owner of the pledge cannot recover it from the creditor. The holder of personal property given as security for a debt is entitled to retain the same from the owner until the debt is satisfied, even though the statute of limitations has barred all right of action to recover the debt. Jones v. Bank, 4 Rob. (N. Y.) 221.

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[1] 12 Fed. Rep. 42.

Under the same principle the mortgagee in possession is entitled to retain such possession until the debt is paid. "The mortgagee's right, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to retain the possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the lands." Kortright v. Cady, 21 N. Y. 364. "On the same principle that the party who holds goods in pledge for a debt may retain these goods, even after an action at law upon such debt has been barred, the party who has got rightful possession of land mortgaged may retain possession thereof until his debt is paid, although he can bring no action to enforce the debt." Henry v. Mining Co., 1 Nev. 622. In Dutton v. Warschauer, 21 Cal. 625, it is said: "When possession is taken by the mortgagee after condition broken by consent of the mortgagor, it will be presumed, in the absence of clear proof to the contrary, to be with the understanding that the mortgagee is to receive the rents and profits, and apply them to the payment of the debt secured. There is, indeed, no other good reason why the mortgagee should be let into possession in preference to any other party, and, unless a limitation to the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt. Having thus entered, the mortgagee can hold against the mortgagor and all others until such satisfaction is obtained."

The rights which grow out of the relations existing between mortgagor and mortgagee, as well as the remedies for the enforcement and protection of those rights, are of equitable origin, and are to be determined by the principles of equity, whether the right be asserted or the remedy sought in an action at law or in equity. These principles, when once established, become the guidance of courts of law as well as of equity, even in those countries where the tribunals of law and equity are distinct. It was said by Lord REDESDALE: "The distinction between strict law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining ground upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." Section 307, Code Civil Proc., declares: "There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs." While all distinctions in the form of actions are abolished, yet the principles upon which the rights of parties are to be determined remain to guide the judgment of the court. Courts look to the substantial rights of the parties for the purpose of determining the remedy to which they are entitled, irrespective of the form of the complaint under which the remedy is sought. Whenever a mortgagor seeks a remedy against his mortgagee which appears to the court to be inequitable, whether it be to cancel the mortgage as a cloud upon his title, (Booth v. Hoskins, 75 Cal. 271, 17 Pac. Rep. 225,) or to enjoin a sale under the power given by him in the security, (Grant v. Burr, 54 Cal. 298,) or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the condition that he shall do that which is consonant with equity. In accordance with these principles, it is a settled rule that a mortgagor cannot maintain ejectment against his mortgagee until the debt is paid. Phyfe v. Riley, 15 Wend. 248; Hubbell v. Moulson, 53 N. Y. 225; Fee v. Swingly, 6 Mont. 596, 13 Pac. Rep. 375; Roberts v. Sutherlin, 4 Or. 220; Cooke v. Cooper, 18 Or. 142, 22 Pac. Rep. 945; Frink v. Le Roy, 49 Cal. 314; Tallman v. Ely, 6 Wis. 244; Brinkman v. Jones, 44 Wis. 512; Sahler v. Signer, 44 Barb. 614; Madison Ave. Church v. Oliver St. Church, 73 N. Y. 82; Den v. Wright, 7 N. J. Law, 175; Wells v. Van Dyke, 109 Pa. St. 335; Duke v. Reed, 64 Tex. 705; 1 Jones, Mortg. § 715.

The debt is not satisfied or paid by mere lapse of time. The statute of limitations is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor. It is available in judicial proceedings only as a defense, and can never be asserted as a cause of action in his behalf, or for conferring upon him a right of action. It is to be used as a shield, and not as a sword. "It has never been held that the expiration of the statutory time for bringing an action to recover a debt, or to enforce any personal obligation, operated either as an extinguishment or payment. Such a result cannot be derived from the language of our statute, the reason or policy of the law, or the decisions of courts in this state or elsewhere." Grant v. Burr, 54 Cal. 301. The mortgagee, after the mortgage debt has been barred by the statute of limitations, cannot, by any affirmative proceedings on his part, invoke the aid of the court for the collection of the debt; but, if the mortgagor has placed him in the possession of the land mortgaged, he does not lose the right thus conferred upon him, and can resist any action by the mortgagor to deprive him of this security. In Frink v. Le Roy, 49 Cal. 314, a decree of foreclosure and sale of the mortgaged premises was entered in 1859. Thereupon Le Roy, one of the mortgagees, took possession of the premises under an agreement between the parties that he might do so, and apply the rents to the satisfaction of the judgment. In 1870, Frink, who had succeeded to the interest of the mortgagor in the premises, brought an action in ejectment against Le Roy for their recovery. Le Roy in his answer, by way of equitable defense, set up the mortgage, the judgment foreclosing the same, and the agreement under which he had taken possession. To this defense the plaintiff pleaded the statute of limitations. Upon an appeal from the judgment in favor of the plaintiff, the supreme court held that the statute of limitations had no application, and that Le Roy's right to remain in possession under the agreement was not affected by it, saying that "the equity of Le Roy to be maintained in possession until satisfaction of the debt is not lost from the fact that for upwards of ten years he has been in the actual possession of that of which he is now sought to be deprived." In Hubbell v. Moulson, 53 N. Y. 225, it was held that the mortgagor could not maintain an action in ejectment against the mortgagee for the mortgaged premises, even though he could prove at the trial that the mortgagee had received from the lands sufficient rents and profits to satisfy the debt; that such receipt did not *ipso facto* satisfy the mortgage and discharge its lien, but was in the nature of an equitable set-off to the amount due upon the mortgage debt; and that until after a judicial determination had been had upon an accounting in equity, and the application of these receipts decreed by the court in satisfaction of the debt, the mortgage was not satisfied. Section 346, Code Civil Proc., provides that "an action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage." If the mortgagor could maintain ejectment against his mortgagee, after the debt for which the mortgage was given had become barred by the statute of limitations, he would have no need to bring an action to redeem the mortgage; and, if the mortgagee had maintained an adverse possession of the mortgaged premises for five years after the breach of some condition of the mortgage, such adverse possession would be a complete defense to the action of ejectment. Mere lapse of time does not constitute adverse possession, but, if the mortgagor could maintain ejectment as soon as the right of action upon the debt was barred by the statute of limitations, the provisions of this section would be meaningless. It follows, from a consideration of the principles which we have herein stated, that the equitable defense alleged by the defendant was, if sustained by proofs, sufficient to defeat the plaintiff's right of recovery; and that the failure of the court to make findings upon the issues so presented was error, for which the judgment must be reversed; and it is so ordered.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; DE HAVEN, J.; GAROUTTE, J.

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88 Cal. 374

SMITH *et al.* v. WESTERFIELD *et al.* (No. 13,935.)

(*Supreme Court of California.* March 19, 1891.)

DESCENT—DETERMINATION OF HEIRSHIP—JURISDICTION—DEPOSITIONS—APPEAL.

1. Under Code Civil Proc. Cal. §§ 22, 23, providing that an action is an ordinary proceeding for the enforcement or protection of a right, or the redress or prevention of a wrong, and every other remedy is a special proceeding, the determination of the heirship of claimants to an estate by the superior court is a special proceeding, and under Code Civil Proc. Cal. § 1664, conferring jurisdiction, and providing that any person claiming to be an heir to deceased, or entitled to distribution, may, "after the expiration of one year" from the issuing of letters of administration, petition the court to determine the rights of persons to the estate, and to whom distribution shall be made, the court acquires no jurisdiction where the petition is filed within a year from the issuing of letters of administration.

2. The supreme court will not dismiss an appeal from a judgment of the superior court on the ground that the court had no jurisdiction to entertain the proceeding, if it assumed jurisdiction, and rendered an affirmative judgment.

3. The deposition of "James M. T.," taken under a commission to take the deposition of "Jno. T.," is not competent evidence.

4. The admission of such deposition, where it is as to a material fact, is ground for reversal, though there is other competent evidence of the same fact.

In bank. Appeal from superior court, Nevada county; J. W. WALLING, Judge.

John Caldwell for appellants. *P. F. Simonds* and *James A. Stidger*, for respondents.

HARRISON, J. William Westerfield died intestate in Nevada county, October 16, 1888, and on the 29th of that month letters of administration upon his estate were issued out of the superior court of that county to the public administrator. February 27, 1889, the plaintiffs herein filed in said superior court their petition in the matter of said estate for a determination by the court of the interests of all parties in the estate, and to whom distribution thereof should be made, and that upon final hearing thereof they be declared to be the sole heirs of said estate, and that the estate be distributed to them. Thereupon, upon the same day, the court made an order that notice be given requiring all persons claiming to be interested in said estate to appear before said court on the 20th day of May, 1889, and exhibit their respective claims of heirship or other interest in said estate, and directing that said notice be personally served "on all persons herein named, and all other persons known as claiming any interest in said estate, at least thirty days before the time fixed for said appearance;" and further directing that "service of said notice be made on all said persons claiming interest in said estate by publication thereof in the Daily Transcript, a newspaper published in said Nevada county, and that said publication be made at least once a week for seventy consecutive days before the time herein named for such appearance." At the time of filing said petition and making said order no person had appeared claiming any interest in the said estate other than the petitioners, nor were any other persons "named" in said petition or order. Notice, as required by said order, was on the same day issued by the clerk of the court, and on the 27th day of May, 1889, the court made its order and decree, stating that "due and legal notice to all persons claiming an interest in said estate as heirs at law of said deceased or otherwise has been given, and that the same is established of record, and that this decree be entered in the minutes of this court." At various dates prior to July 22, 1889, the plaintiffs and the defendants herein filed their appearance and respective claims of heirship, and on that day the court made an order adjudging "that the default of all such persons that have not appeared herein as aforesaid be, and the same is hereby, entered according to law." On the 30th day of July, 1889, the plaintiffs herein filed their complaint in the matter of said estate, setting forth their claims of heirship thereto, and making as defendants the persons who had previously appeared under said notice, and filed their claims of heirship to said estate. The defendants thereafter filed answers to said complaint, setting forth therein the facts constituting their claims of heirship, and praying that they be declared to be the heirs at law of the deceased, and entitled to the distribution of his estate. The matter was thereafter tried by the court without a jury, and judgment rendered that the plaintiffs "are not and were not relatives of said William Westerfield, deceased, and are not entitled to be decreed his heirs at law;" and also that the respondents herein "are the lawful heirs at law of said William Westerfield, deceased, and, as such, entitled to inherit his estate." This judgment was entered January 3, 1890, and the plaintiffs, having made a motion for a new trial upon a statement of the case, and the same having been denied, have appealed from both the judgment and the order denying the new trial.

Section 1664, Code Civil Proc., provides that "any person claiming to be heir to the deceased, or entitled to distribution in whole or in any part of such estate, may at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate file a petition in the matter of such estate, praying the court to ascertain and declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made." The section further provides that "upon the filing of said petition the court shall make an order directing service of notice to all persons interested in said estate to appear and show cause on a day to be therein named;" and, after prescribing the character of the notice to be given, declares: "Which notice shall be served in the same manner as a summons in a civil action; upon proof of which service, by affidavit or otherwise, to the satisfaction of the court, the court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership, and interest of all parties in and to the property of said deceased." Proceedings for the administration of the estates of deceased persons and for their distribution to those who may be entitled thereto, including the determination of the heirs of the decedent, are purely statutory. The superior court, while sitting as a court of probate, has only such powers as are given it by statute, and such incidental powers as pertain to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them. Although it is a court of general jurisdiction, yet in the exercise of these powers its jurisdiction is limited and special; and whenever its acts are shown to have been in excess of the power conferred upon it, or without the limits of this special jurisdiction, such acts are nugatory, and have no binding effect, even upon those who have invoked its authority, or submitted to its decision. The authority conferred upon the superior court by the above section to determine the heirship of claimants to an estate is a "special proceeding," within the meaning of that term as defined in the Code of Civil Procedure. Section 22, Id., declares that "an action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or punishment of a public offense;" and section 23 of the same Code declares that "every other remedy is a special proceeding." Jurisdiction of special proceedings is conferred by the constitution upon the superior court; but, inasmuch as special proceedings are only such as are created and authorized by statute, the court, in the exercise of this jurisdiction, is limited by the terms and conditions under which the proceedings were authorized. It is stated in the briefs of both appellants and respondents that this may be regarded as a contest to determine heirship under the general provisions of the probate law, preparatory to the final distribution of said estate. We have not been referred, however, to any section of the Code which authorizes such proceeding other than section 1664; and, as we have above shown, unless authorized by statute, the superior court has no power by virtue of its general jurisdiction in cases at law and in equity to entertain a proceeding of this character. Section 1664, Id., provides that distribution of an estate may be made on the settlement of the final account, provided a petition therefor has been filed with said account, and section 1665, Id., provides that at any time subsequent to the final settlement of the account distribution may be made. Whenever distribution is sought under either of these sections the court has power to inquire into and determine who are the heirs of the deceased and entitled to receive the estate; but the terms of each of these sections show that this power can be exercised only after the final accounts of the administrator have been settled.

In view of the principles above stated, and of the statute under which the proceedings herein were had, it results that the superior court had no jurisdiction to entertain the petition of the plaintiffs, or to determine who were the legal heirs of the deceased. The petition of the plaintiffs, under which the court proceeded to act and to render judgment, was filed in the superior court within less than four months after the issuance of letters of administration upon the estate of the deceased; and the complaint and answers upon which the issues were tried were all filed before the expiration of the year. The court, however, had no jurisdiction to entertain any petition for this purpose, or to make any order that would be binding upon the heirs of the deceased, or upon those who may claim to be such heirs, until "after the expiration of one year from the issuing of letters of administration upon said estate." It does not appear from the record that the respondents made any objection in the court below to its want of jurisdiction, but they now ask that the appeal be dismissed upon the ground that the proceeding was instituted before the expiration of a year after the issuance of the letters of administration upon the estate of the deceased. This court will not, however, dismiss an appeal from a judgment of the superior court upon the ground that that court had no jurisdiction to entertain the proceeding when it has assumed such jurisdiction, and rendered an affirmative judgment therein. Our appellate jurisdiction over the judgments of the superior court includes those in which that court improperly assumed jurisdiction, as well as those in which it was properly entertained. It is revisory of the action of that court, and is to be exercised by affirming, correcting, modifying, or setting aside its judgments; whereas, if the appeal therefrom is dismissed, the judgment would remain as originally pronounced. Section 1664, supra, provides, however, that "all appeals herein must be taken within sixty days from the date of the entry of the judgment or the order complained of." The judgment herein was entered January 3, 1890, and the appeal therefrom was not taken until June 2, 1890. It follows, therefore, that by reason of the failure to take the appeal from the judgment until more than 60 days after its entry we have no jurisdiction of that appeal, and it must be dismissed.

The appeal from the order denying the plaintiff's motion for a new trial was, however, taken within 60 days after its entry, and can, therefore, be reviewed by us. A commission was issued out of the superior court to Orris C. Cobb to take the depositions of several witnesses named therein, one of whom was "Jno. Thompson," of Cincinnati, state of Ohio. At the trial of the cause the respondents offered to read in evidence the deposition of James M. Thompson, taken under said commission, to which the appellants objected on the ground that the commission to Cobb did not authorize him to take the deposition of James M. Thompson, but to take that of one John Thompson. Upon this objection being made, J. C. McBurney testified on behalf of the respondents that he presented them in the matter of taking said deposition, and was personally acquainted with said James M. Thompson at the time of the issuance of the commission to take his deposition, and that "the name intended to be inserted in said commission was James M. Thompson, and the person designated as John Thompson in said commission was identical." It was not shown, however, that this fact was known by or ever communicated to the appellants, and the difference in the names would presumptively indicate different persons. The court overruled their objections, and allowed the deposition to be read. This ruling was erroneous. The commissioner had no authority to take the testimony of any person other than those named in the commission, and the testimony of any person not so named was not properly taken by him, and should not have been received in evidence. The real name of the person whom the defendants intended to examine under the commission should have been given to the plaintiffs and inserted in the commission, in order that the plaintiffs might intelligently prepare their cross-interrogatories. This not having been done, the taking of the testimony of James M. Thompson was, so far as they were concerned, purely *ex parte*, and should have no effect against them in determining the issues in the case. Brown v. Southworth, 9 Paige, 351; Scholes v. Ackerland, 13 Ill. 650; Strayer v. Wilson, 54 Iowa, 565, 7 N. W. Rep. 7; Denny v. Horton, 11 Daly, 361; Patterson v. Railway Co., 54 Mich. 91, 19 N. W. Rep. 766. In Brown v. Southworth, supra, a commission had been issued to take the testimony of James Hurd, whereas the true name of the witness who was intended to be examined, and who in fact was examined, was Imus Hurd. The court, upon the objection of the defendant, excluded the deposition upon the ground that, "owing to the mistake in his Christian name, he was not one of the witnesses that the commissioners were authorized to examine, and would not, therefore, by the laws of any country, be guilty of perjury if his deposition was false." In Scholes v. Ackerland, supra, a commission had been issued to take the testimony of Seymour Rank of Cincinnati. The deposition of Seigmund Rank, and signed "Seigmund Rank," was taken, and returned with the commission. The supreme court held that it was error in the trial court to admit the deposition in evidence, saying: "The *dedimus* directed the commissioner to take the testimony of one person, and under it the deposition of another person was taken. The special authority was not pursued. The names were essentially variant, and clearly indicated different individuals." We cannot agree with the respondents that, inasmuch as other witnesses testified to the same fact, this was an immaterial error. One of the issues presented for trial in the case, and which was sharply contested on both sides, was whether the name of the plaintiff's father was "Westfield" or "Westerfield." The respondents alleged in their answer that the true name of the plaintiff's father was Charles Westfield, and the court found that the plaintiffs are "the issue of Charles Westfield and Mary Westfield, his wife." It was for the purpose of establishing this fact that the defendants issued the commission to take the testimony of the witnesses at Cincinnati. This is not a case where an incidental and collateral fact which may not be seriously contested had been shown by incompetent evidence, but the testimony of the witness bore directly upon the main point in issue. In such a case all the evidence upon that point becomes material, and the introduction of any incompetent testimony is presumed to cause an injury to the opposite party. We cannot determine the weight which the court below gave to the testimony of this witness in reaching its conclusion upon this controverted point. If the respondents believe that this testimony of the witness was unnecessary for the purpose of establishing their case, they should have declined to introduce it after the objection had been made thereto. They cannot now, after insisting upon a ruling in their favor, and introducing the testimony, say that the error was harmless.

Other errors appear from the statement of the case to have been assigned by the appellants, but, inasmuch as the error in receiving in evidence the above deposition necessitates the reversal of the order denying a new trial, and in view of what we have said upon the jurisdiction of the superior court to entertain the proceeding, it is unnecessary to pass upon the correctness of the other rulings of the court which were excepted to by the plaintiffs. The appeal from the judgment is dismissed, the order of the court below denying a new trial is reversed, and that court directed to enter an order dismissing the petition of the plaintiffs, and all proceedings subsequently taken thereunder.

We concur: DE HAVEN, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.

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88 Cal. 316

Ex parte ESTRADO. (No. 20,819.)

(*Supreme Court of California.* March 21, 1891.)

ABDUCTION—COMMITMENT.

1. An order of commitment for taking a female away for the purpose of prostitution "from her father, mother, guardian, or other person having the legal charge of her person," in violation of Pen. Code Cal. § 267, need not recite that the father, mother, or guardian had legal charge of the female's person, since the law gives them such charge.

2. A defect in the commitment in describing the offense is immaterial if it is sufficiently described in the order indorsed on the deposition.

3. Evidence that a woman took a girl 17 years old to a house of prostitution, to act as a domestic, warrants her commitment for taking the girl for the purpose of prostitution.

In bank. Appeal from superior court, city and county of San Francisco

B. B. Haskell, for petitioner.

BEATTY, C. J. The petitioner is held in the custody of the chief of police of the city and county of San Francisco under a commitment which recites an order of the police judge holding her to answer "on a charge of felony, to-wit, enticing a minor away for the purpose of prostitution, committed as follows: said Cora Estrado did, in the city and county of San Francisco, on the 25th day of February, 1891, willfully, unlawfully, and feloniously take away a certain female under the age of eighteen years,"—naming her,—"of the age of seventeen years, from her father, for the purpose of prostitution. It is claimed that the imprisonment of the petitioner is unlawful for two reasons: *First*, because the order recited in the commitment does not show that the father of the girl, from whom she was taken, had the legal care of her person; and, *second*, because the evidence adduced at the examination does not show any reasonable or probable cause for holding that the petitioner is guilty of the offense charged.

The first ground is not alleged in the petition upon which the writ was issued, but is taken by way of objection to the return, and rests upon counsel's construction of section 267 of the Penal Code, which reads as follows: "Sec. 267. Every person who takes away any female under the age of eighteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is liable to imprisonment in the state-prison not exceeding five years, and a fine not exceeding one thousand dollars." According to the construction of this section contended for, it is not sufficient to allege and prove that a girl has been taken away from her father, mother, or guardian; it must also be alleged that the father, mother, or guardian had the legal charge of her person. But a father, mother, or guardian necessarily has the legal charge of the person of a minor child or ward, and the true construction of the statute only requires averment and proof of legal custody when the child is taken from some other person. Moreover, a defect in the commitment in describing the offense is immaterial if it is sufficiently described in the order indorsed on the deposition, (Ex parte Keil, 85 Cal. 309, 24 Pac. Rep. 742, and cases cited;) and it is not alleged in this case, either in the petition or by way of traverse to the return, that a sufficient order was not so indorsed.

The second ground relied on is, if possible, more barren of merit than the first. We note in passing, that the petition, so far as this ground is concerned, was wholly insufficient to call for the issuance of the writ under the decision in Ex parte Walpole, 84 Cal. 584, 24 Pac. Rep. 308. But the writ was issued, and on the return enough of the deposition was read to show that the petitioner induced a girl of 17 years to go to a house of prostitution for the ostensible purpose of domestic service. She did not disclose to the girl or her father what the character of the place was. It is contended that this does not show that the purpose of taking the girl to the house was to make her a prostitute; but clearly such evidence would sustain a verdict against the petitioner. It is not to be supposed that a procuress will furnish direct and positive proof of her guilt by openly proposing a life of shame to a girl that she is seeking to lead astray. On the contrary, every motive of policy will conspire to induce her to pursue a course of discretion in carrying out her design, and she is judged not by what she says so much as by what she does. People v. Marshall, 59 Cal. 386. If a person is to be presumed to intend the natural consequences of his acts, it is certainly fair to presume that when a woman takes a young girl, without the knowledge or consent of her parents, and puts her to work as a domestic servant in a house of prostitution, she intends to lead her to take up that sort of life; for it is very certain that amidst such surroundings she cannot long preserve either reputation or modesty.

And a court should look with extreme suspicion upon such an excuse as the petitioner offers for her conduct. To treat it with any favor would make the nefarious traffic of which she is accused easy and safe, when it ought to be made difficult and dangerous. An example which would enforce the lesson that domestic servants for such places are to be sought outside of the ranks of immature girls, would be extremely salutary. The prisoner is remanded.

We concur: De Haven, J.; Garoutte, J.; McFarland, J.; Sharpstein, J.; Harrison, J.

88 Cal. 447

Barnhart v. Kron. (No. 13,233.)

(*Supreme Court of California.* March 26, 1891.)

Costs—Allowance.

The allowance of costs is in the discretion of the trial court, and its action will not be disturbed on the ground that items of expense allowed against appellant were incurred by his codefendant only, unless the record shows that the items were not incurred partly by appellant, or for his benefit.

Department 1. Appeal from superior court, Santa Cruz county; F. J. McCann, Judge.

E. Spalsbury and *W. E. Turner*, for appellant. *T. H. Laine* and *Wm. T. Jeter*, for respondent.

Harrison, J. The plaintiff moved the court below to retax the bill of costs filed by the respondent, by striking out each and every item thereof, upon the ground that none of said items were incurred by the respondent in maintaining or establishing any part of his defense to the action, but that each of said items was so incurred by his co-defendant. The court denied the motion, and the plaintiff has appealed.

The allowance or disallowance of items for the expenses and disbursements incurred upon the trial of an action must be left, in nearly every instance, to the discretion of the judge before whom the cause was tried. He has an opportunity to know the issues that are tried, the character of the prosecution and of the defense, the principal points upon which the witnesses are called, and whether there existed any necessity for calling them. We must assume that he would not allow costs to a party for witnesses that were unnecessarily called, or, in a case like the present, for witnesses who were not called for the respondent. There is nothing in the record in the present case which shows that the court did not properly exercise its discretion in refusing to strike out the items objected to. The plaintiff does not in his affidavit show that the witnesses named in the bill of costs were not necessary for the defense of the respondent, or that they did not testify in his behalf. His statement that certain of the witnesses were called as witnesses for the co-defendant of the respondent, and did not testify on behalf of the respondent, "except in a general manner in connection with H. F. Kron, * * * and that they did not testify on behalf of Oscar Kron, as contradistinguished from H. F. Kron," is an admission that they did in some respects, or upon some matters, testify in behalf of the respondent. So, too, his statement that other witnesses "did not testify as to any separate issue, as made by the answer of Oscar Kron," does not sufficiently show that the items for their defense as witnesses should be stricken from the cost-bill. The character of their testimony at the trial is not a test of the necessity for incurring the expense of subpœnaing them as witnesses. The memorandum of costs filed by the respondent is supported by the affidavit of his attorney that "the foregoing items of costs and disbursements in this action are correct, and that the said disbursements have been necessarily incurred in said action," and, unless controverted, should control the decision of the court. The fact that the items for the fees of the sheriff, the clerk, and the reporter were for services performed for both defendants, and not "for services performed for Oscar Kron alone," would not authorize the court to strike these items from the cost-bill. The respondent may have himself paid all of these items, and, if so, they were expenses necessarily incurred by him in his defense. The order appealed from is affirmed.

We concur: Garoutte, J.; Paterson, J.

88 Cal. 446

Moulton v. Knapp. (No. 12,212.)

(*Supreme Court of California.* March 25, 1891.)

Injunction—Relief against Execution—Laches.

Where defendants consent to waive all defenses, and confess judgment on the strength of a verbal agreement that plaintiffs will stay execution for a year, they cannot enjoin a sale under the execution which plaintiffs levied before the end of the year, being guilty of laches in standing by and permitting the execution to be levied without moving the court to recall it. Affirming Moulton v. Knapp, 85 Cal. 385, 24 Pac. Rep. 803.

In bank. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

E. G. Knapp, *T. Z. Blakeman*, and *Wright & Hazen*, for appellant. *Turner & Maddux* and *J. H. Budd*, for respondent.

Paterson, J. In Moulton v. Knapp, 85 Cal. 385, 24 Pac. Rep. 803, (this cause,) an injunction had been granted on verified complaint alone. It was held that plaintiffs' remedy, if any they had, was by motion to set aside the execution, and to stay all process until the expiration of the year; that plaintiffs were not entitled to an injunction. That decision is the law of the case, and is conclusive of the question involved in this appeal. The judgment appealed from is based upon the complaint on which the preliminary injunction referred to was granted, and decrees to plaintiff the relief therein prayed for. Judgment reversed.

We concur: McFarland, J.; De Haven, J.; Garoutte, J.; Harrison, J.; Sharpstein, J.

88 Cal. 372

NEVADA SCHOOL-DIST. v. SHOECRAFT *et al.* (No. 14,092.)

(*Supreme Court of California.* March 19, 1891.)

SPECIAL ACTS—SCHOOL-DISTRICTS—OFFICERS.

1. There being nothing in the old constitution of California which prevented special legislation, Pol. Code Cal. § 1593, providing that "the number of school trustees for any school-district, except where city boards are otherwise authorized by law, shall be three," did not prevent the passage of Act Cal. March 25, 1874, creating the Nevada school-district, and providing for the election of its directors, and the latter act controls.

2. Const. Cal. art. 4, § 25, prohibiting the legislature from passing local or special laws in certain cases, does not affect past legislation.

SHARPSTEIN, J., dissenting.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

J. J. Caldwell, for appellant. *Niles Searls* and *P. F. Simonds*, for respondents.

PER CURIAM. This action is brought in the name of the Nevada school-district; and its purpose is to have the court decree that the defendants deliver all the lots, buildings, and school-houses in the city of Nevada, used for the purpose of conducting the public schools, into the possession of George E. Shaw, J. I. Caldwell, and N. Douglas, who claim to have been recently elected school trustees of said district. The defendants, all but two, are the persons who are the regularly elected and acting school directors of said district, under an act of the legislature, approved March 25, 1874, entitled "An act to establish and define the powers and duties of the board of education of Nevada school-district," and the other two are the janitor and watchman under said other defendants. The point relied on by appellant is that said act of March 25, 1874, under which the board of education of Nevada City has been acting for more than 16 years, is unconstitutional, and totally void. We do not think that the position taken by appellant is tenable. There is nothing in the old constitution which prevented special legislation, (Meade v. Watson, 67 Cal. 591, 8 Pac. Rep. 311;) and therefore the fact that when the said act was passed section 1593 of the Political Code provided that "the number of school-trustees for any school-district, except where city boards are otherwise authorized by law, shall be three," did not prevent the legislature from subsequently creating the Nevada district. The latest expression of the legislative will on the special subject in hand controls. The provision of the present constitution,[1] that the legislature shall not pass local or special laws in certain cases, applies to future, and not to past, legislation. Ex parte Burke, 59 Cal. 6. Neither do we think that the act is void because inconsistent with any of the provisions of the present constitution. The judgment is affirmed.

SHARPSTEIN, J., dissenting.

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[1] Const. Cal. art. 4, § 25.

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88 Cal. 399

ESREY v. SOUTHERN PAC. R. CO. (No. 13,914.)

(*Supreme Court of California.* March 20, 1891.)

RAILROAD COMPANIES — INJURIES TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

1. Where a person, seeing a train advancing on a track located within three feet from a high station platform, hurriedly crosses, and stands between the track and platform for the train to pass, she is guilty of contributory negligence, and cannot recover for injuries by being struck by the train.

2. In an action for injuries in such case there cannot be a recovery, notwithstanding plaintiff's negligence, on the ground that defendant's employes saw her dangerous position, and failed to stop the train and allow her to move, if the complaint merely alleges negligence on defendant's part, and not willful and wanton negligence.

BEATTY, C. J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

E. L. Craig and *Horace Hawes*, for appellant. *Justin Jacobs* and *W. A. Gray*, for respondent.

VANCLIEF, C. This was an action for damages for personal injuries. The plaintiff had a verdict and judgment for $5,000, and the defendant appeals from the judgment and an order denying its motion for a new trial. The following are the material facts: The accident occurred at Leemore, a small town between Tulare and Huron, in the afternoon of February 13, 1889. The plaintiff had gone to the depot with a friend, one Miss Furnish, to bid good-bye to an acquaintance, one Mrs. Shively, who took the freight train which passed Leemore about that time. The general features of the locality are as follows: The main track ran east and west. Almost parallel with it, and a few feet to the south, was a side switch, which ran along a platform about four feet high, and came into the main track a little further to the east. The platform was about 100 feet long, and about 3 feet from the first rail of the side switch. The train was headed towards the east. Its forward part, consisting of the engine and some flat-cars, uncoupled from the caboose, (which was left standing on the main track opposite the platform,) for the purpose of taking on some box-cars which were on the western end of the side switch. Mrs. Shively got into the caboose, and the plaintiff and Miss Furnish, having taken leave of her, started to go around by the western end of the platform to the street which crosses the track there. They changed their minds, however, and went towards the western end. By this time the engine and the platform cars were backing down the side switch, and plaintiff was aware of the fact. She says: "I knew the train was switching before I crossed, but I thought I had time to escape any danger." "And I thought that the space between the cars—I had never paid any particular attention to that—and I thought the space between the cars and the platform would be wide enough that I could walk right along without being injured in the least." She "crossed the switch just at the end of the box-cars." Miss Furnish did not cross the switch. In this regard plaintiff says: "At this time Miss Furnish was with me. She did not cross the track with me. I told her I thought we had ample time to get across. I don't know what her answer was exactly. I know she didn't come. I could not say whether she said anything to me about going, or that there was not time to cross the track before the cars came. There was no time for talking. She might have spoke, but I did not hear." Miss Furnish says that she did not cross because she was afraid. There were two brakemen employed on the train. One of them (Ferguson) was on the ground near the box-car for the purpose of signaling the engineer. The other (Williams) was on the end of the flat-car, but got down to make the coupling when the end of the train neared the box-car. He says: "A young lady ran in between the box-car and the flat-car, and I told her to 'get out of there, or you will get hurt;' and she said, 'I am not afraid.'" The fact that he did not say this is corroborated by Miss Furnish, by one Benton, "an engineer and pumper" about the station, and by Mrs. Shively. The plaintiff says that if the brakeman spoke to her she did not hear him, and it is assumed that her statement in this regard is true. After she had crossed the switch she found that she had not time to get around the platform before the end of the train reached her, so she stood with her back against the platform. While standing in this position the flat-cars passed her, but did not touch her; and she does not seem to have been alarmed. In this regard her testimony was as follows: "Question. The brakeman at this time was about six feet from you. Could you not have spoken to the brakeman, and asked him to hold until you could get around the corner? Answer. Yes, sir; I could. Q. Did you attempt to? A. No, sir. Q. Did you do anything but press back against the platform? A. I did not, because I thought I was perfectly safe." The same sense of security appears from her conversation with Mrs. Shively. The latter says: "I looked out the caboose window, and saw the plaintiff standing between the flat-car and the platform. I told her I thought it was a dangerous place where she was. She said she was all right;" and the plaintiff admits that this conversation occurred. The defendant's employes evidently shared plaintiff's opinion that there was no danger, for they paid no further attention to her. The brakeman Williams says: "I went about my work, made the coupling, and Mr. Ferguson, the other brakeman, gave the signal to go ahead. When he gave the signal to go ahead the girl was out of my sight. I did not see her. She must have gone behind the box-car, or I would have seen her." The engineer says he did not see her when he got the signal. And the fireman, who had seen her cross the switch, says: "She disappeared from my sight. I cannot tell which way she went;" and he went on ringing his bell without troubling himself further about the matter. The plaintiff's account does not differ materially from this. Her testimony is as follows: "Question. You did not ask either brakeman to stop the train? Answer. No, sir. Q. But simply pressed back against the platform? A. I did. Q. State whether or not you are positive that both these brakemen saw you. A. I am positive. Q. I ask you now with reference to that. Do you mean to say at this time that both of those brakemen were looking at you at the time the car was coupled, and you were standing here, pressed up against the platform? A. I mean to say that both could have seen me. Q. You mean to say that both could have seen you? A. Yes, sir. Q. You don't mean to swear positively that they were both looking at you at that time? A. I didn't say they were looking at me at the time; but I know positively they both saw me. They saw me standing there. Q. At some time? A. At some time. Q. You don't mean, then, however, to be understood by the jury that at the time the coupling was made, and the signal given to start, that both these brakemen were looking at you in this position? A. I could not say they were looking at me just at that time, but I am positive they both saw me. Q. As I understand you, you are positive that while you were standing there, and the train was coming in, that they saw you over on that side of the car? A. Yes, sir." These extracts show clearly enough that the employes on the train saw the plaintiff go in between the flat-cars and the box-cars, and saw her standing up against the platform as the flat-cars passed her, but paid no further attention to her, apparently sharing her belief that she was safe. But neither she nor they seem to have thought of the fact that the box-cars were wider than the flat-cars. She says: "When the cars began to move I noticed that the box-cars were considerably wider than the flat. Then I fully realized my danger. Not until that time." The first car struck and crushed her shoulder, whereupon she threw herself upon the ground, and the train passed without injuring her further.

All of the foregoing facts appear without substantial contradiction. The only conflict is as to whether she heard the brakeman tell her not to go in there; and for the purposes of the opinion it is assumed that she did not hear him. Upon these facts it seems clear that her own negligence contributed directly and approximately to the injury. She had voluntarily placed herself in a dangerous position,—a position in which, as it turned out, she would be almost certain to be injured by the running of the cars in the ordinary way, and from which her more prudent companion shrank back in fear. Now, if the defendant's employes had not seen her position of danger, the defendant would have owed her no duty to take any particular precaution, and consequently would not have been guilty of negligence. Toomey v. Railroad Co., (Cal.) 24 Pac. Rep. 1074. But the defendant's employes saw her in time to have avoided the accident, and hence were bound to use care. The brakemen ought to have stopped the train, and, if necessary, compelled her to get out of harm's way. They did not do this, and hence are guilty of negligence. But the complaint does not charge that there was anything willful or wanton against the defendant. It simply alleges that the defendant "carelessly and negligently" ran one of its cars against the plaintiff, and this is all that the evidence shows. For this negligence on the part of the defendant plaintiff would have had a cause of action if there had been no contributory negligence on her part; but the rule is that, wherever the negligence of the plaintiff contributed directly and approximately to the injury, there can be no recovery. Such negligence must have contributed to the injury, not remotely, but directly and proximately. Needham v. Railroad Co., 37 Cal. 409; Kline v. Railroad Co., Id. 406; Fernandez v. Railroad Co., 52 Cal. 53. But I think that such was the case here. The plaintiff's negligence was certainly not remote in point of time. She voluntarily went into a dangerous place, where she had no right to be; and the brakeman very foolishly allowed her to do so. The fatal mistake after this was in not thinking of the fact that the box-cars were wider than the flat-cars; and this was evidently shared by all the parties. The plaintiff probably was correct in the opinion which she expressed to Mrs. Shively shortly after the accident. "She said it was some of her foolishness,—it was her own fault. I asked her what in the world did she go in there for. She said, 'Some of her own foolishness.'" I think the judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

BEATTY, C. J., dissenting.

(88 Cal. 396)

MASON v. VESTAL. (No. 14,001.)

(*Supreme Court of California.* March 20, 1891.)

EXECUTION—CLAIMS BY THIRD PERSON—FRAUDULENT CONVEYANCE.

1. In an action against an officer for the value of property wrongfully levied on, in which plaintiff claims title by purchase from the execution debtor, defendant may show that the alleged sale was fraudulent, without having alleged fraud in his answer.

2. In such action evidence that the execution debtor, who was a witness for plaintiff, before the trial made statements consistent with his testimony, is not admissible either in rebuttal of proof of inconsistent statements, or of evidence of his bad reputation for veracity.

Commissioners' decision. In bank. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

John F. Ellison and *J. T. Matlock*, for appellant. *A. M. McCoy, Clay W. Taylor*, and *Jackson Hatch*, for respondent.

TEMPLE, C. This appeal is from the judgment and from an order denying defendant's motion for a new trial. The suit was brought against the sheriff to recover for property seized at the suit of L. Newcomer against James Gleason, who is a brother of the plaintiff. The answer denies the title and possession of plaintiff, justifies under the writ, and avers title in Gleason. Plaintiff derives her title from Gleason, and at the trial the controversy was as to the validity of the transfer against her. The questions raised relate almost entirely to alleged erroneous rulings in the admission of evidence tending to establish the *bona fides* of the sale to plaintiff. On the trial the plaintiff objected to the testimony of defendant on this subject, claiming that the answer did not raise the issue of fraud, and now insists that, if the rulings complained of are erroneous, they are still not injurious for the same reason. It is claimed that the insufficiency of this answer is established by the cases of Albertoli v. Branham, 80 Cal. 633, 22 Pac. Rep. 404, and Sukeforth v. Lord, (Cal.) 25 Pac. Rep. 497. In those cases, however, the defendants did not content themselves with simply denying the right of plaintiff, justifying under a writ, and averring title in the debtor of the attaching creditor, but proceeded to charge the plaintiff with an attempt to assist the debtor in defrauding his creditors. It is not necessary to set up such a defense; it has been held that the defendant is not required to anticipate the source from which plaintiff claims to derive his title, but, if he does proceed to set up the acts of fraud which he charges render plaintiff's title invalid, he must state facts which are sufficient in law to that end. But such plea is entirely unnecessary. A sale made to hinder, delay, and defraud creditors is, as to such creditors, absolutely void, and not voidable merely. Section 3439, Civil Code; Freem. Ex'ns, § 136; Butler v. Collins, 12 Cal. 457. When the defendant denies the plaintiff's title, and shows himself to be a creditor, such evidence is admissible in rebuttal of plaintiff's proof of title. It shows such title invalid; that as to defendant the transfer is void. This question was expressly decided in this court in Grum v. Barney, 55 Cal. 254, and in Humphreys v. Harkey, Id. 284, and decisions elsewhere accord with these decisions. See Tupper v. Thompson, 26 Minn. 385, 4 N. W. Rep. 621.

James Gleason was a witness for the plaintiff, and gave evidence in support of nearly all the facts constituting plaintiff's case. In rebuttal he was impeached by evidence of statements made by him inconsistent with his testimony, and by showing that his reputation for truth was bad. The plaintiff was then allowed, against the objection of defendant, to prove by other witnesses that he had also made statements consistent with his testimony. When this testimony was objected to, counsel explained the offer, "We propose to prove [statements made?] at a time so far remote that there was no possibility he would foresee it, and which precludes the idea that the story was a fabrication of recent date." Respondent does not claim the right to prove such statements in rebuttal of the statements proved by defendant, but claims that the fact that his witness was impeached by evidence of bad reputation justifies such evidence. The first thing that strikes one upon such a proposition is that this character of evidence does not meet the emergencies of the case. Where a witness is discredited by showing that he is not disinterested, but is testifying under an inducement to misstate the facts, there is some plausibility in the claim that statements to the same effect as his testimony, made before he became interested, tend in some degree to show that his testimony was not affected by this interest. Here the question was whether Gleason was a truthful man, and the evidence had no bearing upon that issue. The doctrine upon this subject is discussed in People v. Doyell, 48 Cal. 90; Barkly v. Copeland, 74 Cal. 1, 15 Pac. Rep. 307; and 1 Greenl. Ev. § 469. These authorities do not support the respondent in this matter, and he has not referred us to any which do. On the hypothesis of the plaintiff, Gleason had no interest in the case, nor could he have had any except upon the theory of the defense that the transaction was an attempt to hide his property from his creditors; and upon that supposition, who can tell how long he had been seeking a cover for his fraud? It is denied that the evidence was material, and it must have been injurious. The trial was before a jury, who found for plaintiff. We think the ruling erroneous. The other alleged errors need not be noticed, as they may not be repeated on a new trial, except the point made that the evidence does not show an immediate delivery. Upon that point we think there was evidence enough to warrant the court in submitting the matter to the jury. We advise that the judgment and order be reversed, and a new trial ordered.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

(88 Cal. 429)

WHITE v. WHITE. (No. 14,293.)

(*Supreme Court of California.* March 24, 1891.)

RECORD ON APPEAL—BILL OF EXCEPTIONS.

Where, on appeal from an order made after final judgment, directing payment to respondent of a sum of money for the purpose of defraying expense of counsel, the transcript showed that certain affidavits and testimony of witnesses were used at the hearing of the motion, and there is no bill of exceptions, the appeal will be dismissed, under rule 32, supreme court of California, providing in such cases that the papers and evidence used on hearing the motion must be preserved by bill of exceptions.

Department 2. Appeal from superior court, city and county of San Francisco; E. R. GARBER, Judge.

E. D. Wheeler and *Barclay Henley*, for appellant. *Henry E. Highton* and *McPike & Cooper*, for respondent.

DE HAVEN, J. This is an appeal from an order made after final judgment, directing the appellant to pay to the respondent the sum of $7,500, for the purpose of paying certain of her attorneys for professional services rendered in the action. The respondent moves to dismiss this appeal upon the ground, among others stated: "The order appealed from was made after final judgment, and no bill of exceptions to the making of said order was ever served, settled, allowed, or filed." The transcript on appeal herein purports to show that certain affidavits and testimony of witnesses were used upon the hearing of the motion, which resulted in the order appealed from, but there is no bill of exceptions in the record. In the case of Somers v. Somers, 81 Cal. 608, 22 Pac. Rep. 967, the members of this court were divided as to the proper practice to be pursued in authenticating the record on appeal from this class of orders; but since then the court has adopted rule 32, which we think should be deemed as settling the practice, so far as relates to appeals taken since it went into effect; and, this appeal having been taken since that date, the rule is decisive of the question arising on this motion. The rule is as follows: "In all cases of appeal to this court from orders of inferior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in the bill of exceptions, except where another mode of authentication is provided by law." Appellant suggests a diminution of the record so as to have the transcript herein properly certified by the clerk of the court below; but it is manifest that such certificate could not supply the place of a bill of exceptions, which is required by the rule just quoted. Appeal dismissed; *remittitur* stayed for 30 days.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(88 Cal. xxi)

PEOPLE v. WOHLFROM. (No. 20,762.)

(*Supreme Court of California.* Feb. 17, 1891.)

CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

It is error to charge that a reasonable doubt is "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself." Following People v. Bemmerly, 25 Pac. Rep. 266.

Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Indictment for murder. On request of the people, the court instructed the jury that a reasonable doubt was "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself." Defendant was convicted of murder in the second degree, and appeals.

Clark & Aram, *Craig & Hawkins*, and *J. E. Strong*, for appellant. *W. H. H. Hart*, Atty. Gen., and *C. W. Thomas*, for respondent.

PER CURIAM. On the authority of People v. Bemmerly, (Cal.) 25 Pac. Rep. 266, the judgment and order appealed from in this case are reversed, and the cause is remanded for a new trial.

(88 Cal. 334)

BOARD OF DIRECTORS OF MODESTO IRRIGATION DISTRICT v. TREGEA. (No. 13,988.)

(*Supreme Court of California.* March 19, 1891.)

IRRIGATION BONDS — NOTICE OF PETITION—JURISDICTION.

1. St. Cal. 1889, p. 212, provides, in proceedings for the issue of bonds of irrigation districts, that the court shall direct publication of a notice of the filing of the petition in the same manner and length of time that a notice of special elections is provided for, stating the time and place for the hearing the prayer of the petition, and that any person interested in the organization may on or before the day of hearing demur to or answer said petition. *Held*, that the notice prescribed by the statute was sufficient to confer jurisdiction upon the superior court.

2. Under St. Cal. 1889, p. 212, in proceedings for the confirmation of the issue of bonds of an irrigation district, the prayer of the petition is sufficient if it prays for the examination, approval, and confirmation of the proceedings "aforesaid" for the issue and sale of bonds of the district.

3. The notice is sufficient if it states the substance of the prayer in the petition.

4. Under St. Cal. 1889, p. 212, supplemental to an act providing for the organization of irrigation districts, approved March 7, 1887, authorizing the directors to institute proceedings for the confirmation of the issue and sale of bonds, the directors of the M. district issued bonds to the amount of $800,000, and, failing to dispose of them, issued another series upon vote of the stockholders to the amount of $400,000. They filed a petition setting forth the last issue, published a notice praying for confirmation of the issue and sale, and designated the time when any interested person might demur or answer. Thereafter the directors filed an amended petition, alleging the issue of the first series of bonds, and stated that the $400,000 were part of the original series, but no notice of the changes introduced in the amended petition was published or served save on defendant. The court below confirmed the order relating to the sale of both series of bonds. *Held* that, where the petition was amended by setting out new orders of the board, the court acquired no jurisdiction to confirm same without publication of a new notice, and the decree is void as to the $800,000 issue.

5. St. Cal. 1887, p. 30, § 2, provides: "Nor shall any lands which will not, in the judgment of said board, be benefited by irrigation by said system, be included within said district." *Held*, that a city or town, or a portion thereof, may, in a proper case, in the discretion of the board of supervisors be included in an irrigation district.

6. Upon the question of fact as to what lands will or will not be benefited by irrigation the decision of the board of supervisors is conclusive.

7. St. Cal. 1889, p. 23, § 6, provides that, if there be any outstanding bonds, no order of exclusion of part of the district can be made without consent of the bondholders. There was an understanding between the bidders and directors that the former were not to be held to their offer unless they could effect a sale of the bonds. The bonds were never issued or paid for, and prior to the order of exclusion the bidders had been released from their offer. *Held*, that the decree of validity of the order of exclusion rendered by the lower court was proper.

8. Under a petition in proceedings to confirm the sale of $400,000 of bonds issued by an irrigating district evidence applicable thereto was taken. *Held*, that on the filing an amended petition it was not error of the court below to refuse to try the case *de novo*.

9. St. Cal. 1887, p. 35, § 15, which provides the manner of giving notices for special elections for voting bonds for irrigating districts excludes the notice provided by section 5 of the act, which provides for general elections.

10. Under St. Cal. March 16, 1889, the directors of irrigation districts may commence confirmation proceedings as soon as any resolution for the issue and sale of bonds has been adopted by them.

In bank. Appeal from superior court, Stanislaus county; D. O. MINOR, Judge.

Geo. D. Schell, *C. W. Eastin*, and *T. B. Bond*, for appellant. *C. C. Wright* and *C. A. Stonesifer*, (*A. L. Rhodes*, of counsel,) for respondent.

BEATTY, C. J. This is a special proceeding instituted in pursuance of the act of March 16, 1889, (St. 1889, p. 212,) for the purpose of obtaining judicial confirmation of the validity of certain bonds of the respondent, which it has ordered to be issued and sold. The act referred to is supplemental to the act entitled "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, and commonly known as the "Wright Law." St. 1887, p. 29. The original act, as its title imports, provides for the organization of irrigation districts, and for the adoption and carrying out of plans for the irrigation of the lands embraced therein. Among other things so provided for is the issuance and sale of the bonds of the several districts. Before any such bonds can be issued or sold the directors of the district are required to submit the proposition to a vote of the electors at a special election, and to order and give notice of such election in a manner particularly prescribed. As the validity of the bonds, when issued, depends upon the regularity of the proceedings of the board, and upon the ratification of the proposition by a majority of the electors, it is matter of common knowledge that investors have been unwilling to take them at their par value while all the facts affecting their validity remain the subject of question and dispute. To meet this inconvenience—for the security of investors, and to enable the irrigation districts to dispose of their bonds on advantageous terms—the supplemental act, under which this proceeding was instituted, was passed. It provides that the board of directors of any irrigation district may "commence a special proceeding in and by which the proceedings of said board and of said district providing for and authorizing the issue and sale of the bonds of said district, whether said bonds or any of them have or have not been sold, may be judicially examined, approved, and confirmed." The proceeding is commenced by the filing of a petition in the superior court of the county in which the lands of the district, or some portion thereof, are situate, praying the confirmation of the proceedings of the directors; whereupon the court is required to make and publish an order stating the prayer of the petition, and fixing a time and place for the hearing. Any person interested may demur to or answer the allegations of the petition, and the issues of law and fact are tried and determined by the court as in other cases, under the ordinary rules of practice. The court has power, upon the hearing, to examine and determine the legality and validity of the organization of the district, and all matters affecting the legality and validity of the bonds and the order for their sale, and has the power to confirm the proceedings in whole or in part, according to the facts. In this case the proceeding in the superior court resulted in a judgment affirming the regularity of the organization of the respondent as an irrigation district, and the legality and validity of its orders for the issuance of its bonds to the amount of $800,000, and for the sale of $400,000 thereof. The defendant, a resident and property owner of the district, who contested the validity of the respondent's proceedings, appeals from the judgment of the superior court, and from an order denying his motion for a new trial.

Numerous errors are assigned and argued, but they are all involved in, and may be disposed of by, a consideration of a few general propositions:

First it is contended that there was no sufficient notice of this proceeding to give the superior court jurisdiction to render a judgment binding upon the lands of the district and their owners. There seems to be a claim under this head, though it is not particularly insisted upon, that the notice prescribed by the statute is not sufficient. The object of the proceeding is, of course, to compel every person interested in the district, and whose property is to be bound for the payment of its debts, to come into court, and within the time limited present and submit to judicial investigation any and all objections he may have to the regularity of the organization of the district, and all other matters affecting the validity of the bonds, so that it may be finally and conclusively determined, by a judgment which neither he nor his successors in interest can thereafter question, whether such bonds are legal and valid or not. Notice must therefore be given to all persons so interested. But it need not be a personal notice. It not only may be, but, to secure the ends of the statute, it must be, a general notice by publication in some form. It is unnecessary to take up time in the discussion of this question, which has long since ceased to be an open one in this state. Without referring to many earlier and later decisions bearing more or less directly upon the point, it is sufficient to say that the statute and proceedings under review in Lent v. Tillson, 72 Cal. 404, 14 Pac. Rep. 71, were in all essential respects similar as to their objects and the substance of their provisions to the statutes and proceedings in question here, and the notice of this proceeding prescribed by the statute of 1889 is for every purpose as ample and beneficial as the notice to property owners, which was, in that case, held sufficient to give validity to the proceedings by which the lands of the local assessment district were subjected to a lien for the payment of the Dupont-Street bonds. The provisions of the supplemental act in regard to this matter are found in section 3, St. 1889, p. 212, which reads as follows: "The court shall fix the time for the hearing of said petition, and shall order the clerk of the court to give and publish a notice of the filing of said petition. The notice shall be given and published in the same manner and for the same length of time that a notice of special election, provided for by said act to determine whether the bonds of said district shall be issued, is required to be given and published. The notice shall state the time and place fixed for the hearing of the petition, and the prayer of the petition, and that any person interested in the organization of said district, or in the proceedings for the issue or sale of said bonds, may, on or before the day fixed for the hearing of said petition, demur to or answer said petition. The petition may be referred to and described in said notice as the petition of the board of directors of ——— irrigation district, (giving its name,) praying that the proceedings for the issue and sale of the bonds of said district may be examined, approved, and confirmed by said court."

But it is further contended that, even conceding the sufficiency of the notice prescribed by the statute, the notice actually given of this proceeding did not comply with the statute. In order to a proper understanding of the several objections falling under this head it is necessary to state generally the facts concerning the organization of the respondent as an irrigation district, and its subsequent proceedings. The petition to the supervisors of Stanislaus county in which all its lands are situate, for the formation of the district, was filed May 11, 1887; and the order of the board declaring the due organization of the district was made July 18, 1887. Thereupon the directors of the district organized, caused surveys and estimates of the cost of acquisition and distribution of water to be made, and on November 19, 1887, fixed the sum necessary to be raised by the issuance of the bonds of the district at $800,000. The proposition to issue this amount of bonds was at a special election submitted to a vote of the electors of the district, who, by a considerable majority, voted in favor of the proposition. Upon ascertaining the result of this election, the directors, on the 3d day of January, 1888, "resolved and order that the bonds of said district in the sum of $800,000 be issued in the manner and form prescribed by said act." After resolving upon the issuance of said bonds, several unsuccessful efforts seem to have been made to dispose of a portion of the amount authorized, and finally, on July 1, 1889, the following resolutions were adopted by the board of directors: "It is hereby ordered that the bonds of this district be issued in the amount of $400,000 of the following denominations: 760 bonds of the denomination of $500 each, and 200 bonds of the denomination of $100 each; and that the said bonds shall in form and substance conform to the provisions of the act of the legislature of the state of California entitled 'An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes,' approved March 7, 1887, and that they be signed, sealed, and numbered as in said act provided. It is further ordered that the bonds of the district, conforming to the provisions of said act and to this order, be prepared, executed, and issued in such manner and form in all respects that they shall become and be ready for sale by this board, and on behalf of this district. Resolved, that this board hereby declares its intention to sell the bonds of this district to the amount of $400,000, to-wit: 760 bonds of the denomination of $500 each, and 200 bonds of the denomination of $100 each; and it is therefore ordered that a notice that sealed proposals will be received by this board at its office in the city of Modesto, up to the hour of 1:30 o'clock P. M. of the 3d day of September, 1889, for the purchase of said bonds be published for twenty days before the said date in the following newspapers: The Daily Alta, published in the city of San Francisco; the Record Union, published in the city of Sacramento; and the Daily Times, published in the city of Los Angeles. On motion duly made, seconded, and carried, it was ordered that the board of directors of this district commence special proceedings in and by which the proceedings of said board and of said district for and authorizing the sale of the bonds of said district may be judicially examined, approved, and confirmed." In pursuance of this resolution the original petition in this case was filed in the superior court of Stanislaus county on the following day, August 1, 1889. In this petition the due organization of the district under the act of March 7, 1887, is alleged to have been effected on the 18th day of July, 1887. It is alleged that certain persons—naming them—were then duly elected, and have ever since been the directors of the district; that all its lands are in Stanislaus county; that as soon as practicable after its organization, to-wit, on November 19, 1887, the directors duly estimated the cost of acquiring water-rights and constructing irrigation works for the district at $800,000, and that it was necessary to issue the bonds of the district to that amount, and that the same should be sold, provided the electors of the district should vote in favor of their issuance. It is alleged that a special election was immediately called, at which the proposition should be submitted and voted upon, of which the notices required by the statute were duly published and posted; that at the time appointed the election was in fact held; that the returns of said election were duly made and canvassed, and the result duly declared and recorded, and that the vote was 439 in favor of and only 76 against the proposition. The original petition fails at this point to state the next steps actually taken by the board of directors, viz., its resolution of January 3, 1888, to issue the $800,000 authorized by said vote, and its unsuccessful efforts to sell portions of such issues. Omitting all reference to these proceedings, it alleges the orders and resolutions of July 31, 1889, above quoted, directing the issuance and sale of bonds to the amount of $400,000, and closes with the following prayer: "Wherefore your petitioner prays that the proceedings aforesaid for the issue and sale of said bonds of said irrigation district may be judicially examined, approved, and affirmed by said court." Upon the filing of this petition the judge of the superior court made an order fixing the 24th day of August, 1889, for the hearing of the petition, and ordered the clerk to cause notice of the filing of the petition to be given and published as prescribed by law. In pursuance of said order the following notice was issued and published for the prescribed period: "In the superior court of the county of Stanislaus, state of California. In the Matter of the Modesto Irrigation District, No. 1,003. Notice is hereby given that the petition of the board of directors of the Modesto irrigation district, praying that the proceedings for the issue and sale of the bonds of said district may be examined, approved, and confirmed, was on the 1st day of August, 1889, filed in said court; that said court fixed as the time for the hearing of the said petition the 24th day of August, 1889, at the court-house, in the city of Modesto; and notice is further given that any person interested in the organization of said district, or in the proceedings for the issue or sale of said bonds, may, on or before the day last above mentioned, demur to or answer said petition. By order of the court. Attest: E. D. McCabe, Clerk. By A. J. Lewis, Deputy-Clerk. [Indorsed.] Filed October 21, 1889. E. D. McCabe." The defendant, on the 24th day of August, 1889, appeared in the proceedings by his attorney, and filed a demurrer to the petition, which was overruled by the court, and on September 3d he filed an answer, and the issues were set for trial on October 21, 1889, upon which day the trial commenced, and continued until both parties closed their evidence on October 26th, whereupon the court adjourned until October 28th. When the hearing was resumed on the 28th, and after the argument had commenced, the petitioner asked and obtained leave to file and serve an amended petition, and defendant was granted leave to demur to or answer such amended petition within 10 days after service of an engrossed copy. On the 30th day of October the amended petition was filed, which, in addition to the allegations of the original petition, alleged the order of the board of directors of January 3, 1888, for the issuance of the $800,000 of bonds voted by the electors, and also that the $400,000 of bonds ordered issued and sold by the resolution of July 31, 1889, were a part of the amount of $800,000 ordered issued by the resolution of January 3, 1888. The prayer of the amended petition was a repetition of the original prayer. The defendant, upon being served with the amended petition, again demurred, and, his demurrer being overruled, he again answered, specifically denying everything alleged in the petition, and setting up several matters of defense. He then demanded that the whole case should be tried *de novo*, disregarding all the evidence that had been taken; but the court refused this demand, holding that the evidence already taken might properly be considered, but allowing the parties to introduce evidence as to the new matters embraced in the amended pleadings. In pursuance of this order the trial was resumed on November 21st between the petitioner and defendant, and thereupon the case was argued, submitted, and decided. No notice of the changes introduced into the petition by the amendments above mentioned was ever published or served in any manner except upon the defendant, but the court in its findings and decree confirmed and declared valid not only the order of July 31, 1889, relating to the issue and sale of the $400,000 of bonds, but also the order of January 3, 1888, relating to the issue of $800,000, which, as we have said, was mentioned for the first time in the amended petition.

Such being the case, the appellant objects to the published notice of the filing of the petition—*First*, that it was insufficient as a notice of the original petition; and, *second*, that it could not possibly confer upon the superior court any jurisdiction to confirm the proceedings alleged for the first time in the amended petition. The statute (section 3) requires that the notice shall state, among other things, the prayer of the petition; and it is contended that this notice did not state the prayer of the petition; but we think the notice contained everything necessary to a substantial compliance with the law. The prayer of the petition must be read in connection with the petition itself in order to understand its meaning, but, so read, it is clear and intelligible, and is in effect a prayer for the judicial examination, approval, and confirmation of all the proceedings set out in the petition, including those for the organization of the district, for they, like the rest, were essential to the legality and validity of the bonds; and, accordingly, the statute (section 5) expressly confers power and jurisdiction upon the court in all proceedings for the confirmation of bonds to examine and determine, approve and confirm, the proceedings for the organization of the district, as well as all other proceedings that may affect the legality and validity of the bonds and the order for their sale. The prayer, therefore, was sufficient, when read in connection with the petition; but to have repeated it in its literal terms in the notice would have been meaningless, and the only way to "state" it was to give its substance, as was done. Of course, to a person entirely ignorant of the law authorizing and regulating the proceedings, the notice may have been unintelligible; but it would have been equally so to such a person if the prayer of the petition had been as full and specific as the allegations upon which it was founded, and had been copied *verbatim* in the notice. A knowledge of the law is, however, imputed to every one interested in the proceeding; and it is decided in Lent v. Tillson, supra, that the notices required in cases of this character are to be construed and aided by reference to the statute. So read and construed, we think that the notice in this case was in substantial compliance with the statute, and imparted sufficient notice to all the world that the directors of Modesto irrigation district, No. 1,003, would, on the 24th day of August, 1889, submit the question of its corporate existence and the regularity of all its proceedings for the issuance and sale of its bonds, so far as the same were set out in its petition on file, to the superior court of Stanislaus county, and would ask the court to decree the regularity of all such proceedings; and we think that all persons interested in the district, being so notified of the time of the filing of the petition and of the office in which it remained as a public record, were bound to take notice of its specific allegations, and, if they had any objection to the confirmation of the orders and proceedings referred to in the prayer of the petition, that they were required to present their objections to the court at the time and place mentioned in the notice, or be forever precluded—they and their successors—from questioning the validity of the bonds issued in pursuance of such proceedings.

But could the court, without the publication of a new notice for the statutory period, acquire jurisdiction to examine and make a valid confirmation of the proceedings not set out in the petition on file when the original notice was published, and to which alone it referred? Or, to state the question more precisely, could the court, by giving notice of a petition to confirm an order for the issue and sale of bonds to the amount of $400,000, acquire jurisdiction to confirm an order for the issuance of bonds to the amount of $800,000? We do not think it could. The only answer which respondent makes upon this point to the contention of appellant is that he had notice of the amended complaint; that he demurred and answered to its allegations, and therefore cannot be heard to object that other persons had no notice. Of course, in ordinary proceedings intended to fasten a liability upon particular defendants, and in which each may be made independently liable, this would be a sufficient answer. But here the proceeding is *in rem*, and its object is to establish the validity of the bonds as against the irrigation district and all persons interested in the district. To be effective for the protection of investors or the advantage of the district, the judgment would bind all the world. A judgment binding upon the appellant alone must be, in effect, a nullity, leaving the district in precisely the same position it was in before the proceeding was commenced. Such being the case, this appellant, as a land-owner of the district, directly interested in the price to be realized upon a sale of its bonds, has a right to insist that the steps necessary to give the court jurisdiction to pronounce a binding decree shall be regularly taken. And we can see no escape from the conclusion that this decree, so far as it attempts to confirm the order of January 3, 1888, for the issuance of $800,000 of the bonds of the district, is erroneous, and void for want of jurisdiction; but we think there is no doubt that the superior court had jurisdiction, acquired by full compliance of the law, to examine into and confirm the order of July 31, 1889, for the issuance and sale of $400,000 of the bonds of the district, and that, as to that order, the decree may be affirmed, if it, and the proceedings upon which it was founded, were regular and legal. To sum up in this branch of the case, we are told, with reference to the points presented by appellant, as follows: The object of the act of March 16, 1889, is to provide a security for investors, and promote the advantage of the irrigation districts by enabling the courts of the state to render a judgment binding on all the world as to the validity of bonds to be offered for sale by such districts. To obtain such judgment the petition should set forth the particular orders for the issuance and sale of bonds, confirmation of which is desired. How fully the preliminary proceedings must be alleged is a question which does not arise here, but with respect to the organization of the district it is only necessary that its due organization and the election of its first board of directors should be alleged in general terms. The prayer of the petition is sufficient if it prays for the examination, approval, and confirmation of the proceedings "aforesaid" for the issuance and sale of bonds of the district; and the notice is sufficient if it states the substance of such prayer, and in other respects conforms to the statute. But the decree of the court cannot go beyond the orders for the issuance and sale of bonds which are alleged in the petition; and, in case the original petition is amended by setting out other orders for the issuance or sale of bonds, the court will not acquire jurisdiction to confirm such orders without the publication of a new notice of the amended petition. A decree, however, confirming all the orders alleged in the original and amended petitions, is not void for want of jurisdiction as to the orders set out in the original petition merely because no new notice has been given of the filing of the amended petition. If there was due publication of sufficient notice of the original petition, the decree of the court confirming the orders for the issuance and sale of bonds therein specifically alleged, and of all the preliminary proceedings affecting their validity, including those for the organization of the district and the election of its first board of directors, is within the jurisdiction of the court, and can be assailed only by those who have contested the proceeding, and by them only upon the ground of prejudicial errors affecting their substantial rights, which have been duly excepted to. In this case, accordingly, we hold that so much of the decree as confirms the order for the issuance of $800,000 of bonds of the district dated January 3, 1888, is void, but that it should be affirmed, so far as it confirms the order of July 31, 1889, for the issuance and sale of $400,000 of the bonds of the district, unless in conducting the proceeding the superior court committed error to the prejudice of this appellant.

The first point urged by the appellant upon this branch of the case is that the superior court erred in confirming the proceedings of the board of supervisors in organizing the district because said board, by including therein the city of Modesto, had violated the following provision of the Wright law: "Nor shall any lands which will not, in the judgment of said board, be benefited by irrigation by said system, be included within such district." St. 1887, p. 30, § 2. It appears from the record that the district as originally organized contained about 108,000 acres of land, including the city of Modesto, a town covering about 2,000 acres and having about 3,000 inhabitants and about 600 dwelling-houses, besides shops, stores, etc.

One proposition of the appellant seems to be that the mere fact of the corporate existence of a town or city, though situate in the midst of a district susceptible of irrigation by one system, necessarily deprives the board of supervisors of the county of the power to include any of the lands within the corporate limits of such city or town in an irrigation district. We say this seems to be a proposition of the appellant, because, although it is not expressly stated in terms, it appears to be necessary to sustain his contention; for, if it lies within the discretion of the board to include in an irrigation district any part of the lands of a town or city upon the ground that in their judgment such part will be benefited by irrigation under the system proposed and if the judgment of the board upon the question of benefits is conclusive of the fact,—as we shall show that it is,—there is no ground upon which a court can say that an order including all the lands of a city or town in such district is void. The idea of a city or town is, of course, associated with the existence of streets, to a greater or less extent lined with shops and stores, as well as of dwelling-houses but it is also a notorious fact that in many of the towns and cities of California there are gardens and orchards inside the corporate boundaries requiring irrigation. It is equally notorious that in many districts lying outside of the corporate limits of any city or town there are not only roads and highways, but dwelling houses, outhouses, warehouses, and shops. With respect to these things, which determine the usefulness of irrigation, there is only a difference of degree between town and county. The advantages of irrigation to a town like Riverside, in San Bernardino county, for instance, no one could deny; and the difference between such a town and these places where irrigation would be as manifestly out of place are not marked by any hard and fast line which would enable a court to lay down a rule of discrimination. The question whether in any particular case a town will, as a whole, be benefited directly by the application of water for irrigation, is in its nature, and under existing conditions must remain, a question of fact to be decided by that tribunal to whose discretion it had been committed by the legislature. It is very certain that the legislature intended that cities and towns should, in proper cases, be included in irrigation districts, for the act expressly provides for the assessment and taxation according to their value not only of city and town lots, but also of the improvements thereon. St. 1887, p. 37, § 18 et seq. And this feature of the law was made an argument against its constitutionality in the case of Irrigation Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379, in which its constitutionality was affirmed. Such having been the intention of the legislature, as is clearly apparent, and it being equally clear and notorious as matter of fact that there are cities and towns which not only may be benefited by irrigation, but actually have in profitable use extensive systems for irrigating land within their corporate limits, it cannot be denied that the supervisors of Stanislaus county had the power to determine that the lands comprising the city of Modesto would be benefited by irrigation, and might be included in an irrigation district. There was, it appears, a large majority of the electors of Modesto in favor of such nclusion; but the appellant, and others owning buildings, objected to being included in the district, on the ground that their lots, covered with stores, shops, and warehouses, would not be benefited. If this objection was good ground for excluding the city from the district, it is probable that no district could ever be successfully organized; for, in the nature of things, an irrigation district must cover an extensive tract of land, and, no matter how purely rural and agricultural the community may be, there must exist here and there within its limits a shop or warehouse covering a limited extent of ground that can derive no direct benefit from the use of water for irrigation. Here, again, the difference between town and county is one of degree only, and a decision in the interest of shop-owners in towns that their lots cannot be included in an irrigation district would necessarily cover the case of the owner of similar property outside of a town. It is nowhere contended by the appellant that in organizing irrigation districts it is the duty of the supervisors to exclude by demarkation every minute tract or parcel of land that happens to be covered by a building or other structure which unfits it for cultivation, and certainly the law could not be so construed without disregarding many of its express provisions, and at the same time rendering it practically inoperative. We construe the law to mean that the board may include in the boundaries of the district all lands which in their natural state would be benefited by irrigation, and are susceptible of irrigation by one system, regardless of the fact that buildings or other structures may have been erected here and there upon small lots, which are thereby rendered unfit for cultivation at the same time that their value for other purposes may have been greatly enhanced. So construed, we can see no objection to the law upon constitutional grounds or grounds of expediency. As to owners of such property, it seems reasonable to assume that they must participate, indirectly at least, in any benefits the district may derive from the successful inauguration of a system of irrigation; but, aside from this, the law contains an express provision designed to secure to them a benefit exactly corresponding to any burden to which they may be subjected, and in that respect is far more equitable than many of the assessment laws which have been upheld here and elsewhere. The provision referred to is this: Every taxpayer of the district receives a portion of all the water distributed exactly equivalent to his proportion of the total tax levied, and this water is his to use or to sell, as he may elect; so that, if his lot is not fit for cultivation, he nevertheless gets a full equivalent for the tax assessed to him. St. 1887, p. 34, § 11. Upon these grounds we hold that a city or town, or a portion thereof, may, in a proper case, be included in an irrigation district. As to what is or what is not a proper case for such inclusion, the decision of that question has been committed to the several boards of supervisors, whose discretion is not subject to the control of any court. Upon matters affecting their jurisdiction the orders of the board of supervisors may be open to review, but upon the question of fact as to what lands will or will not be benefited by irrigation their decision is final and conclusive. See section 2 of the act, St. 1887, p. 30.

The formation of irrigation districts is accomplished by proceedings so closely analogous to those prescribed for the formation of swamp-land reclamation districts that the decisions with respect to the latter are authority as to the former, and we cite, as conclusive of this point, People v. Hagar, 52 Cal. 181; 66 Cal. 60, 4 Pac. Rep. 951. Many other decisions to the same effect are cited in the briefs of counsel, but we deem it unnecessary to refer to them here. The superior court did not err, therefore, in refusing to allow the appellant to introduce evidence for the purpose of proving that his and other lots in the city of Modesto would not be benefited by the proposed system or any system of irrigation. Nor did the court err in refusing the offer of appellant to prove that the board of supervisors wrongfully included the city of Modesto in the irrigation district, for the purpose of carrying out the scheme of organization against the wishes of the farmers outside the city. To entitle the appellant to prove that the board and its members, well knowing that the lands of the city would not be benefited by irrigation, had nevertheless included them for the corrupt purpose suggested, and not in the exercise of their honest judgment and discretion, the facts constituting the fraud should have been fully pleaded in the answer; but no such facts as he offered to prove were pleaded. It is, indeed, alleged that the order including the city was not made in the exercise of the judgment and discretion of the board, but contrary thereto. This allegation is part of a separate defense, in which it is coupled with other allegations, going to show that the lands of the city would not be benefited by irrigation; but it is nowhere alleged that the board, or any of its members, actually believed at the time they offered such lands to be included in the district that they would not be benefited. The court therefore properly sustained the objection that the offered evidence was immaterial. As to all such matters as were alleged in the answer, the evidence shows that the board of supervisors acted with the utmost deliberation upon the petition for the organization of the district; that they heard and considered numerous objections and the testimony offered in support of them, and did not make their final decision until the time allowed for deciding had nearly elapsed.

The next point urged for appellant arises out of the fact that, after the original organization of the district including 108,000 acres, and after the proposition to issue $800,000 of bonds had been ratified by a vote of the electors of the district, and after the resolution of the directors to issue the bonds to that amount, the board of supervisors had ordered a portion of the district embracing 28,000 acres to be cut off and excluded therefrom. It is contended that this order, which was one of the proceedings confirmed by the superior court, was void for want of jurisdiction in the board to make it. The proceedings for the exclusion of lands from an irrigation district, of which they form a part, are authorized and prescribed by another act amendatory and supplemental to the Wright act, approved February 16, 1889. St. 1889, p. 21. This act provides for the filing of a petition for exclusion by owners of lands within the district; notice of the filing of such petition, and time and place of hearing; the presentation of objections by parties interested; and, in certain cases, for a submission of the question of exclusion to a vote of the electors of the district. Among other things it is provided that, if there be any outstanding bonds of the district, no order of exclusion can be made without the consent in writing of the holders of such bonds, acknowledged as deeds of conveyance are required to be acknowledged. It is contended by the appellant that at the time the petition for the exclusion of the 28,000 acres was filed, and during the greater portion of the time the notice of the hearing was being published, there were outstanding bonds of the district, and that no written consent of the holders of said bonds was ever given to the making of the order. But the fact is, there never were any outstanding bonds of the district. Its bonds, as above stated, had more than once been offered for sale, and at one time a bid for $50,000 of the bonds had been made by Tucker and Perley, and formally accepted by the directors. But the evidence shows that at the time of the making and accepting of this bid there was an understanding between the bidders and the directors that the former were not to be held to their offer unless they could succeed in negotiating a sale of the bonds to some outside party, and, as they failed to do so, the bonds had never been issued or paid for; and prior to the making of the order of exclusion, Tucker and Perley had, upon their written request, been released from their offer by formal resolution of the board of directors. Such being the case, it is clear that there had not only never been any outstanding bonds of the district, but that at the date of the order of exclusion there was not even a subsisting contract for the issuance of the bonds. We cannot perceive, therefore, that the court committed any error in decreeing the validity of the order of exclusion. But, even if the decree had been in that respect erroneous, it is by no means clear that it would have been material; for the order of exclusion is not one of the orders set out in the petition of the respondent, confirmation of which is prayed. It is alleged for the first time in the answer of appellant, and its invalidity charged as matter of defense, and as a ground for refusing confirmation of the order for the issuance and sale of bonds. It is therefore material only so far as its validity or invalidity affects such order for the issuance and sale of bonds, and we do not understand how that order would be any more or less valid whether the order of exclusion was legal or not.

The superior court did not err in holding that the $400,000 of bonds ordered to be issued and sold by the order of July 31, 1889, was part of the issue of $800,000 proposed and voted and ordered issued January 3, 1888. The evidence fully sustains the finding, and there is nothing really opposed to it, except the mere fact that the resolution of the board of directors does not in express terms couple the issue and sale of the $400,000 of bonds with the previous proceedings authorizing the issuance of $800,000 of bonds. The fact that when the proposition for the issuance of $800,000 was ratified by a vote of the electors, the plan in contemplation was to bring water from the Stanislaus river sufficient to irrigate 108,000 acres, and that the order for the issuance and sale of $400,000 was made after a change in the district and a change of plan contemplating the bringing the water from the Tuolumne river sufficient only for the irrigation of 80,000 acres, does not destroy the relation between the last order for the sale of bonds and the original authority to issue them. The authority to issue bonds is wholly independent of the source of supply of water or any plans for obtaining it. There is nothing in the law to prevent the directors from changing their plans in this respect whenever they find it to the advantage of the district to do so; and any order they may make for the issuance and sale of bonds must be referred to the proceedings by which alone such order is authorized whether they are expressly referred to or not.

The superior court did not err in refusing to try the case *de novo* after the filing of the amended petition. All the evidence that had been taken was applicable to the issues formed by the amended pleadings; and, indeed, the principal object and only effect of the amendments to the petition were to make it conform to the evidence already in. It would therefore have been a mere waste of time, as well as a most unusual practice, to have introduced anew the evidence already before the court.

It is contended that the board of directors never had any authority to issue any bonds of the district, because no legal notice was given of the special election at which the proposition to issue bonds was submitted to a vote of the electors. The point of this objection is that the general notice prescribed by section 5 of the Wright act (St. 1887, p. 31) was not posted in the office of the board; but this was a special election held under section 15 of the act, page 35, and the notices prescribed by that section were duly given. As we construe the law, that section applies to such special elections, to the exclusion of section 5.

It is contended that this judgment cannot be sustained because the proceeding was commenced before any bonds had been issued. According to appellant's construction of the supplemental act, no proceeding can be commenced under it until bonds have been actually issued. There may be something in the literal terms of the title and one or two clauses of the act to countenance this construction, but, read as a whole, and with reference to its manifest purpose, and the evil it was intended to correct, it must be construed as allowing the proceeding to be commenced as soon as any resolution has been adopted for the issue and sale of bonds.

Finally, it is contended by appellant that the authority originally granted to the directors to issue bonds to the amount of $800,000, at the time when the district embraced 108,000 acres, ended with the order excluding 28,000 acres; for, he says, even if the legislature intended to bind the new or reconstituted district by a vote of the old district, the law, to that extent, would be unconstitutional; citing sections 11, 12, and 13 of article 11 of the constitution of California, and section 10, art. 1, of the constitution of the United States. If, after this district had actually incurred a debt by the issuance of bonds, a portion of the lands of the district had been excluded without the consent of the owners of the lands remaining, the argument of appellant on this point would have had much force, and would at least have been deserving of serious consideration. But the facts being that, at the time of the exclusion of 28,000 acres from this district, it had no debt, and that, after notice of the proceeding, no objection was made to such exclusion by any person, there is no basis for any claim of injustice or violation of constitutional rights. The identity of the district was not destroyed by the exclusion of a part of its lands. Those who remain in the district will receive all the benefits of the expenditures of the proceeds of its bonds. They will not be compelled to pay for anything for the benefit of others. Nor is there anything in the law to compel the directors of the district, as constituted, to expend the whole amount of bonds authorized, if such amount shall not be needed. The provision of section 15 for the issuance of the bonds voted is merely directory, leaving it in the discretion of the board to issue and sell such amount of bonds, within the amount voted, and at such times, as they may find expedient. Upon a review of the whole case, we conclude that all the proceedings examined, approved, and confirmed by the superior court were regular and valid, but that the court did not acquire jurisdiction to confirm the order or resolution of January 3, 1888, for the issuance of $800,000 of the bonds of the district in this proceeding. That order, however, is not essential to the validity of the order for the issuance and sale of $400,000 of bonds, which depends upon and is sustained by the other proceedings for the organization of the district and the issuance of bonds. It is therefore ordered that the judgment and decree of the superior court be, and the same is hereby, modified by striking out so much thereof as confirms said order of January 3, 1888, for the issuance of $800,000 of bonds of respondent, and, as so modified, the judgment and decree, as well as the order overruling appellant's motion for a new trial, are affirmed.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

(85 Cal. 545)

OHM v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 13,679.)

(*Supreme Court of California.* Sept. 10, 1890.)

EXECUTORS AND ADMINISTRATORS — FRAUDULENT CONVEYANCES BY DECEDENT — ACTION TO SET ASIDE.

1. Under Code Civil Proc. Cal. §§ 1589, 1590, which direct the administrator, on the application of creditors of the decedent, to sue for the purpose of setting aside fraudulent conveyances made by the decedent in his life-time, only such creditors whose claims have been allowed by the administrator, or who have established them by judgment, can compel the administrator to bring the action.

2. A creditor of an estate may bring an action in his own name to set aside a conveyance made by the decedent in his life-time in fraud of creditors, or the administrator may be compelled to bring the action in a proper case; and an order of the superior court, directing a creditor to commence and prosecute the action in the name of the administrator, will be annulled on a writ of review brought for that purpose.

In bank. On writ of review.
W. C. Belcher, for petitioner.

PATERSON, J. The petitioner is administratrix of the estate of E. F. Ohm, deceased. On March 23, 1889, Mrs. Judge filed a petition in the superior court, asking for an order directing the administratrix to allow her name to be used in an action to be brought against the surviving wife of the deceased (Augusta L. Ohm) to set aside a conveyance of certain land made by E. F. Ohm in his life-time to his said wife, with intent to defraud his creditors. It was alleged that at the time of the conveyance E. F. was indebted to sundry persons in the sum of about $90,000, including a debt to petitioner of about $5,000; that the conveyance was made without consideration, and to defraud creditors; that deceased left no estate, except what was conveyed to his wife as aforesaid, with which to pay the claims of creditors; that the administratrix, though requested to do so, refused to bring suit to set aside the conveyance. A hearing was had upon the allegations of the petition, and the court ordered that Mrs. Judge be allowed to sue in the name of Anna A. Ohm, the administratrix, on condition that Mrs. Judge defray all expenses of the action, and save the administratrix harmless therefrom. Thereupon the administratrix filed a petition herein for a writ of review, the writ was issued, a return has been made setting forth the facts substantially as narrated above, and showing the additional facts in a bill of exceptions, which is made a part of the return; that in due time Mrs. Judge presented her claim against the estate for over $5,000; that the claim was rejected; and that she commenced an action against the administratrix on said rejected claim, which action is still pending.

The question is presented, therefore, whether a person whose claim has been disallowed by the administratrix, and for the establishment of which as a claim an action is pending and undetermined, is a creditor, within the meaning of section 1590 of the Code of Civil Procedure. That section reads as follows: "No executor or administrator is bound to sue for such estate, as mentioned in the preceding section, for the benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor, as the court, or judge thereof, shall direct." Under the provisions of this section, and the provisions of sections 1589 and 1591 of the Code of Civil Procedure, it is clear that the administratrix would have no right to commence an action to set aside a deed of her intestate as void against creditors, unless "there is a deficiency of assets," (section 1589,) and there are creditors for whose benefit "all real estate so recovered must be sold," (section 1591.) Any creditor is entitled to maintain an action to set aside such a fraudulent conveyance, (Hills v. Sherwood, 48 Cal. 392,) but he must be a creditor whose claim has been allowed by the administrator, or is evidenced by a judgment. Mesmer v. Jenkins, 61 Cal. 153; McMinn v. Whelan, 27 Cal. 300. And the statute of limitations does not bar an action by the creditor until three years after the judgment establishing the creditor's claim. Forde v. Fire Co., 50 Cal. 302. In New York it is held that the debt must be ascertained by judgment, and that the reason of the rule "does not fail by the death of the debtor before judgment recovered for the debt." Estes v. Wilcox, 67 N. Y. 264. And in Michigan, under statutes similar to our own, it has been decided that, until the estate has been charged with claims by allowance or judgment, "there is no basis for a bill against a decedent's fraudulent conveyance in order to recover means to pay them." O'Connor v. Boylan, 49 Mich. 209, 13 N. W. Rep. 519. To the same effect is the decision of the court in Fletcher v. Holmes, 40 Me. 364.

It is claimed that the order cannot be annulled in this proceeding; that the court below had jurisdiction of the subject-matter and of the parties, and, if it decided wrongfully on the evidence adduced at the hearing, it is a case of mere error, and review will not lie. If the order of the court directed the administratrix to commence an action, it would be conclusively presumed that the evidence taken by the court was sufficient to support the order. The order, however, is not that the administratrix herself commence and prosecute the action, but that Mrs. Judge do so in the name of the administratrix. This gives to Mrs. Judge, one of the alleged creditors, control of an action in the name of the representative of all who are interested in the estate,—heirs as well as creditors. We are unable to find any warrant in the statute for such authority, and no case has been cited which upholds it. There certainly is no necessity for such action. The creditor may bring an action in his own name. The statute does not exclude him,—he has his remedy independently of the administrator. Hills v. Sherwood, 48 Cal. 392. Furthermore, the court can compel the administratrix to bring suit in a proper case. The statute declares that the "executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same." Section 1589. Obedience to this mandate and the order of the court may be compelled by proceedings for contempt, or the letters may be revoked, and an administrator appointed who will prosecute a proper action. The order of the court under review herein is annulled.

FOX, J., MCFARLAND, J., and SHARPSTEIN, J., concurred.

WORKS, J. I concur in the judgment.

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85 Cal. 509

PEOPLE *ex rel.* FINIGAN v. PERKINS. (No. 13,535.)

(*Supreme Court of California.* Sept. 5, 1890.)

STATE OFFICER — QUALIFICATION — DIRECTOR OF STATE BOARD OF AGRICULTURE.

1. Pol. Code Cal. § 907, requires an officer to qualify (1) within 10 days after notice of his appointment or election; or, (2) when no such notice has been given, within 15 days from the commencement of his term of office. *Held*, that one appointed, without any knowledge on his part, as director of the state board of agriculture, may qualify within 10 days after the receipt of his commission from the governor; and the fact that it was not received by him until after the expiration of 15 days from the commencement of his term will not render his qualification invalid, as the second clause of section 907 applies only when the officer has knowledge of his election or appointment.

2. Since the appointee had no knowledge of his appointment until after the receipt of his commission, his failure to qualify within the 15 days from the commencement of his term was not a "refusal or neglect" to qualify, within the meaning of Pol. Code Cal. § 996, which provides that an office becomes vacant on the "refusal or neglect" of the appointee to file his official bond within the time prescribed by law.

3. St. Cal. April 15, 1880, declares the "state agricultural society" a state institution, to be managed by the "state board of agriculture," consisting of 12 directors, to be appointed by the governor. *Held*, that the qualification of one appointed a director of the "state board of agri

culture" is not vitiated by the fact that his official oath designated the office as that of director of "the state agricultural society;" the variance being unimportant.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco.

Edward P. Cole and *M. M. Estee*, for appellant. *Atty. Gen. Johnson*, *W. W. Foote*, and *Thomas J. Clunie*, for respondent.

Gibson, C. On the 19th day of January, 1887, Gov. Bartlett issued a commission to the relator, appointing him a director of the state board of agriculture for the term of four years, which began on February 1st of the same year, as prescribed by section 4 of the act of 1880. St. Cal. 1880, p. 49. The commission was forwarded from the capitol, at Sacramento, to San Francisco, by Wells, Fargo & Co.'s express, addressed to the relator at the latter place, but was not received by him until the 17th day of February, 1887, prior to which time he had no notice of his appointment or the issuance of the commission. The day after he received the commission he qualified by taking and subscribing the oath of office, which was filed the next day—February 19, 1887—in the office of the secretary of the state. Upon the filing of his official oath he immediately entered into and commenced to exerercise the functions of the office, and continued to hold and discharge the duties of such office, until he was ousted therefrom by the defendant, Dana Perkins, on the 27th day of January, 1888, who claimed the office by virtue of a commission issued to him by Gov. Waterman on the 3d day of January, 1888, and under which he had duly qualified. To determine the defendant's right to the office, the relator caused this action to be prosecuted, which resulted in a judgment removing the defendant from and letting the relator into the office. Thereupon the defendant appealed.

The main question to be determined is whether the relator, in not qualifying under the commission until nearly 30 days after it was issued to him, forfeited his right to the office, under sections 907 and 996 of the Political Code. The first of the sections referred to provides that, when a different time is not prescribed, the oath of office must be taken, subscribed, and filed within 10 days after the officer has notice of his election or appointment, or, when no such notice has been given, then within 15 days from the commencement of his term of office; and the other section provides that an office becomes vacant upon the happening of certain events, one of which is the refusal or neglect of one who is elected or appointed to an office to file his official oath or bond within the time prescribed. These provisions of the law are mandatory. The official oath or bond must be filed within the prescribed time, or the right to the office becomes forfeited. People v. Taylor, 57 Cal. 620; Payne v. San Francisco, 3 Cal. 122; People v. Brite, 55 Cal. 79; Hull v. Superior Court, 63 Cal. 174; People v. Hartwell, 67 Cal. 11, 6 Pac. Rep. 873. See, also, Ball v. Kenfield, 55 Cal. 320, and People v. Perry, 79 Cal. 105, 21 Pac. Rep. 423.

Now, can it be said that the relator refused or neglected to file his official oath within the proper time? We think not. To "refuse" is to decline the acceptance of something offered, or to fail to comply with some requirement. Neglect imports the omission or disregard of some duty. How could the relator refuse the appointment, or disregard the duty to qualify connected with it, until he received information of his appointment? The power to refuse a thing or neglect a duty must necessarily be based upon a knowledge of the existence of the thing or the duty. The relator did not receive his commission until February 17, 1887, nor have any knowledge of his appointment until that time; hence he could not have acted upon it before that date. It is conceded that he filed his official oath two days after he received his commission. Treating his commission, then, as notice of his appointment, he qualified in time. In cases of elections, it seems that the commissions of state officers elect, except governor and lieutenant governor, are the only notices of their election that are provided for. The issuance of commissions to such officers devolves upon the governor under section 1291 of the Political Code, wherein it is prescribed that the governor shall, upon receiving from the secretary of state, in accordance with section 1290 of the same Code, a copy of the statement of the vote cast at the election, issue commissions to the persons who from such statement appear to have received the highest number of votes for office. It is the same with regard to the certificates of election to county officers. In their case the county clerk must, as soon as the result of the election is declared by the board of supervisors, make out, under the seal of the superior court, certificates of election, and deliver one to each person declared elected by the board of supervisors. Pol. Code, §§ 1283, 1284. These are the only notices provided for; and unless the legislature intended that the receipt of the commission in the one case, or of the certificate of election in the other, should operate as a notice, then that portion of section 907 of the Political Code, requiring officers to qualify within 10 days after the officer has notice of his election or appointment, can have no effect. But, as the construction of statutes which leads to such a result is not favored, we must where possible, as in the case before us, adopt one that will give effect to every part; hence we think that it must have been the intention of the legislature that the receipt of either a commission or a certificate of election should be deemed a notice of an election. This view is sustained by People v. Taylor, 57 Cal. 620. There, it seems, a certificate of election as sheriff issued to the relator, and he failed to qualify within 10 days thereafter, and it was accordingly held that the certificate of election was notice of his election, and, having failed to qualify within 10 days thereafter, the office became vacant. We are also of the same opinion regarding the receipt of the commissions by appointees of the governor.

To them the governor must also issue commissions, (Pol. Code, § 891,) and there is no provision for any other notice to them of their appointment. The other portion of section 907, which requires an officer elected or appointed to office to qualify within 15 days from the commencement of his term of office, evidently applies where an officer is elected at a general or special election, the result of which, when legally declared, is presumed to be known to him, and he fails to receive his commission or a certificate of his election, in which event he must qualify within 15 days after his term of office begins. Or where he is an appointee of the governor, and, as in the case of the relator here, the commencement of his term of office is fixed at a time different from that of other offices, and he knew of his appointment when it was made, which became effective upon the issuance of the commission to him, (Ball v. Kenfield, 55 Cal. 320; People v. Whitman, 10 Cal. 38; Conger v. Gilmer, 32 Cal. 80; Marbury v. Madison, 1 Cranch, 137,) and he fails to receive his commission, he is then required to act upon such knowledge, and qualify with 15 days from the commencement of his official term. The relator in the present case had not, as appears from the evidence, applied personally, nor through any one else, for the office, and had no knowledge whatever of his appointment until he received his commission. He therefore had 10 days thereafter to qualify, and, having qualified within that time, he is entitled to the office.

The remaining question is, did the relator qualify as a member of the state board of agriculture? The appellant contends that he did not, as the act of April 15, 1880, provides for two separate and distinct institutions, viz., state board of agriculture and state agricultural society, and the relator qualified as a director of the state agricultural society. The act referred to is entitled "An act to provide for the management and control of the state agricultural society of the state." By the act the state agricultural society was declared to be a state institution; and a "state board of agriculture," to consist of 12 directors, to be appointed by the governor, was also provided for the exclusive control and management of the said "state agricultural society, as a state institution. The relator was commissioned as a director of the "state board of agriculture," and he qualified as a "director of the state agricultural society." The commission followed the designation of the office in the act by which it was created, and we think it therefore sufficiently definite and certain. The slight difference between that and the designation of the office in the relator's official oath we deem of no importance whatever. He qualified as a director of the state agricultural society. This is the equivalent of qualifying as a member of the board of directors, and also as a member of the society; for it is clear he could not be a director without being a member, nor be a director without being a member of the only board of directors designated and provided for in the act. The questions being thus disposed of adversly to the appellant, it results that the judgment should be affirmed.

FOOTE and VANCLIEF, CC., concurred.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

85 Cal. 549

Mooney v. Detrick. (No. 12,551.)

(*Supreme Court of California.* Sept. 10, 1890.)

Insolvency—Discharge—Effect.

Section 37 of the insolvent act of California provides that all debts existing at the time of the adjudication of insolvency, though not payable until a future time, may be proved against the estate of the debtor. Section 40 provides for the allowance of contingent claims at their present value. Section 53 provides that the discharge shall release the debtor from all debts and liabilities which were or might have been proved against his estate. *Held*, that the discharge in insolvency is a bar to an action for breach of a contract of hiring for a definite period, even as to money which became due thereon after the filing of the petition in insolvency and after the discharge. Sharpstein and Thornton, JJ., dissenting. Reversing 22 Pac. Rep. 1111.

In bank. Appeal from superior court, city and county of San Francisco.

On rehearing. For decision in department 2, see 22 Pac. Rep. 1111.

Kellogg & King, for appellant. *Dorn & Dorn*, for respondent.

PATERSON, J. This is an action for the recovery of money alleged to be due plaintiff from defendants under a contract between them, to the following effect: Plaintiff having sold and assigned a patent-right to defendants, in consideration thereof promised to serve said defendants in and about their business for the term of five years from the 1st day of January, 1881; and the defendants agreed to employ the plaintiff during said entire period of five years, and to pay him for every day of his employment, Sundays and holidays excepted, the sum of four and one-half dollars. Pursuant to the terms of said agreement, defendants employed plaintiff in and about their business constantly, and paid him in full therefor until the 1st day of March, 1884. Since March 1, 1884, defendants have failed and refused to give plaintiff employment, except for the space of 166 days, and refused to pay plaintiff anything more than $654 under the contract. Judgment was entered in favor of plaintiff and against the defendants for the sum of $1,333.40, interest and costs. Defendants' motion for a new trial was overruled, and from that order and the judgment this appeal is taken by defendant Detrick. The defendants, in their answer, allege that as a firm and individually they and each of them were on the 1st of July, 1884, discharged of and from all debts, liabilities, and claims whatever except such as were by the insolvent laws excepted from their operation, and that the claim sued on in this action is not one of the claims so excepted. The petition of the defendants as a firm and individuals was filed on the 28th day of February, 1884, and the plaintiff's cause of action, if any, has accrued since that date. The discharge and proceedings leading up to it are well pleaded, and the allegations of the defendants in relation thereto are admitted by the plaintiff to be true. The plaintiff presented his claim against the defendants to the assignee in insolvency, and he refused to allow it; whereupon plaintiff applied to the court in which the insolvency proceedings were pending for leave to sue the assignee, but such application was denied.

Section 37 of the insolvent act provides that "all debts due and payable from a debtor at the time of the adjudication of insolvency, and all debts then existing, but not payable until a future time, * * * may be proved against the estate of the debtor." Section 40 provides that "in all cases of contingent debts and liabilities contracted by the debtor, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends if the contingency shall happen before the order for the final dividend, or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated;" and section 53 provides that "a discharge * * * shall release the debtor from all claims, debts, liabilities, and demands set forth in his schedule, or which were or might have been proved against his estate." We think that under these provisions of the insolvent act the plaintiff's claim against the insolvents was barred by the discharge in insolvency. It is admitted that the defendants complied with all the provisions of the act. A personal covenant creates certainly a "liability," if not a "debt," within the meaning of the act. If the assignment had been made for an annuity payable during the remainder of the life of the plaintiff, the obligation would be discharged by the discharge in insolvency. Heywood v. Shreve, 44 N. J. Law, 94. In this case there was no continuing benefit direct to the insolvents, such as would constitute a consideration and a new debt. The benefit went to the assignee, and through him whatever advantages the defendants had gained under the contract passed to the creditors, for the patents became the assets of the estate, and no services thereafter were rendered by the plaintiff. In cases of lease, where the occupancy is by the insolvent, he, and not his creditors, derives the benefit subsequent to bankruptcy. In such case the discharge will not bar a recovery. Judgment and order reversed, and cause remanded for a new trial.

BEATTY, C. J., and WORKS and MCFARLAND, JJ., concur. SHARPSTEIN, J., dissents.

THORNTON, J. I dissent, and adopt the opinion delivered in department 2 in this case as my opinion herein.

FOX, J., being disqualified, did not participate in the decision of the above cause.

Rehearing denied.

65 Cal. 583

MEYER v. BROWN *et al.* (No. 8,896.)[1]

(*Supreme Court of California.* Sept. 1883.)

MUNICIPAL BONDS — IRREPEALABLE CONTRACT— MANDAMUS TO COMPEL TAX LEVY.

1. Act Cal. April 24, 1858, consolidating the city and county of Sacramento, provided for "liquidating, funding, and paying" the outstanding debts of the old city government by the issuance of interest-bearing bonds. To pay the accruing interest and redeem the bonds, 55 per cent. of the city revenue was set aside as a sinking fund, and the board of supervisors of the new consolidated government was required to levy an annual tax of 100 cents on the $100 for municipal purposes. *Held*, that the surrender of their claims by the creditors of the old city government, and their acceptance of the bonds issued by the new consolidated government on the faith of the above provisions for their payment, constituted a contract between the creditors and the consolidated government which cannot be affected by subsequent legislation, and that *mandamus* would issue on the application of the bondholders to compel the levy of the taxes by the legal successor of the consolidated city and county.

2. The fact that the bonds were issued by the officers of the consolidated government in payment of claims which they knew to be illegal

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[1] This case, filed September, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all the cases in volume 65, California Reports.

will not effect the validity of the bonds in the hands of *bona fide* holders, as the only question in such case is as to the power of the municipality to issue them.

In bank. On application for *mandamus.*

Daniel Meyer, the petitioner, is the holder of certain bonds issued by the city and county of Sacramento. He made this application to compel defendants, John Q. Brown and others, trustees of the city of Sacramento, which was created the legal successor of the city and county of Sacramento, to levy a tax for the payment of the bonds. Defendants demurred to the petition.

S. C. Denson and *Rosenbaum & Scheeline*, for petitioner. *W. A. Anderson* and *McKune & George*, for respondents.

ROSS, J. On the 27th day of February, 1850, the legislature of the state passed an act, by which it was declared that all that tract of land lying within certain designated limits should thereafter be known by the name of "Sacramento City," for the government of which there should be a mayor, recorder, and council, to consist of nine members, one of whom should be elected president; that the mayor, recorder, and councilmen should be a body politic and corporate by the name and style of "The Mayor, Recorder, and Common Council of Sacramento City," and by that name they and their successors should be known in law, have perpetual succession, sue and be sued in all courts, and in all actions whatsoever, etc. St. 1850, p. 70 et seq. By an act passed March 26, 1851, the legislature declared that the same territory should thereafter be known by the name of "The City of Sacramento," for the government of which there should be a mayor, recorder, and council, to consist of nine members; that the mayor, recorder, and councilmen should be a body politic and corporate by the name and style of "The Mayor and Common Council of the City of Sacramento," and by that name they and their successors should be known in law, have perpetual succession, sue and be sued, in all courts and actions whatsoever, etc. By the seventh section of the act last mentioned the council was, among other things, given power to cause the streets to be cleaned and repaired; to provide for the making and improving of sidewalks; to lay out, extend, alter, or widen streets and alleys; to alter, improve, keep, and repair, and have full control of the levee; to establish and regulate a police, to be subject to the supervision of the mayor; to make appropriations for any object of city expenditure; to erect and maintain poor-houses and hospitals for the support of the indigent, sick, and insane; to prevent the introduction and spreading of diseases; to erect, repair, and regulate wharves; to provide for the prevention and extinguishment of fires, etc. On the 24th of April, 1858, the legislature passed an act consolidating the city and county governments, the first and second sections of which are as follows: "Section 1. For the government of that territory now known as 'The City and County of Sacramento,' there shall be a board of supervisors; and the said board of supervisors and their successors in office shall be a body politic and corporate under the name and style of 'The City and County of Sacramento,' and by that name they shall be known in law; may make, have, keep, alter, and renew a common seal, different and distinct from the seal of the county clerk; shall have perpetual succession; may sue in all courts, and in all actions whatsoever; may, under the limitations hereinafter provided, purchase and hold real estate or personal property, and receive and hold the same by legacy or donation for the city and county, or in trust for the use of public schools, or the fire department, or for a poor-house and indigent sick; and they may do all such other things, and exercise all such other powers as by this act or by any other law are or may be granted or allowed to them to do; but the city and county shall not be sued in any action whatever; nor shall any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in actions, and effects be subject to any attachment, levy, or sale, or any process whatever, either mesne or final. Sec. 2. The city and county of Sacramento is hereby made and constituted the successor of the corporation by this act dissolved, and heretofore known as 'The Mayor and Common Council of the City of Sacramento.' The lands, public and private buildings, property, rights of property, actions, rights of actions, moneys, revenues, income, and trust now vested in or belonging or in any wise appertaining to the corporation known as 'The Mayor and Common Council of the City of Sacramento,' are hereby transferred to and vested in, and are declared to appertain and belong to the city and county of Sacramento, as hereinafter provided." Sections 37, 38, 34, and 35 of the consolidation act are as follows: "Sec. 37. For the purpose of liquidating, funding, and paying the claims against the city and county of Sacramento, hereinafter specified, the treasurer shall cause to be prepared suitable bonds of the county of Sacramento, not exceeding the sum of six hundred thousand dollars, and for the city of Sacramento, not exceeding the sum of one million six hundred thousand dollars, bearing interest at the rate of six per cent. per annum from the first day of January, one thousand eight hundred and fifty-nine, and payable at the office of the treasurer. Said claims shall be funded in the order of their reception; shall, in the order of reception, be entitled to the shortest time, and one-fourth of the whole amount made payable on the first day of February, one thousand eight hundred and eighty-eight; one-fourth on the first day of February, one thousand eight hundred and ninety-three; one-fourth on the first of February, one thousand eight hundred and ninety-eight; and the balance on the first of February, one thousand nine hundred and three. The interest on said bonds shall be made payable at the office of the treasurer on the first day of January of each year. Said bonds shall be signed by the president of the board of supervisors, countersigned by the clerk of the board of supervisors, and indorsed by the treasurer, and shall have the seal of the city and county affixed thereto. Coupons for the interest shall be attached to each bond, so that they may be removed without injury to the bond. Said coupons, consecutively numbered, shall be signed by the treasurer. It shall be the duty of the bookkeeper of the city and county and the treasurer each to keep a separate record of all bonds issued, showing the number, date, and amount of each bond, to whom issued, upon what claim, and its amount; and none of the claims herein specified shall be liquidated or paid except in the manner herein provided. Sec. 38. The following claims shall be received and funded under the provisions of this act: *First.* All legal debts or liabilities against the county of Sacramento, which may be unpaid and unprovided for by this act on the first day of January, one thousand eight hundred and fifty-nine. The annual interest and principal of all bonds issued for claims mentioned in this section shall be paid from the interest and sinking fund, as provided in section 36, and in the manner otherwise provided in this act. *Second.* All legal debts or liabilities against the city of Sacramento, which may be paid and unprovided for by this act on the first day of January, one thousand eight hundred and fifty-nine. The annual interest and principal of all bonds issued for claims against said city shall be paid from the interest and sinking fund, provided in section 35, and in the manner otherwise provided in this act." "Sec. 34. The board of supervisors shall not have power to levy any greater taxes than as follows, viz.: On the real and personal estate, except such as is exempt by law, throughout the city and county, a tax of one hundred cents on the one hundred dollars; such state taxes as the laws may require; and, in addition thereto, they shall levy, for municipal purposes, on all real and personal property within the city limits, except as is exempt by law, a tax of one hundred cents on the one hundred dollars; also a tax for road purposes, of five cents on the one hundred dollars on the property outside the city limits. All of which taxes shall be levied and collected strictly in accordance with the revenue laws of the state, except as may be otherwise provided in this act: provided, that nothing contained in this section shall prevent the board of supervisors from levying, in addition, a tax in accordance with an act passed February, [March,] one thousand eight hundred and fifty-eight, entitled 'An act to amend an act passed April twenty-seventh, one thousand eight hundred and fifty-seven, entitled "An act to submit to the people of the counties of Sacramento and El Dorado a proposition for the construction of a wagon road."' Sec. 35. The revenue derived from and within the city limits for municipal purposes, viz., taxes, licenses, harbor dues, water-rents, and fines collected in the mayor's court or otherwise, when paid into the treasury, shall be set apart and appropriated as follows: Fifty-five per cent. to an interest and sinking fund, which shall be applied to the payment of the annual interest and the final redemption of bonds issued for city indebtedness in accordance with the provisions of this act; fifteen per cent. to a salary fund, which shall be applied to the payment of the salaries of municipal officers as provided in this act; eight per cent. to a school fund, which shall be applied to the support of schools within the city limits; and the balance—twenty-two per cent.—to a fund to be used for all such necessary municipal expenses as are not otherwise provided for in this section, and shall be called the 'contingent fund.'"

By the second section of the act of consolidation all of the property and rights theretofore belonging or pertaining to the corporation known as "The Mayor and Common Council of the City of Sacramento" were vested in and declared to appertain and belong to the consolidated government. But in dissolving the old city government and transferring all of its property and rights to a new corporation the legislature did not forget that there were outstanding claims against the old one. Recognizing that fact, it made provision in and by the act of consolidation for "liquidating, funding, and paying" those claims. Suitable bonds were directed to be prepared for the city of Sacramento, not exceeding $1,600,000, with interest coupons at the rate of 6 per cent. per annum, payable on the 1st day of January of each year, with which the legal claims against the old city government were to be paid and discharged. To pay the interest as it should accrue and to redeem the bonds it was provided by the act of consolidation that 55 per cent. of the revenue derived from and within the city limits for municipal purposes—that is to say, taxes, licenses, harbor dues, water-rents, and fines collected—should be set apart and appropriated to an interest and sinking fund, which should be applied to the payment of the annual interest and the final redemption of the bonds; and the governing body of the consolidated government, viz., the board of supervisors, was required to levy for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, a tax of 100 cents on the $100. Having thus made provision for the payment annually of the interest on the bonds, and ultimately for their redemption, the legislature offered them in payment of the legal claims against the old city government. The offer was accepted, and the holders of the latter surrendered their claims, in consideration of which the consolidated government issued to them its bonds, pursuant to the provisions of the act. The bonds carried with them the pledge of an annual tax for municipal purposes on all real and personal property within the city limits, except such as is exempt by law, of 100 cents on the $100, 55 per cent. of which to be set apart and appropriated to an interest and sinking fund, to be applied to the payment of the annual interest upon the bonds, and to their final redemption. The tax was the chief security offered the creditors as an inducement to accept the bonds in payment of their claims. When the bonds for whose payment, with interest, provision was thus made, were issued and accepted by the creditors of the old city government, a contract was made, as solemn and binding, and as much beyond subsequent legislation, as it would have been if made between private persons. These views will be found sustained and amplified in an able opinion recently rendered by the supreme court of the United States in a case entitled Louisiana v. Pilsbury, reported in 105 U. S. 278. It is well occasionally to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations entered into for value than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other.

Some minor objections are made to the petition, which is for a writ of mandate compelling the city authorities to levy the tax referred to, none of which, in our opinion, are well taken. Demurrer overruled, and defendants allowed 10 days within which to answer.

MCKINSTRY, J., MYRICK, J., SHARPSTEIN, J., THORNTON, J., and MCKEE, J., concur.

ON THE MERITS.

(June 4, 1884.)

PER CURIAM. We are satisfied with the opinion delivered when this case was considered on demurrer to the petition. (The preceding opinion, by Mr. Justice Ross.) The views then expressed are decisive of the case as now presented in favor of the petitioner. It is therefore ordered that a writ of mandate issue to the municipality and its authorities annually to levy and collect for municipal purposes on all real and personal property within the city limits, except such as is exempt by law, a tax of 100 cents on the $100, and that 55 per cent. of the revenue thus derived within the city limits for municipal purposes be set apart and appropriated to an interest and sinking fund, to be applied to the annual interest and final redemption of the bonds issued for the city indebtedness, in accordance with the act of the legislature of the state, adopted April 24, 1858.

ON MOTION FOR NEW TRIAL.

(Sept. 10, 1884.)

PER CURIAM. This is a motion for a new trial. At the trial before the referee defendants offered to prove facts which it is claimed would have shown that certain of the bonds described in the complaint herein, the payment of which is sought to be enforced by the mandate of this court, were issued in consideration of the surrender of bonds purporting to represent indebtedness of the city of Sacramento, which bonds (last named) had been illegally issued, and did not constitute valid claims against the said city. It is contended by the defendants that the referee erred in rejecting the evidence offered. We deem it unnecessary to inquire whether, assuming the facts to be as implied by the defendants' offer of evidence, the bonds in lieu of which the bonds in suit were issued were invalid. True, the act of 1858 (St. 1858, p. 280) provided that all "legal" claims might be funded, but, as we understand the provisions of that act, the president of the board of supervisors, the clerk of the board, and the treasurer were authorized to determine, on the behalf of the city and county of Sacramento, the legality of each claim presented, and, if satisfied of its legality, to issue a bond or bonds therefor. Even if the evidence offered would have shown that the officers mentioned violated their duty by deciding some claims to be legal which they knew were illegal, there was no offer to prove that the claims alleged to be the consideration for the bonds sought to be enforced by this proceeding were presented by plaintiff, or that any of such bonds issued to him. There is no averment in the answer, nor is there any finding in the record, or any evidence tending to prove, that plaintiff is other than a holder *bona fide* of the bonds. The bonds recite that they were issued in accordance with the law of 1858. They and the coupons attached are signed and authenticated, as required by that law. They are exactly such bonds as would have been authorized had the officers of the city and county indisputably allowed only "legal debts and liabilities" of the former corporation,—the city of Sacramento. At the trial, the *bona fides* of the plaintiffs being conceded, there was but one question to be decided, to-wit, were the bonds such as the city and county had power to issue? No question of irregularity, or even fraud, on the part of the agents of the municipality could be considered. Ronede v. Jersey City, 17 Reporter, 263; East Lincoln v. Davenport, 94 U. S. 801; Pompton v. Cooper Union, 101 U. S. 196; Sherman Co. v. Simons, 109 U. S. 737, 3 Sup. Ct. Rep. 502; Louisiana v. Pilsbury, 105 U. S. 278. Hereafter, in cases like the present, where the facts shall be found by a referee appointed by this court, and either party shall have given notice of a motion for a new trial within 10 days after receiving notice that findings have been filed, the argument of the cause will not be heard until the motion for a new trial shall have been determined. Nor will argument be heard upon the findings of a referee (no notice of motion for a new trial having been served) unless 10 days shall have expired after notice of the filing of such findings. Motion denied.

(88 Cal. 621)

FRAZER v. LYNCH *et al.* (No. 14,087.)

(*Supreme Court of California.* April 20, 1891.)

CONTEMPT—DISOBEDIENCE OF SUBPŒNA—PUNISHMENT.

1. Though Code Civil Proc. Cal. § 1991, provides that disobedience of a subpœna may be punished as a contempt, "and if the witness be a party his complaint or answer may be stricken out," it is error to strike out the answer for defendant's disobedience of a subpœna *duces tecum*, where his counsel admit the contents of the document sought to be produced, so as not to cripple plaintiff's case.

2. Where defendant is an illiterate person, and it is not clear that she knew the contents of the subpœna, and her counsel knew nothing of the matter, and had given her no advice as to her duty, the court should notify her of the effect of her disobedience, and give her an opportunity to produce the document before striking out her answer.

Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Reinoehl & Harrison, for appellants. *C. L. Jenks*, *D. W. Welty*, and *A. E. Nutt*, for respondent.

DE HAVEN, J. This is an action of ejectment. The defendants joined in an answer, which put in issue all the allegations of the complaint as to the ownership and right to the possession of the demanded premises, the value of the rents, issues, and profits, and the amount of damages claimed by plaintiff. The plaintiff caused to be issued and served upon the defendant Catherine Lynch a subpœna *duces tecum*, requiring her to produce in court a United States patent, conveying a portion of the land in controversy to one Patrick Lynch, through whom plaintiff claims title. The said defendant did not produce the patent as commanded. The court below, of its own motion, examined the defendant upon oath as to her reason for not doing so. Her evidence is as follows: "Question. This paper was served on you, Mrs. Lynch, which reads as follows, among other things, [reading the commands of the subpœna, and then continuing:] This paper purports to have been served upon you,—you say your son read it to you? Answer. Yes, sir; that patent that I got. Q. Did you bring it? A. No, sir; I did not. Q. Why did you not bring it? A. I did not know that there was any case. Q. You did not understand that you were compelled to bring it by this subpœna? A. No, sir. Q. Tell me your reason for not bringing it, after your son read this subpœna? A. He read it to me after I got it from Washington; that is all. Q. Now, who read it to you? —you were served with a paper reading like this, were you not? A. Yes. Q. Who read that to you, or did you read it yourself? A. No, sir; I could not read myself. Q. Who read that to you? A. I do not believe any one read it to me. I was summoned on the road. There was a lady with me. She just looked at it, and I took it home, and left it on the shelf. Q. Your counsel told you, did they not, that it was necessary to bring this document into court? A. No, sir. Q. Your son told you, did he not? A. He did not tell me anything; he came home at six o'clock last night, sick. Q. Didn't your son tell you that your counsel said to you to bring that paper into court. A. I suppose he could have got it; he is very sick, and laying down sick in town here, and didn't get home until six o'clock. Mr. Harrison. We are ready to admit the contents of that document, so that it will not cripple the plaintiff's case. The Court. That paper was served upon that lady. She said at first that it was, and then afterwards that perhaps it was not, read to her. It is her duty, when a paper is served upon her, bearing the official imprint, as this document does,—if she cannot read it,—it is her duty to take it to some person and have it read. I certainly do not wish to be harsh with any person, but it seems to me that this is a flagrant obstruction of justice, and a disobedience of an order of the court, and, although I have listened with interest to the remarks that have been made by yourself and Mr. Reinoehl, I cannot quite come to the conclusion that this woman has done this through ignorance; it seems to me that there is some reason for it. The answer will be stricken from the files."

The question presented by this appeal is as to the correctness of this ruling, and it is clear to us that it cannot be sustained. Section 1991 of the Code of Civil Procedure provides that disobedience of a subpœna may be punished as a contempt of court; "and, if the witness be a party, his complaint or answer may be stricken out." This latter clause of the section is intended for the protection of the adverse party, whose substantial rights are or may be affected by such disobedience, as well as a punishment for the contempt itself; and it is evident from the nature of the power thus conferred on the court, that it should not be exercised, except with guarded discretion, and with a view to promote substantial justice in the case before it. It is apparent from the record before us that the defendant Mrs. Lynch is an illiterate person, and it is not entirely clear that she knew the contents of the subpœna, and that what is claimed as an admission that it had been read to her did not really refer to the reading of the patent itself. It is evident that her counsel knew nothing of the matter, and had given her no advice in relation to her duty in regard to the subpœna. Under these circumstances the court should have distinctly notified her of the effect of a willful refusal to produce the paper, and have given her an opportunity to do so, before making the order under review. But, in addition to this, her counsel, before the making of this order striking the answer from the files, offered to admit everything that could be shown by the patent itself; thus obviating any necessity for its production, and fully saving every right of the plaintiff. This offer, thus made, is to be treated as that of the defendant herself, and was so far a substantial compliance with the commands of the subpœna as to make the subsequent order of the court clearly erroneous. This order is not, as claimed by respondent, a judgment for contempt, such as is provided for by section 1222 of the Code of Civil Procedure, and which, by the terms of that section, is final and conclusive; but was an error of law occurring during the trial of the action, and, being excepted to, may be corrected on this appeal. Judgment and order reversed.

We concur: BEATTY, C. J.; McFARLAND J.

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87 Cal. 371

SHANKLIN v. McNAMARA *et al.* (No. 13,562.)

(*Supreme Court of California.* Jan. 4, 1891.)

PUBLIC LANDS—"SWAMP AND OVERFLOWED"—MEXICAN GRANTS—RES ADJUDICATA.

1. Where the register and receiver of the district land-office decides that certain land was not "swamp and overflowed" at the time of the enactment of Act Cong. Sept. 28, 1850, or that the patentees thereof are entitled to it on the ground that they were, before disposal of it by the state, *bona fide* purchasers within Act Cong. July 23, 1866, providing for the quieting of land titles in California, and confirming to purchasers in good faith lands included in rejected Mexican grants, the decision, if not appealed from, is conclusive against the state and its grantees.

2. The opinion of the register and receiver of the land-office as to whether land was swamp and overflowed, recited: "The evidence shows that all of said tract has for many years been used for ordinary purposes of agriculture in growing grain and grass for hay and pasturage. And the fact of its adaptability for the cultivation of these staple agricultural products would seem to determine the question as to the character of the land against the state. At any rate, these circumstances, coupled with the fact" that claimants were *bona fide* purchasers, etc., entitles them to the land. *Held*, that it was not decided that the land was not swamp and overflowed.

3. Act Cong. Sept. 28, 1850, granting to the different states all swamp and overflowed lands within their borders, did not grant lands the right to the possession of which was at the time vested in a grantee under a Mexican grant, though such land may have afterwards, on final survey, been excluded from the grant.

In bank. Appeal from superior court, Sutter county; PHILIP W. KEYSER, Judge.

M. E. Sanborn and *A. L. Hart*, for appellants. *J. H. Craddock*, for respondent.

THORNTON, J. Ejectment. Judgment for plaintiff. Motion for a new trial by defendants denied, and appeal from the judgment and order denying the motion.

The plaintiff claims title to the land in controversy under a patent of the United States, issued to Willard Hodges, dated December 15, 1882, which was put in evidence, as was also a conveyance of the tract by Hodges to the plaintiff. The claim of Hodges is under the seventh section of the act of congress of July 23, 1866, entitled "An act to quiet land titles in California." 14 St. at Large, p. 220. This section provides that when persons in good faith, and for a valuable consideration, have purchased lands of Mexican grantees or assignees, which grants have subsequently been rejected, or when the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continue in the actual possession of the same, according to the lines of their original purchase, and when no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same, after having such lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required herein, under regulations to be prescribed by the commissioner of the general land-office. Hodges and Upham made proof before the proper land-office of their right to purchase the land in suit under the section of the act of 1866 above referred to, bringing themselves within its provisions, and were allowed to purchase, and did purchase, on this proof and purchase, the patent of the United States above mentioned, under which plaintiff asserts title. This patent establishes *prima facie* the right of plaintiff to recover, and must be regarded as conclusive against the defendants, unless the latter can attack it, and successfully impeach its sufficiency to vest title in those claiming under it.

Defendants claim that the rights possessed by them entitle them to attack the patent. They say that as a matter of fact the land sued for was on the 28th day of September, 1850, swamp and overflowed land, and by virtue of the act of congress of that date entitled "An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits," the title to this tract passed from the United States to the state of California, and that it was out of the power of congress or of the United States government in any way or mode to divest this title so passed to the state by the act of 1850. It must be regarded as settled beyond controversy that the first section of the swamp-land act (Act Sept. 28, 1850) is a grant *in præsenti* to each state of the swamp and overflowed land within its limits. The supreme court of the United States, speaking through Justice FIELD, have said of this act in Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. Rep. 985: "The words of the first section of the act, 'shall be and are hereby granted,' import an immediate transfer of interest, not a promise of transfer in the future." This construction of the act has been sustained in several cases. See Tubbs v. Wilhoit, 73

Cal. 63, 14 Pac. Rep. 361, and cases there cited, and cases cited in Wright v. Roseberry, supra. The contention of the defendants is that they can impeach the patent of plaintiff by showing that the land in suit was, on the day of the passage of the swamp-land act of 1850, in fact swamp and overflowed land. To this contention plaintiff replies that defendants are estopped from making such proof by an authoritative decision of a competent tribunal to the contrary, binding on both plaintiff and defendants. When the defendants offered to defeat the effect of the patent to prove that the land was swamp and overflowed on the 28th day of September, 1850, the plaintiff met it with proof of what he claimed to be an authoritative decision and adjudication to the contrary, as above stated, and with the objection that by reason of such decision such evidence was incompetent and improper.

The material facts pertaining to this adjudication are as follows: In 1871 a contest arose, and was carried on in the United States land-office at Marysville, in the contested case of Willard Hodges and George B. Upham in regard to tract No. 12, township 12 N., range 3 E., to which John McNamara (one of the defendants in this case) and the state of California were parties. Tract 12 includes the land in suit in this case. Hodges and Upham claimed the whole of this tract 12. This contest involved the right to a portion of this tract 12 as between Hodges and Upham and John McNamara, and to a portion of the same tract as between Hodges and Upham and the state of California. There were other parties to the contest, but as their claims are not in any way involved in this action, they need not be further referred to. Citations were issued and served on all the parties. McNamara appeared by counsel and with his witnesses. The state of California did not appear, nor did any one appear for it. The register and receiver awarded the land in contest (in suit here) between the claimants Hodges and Upham and the state of California to the former. To John McNamara a portion of tract 12 was awarded, as against Hodges and Upham. This last-named portion awarded to McNamara is not included in the land sued for in this action. This decision, as between Hodges and Upham and the state of California, does not seem to have been carried by appeal to the commissioner of the general land-office at Washington. The decision of the register and receiver remains unchallenged by the state of California, or any one claiming under her. In a contest with another claimant as to lots 22 and 2 (involved herein) these lots were, on appeal, awarded by the secretary of the interior to Hodges and Upham. In awarding the lands in suit here to Hodges and Upham the register and receiver held that their right to purchase the lands was superior to that of the state. As the ruling was not appealed from, it would usually be regarded as concluding the state, and estopping her from any claim to the land in controversy.

But did the register and receiver hold that the land was not swamp and overflowed? On this point they say in their opinion: "Contestant, state of California, does not appear to contest the claim of Hodges and Upham, and no direct testimony was called out as to the alleged swamp and overflowed character of the land in dispute between these parties. The evidence, however, shows that all of said tract No. 12 has for many years been used for ordinary purposes of agriculture in growing grain and grass for hay and pasturage; and the fact of its adaptability for the cultivation of these staple agricultural products would seem to determine the question as to the character of the land as against the state. At any rate, these circumstances, coupled with the fact that prior to the act of July 23, 1866, and to the state's disposal of the land to purchasers in good faith, the claimants became purchasers in good faith of the grant title to the same, should, in our judgment, conclude the state in the premises." It is undoubtedly held in the opinion of the register and receiver that Hodges and Upham were entitled to the land involved in the contest with the state under the seventh section of the act of July 23, 1866. As far as regards the land in suit, the decision is binding on the state, in so far as the register and receiver have decided on the right of Hodges and Upham, (see Hosmer v. Wallace, 97 U. S. 580;) and also binding, in our judgment, on defendants, the McNamaras. In these contests before the officers of the land department as to the right to enter land the parties to whom it could be awarded on the contest are the proper and necessary parties. In the contest we are considering between Hodges and Upham and the state of California land could be awarded only to one of these parties. It would not and could not be awarded to a grantee of the state, as, in this case, to McNamara. The United States authorities in such contests only notice the rights of parties who have a right under the laws of the United States to enter and purchase the land. Any person claiming under the state must prosecute or defend their rights under the state as a party to the contest. McNamara, claiming under the state in this case, must have defended his right under the state as a claimant, and it was incumbent on him to do so. Therefore it follows that whatever was binding on the state, bound McNamara. If, as the result of the contest between Willard Hodges and the state, it had been adjudged that the land was not swamp and overflowed, that would have bound the state within the rule laid down in Johnson v. Towsley, 13 Wall. 72, approved and followed in Hosmer v. Wallace, 47 Cal. 471. See, also, Samson v. Smiley, 13 Wall. 91; Warren v. Van Brunt, 19 Wall. 653; Shepley v. Cowan, 91 U. S. 330; Moore v. Robbins, 96 U. S. 530; Hosmer v. Wallace, 97 U. S. 580; Marquez v. Frisbie, 101 U. S. 473. The determination of the facts in the same contest adjudging the right of Hodges and Upham as against the state to enter and purchase the land in suit is for the same reason binding on McNamara. The estoppel as to the state exists only as to the determination by the officers of matters of fact. Their determination, if free from fraud, and not the result of a fraudulent imposition upon them, is final and conclusive. It is still conclusive, though they may err in judgment as to the weight of testimony, or may decide directly against the evidence, subject to the limitation as to fraud and fraudulent imposition above stated. It may be remarked that this matter of fraud, or fraudulent imposition, could not be set up in an action at law, as this is. The patent on these grounds must be assailed by a proceeding in equity. Such is the law on this subject. See Johnson v. Towsley, supra, and Moore v. Robbins, supra. But if the officers of the land department award land to one person which has been granted to another, the courts of law can furnish a remedy. It is not within the power or jurisdiction of the land department to award that to one person which by an act of congress has been granted to another. The land department cannot grant land. It is incumbent on the land department, in executing the laws of congress in relation to the public lands, to award to a party claiming to enter and purchase land, such right as the laws of the United States have invested him with in regard to the land he claims; but if the laws have invested another with title by grant of the land to that other, a decision of the land department awarding it to another is a nullity. No title passes by such decision, though the officers of the land department have decided that he is entitled to it. To decide otherwise would be to hold that the land department can grant land contrary to an act of congress.

It is argued here on behalf of appellants that the officers of the land department have not decided as a matter of fact that the land in controversy was not swamp and overflowed. It seems to us that this contention, on a fair consideration and interpretation of the opinion of the register and receiver, is sound and maintainable, and that the decision of the register and receiver awards the land to Hodges and Upham on their claim, preferred under the seventh section of the act of July 23, 1866, and regardless of the fact whether the land in contest before them was swamp and overflowed or not. The language of their opinion on the point whether the land is swamp and overflowed or not is indefinite and ambiguous, and such that it cannot be said of it that it determines that the land is not swamp and overflowed. The opinion refers to the evidence, and says of it, "that it would seem to determine the question as to the character of the land as against the state." It does not say (as will be observed on a perusal of it) that the evidence shows the land to be dry land, and not swamp and overflowed, but that it would seem to do so. The opinion, in the next sentence, proceeds: "At any rate, these circumstances, coupled with the fact that prior to the act of July 23, 1866, and to the state's disposal of the land in good faith," etc., proceeding then to award the land to Hodges and Upham upon this claim under the seventh section of the act of congress just referred to. The judgment of the register and receiver is too indefinite in its terms to be regarded as a decision that the land here was not swamp and overflowed. Under these circumstances, it is argued that the defendants have a right to show that the land is swamp and overflowed; that as such it vested in the state by the act of 28th September, 1850, known as the "Swamp-Land Act;" and that, having so vested, it could not be divested and the title conferred on another, by the subsequent act of July 23, 1866.

Did the swamp-land act of 1850 grant the swamp and overflowed land within the exterior bounds of a grant, which were excluded on the final survey, to the state of California? This is a question of interpretation of the provisions of the act of 1850, considered in the light of and influenced by the nature of the grants made by the Mexican authorities in California. Was it the intention of the law-makers to grant to the state lands of the nature and character above mentioned? The question is one relating to the intent of the law-making power. We are of opinion that there was no such intent to grant by the act referred to. The reasons for this opinion we will proceed to give. It is the settled law of this state that the grantee of a Mexican grant is entitled to the possession of all the land within the exterior limits of the tract designated in the map or *diseno*, (which generally attended the application of a grant,) though the quantity intended to be allotted to him on the final survey is a much less quantity than that designated in the map or *diseno*, and this right continues until the final survey has been made and approved, and perhaps until the patent is issued; or, to express the rule more briefly, where the grant is of a smaller quantity (say three leagues) within a larger area, (say of ten leagues,) from which the three leagues are to be taken, that the grantee is entitled to the possession of the whole until the quantity (three leagues) to be allotted to him is set off by the final survey, and that he (the grantee) is entitled to recover possession of the whole ten leagues by action appropriate to that end, until the specific quantity granted him is set off.

The above is the rule declared in Ferris v. Coover, 10 Cal. 621, followed in numerous cases to the same effect. Cornwall v. Culver, 16 Cal. 429; Riley v. Heisch, 18 Cal. 198; Mahoney v. Van Winkle, 21 Cal. 552. The same rule has been approved and declared to be the law by the supreme court of the United States in Van Reynegan v. Bolton, 95 U. S. 35, 36. We insert here that portion of the opinion (by FIELD, Justice) which relates to this point, as a clear exposition of the rule and the reasons on which it rests: "In the case at bar, the surveyor general for California disregarded the boundaries established upon the juridical possession delivered to the grantee. He proceeded upon the conclusion that the confirmees were restricted by the decree to one square league, to be measured out of the tract within those boundaries, which exceeded that amount by about fifteen hundred acres. Whether the terms of the decree justified his conclusion is a question upon which it is unnecessary for us to express an opinion. That is a question which must, in the first instance, be determined by the land department in carrying the decree into execution by a survey and patent. It is sufficient for the present case that the survey made was contested by the confirmees, and the contest was undetermined when this action was tried. Until finally approved, the survey could not impair their right to the possession of the entire tract as delivered by the former government to the grantee under whom they claim. Until then it was inoperative for any purpose. Even if the limitation to one square league should ultimately be held correct, that square league might be located in a different portion of the tract by direction of the land department, to which the supervision and correction of surveys of private land claims are intrusted. The confirmees could not measure off the quantity for themselves, and thus legally segregate it from the balance of the tract. The right to make the segregation rested exclusively with the government, and could only be exercised by its officers. Until they acted and effected the segregation, the confirmees were interested in preserving the entire tract from waste and injury, and in improving it; for until then they could not know what part might be assigned to them. Until then no third person could interfere with their right to the possession of the whole. No third person could be permitted to determine, in advance of such segregation, that any particular locality would fall within the surplus, and thereby justify his intrusion upon it, and its detention from them. If one person could in this way appropriate a particular parcel to himself, all persons could do so; and thus the confirmees would soon be stripped of the land which was intended by the government as a donation to its grantee, whose interests they have acquired, for the benefit of parties who were never in its contemplation. If the law were otherwise than as stated, the confirmees would find their possessions limited, first in one direction, and then in another; each intruder asserting that the parcel occupied by him fell within the surplus, until in the end they would be excluded from the entire tract." This right of possession is property, and full protection of it was granted to the Mexican grantee by the treaty of Guadaloupe Hidalgo, and by the constitution and laws of the United States. Ferris v. Coover, 10 Cal. 620, 621.

That the tract of land involved in this case was within the limits of the grant to Sutter was conclusively determined against defendants in the proceeding in the land-office considered in a former part of this opinion, where the land in suit was awarded to Hodges and Upham, under the seventh section of the act of congress of July 23, 1866. When the swamp-land act of the 28th of September, 1850, was passed, Sutter had a right to possession of the land sued for, and it is not to be supposed that the congress of the United States would grant land to one when another person had to it a right of possession for an indefinite period, granted to him by its laws at the time the grant is said to have been made. It cannot be presumed that congress would have granted directly and unconditionally to a person a tract of land of which the United States did not have the absolute and uncontrolled title, so that its grantee might at once take possession. It could not be predicated of such a grant as the swamp-land act that congress intended to grant land to the state when at the time of the grant Sutter had title to possession of the land, and might become invested with the full legal title. He would have been so invested if, on the final survey of his grant, the land in suit had been included in such final survey. The principle here invoked and relied on was adopted by the United States supreme court in Railroad Co. v. U. S., 92 U. S. 733, where it was held that a grant of land to the state of Kansas to aid in the construction of a railroad, embraced only the land whereto the complete title was in the United States at the date of the act, and was applicable only to public lands owned absolutely by the United States. This was held in regard to a grant of land to the state of Kansas, where at the time the grant was made the land in question was included in a reservation made to the Osage tribe of Indians. We think the rule of construction laid down in the case just cited shows that it was not the intention of congress to grant to the state of California by the act of September 28, 1850, lands the right to the possession of which was then vested in a Mexican grantee, and guarantied to him by a treaty as well as by the constitution and laws of the United States. We see nothing in Newhall v. Sanger, 92 U. S. 761, or U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, in conflict with anything ruled herein. We cannot see that those cases have any correct application to the case under consideration. From the foregoing it follows that the judgment and order are without error, and must be affirmed.

There is some very significant evidence in the record in relation to the land in suit, upon which we will make some observations in its relation to the legislation of congress in regard to swamp and overflowed lands. The fourth section of the act of July 23, 1866, is in these words: "Sec. 4. And be it further enacted, that in all cases where township surveys have been or shall hereafter be made under the authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the general land-office to certify over to the state of California, as swamp and overflowed, all the lands represented as such upon such approved plats within one year from the passage of this act, or within one year from the return and approval of such township plats. The commissioner shall direct the United States surveyor general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said state; and, where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward them to the general land-office for approval: provided, that in segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land. In case such state surveys are found not to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the commissioner shall direct the surveyor general to make segregation surveys, upon application to said surveyor general by the governor of said state, within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the general land-office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain. If the authorities of said state shall claim as swamp and overflowed any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant, September twenty-eight, eighteen hundred and fifty, and the right to the same, shall be determined by testimony, to be taken before the surveyor general, who shall decide the same, subject to the approval of the commissioner of the general land-office." The record shows that the plaintiff offered in evidence the approved official township plat of township 12 N., range 3 E., M. D. M., filed in the United States land-office at Marysville, in this state, on August 2, 1869, and also the approved diagram of amendments to said plat from the office of the surveyor general of the United States for the state of California, dated 6th of September, 1869, filed in the United States land-office above mentioned, of the land district in which the land in controversy is situated, on September 9, 1869, showing the public lands and claims with specific boundaries within the rejected limits of the New Helvetia ranch. The above plat and diagram include the land involved herein, which is designated thereon as land claimed by purchasers of Mexican grantees, or their assignees, and which have been excluded from the final survey of the Sutter grant. It will be observed that the land involved in this suit was not represented on the approved plat, or the approved diagram of amendments to it as swamp and overflowed, and it therefore did not become the duty of the commissioner of the general land-office, under the fourth section of the act of 1866, above quoted, to certify such land over to the state. Nor does it appear in the record that any township plat has been constructed which represents such land to be swamp and overflowed. Under the provisions of the fourth section it will be seen that the governor of the state was vested with authority to have the swamp and overflowed lands segregated by survey on application to the surveyor general; and it was further provided in the same section that if the authorities of the state shall claim as swamp and overflowed any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant, (September 28, 1850,) and the right to the same, shall be determined by testimony, to be taken before the surveyor general, who shall decide the same, subject to the approval of the commissioner of the general land-office. In this case no steps have been taken by the governor or the state authorities to have the character of this land determined, to have it decided whether it was swamp and overflowed at the date of the grant. Nor does it appear that the defendants have ever taken any steps to have the governor or state authorities move in the matter. The patent under which the plaintiff makes title was issued on the 16th of December, 1882, on a claim commencing as far back as 1850. Defendants claim that their claim vested on a certificate of purchase issued on the 21st of July, 1856. The delay in this matter to have the character of the land determined as it could have been done under the section of the act of 1866 above quoted, though not conclusive, is strongly persuasive that the land was never of the character described by the swamp-land act of 1850 as swamp and overflowed. The court did not err in refusing to allow defendants to prove that the lands in suit belonged to the category of swamp and overflowed lands. We find no error in the record, and the judgment and order are affirmed.

We concur: WORKS, J.; SHARPSTEIN, J.; McFARLAND, J.

PATERSON, J., (*concurring.*) I concur in the judgment. The swamp-land grant of 1850 is one *in præsenti*, and passed the title to the lands as of its date, but it could not attach to any specific tract until it was determined by the proper officer that the land was swamp in character. Under the act of 1850 it was the duty of the secretary of the interior to make out accurate lists and plats, and transmit the same to the governor of the state, and at the request of the latter, cause patents to issue therefor. No provision was made for a review of his action in ascertaining and designating the character of the lands. Under the act of July 23, 1866, which was passed to quiet land titles in California, the duty of identifying swamp lands by survey and segregation was put upon the surveyor general, subject to the approval of the land commissioner. It was provided that a hearing might be had by the state before the surveyor general for the purpose of showing that the township plats were incorrect. Provision was also made for the adjustment of the claims of *bona fide* purchasers from Mexican grantees, where the land purchased had been excluded from the survey of the grant on its final confirmation. These contests were heard before the register and receiver of the local land-office, under certain rules formulated by the commissioner. On August 2, 1869, the land in controversy was returned and designated upon the official plat as public land, claimed by purchasers of Mexican grantees, or their assigns. It was not returned as swamp land, and was not designated on the official plat with the usual government sections and subdivisions, but in accordance with existing lines of subdivisions, so as to include "permanent improvements," as provided by section 7 of the act of July 23, 1866. This plat, which in effect showed that the land was not regarded by the surveyor general as swamp and overflowed land, remained on file in the local land-office from August, 1869, to June, 1888, without challenge by any one—the state or its grantees—as to the character of the land. Hodges and Upham filed, in the local land-office, in September, 1869, a preemption claim for the land under section 7 of the act of 1866, claiming to have purchased it for a valuable consideration from the Mexican grantees, and placed valuable improvements thereon in part only. On this statement citations were issued by the officers of the land-office to the defendant, who had filed on a portion of the tract described in the Hodges claim, and to the state, to show cause against the application of Hodges and Upham to purchase. The state did not appear, but the defendant herein appeared, and contested the application. An appeal was taken to the commissioner of the general land-office, and from his decision to the secretary of the interior, who finally determined that the applicants were entitled to a patent. I think the proceedings had on application of plaintiff's grantors, who purchased the land under the provisions of the seventh section of the act of July 23, 1866, and the decision rendered by the department, are a complete bar to any claim of the state, and to the claim of the defendants. It is true, the proceedings against McNamara involved other lands than those in controversy here, but they also involved the right of said grantors to purchase the lands in controversy as against all parties to that action. At the time those proceedings were pending, McNamara held a certificate of purchase, under which he now claims title to the lands in suit. Although that certificate was issued in 1860, and the hearing before the land-office was not had until March, 1871, yet I think McNamara's right was concluded therein. The application of Hodges and Upham was based upon the allegation that they were *bona fide* purchasers for a valuable consideration from Mexican grantees of land which had been excluded from the final survey of the grant; that they had made improvements, and occupied the land according to the lines of their original purchase, and that there was no valid adverse right except that of the United States. In accordance with the rules of the department the said McNamara and all other persons interested were duly cited to appear and contest their right to purchase the land under the act of July 23, 1866. The defendant did appear and contest the claimant's right to a portion of the land, but made no contest as to that portion which is in controversy here, and for which he at that time held a certificate of purchase. The state had parted with her title to the defendant, and was interested in the contest. It was the duty of McNamara, as grantee of the state, to defend whatever claim he had under his certificate. It seems to me that, in the absence of fraud, the decision of the land department was binding on all the parties and all the world. Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. Rep. 985; French v. Fyan, 93 U. S. 169. The defendants did not offer to show that the land was swamp and overflowed at the time the grant took effect, to-wit, September 28, 1850. The evidence offered was all addressed to the question as to its character at the time of the trial. The court did not err, therefore, in excluding the evidence.

CARROLL v. SEYMOUR. (No. 14,221.)

(*Supreme Court of California.* April 21, 1891.)

EVIDENCE—SUFFICIENCY.

Where the sole question is one of fact, and the evidence is sufficient to support the finding of the court, the judgment will be affirmed.

Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

E. B. Stanton and *Goodcell & Leonard,* for appellant. *Rolfe & Freeman,* for respondent.

PER CURIAM. There seems to have been but one material issue of fact made by the pleadings in this action, and that was as to the ownership of the land described in the complaint. On this issue the court found for the plaintiff. We think the evidence is sufficient to sustain this finding. We find no error in the record. Judgment and order affirmed.

(88 Cal. xxi)

CARROLL v. SEYMOUR. (No. 14,222.)

(*Supreme Court of California.* April 21, 1891.)

Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

E. B. Stanton and *Goodcell & Leonard,* for appellant. *Rolfe & Freeman,* for respondent

PER CURIAM. This case presents the same question as was involved in Carroll v. Seymour, ubi supra, (No. 14,221, just decided by this court,) and upon the authority of that case the judgment and order are affirmed.

(88 Cal. 599)

SCOTT v. SELLS *et al.* (No. 14,220.)

(*Supreme Court of California.* April 17, 1891.)

MORTGAGES—FORECLOSURE—DESCRIPTION OF PREMISES—JUDICIAL NOTICE.

Where the description in a mortgage annexed to and made part of the complaint, in a suit to foreclose, shows that the mortgaged premises were, at the time the suit was commenced, in a legal subdivision, which the court judicially knows to have been within the boundaries of the county in which the suit was brought, it cannot be objected that the complaint does not show that the premises were so situated.

Department 2. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Wells & Hendershot and *Chas. S. McKelvey,* for appellants. *Lee & Scott,* for respondent.

BEATTY, C. J. This is an appeal from a decree foreclosing a mortgage. The complaint is in all respects sufficient, and, as the answer raised no material issue, the court properly gave judgment for the plaintiff on the pleadings. It is objected that the complaint does not show that the mortgaged premises are in the county of Orange, where the action was commenced and the decree rendered. But the description in the mortgage, which is annexed to and made a part of the complaint, shows that the mortgaged premises are part of a legal subdivision which we know to have been within the boundaries of Orange county at the date of the commencement of the action, though at the date of the mortgage it was in Los Angeles county. Judgment affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

88 Cal. 413

GARNISS v. SUPERIOR COURT OF SAN FRANCISCO. (No. 14,160.)

(*Supreme Court of California*. March 21, 1891.)

JURISDICTION OF JUSTICE—ACTION AGAINST RECEIVER—ASSIGNMENT OF CLAIM.

1. An action against a receiver appointed to receive and hold the rents of land pending an appeal in ejectment, brought by one to whom the successful party assigns her right to such rents, is not an equitable action, but an action for money had and received, and a justice has jurisdiction thereof. The rents in his hands are no part of the judgment in ejectment.

2. The assignment is not made an assignment of part of a demand only, by the fact that the receiver holds the money subject to costs.

In bank. Application for bill of review. *Thornton & Merzbach*, for petitioner.

APPLICATION FOR WRIT OF REVIEW.

GAROUTTE, J. The facts set out in the petitioner's application are as follows: That one Horace W. Philbrook, upon the 15th day of April, 1890, commenced an action against the petitioner in the justice's court of the city and county of San Francisco upon a complaint stating, among other things: "That on the 24th day of January, 1889, in the superior court of the city and county of San Francisco, a civil action was commenced by Edward Harrison, administrator, et al., against Mary J. Lynch et al., for the purpose of recovering from said Mary J. Lynch a certain lot of land, and of barring the other defendants of all right, title, and interest therein. That on the 24th day of February, 1889, a judgment was rendered in said action against the said defendants. That on the 27th day of March, 1889, and prior to the commencement of the action of Philbrook v. Garniss, the superior court appointed James R. Garniss (defendant herein) receiver, to receive, hold, and preserve, during the pendency of an appeal from said judgment, the rents of said lot of land. That prior to January 1, 1890, said receiver, as such, received the sum of four hundred and eighty dollars as rent of the property. That on the 8th day of November, 1889, said superior court granted a new trial in said cause, and upon the 11th day of December, 1889, rendered judgment in said action in favor of Mary J. Lynch, declaring her to be the owner of said lot of land and the money in the hands of the receiver. That on the 28th day of February, 1890, said Mary J. Lynch assigned to this plaintiff (Philbrook) all moneys belonging to her in the hands of said receiver. That on the 7th day of March, 1890, the court settled the receiver's accounts, and allowed him as credits as such officer all of said $480, except the sum of $274.50, and directed him to pay said sum to Mary J. Lynch. That on the 10th day of March, 1890, plaintiff notified the receiver of the assignment, and demanded the payment to him of the $274.50, but he has refused to pay the same. Plaintiff prays for judgment," etc. Defendant answered this complaint with a general denial, and at the opening of the trial objected to the justice's court trying the action, upon the ground that it was an action in equity, and therefore the court had no jurisdiction. The objections were overruled, and upon trial the plaintiff obtained judgment as prayed for. The defendant appealed the case to the superior court, filed an amended answer, and at the commencement of the trial objected to the jurisdiction of the superior court to try the case, upon the ground that its jurisdiction in equity was original, and it had no appellate jurisdiction in such a case. The objections were overruled, and trial resulted in another judgment for plaintiff, as prayed for in the complaint. That on the trial of said case both the justice's court and the superior court exceeded their jurisdiction for the reasons above stated, and petitioner has no remedy, except by this application.

It appears that the petitioner occupies the somewhat novel position of having appealed his case to the superior court upon questions of law and fact; then objecting to said court trying the case upon the ground of want of jurisdiction; and, upon that objection being overruled, taking the chance of an adverse verdict; and having lost that chance, then proceeding, by review, to this court to test the jurisdiction of the superior court. It seems the much better practice for petitioner would have been to directly attack the jurisdiction of the justice's court in some appropriate manner, rather than appeal the case to the superior court upon its merits. Indeed, if petitioner's contention is true, that the superior court had no jurisdiction to try the case upon appeal, because the justice's court had no jurisdiction to try the case at all, then it is difficult to see how the petitioner could secure a standing in the superior court upon appeal for any purpose; for after a case has been tried in the justice's court upon its merits, and an appeal is taken to the appellate court upon the law and the facts, or upon the law, (when a new trial is granted,) the cause is heard *de novo* in the superior court. Owing to the views we entertain upon the other branch of the case, it is not necessary to consider the question as to whether the conduct of the petitioner in appealing this cause to the superior court, upon the law and facts, creates such an estoppel against him as that he cannot be heard to object to the jurisdiction of that court to try the cause.

Petitioner contends that the complaint in the case of Philbrook v. Garniss shows an equitable cause of action of which the justice's court had no jurisdiction. Respondent insists that the complaint shows a claim for money had and received by defendant to plaintiff's use. A receiver may be appointed in an action of ejectment, after judgment, during the pendency of the appeal; and, reading the application of the petitioner by the very dim light thrown upon the question by the meager facts stated as to the character of the action of Harrison v. Lynch, it appears to be a proceeding in ejectment. We then find the petitioner appointed receiver, after judgment for the plaintiff, and pending proceedings for appeal, for the express purpose of collecting and preserving the rents of the land. Thereafter, the motion for a new trial being granted by the lower court, and upon the succeeding trial judgment going for the defendant, the powers and duties of the receiver were clearly at an end. "Though a receiver may be, and generally is appointed upon the application of one of the parties interested in the property which he is to preserve, his holding is not merely for the benefit of such party, or of any other party. It is the holding of the court for the equal benefit of all persons who may be finally adjudged by the court to have rights in it. Where, however, the rights of the parties are established, he is considered as holding for the benefit of the parties entitled to the property." Beach, Rec. § 252. The contention of petitioner that these moneys in his hands were a part of the judgment in the case of Harrison v. Lynch et al. cannot be sustained. Indeed, the necessity of a specific decree by the court, declaring them the property of defendant Lynch, was not required, as she was necessarily entitled to them by reason of the judgment in her favor as to the possession of the realty. If plaintiff had finally recovered in the action, he could have had no judgment against defendant Lynch for these moneys, for she never had possession of them. They were in the custody of the court. The amount was certain, and had been preserved by the receiver *in specie*, for the only purpose that it might be delivered upon the order of the court to the party who should finally recover in the action. The order of the court decreeing that this money was the property of Mary J. Lynch was not a judgment for the rents and profits of the realty; it was no money judgment whatever; it was no judgment upon which an execution could have issued against anybody. It was not a judgment against the plaintiff, and it was not a judgment against the receiver, for he was not a party to the suit. This decree, then, establishing the *status* of the funds in the hands of the receiver, was not a part of the judgment within the pleadings or the proof in the case of Harrison v. Lynch. Neither was the assignment by Mary J. Lynch to Philbrook of the moneys in the hands of the receiver an assignment of a part of a demand. She assigned her entire demand, amounting to $480. The mere fact that this money was held by the receiver, subject to a lien upon it for his fees and costs of receivership, and was thus charged with such costs, which he was entitled to deduct from the amount upon the settlement of his account, in no way affects the question of Mary J. Lynch's assignment of the entire demand. Her act in the matter was as entire, full, and complete as it was possible to make it, and it effected the exact result contended for by petitioner, for it obliterated the entire demand. What the assignee failed to obtain of the demand, Garniss, the debtor, secured for himself. Why should he be allowed to complain that this assignment was for a part of the demand, when at this very moment the balance of the demand is in his pocket, and his own property by a decree of the court. The rule that a court of law will not recognize an assignment of part only of an entire demand or judgment is based upon the reason that the liability of the debtor extends in favor of one person, and the law will not impose upon him the burden of being subjected to several suits or executions by different persons for fractional parts of the demand or judgment. In the case at bar, for the reasons already stated, this principle has no application. It seems clear that the petitioner held this money as money had and received for the benefit of Mary J. Lynch, and that the action of Philbrook v. Garniss was in *assumpsit;* an action at law, and not in equity; and was within the jurisdiction of the justice's court, and the appellate jurisdiction of the superior court. Let the application be denied. So ordered.

We concur: HARRISON, J.; PATERSON, J.; DE HAVEN, J.; MCFARLAND, J.; SHARPSTEIN, J.

(88 Cal. 473)

KLOSE v. HILLENBRAND *et al.* (No. 13,927.)

(*Supreme Court of California.* March 28, 1891.)

DEEDS—CANCELLATION—FRAUD—EVIDENCE.

In a suit to set aside a deed as obtained by fraud it was shown that the grantor, an old man of weak mind, was falsely advised by his attending physician, the grantee's father-in-law, that he was about to die, and that, in order not to delay certain transactions in connection with the land, he had better convey his interest therein to the grantee; but the instrument was to contain a clause by which it should not go into effect, unless he died of that illness. The deed was drawn without any such clause, however, and the grantee got possession thereof without the consent of the grantor, had it placed on record, and thereafter claimed title under it. *Held*, that the evidence warranted a judgment setting aside the deed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Bishop & Watt, (*John H. Durst*, of counsel,) for appellants. *Haskell & Meyer* and *Otto Tum Suden*, for respondent.

FOOTE, C. The plaintiff, Klose, had judgment in this action that a certain deed of conveyance to a one-half interest in certain real property situate in San Francisco from him to one William Hillenbrand, of date the 25th of April, 1888, was procured by fraud and artifice; that it was null and void, and conveyed no interest of Klose to the property therein described; and that ever since that date the plaintiff had been, and is now, the owner of, and entitled to the possession of, an undivided one-half part or share of the lot of land described in the deed, with the improvements thereon. And further, that a conveyance from William Hillenbrand of the same property, by deed excuted on the 21st of January, 1889, to his wife, Anna Hillenbrand, was executed in fraud of the rights of the plaintiff, and is null and void. It was further ordered and adjudged that the plaintiff be let in to the quiet possession, occupation, and enjoyment of the undivided one-half part or share of the lot of land and premises described in the judgment, and that the plaintiff recover his costs. From that judgment, and an order denying a new trial, this appeal is taken.

It appears from the evidence on behalf of the plaintiff that he was at the time he signed and acknowledged the deed to William Hillenbrand a person advanced in years, and of great weakness of mind, although not amounting to disqualification; that he made the deed without adequate consideration and without independent advice; that he was induced to make that instrument by an imposition practiced upon him on the part of Dr. Schmitz, the father of Anna Hillenbrand, who was the plaintiff's attending physician, in this: that Klose was informed by the doctor that he was dangerously sick, and that it would be better, in order not to retard the building of a house on the lot conveyed, which was then being erected by William Hillenbrand and Klose jointly, that he, Klose, should execute a deed to Hillenbrand of Klose's interest in the property, but that this instrument should have included in it a clause that it was not to go into effect unless Klose should die from his then illness, and should not be delivered or go into effect until after his death from such illness. But without any authority from Klose, after Schmitz obtained the deed in this way, Hillenbrand got possession of it, and placed it upon record. After Klose found this out he was uneasy, and asked to look at it, so that he could have it examined by a friend, presumably to see if his wishes had been carried out as promised. He was put off, however, from time to time, by the promises of Hillenbrand to deal fairly with him, and in good faith carry out the original design as understood by Klose, viz., that if he got well from the illness for which the father of Mrs. Hillenbrand was treating him the deed should be destroyed. But so far from drawing the deed as he agreed to, or delivering it as he promised, the physician of Klose violated both his agreements, with the knowledge and connivance of Hillenbrand and wife. The deceived and confiding old man brought this action after he found that, so far from keeping the promises made to him, these parties, bent on preserving their unjust advantage, had fully consummated it, as they supposed, by Hillenbrand conveying the property to his wife.

It is first contended for the appellants that the evidence is insufficient to support the findings. We think that which was introduced by the plaintiff is ample for that purpose.

It is next contended that the complaint does not allege that the deed was to contain a clause that it was not to go into effect unless the plaintiff died from his then illness, but that the pleading only alleges that the clause was to be to the effect that the deed was not to go into effect until after the death of Klose, without reference to whether he died from his then illness or not. That, therefore, the evidence and findings are conflicting with the case made in the complaint. A careful examination of the pleading in question does not bear out this contention. It is manifest from the whole language employed, although the same is not couched in the clearest terms for that purpose, that the pleading as to that matter conforms to the findings and evidence. It is alleged in the complaint, and found to be a fact by the finding, "that said William Hillenbrand at once took possession of said deed from the hands of said Schmitz, [the doctor,] and caused the same to be recorded by said Schmitz in the office of the county recorder of the city and county of San Francisco, as though the same had been delivered to him by this plaintiff, when in truth and in fact the said deed has never been delivered to said Hillenbrand." The argument made in this connection by the appellants for a reversal of the judgment and order seems to be that this finding shows that the deed was delivered by Schmitz, and that he had the power confided to him to deliver it conditionally; that, although he used this power by violation of his promise to the plaintiff, yet it was a legal delivery, and hence the finding that there was no delivery conflicts with the fact which states that delivery was given by the possession taken by Hillenbrand from Schmitz. In other words, although Schmitz violated his promise not to deliver, yet this did not affect the delivery so far as Hillenbrand was concerned. We cannot conceive how such an act can accomplish the legal result claimed. Brison v. Brison, 75 Cal. 527, 17 Pac. Rep. 689; Civil Code, § 1572. The allegation of the pleading and the finding show no authorized delivery to Hillenbrand, but a possession and a recording of the deed fraudulently obtained and made. But if we were to concede the specific points made by the appellants involving the pleadings and findings as being well taken, the judgment and order should not be reversed, as the pleadings, findings, and evidence all show this much, at the very least, viz.: That Klose made a deed that he did not intend to make; that he was old, sick, and of impaired intellect; that the instrument was made without any adequate consideration, and without independent advice, but, to the contrary, by intended and deceptive advice; and that he would have moved to set it aside in reasonable time but for the promises made him by William Hillenbrand; and that, as soon as he unwillingly discovered that he had been deceived by those he had reason most to trust, he sought through the courts to obtain redress. Under this state of facts, as we understand the rule in such cases, laid down in Richards v. Donner, 72 Cal.

210, 211, 13 Pac. Rep. 584, it would seem that no predjucial error has been committed, and that the judgment and order should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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88 Cal. 462

MCKEEN v. NAUGHTON. (No. 13,630.)

(*Supreme Court of California.* March 27, 1891.)

APPEAL FROM THE JUSTICE OF THE PEACE—FAILURE TO FILE BOND—ESTOPPEL.

1. Under Code Civil Proc. Cal. §§ 974, 978, the undertaking on appeal from a justice of the peace must be filed within 30 days from the rendition of judgment in order to give jurisdiction, and, where it is not filed in time, the judgment, on appeal, of the municipal court of appeals of San Francisco, to which it was transferred from the county court, is void.

2. The fact that the appellant therein resisted a motion to dismiss will not estop him to set up the invalidity of the judgment in an action involving title to land acquired at a sale thereunder.

Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

James F. Smith and *Smith & Maurasky*, for appellant. *J. C. Bates*, (*Myrick & Deering*, of counsel,) for respondent.

DE HAVEN, J. Action to determine conflicting claims to certain real property. The appellant claims title to the land in controversy by virtue of a purchase thereof at a sale under an execution issued upon a judgment of the municipal court of appeals of San Francisco, in favor of one Harry Pateman against Robert McKeen and W. H. Norton, for the sum of $277.70, including costs. The action of Pateman v. McKeen and Norton was commenced in the court of a justice of the peace for the city and county of San Francisco, and judgment therein rendered on May 8, 1879, in favor of the plaintiff therein, and against the defendants in that action. On June 6, 1879, the defendants therein served and filed a notice of appeal from said judgment to the county court of said city and county, but no undertaking thereon was filed until June 9, 1879. The case was tried in the municipal court of appeals on September 24, 1879, and on that day said court rendered the judgment under which the appellant claims. No order was made by the county court transferring the case to the municipal court of appeals until after the latter court had given its judgment. But on November 11, 1879, such order of transfer was made, and which also directed that the same be filed *nunc pro tunc* as of June 14, 1879. It is claimed by respondent that this judgment was void for want of jurisdiction, and that, therefore, no title passed under the execution sale mentioned, and this is the principal question for decision here. It is unnecessary to determine whether it was competent for the legislature, under the constitution then in force, to transfer to the municipal court of appeals a portion of the jurisdiction conferred by that constitution upon the county court, as it is clear that the municipal court of appeals never acquired any jurisdiction of the case of Pateman v. McKeen and Norton for other reasons. There was no attempt to take an appeal to the municipal court of appeals, and the attempted appeal to the county court was ineffectual. It it be assumed that the undertaking given upon such attempted appeal was sufficient in amount, still the county court acquired no jurisdiction of the action, as the undertaking was not filed within 30 days after the rendition of the judgment in the justice's court. Code Civil Proc. §§ 974, 978; Coker v. Superior Court, 58 Cal. 177. In the case just cited this court said: "To effectuate an appeal from the judgment of a justice of the peace, three things are necessary, viz.: The filing of a notice of appeal with the justice, the service of a copy of the notice upon the adverse party, and the filing of a written undertaking; and all these things must be done within thirty days after the rendition of the judgment. Code Civil Proc. §§ 694, 978. All of these are jurisdictional prerequisites; none of them can be dispensed with, nor can any one of them be supplied, or, if fatally defective, be remedied, after the time limited in the statute; for, until all the prerequisites are completed, the appeal is not effectual for any purpose." This view of the law has been approved in the later cases of Hall v. Superior Court, 68 Cal. 25, 8 Pac. Rep. 509, and Dutertre v. Superior Court, 84 Cal. 536, 24 Pac. Rep. 284, and must be considered as the settled rule here. The act creating the municipal court of appeals did not attempt to confer upon it any other than appellate jurisdiction,—"the same power and jurisdiction in civil appeal cases as is possessed by the said county court." Act April 1, 1878, St. 1877-78, p. 947. And it would seem that, in order to call into exercise this appellate jurisdiction in a given case, there must have been an effectual appeal taken in such case, either directly to such court or to the county court; and if in the case of an attempted appeal to the county court the action should in any manner be transferred, either by force of the statute referred to, or by order of the county court, to the municipal court of appeals, that court would not thereby obtain any greater jurisdiction of the cause than was possessed by the county court. The appeal to the county court in the case of Pateman v. McKeen and Norton being ineffectual for any purpose, for the reasons hereinbefore stated, it necessarily follows that the judgment rendered on such appeal in the municipal court of appeals was without authority, and therefore void.

2. It appears that there was a motion made in the municipal court of appeals to dismiss the appeal in the case of Pateman v. McKeen and Norton, on the ground that no appeal had been taken as required by law. The motion was denied. The appellant insists that thereby the respondent here is estopped from asserting want of jurisdiction in that court to hear and give judgment in the case. If it be assumed that the respondent resisted that motion, still we do not think that such action would estop him to question in this action the jurisdiction of that court. The

matter of this alleged estoppel is not set out in the answer of the defendant, as it should be if relied upon as a defense. Clarke v. Huber, 25 Cal. 594; Davis v. Davis, 26 Cal. 39. But, passing over this defect in the answer, the fact that the appellants therein resisted the motion to dismiss the appeal in that action cannot work the estoppel claimed. Every fact in connection with the attempted taking of the appeal was within the knowledge of the respondent therein, and, being chargeable with a knowledge of the law, neither he nor the appellant here, who stands in his place, can be heard to say that he was deceived by any contention of the appellants in that action, as to the law governing appeals from justices' courts, and involved in the decision of that motion. "The representation, in order to work an estoppel, must generally be a statement of fact. It can rarely happen that the statement of a proposition of law will conclude the party making it from denying its correctness, except when it is understood to mean nothing but a simple statement of fact." Bigelow, Estop. p. 572. There is nothing in this case which takes it out of this general rule. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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88 Cal. 537

REMY v. OLDS *et al.* (No. 13,770.)

(*Supreme Court of California.* April 2, 1891.)

CONTRACTS—BREACH—JOINDER OF ACTIONS—PLEADING.

1. Under Code Civil Proc. Cal. § 427, subd. 1, there may be joined in a single action a claim for damages for defendant's breach of his obligations under a certain contract, and a *quantum meruit* for the performance by plaintiff of his obligations under the same contract.

2. Where the contract between plaintiff and defendant provides for the former's taking possession of land for three years, and the mutual performance of certain obligations during the whole term, and defendant, within less than a year, notifies plaintiff that he repudiates the contract, and turns him out of possession, plaintiff may sue at once for breach of contract without waiting for the time to perform the other undertakings.

3. Where plaintiff undertakes to irrigate the land thoroughly before April 1st, and defendant undertakes to construct an irrigating ditch, such ditch must be constructed before April 1st.

4. Though plaintiff undertakes to build a rabbit-tight fence to protect the vines he is to plant, performance is not due where defendant prevents his planting the vines.

5. After plaintiff has been turned out of possession he need not demand the deed for a portion of the land defendant contracted to make him before he brings an action for damages.

Commissioners' decision. In bank. Appeal from superior court, Merced county; C. H. MARKS, Judge.

Breckinridge & Peck and *Law & Law*, for appellant. *J. W. Knox*, *R. H. Ward*, and *Baldwin & Campbell*, for respondents.

FITZGERALD, C. This is an action for damages for breach of contract. Two alleged causes of action are separately stated in the amended complaint, in each of which the contract, which is in writing, is declared on *in hæc verba*, and contains in brief the following terms and conditions: On the part of plaintiff: (1) During the fall of 1888 to thoroughly plow, level, and put in good condition, to irrigate and plant in vines and trees, all of lots 49 and 50. (2) Before April 1, 1889, to thoroughly irrigate, cultivate, and plant one-fourth each of said lots in first-class Malaga raisin grape-vines, and the remaining three-fourths of each of said lots in first-class Muscat raisin grape-vines, and to plant around each of said lots, in the manner therein provided, such trees as the defendants should furnish for that purpose. (3) For three full years from date of contract, to irrigate, cultivate, prune, and in every way properly care for, and each year during said term replant at his own cost all of the vines and trees planted or set out by him on lots 49 and 50 which should die or fail to thrive during that time. (4) To protect for said full term of three years said vines and trees by a good rabbit-tight fence around each of said lots, with the right granted to plaintiff to remove said fence at the end of said term if he shall so desire. (5) To deliver to defendants at the end of said term of three years all of said lots 49 and 50, fully set out and planted in vines and trees as herein agreed, all of said trees and vines to be in good thrifty condition. (6) To immediately construct, whitewash, or paint a dwelling-house upon lots 71 and 72, and keep the same in good condition during the entire term. On the part of defendants: (1) To allow plaintiff to enter upon at once, and to use and possess, for three years from date of contract, for the purposes heretofore mentioned, all of lots 49 and 50. (2) To allow plaintiff to have the use and possession of all of lots 71 and 72 during the whole of said term for such purposes as he shall desire. (3) To furnish to plaintiff one-half of one full water-right from the Crocker-Huffman Canal & Irrigation Company, and to construct a canal or ditch from the nearest branch of said Crocker-Huffman Canal, along Hattley avenue, to and along one side of said lots 49 and 72. (4) On October 3, 1891, provided plaintiff shall have complied with all the terms and conditions on his part, to execute to plaintiff a conveyance of all of lots 71 and 72. Time is made the essence of the contract; and plaintiff and defendants bind themselves each one to the other for the faithful performance of all the covenants of the contract in the penal sum of $10,000 as liquidated damages to be paid by the failing party to the other. The complaint specifically alleges: (1) Performance or excuse of performance by plaintiff of each obligation resting upon him prior to the notice of repudiation by defendants. (2) Readiness and willingness to perform others. (3) Prevention of performance by defendants failing and refusing to dig the ditch and furnish the water. (4) That on June 10, 1889, while plaintiff was in possession of said land under said contract, and engaged in performing the covenants on his part to be performed, defendants notified plaintiff in writing that they, defendants, would not perform said contract on their part, and then and there prevented plaintiff from any further performance of the terms of said contract on his part; and that said notice has never been retracted. That plaintiff, within a reasonable time after receipt of said notice, removed and vacated, and defendants entered upon and took possession of said lands in said contract mentioned. There is also a general allegation of performance of all the conditions precedent on plaintiff's part to be performed, except in so far as he was prevented by the acts or omissions of defendants. Defendants demurred generally to the whole complaint and separately upon the same grounds to each cause of action therein stated, which demurrer was sustained by the court below, and, upon plaintiff refusing to further amend, final judgment was rendered in favor of defendants. The case comes here by appeal upon the judgment roll alone.

The first objection taken by the demurrer—that several causes of action have been improperly united—is disposed of by the statement that the separate causes of action stated in the amended complaint arose out of the express or implied terms and conditions of the same contract. In other words, the first cause of action stated is for damages for breach of the actual terms of the contract, with each item of damage separately and specifically alleged, and all summed up into one general allegation of damages. The statement of the second cause of action is on a *quantum meruit*, and particularizes each item of work and labor performed and materials furnished, and the reasonable value thereof. Several causes of action may be united in the same complaint, where they all arise out of contracts expressed or implied. Code Civil Proc. § 427, subd. 1. Under the second objection—that the complaint does not state facts sufficient to constitute a cause of action—several questions are raised, and such of them as are necessary for us to consider will be taken up and briefly disposed of in the order in which they are presented.

1. "The action is prematurely brought." The complaint shows upon its face that the action was brought subsequent to the written notice of the repudiation of the contract by defendants, when the plaintiff was not in default, and after he had removed from and vacated, and defendants had entered upon and taken possession of, the premises heretofore mentioned. This constituted such a breach as authorized the plaintiff to immediately sue without waiting for the time to arrive for the performance of the other conditions. Section 1440, Civil Code; Hale v. Trout, 35 Cal. 229; Bunge v. Koop, 48 N. Y. 225; Crist v. Armour, 34 Barb. 378.

2. Nor is there anything in the point contended for, that defendants had until October, 1891, within which to dig the ditch and furnish the water. This provision of the contract is susceptible, as we think, of but one construction, and that is that the ditch should be dug, and the water furnished, when the time for irrigation by plaintiff arrived, and this is fixed by the terms of the contract at a period prior to April 1, 1889. Chipman v. Emeric, 5 Cal. 49, is not in point.

3. Nor is the point well taken that there is no allegation of performance or excuse for non-performance of the covenant to protect the trees and vines by building around lots 49 and 50 a rabbit-tight fence. The contract plainly shows that the fence was intended solely for the protection of the vines and trees, and until there were vines and trees to protect there was no necessity for the fence. The complaint alleges that the vines died (the trees never having been furnished) for the want of the water which the defendants agreed, but failed, to furnish. Performance of this covenant was not due; therefore not necessary to be excused. But admitting that it was, the allegation, "was ready and willing to irrigate, prune, cultivate, and in every way care for said vines and trees, as promised in said agreement," is sufficiently broad to cover this obligation. Bunge v. Koop, 48 N. Y. 225; Crist v. Armour, 34 Barb. 378; Hale v. Trout, 35 Cal. 229.

The only other point which we propose to notice, that the suit cannot be maintained because there is no allegation of demand for a deed, is equally as untenable as the others. Such demand was unnecessary. Why should the plaintiff be required to do that which the defendants have expressly notified him in writing that they would not do? The law does not require the performance of a useless act, and, when it is made to appear by the defendants' own act that the demand would have been refused, then they cannot be heard to object that no demand was made. Parrott v. Byers, 40 Cal. 614; Wood v. McDonald, 66 Cal. 546, 6 Pac. Rep. 452. While we are of the opinion that the first cause of action, as stated in the amended complaint, is not entirely free from defects, some of which might have been reached by special demurrer, yet, on the whole, we are satisfied that it states facts sufficient to constitute a cause of action. In relation to the second cause of action, which is a statement on a *quantum meruit*, we have been unable to discover any defect whatever,—a position evidently concurred in by counsel for respondents, for they do not appear to have urged any very serious objection to it. If either cause of action state facts sufficient to constitute a cause of action, then the demurrer should have been overruled. We therefore advise that the judgment be reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

(88 Cal. 572)

SMITH *et al.* v. SMITH. (No. 13,887.)

(*Supreme Court of California.* April 2, 1891.)

VENUE—COUNTY OF DEFENDANT'S RESIDENCE.

Under Code Civil Proc. Cal. §§ 392, 395, providing that actions to recover real property, or for the determination of any right therein, may be brought in the county where the real estate is situated, but "in all other cases" the action must be brought in the county of defendant's residence, a suit to compel the reconveyance of both real and personal property, and for an accounting of the rents and profits by defendant, and a personal judgment against him for the amount found to be due, must be brought in the county of defendant's residence, and not where the land is situated.

In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge. *Law & Law* and *Jas. H. Budd*, for appellant. *J. C. Campbell* and *P. W. Bennett*, for respondents.

HARRISON, J. This action was commenced in Tuolumne county against the defendant, who was then a resident of the county of Merced. After the service of the summons upon the defendant, and at the time of his demurring to the complaint, he filed an affidavit of merits, and demanded in writing that the place of trial of the action be changed from Tuolumne county to Merced county, upon the ground that Merced was the proper county for the trial of the action, and supported his motion by an affidavit that at the time of the commencement of the action he was, and had been for many years prior thereto, a resident of the county of Merced. The motion was denied, and the defendant has appealed from the order denying the same. It is alleged in the complaint that in July, 1876, one D. G. Smith, under whom the plaintiffs claim, was the owner and in possession of certain real estate in Tuolumne county, and certain estate in Merced county, and certain personal property consisting of upwards of 26,000 sheep, together with horses, wagons, harnesses, and camp equipage, and was at the same time indebted to the defendant in the sum of $31,000, and to other persons in the further sum of $33,000; and that, "for the purpose of securing the payment of said indebtedness," it was agreed between said D. G. Smith and the defendant that said D. G. Smith "should deed by conveyance absolute on its face, but which in fact should be a mortgage, all his right, title, and interest in and to all of said real and personal property to the defendant, who was to carry on the business of said D. G. Smith, to-wit, that of sheep-raising, and pay from the proceeds of said business all the indebtedness of said D. G. Smith, and, when said indebtedness had been fully paid and discharged by the defendant, he was to reconvey all of said property, real and personal, and the increase thereof, to said D. G. Smith;" that "in furtherance of and in accordance with said agreement, and with the purpose and intent of complying with its terms and securing the payment of said indebtedness, said D. G. Smith executed and delivered to the defendant conveyances absolute on their face, but which were in fact mortgages, conveying all the aforesaid real and personal property to the defendant, and said property was then delivered to the defendant, and that the defendant has ever since been in possession thereof, and has had the use and received the proceeds and increase thereof, for the purpose of complying with the terms of said agreement." The complaint further alleges that "the defendant has received from said property, and from the proceeds and increase thereof, large sums of money which greatly exceed all that was necessary to carry on said business and pay the expenses thereof, and also to pay all the indebtedness of said D. G. Smith;" that the defendant ever since said conveyance to him "has had and now retains the sole and exclusive use, possession, and benefit of all of said property, and of all the proceeds and increase thereof." Upon this complaint the plaintiffs pray for a judgment against the defendant that it be decreed that the absolute conveyances aforesaid were and are mortgages, and that the indebtedness which they were given to secure has been fully paid, and the defendant convey said real and personal estate, together with the proceeds and increase thereof, to the plaintiffs, and that the defendant account to the plaintiffs for all of said real estate, and the rents, issues, and profits thereof, and all of said personal property, and the proceeds and increase thereof, and that plaintiffs have judgment against him for such sum as shall be found to be due upon such accounting, after satisfying such mortgage indebtedness.

It does not appear from the complaint whether the conveyance of the real estate was distinct from that of the personal property, or whether the conveyance of the real estate in Tuolumne county was by a separate instrument from that which conveyed the real estate in Merced county, the averment being that said D. G. Smith did execute to the defendant conveyances "conveying all the said real and personal property." Whether we construe this averment as an allegation that each conveyance included both real and personal property, or that one conveyance embraced only real estate, while the personal property was conveyed by another, is immaterial for the purpose of determining this appeal. Section 392, Code Civil Proc., provides that "actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this Code: (1) For the recovery of real property, of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property." Section 395, Id., provides that "in all other cases the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action."

The general spirit and policy of the statute is to give to the defendant the right of having all personal actions against him tried in the county of his residence. Provision is made for the trial of actions affecting real estate in the county where the land is situated, and for the trial of certain other designated actions in the county where the cause of action arose, but the general rule for the place of trial is prescribed in section 395 by the declaration that "in all other cases" the action must be tried in the county in which the defendant resides at the commencement of the action. This section is general and comprehensive in its terms, and embraces all other cases than those which are specified in the three preceding sections. It is intended to protect the defendant against the expense and inconvenience of being compelled to go to a distant county to defend himself against an action that might be commenced against him there, and is in accordance with the principles that obtain wherever the common law prevails, that the plaintiff, who would seek redress from a defendant, must seek it in the county where he resides. When, however, the subject-matter of the action is local, and the judgment which is sought is to operate directly upon that subject-matter, it is provided that the action shall be tried in the county where the subject-matter of the action is situated. This being an exception to the general rule, the conditions under which the exception is claimed must be clearly and distinctly shown. The plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides. It is only when real estate alone is the subject-matter of the action that the provisions of section 392 can be invoked against a defendant who resides in a county different from that in which the land is situated. If, in his complaint, the plaintiff join with such a cause of action another which is not embraced in its provisions, or if he also seeks a remedy against the defendant upon matters which are not embraced within the provisions of this section, his action becomes one of those "other cases" provided for in section 395, which the defendant is entitled to have tried in the county of his residence.

It is evident, upon the examination of the complaint herein, that the primary object of the action is to obtain from the defendant an accounting of his transactions in carrying on the business of sheep-raising under the agreement of July, 1876, with a personal judgment against him for the excess that upon such accounting may be found to have been received by him above the amount required to discharge the indebtedness of his grantor, and that he reconvey the property to the plaintiffs. The basis of the plaintiffs' cause of action against the defendant is contained in their allegation that "he has received from said property and from the proceeds and increase thereof large sums of money, which said sums greatly exceed all that was necessary to carry on the said business and pay the expenses thereof, and also to pay all the indebtedness of said D. G. Smith, covenanted to be paid in said agreement." The "proceeds and increase" of the personal property are treated in the complaint as distinct from the "rents, issues, and profits" of the real estate. It is under this allegation that the plaintiffs demand an accounting from the defendant, and ask that they may "have judgment against him for such sum as shall be found to be due upon such accounting." An action for an accounting is a proceeding in equity, and is essentially a personal action. The defendant has the right under section 395, Code Civil Proc., to have such action tried in the county of his residence. The plaintiff cannot deprive him of this right by uniting in his complaint with such action a demand for an accounting for certain rents, issues, and profits alleged to have been received by the defendant from certain real estate situated in another county, and that he be adjudged to reconvey said real estate. Unless the cause of action set forth in the complaint falls wholly within the provisions of section 392, or of one of the two next succeeding sections, the provisions of section 395 prevail. In Ashurst v. Gibson, 57 Ala. 584, this principle was discussed. The statutes of that state provided that the complainant might file his bill for the foreclosure of a mortgage of real property in the county in which the real estate, or a material portion thereof, was situated. In that case a bill to foreclose a mortgage of real and personal property was filed in a county other than that in which the defendants resided. The court say: "The locality of the real estate and of residence alike confer jurisdiction, and the complainant may, at his pleasure, elect the one or the other jurisdiction. The right of election is limited to suits the the subject-matter of which is real estate, and does not embrace other suits having a different subject-matter. * * * Land must be the subject-matter, and the exclusive subject-matter, of suit, or the jurisdiction conferred by the act does not attach. Remedies must be pursued in the district of the residence of a material defendant, if land and personal property are the subject-matter of suit. Jurisdiction of the one cannot draw to the court jurisdiction of the other. A mortgage may embrace a very inconsiderable quantity of land of insignificant value, and personal property of very large value. It could not properly be said a suit for foreclosure or for redemption had for its subject-matter land. Its subject-matter is land and personal property, and in such a case it would contravene the spirit and policy of our legislation to subject parties to suit in the county in which the land is situated without the county of their residence." This case was cited with approval in the case of Le Breton v. Superior Court, 66 Cal. 27, 4 Pac. Rep. 777, where it was held that an action against a trustee for an accounting on both real and personal property was properly brought in the county where the defendant resided. It was held in Baker v. Insurance Co., 73 Cal. 182, 14 Pac. Rep. 686, that an action for the purpose of procuring a reconveyance of land that had been conveyed by absolute deed as security for a debt, upon the averment that the debt had been paid, should be tried in the county where the land was situated. In that case the only issue presented was as to the right of a reconveyance after the payment of the debt, the court saying: "The land is the subject-matter concerning which the contest is waged, and it is situate in San Joaquin county." We do not intend to question the correctness of that decision, but we are not inclined to extend its doctrine so as to include an action for an accounting and a personal judgment thereon, brought against a defendant in a county other than that of his residence, simply because a portion of the property for which he has to account is land situate in that county. The order of the superior court denying the motion is therefore reversed, and it is directed to make an order changing the place of trial from Tuolumne county to Merced county.

We concur: PATERSON, J.; SHARPSTEIN, J.; DE HAVEN, J.; MCFARLAND, J.; GAROUTTE, J.

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88 Cal. 514

FALK v. REIS, Treasurer. (No. 14,008.)

(*Supreme Court of California.* March 13, 1891.)

ELECTIONS—REGISTRATION—APPOINTMENT OF OFFICERS.

1. Act Cal. March 18, 1878, (St. 1877-78, p. 299,) requires (section 6) the board of election commissioners of the city and county of San Francisco to pass on cases of alleged illegal registration on the precinct registers, brought before it by the register of voters, and (section 29) on the action of the registrar in cancelling names upon, or adding names to, the register, and is authorized to "appoint clerks or other assistants to the registrar," to enable him to ascertain the correctness of the registers. Section 12 authorizes the board to select all election officers "provided for by law." *Held*, that the board cannot appoint persons to advise or assist the board, in the selection and appointment of officers of election, or, independently of the registrar, to scrutinize the roll and detect fraud in registration.

2. Nor is such authority given the board by section 33, providing that all provisions for carrying out the registration and election laws shall be made by the board.

In bank. Application for *mandamus*.

Oliver P. Evans, for plaintiff. *George Flournoy*, for respondent.

DE HAVEN, J. Application for a writ of mandate, commanding the defendant, as treasurer of the city and county of San Francisco, to pay to plaintiff certain audited demands held by him against said city and county. It appears from the petition that on September 6, 1886, the board of election commissioners for said city and county resolved "that an agent be, and he is hereby, employed and commissioned by the board of election commissioners of the city and county of San Francisco, with such clerical assistance as may be necessary, not to exceed fifteen clerks to be appointed by this board, to take all necessary, active, and efficient measures to scrutinize the rolls and to prevent frauds in the present registration for the coming general election, and for the purpose of enabling this board to discharge its duties in connection with the appointment of precinct boards of registration satisfactorily. Said agent shall detail a sufficient number of clerks to assist the commission in the discharge of its duty in selecting said precinct boards, and that in this behalf the registrar is requested to furnish him and his assistants such information and facilities as will enable them properly to discharge their duties." On September 15, 1886, the said board by resolution employed the plaintiff, his assignor, Smith, and 14 others, "for the purpose of scrutinizing the roll and detecting fraud in the present registration, and also to assist and advise the present board of election commissioners in the selection and appointment of precinct boards of registration and officers in the general election." The defendant has demurred to the petition, and in passing upon this it is necessary to determine whether the board of election commissioners of the city and county of San Francisco were authorized by the act of March 18, 1878, (St. 1877-78, p. 299,) to appoint or employ petitioner and his assignor, Smith, to discharge the duties named in the resolutions already referred to. It is sufficient for the question in hand to say that by section 6 of this act the said board is required to pass upon such cases of alleged illegal registration upon precinct registers as may be brought before it by the registrar of voters, and by section 29 the said board must pass upon the action of the registrar in either cancelling names upon or adding other names to the precinct registers received by him from the board of precinct registration. And under this section it may also appoint clerks or other assistants to the registrar, to enable him to ascertain the correctness of such precinct registers. Schmitt v. Dunn, 55 Cal. 651. The said board is also empowered by section 12 of the act under consideration to "select all election officers provided for by law for said city and county, * * * and if the list furnished them by the registrar does not contain a sufficiency of names of respectable and fit persons for election officers, they must take measures to secure the names of proper persons." The resolutions under which the petitioner and his assignor were appointed show that such appointments were not made to assist the registrar in the discharge of any of the duties imposed upon that officer by section 29, already referred to, nor is it claimed in the petition that any such assistance was in fact rendered by either of them; therefore their appointment cannot be considered as specially authorized by that section.

Section 33, which provides that "all provisions for carrying out the registration and election laws in said city and county of San Francisco shall be made by the board of election commissioners, and demands on the treasury authorized or allowed by them for such purposes shall have the same force and effect as if authorized and allowed by the board of supervisors," does not, so far as concerns the question with which we are now dealing, add anything to the powers given said commissioners by the preceding sections to which we have referred. From this general reference to the powers conferred upon the board of election commissioners, by the act of March 18, 1878, we think it very clear that no express authority is conferred by that act on said board to appoint an agent for the purpose named in the resolution first quoted, or to appoint any person or persons to advise or assist said board in the selection and appointment of any officers of election, or, independently of the registrar, to scrutinize the rolls and detect fraud in the registration. And we think it equally clear that no such authority is given to said board by implication, as being incident to or appropriate, to be exercised in connection with any of the express powers conferred upon such board. Undoubtedly the purpose of the statute under consideration is, as stated by the attorney for petitioner and expressed in its title, "to regulate the registration of voters and to secure the purity of elections in the city and county of San Francisco;" but, for the purpose of effecting this, the act itself makes minute provisions for the appointment of all officers contemplated by it as necessary for its enforcement, and for the employment of all clerks and other assistants to the officers named in it, and assigns to each officer his appropriate duties. By this assignment the registrar of voters has devolved upon him the duty to "constantly inform himself, by examination and inquiry, as to the condition of the precinct registers, and the legality of the names therein, or demanding to be placed thereon, and shall see that none but legal voters are registered," and, to enable him to discharge this duty he is allowed a clerk "and such other clerical assistance as shall be found necessary, * * * to be allowed and authorized by the board of election commissioners of said city and county." Section 3, Act March 18, 1878. But these clerks are to be appointed by the registrar, and not by the board of election commissioners. Schmitt v. Dunn, supra. If, in the performance of his duty of making constant examination and inquiry into the proceedings touching registration, the registrar shall "have reason to believe" that in any particular case a person has been improperly registered, he is required to cite such person before the board of election commissioners, and it then becomes the duty of such board to pass upon the case thus presented, and substantially the same duty is devolved upon the board in approving or disapproving the act of the registrar in cancelling names upon or making additions to the precinct registers returned to him. It would seem that the law, in assigning the duties mentioned to the registrar, does not contemplate that the board of election commissioners should also be charged with the same duty of making a general and vigilant inquiry in relation to the matter of registration. Nor is it at all necessary that the board should have the authority to appoint persons to discharge the very duty which is plainly enjoined upon the registrar, in order that such board may obtain information to enable it to properly dispose of cases brought before it by the registrar for decision. The law evidently intends that, in a case thus brought to its attention, the board shall act upon such appropriate evidence as may upon the hearing be submitted to it by the registrar and the other party to the proceeding. It is also clear to us that the board had no implied authority to appoint the assignor of petitioner and the other persons named in the resolution of September 15, 1886, to assist the board in the selection and appointment of precinct boards of registration and other officers for the general election. The duty of appointing such election officers is, by the act under consideration, devolved upon the board of election commissioners, and the board was not authorized, as an incident to this, to employ any person to advise it in relation to the proper performance of this duty. What measures the board would be authorized to take to secure the names of proper persons to serve in such positions, if the registrar should neglect to furnish the list of names of persons possessing the necessary qualifications, as provided by section 11 of the act here construed, we need not consider, as it is not alleged that any such failure necessitated the action of the board now under review. In Falk v. Strother, 84 Cal. 545, 22 Pac. Rep. 676, and 24 Pac. Rep. 110, nothing was decided contrary to the conclusions announced here, the court, in that case expressly saying: "Whether or not the payment of the demand could be prevented or enforced at any other stage of its history is a question which does not arise here." Demurrer to the petition sustained, and judgment for the defendant, denying the application for the writ of mandate asked for in petition.

We concur. Beatty, C. J.; Sharpstein, J.; Harrison, J.; Garoutte, J.; McFarland, J.

88 Cal. 434

Hall *et al.* v. Wallace. (No. 13,034.)

(*Supreme Court of California.* March 25, 1891.)

Statute of Frauds — Parol Sale of Lands by Agent without Written Authority—Tenancy at Will.

1. A verbal contract by an agent for the sale of lands whenever the owner shall perfect his title thereto is invalid under the statute of frauds. Civil Code Cal. § 1624.

2. A contract for the sale of lands, made by an agent having no authority in writing, is invalid under the statute of frauds. Id. § 1624, subd. 5.

3. The entry on land under a verbal contract to purchase makes the person in possession a tenant at will.

Department 2. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Philip Teare, for appellant. *Wm. & Geo. Leviston*, for respondents.

Sharpstein, J. This is an appeal from a judgment and order denying defendant's motion for a new trial in an action of unlawful detainer. The plaintiffs allege that on or about the 1st day of May, 1886, they, by a verbal agreement and lease, leased and demised to the defendant certain premises now in his possession, to have and to hold at the will of the plaintiffs. That plaintiffs on the 7th day of January, 1888, terminated said lease by giving defendant a notice in writing to remove from the said premises within a period of one month from the said date; and on the 28th day of March, 1888, three days' notice in writing was given by plaintiffs to defendant, requiring and demanding of him possession of said premises, but defendant neglected and refused for the space of three days after said demand was served on him, and ever since has neglected and refused, to surrender possession of said premises; wherefore plaintiffs pray restitution thereof, etc. Each and every material allegation of the complaint is specifically denied by the defendant. And defendant, further answering, alleges that he entered into possession of said premises, and made valuable improvements thereon, under a verbal agreement with one Watson, an agent of plaintiff Carpentier, to purchase the same whenever said Carpentier had perfected his title thereto. Defendant further alleges that he has always been ready and willing, and is now ready and willing, to pay for said land the price which he agreed to pay therefor. Upon these issues the parties went to trial before a jury, which returned a verdict for the plaintiff for the restitution of the premises without damages, upon which a judgment was entered that the plaintiffs recover from the defendant the restitution of the possession of said premises. The contention of appellant is that he "did not occupy the premises as a tenant at will or for a term, but on a definite verbal agreement to purchase the land improved by him." A verbal contract for the sale of real property, or for an interest therein, is invalid; and, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent be in writing, subscribed by the party sought to be charged. Civil Code, § 1624, subd. 5. Here there was no written agreement to sell by the owner of the property, or authority in writing to an agent to sell. The alleged agreement is doubly invalid,—(1) it was not in writing, (2) it was not made by an agent having authority in writing to make it. We think the entry and holding of the defendant under a void agreement constituted him a tenant at will. That being so, the record presents no error committed by the court which could affect the substantial rights of the parties. Judgment and order affirmed.

We concur: DE HAVEN, J.; MCFARLAND, J.

(88 Cal. 468)

In re NOAH'S ESTATE. (No. 12,999.)

(*Supreme Court of California.* March 27, 1891.)

EXECUTORS—DISCHARGE—WIDOW'S ALLOWANCE.

Where a wife, because of separation from her husband, and not of the value of his estate, has been adjudged not entitled to an allowance for her support, she cannot sue to set aside a decree of final distribution discharging the executors, on the ground that property belonging to the estate was fraudulently excluded from the inventory and appraisement, since she is not affected by the decree.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

H. E. Highton, for appellant. *Pillsbury & Blanding*, for respondent.

BELCHER, C. Most of the questions involved in this case were considered and passed upon in the case of the same title, reported in 73 Cal. 583, 15 Pac. Rep. 287. It is now further shown that one of the executors of Joel Noah's will, William H. Morris, died on the 1st of October, 1887; that the two surviving executors proceeded to settle up the estate; that on the 29th of November, 1887, they presented and filed their final account, with a petition praying that the account be settled and the estate in their hands be distributed; that upon the 12th of December following, after due and regular notice, the matter came on to be heard, and, no objections being made thereto, a decree in due form was made and entered, settling and allowing the accounts of the executors, and distributing all of the estate remaining in their hands; and that afterwards, on the 14th of May, 1888, a decree in proper form was made and entered, discharging the executors from all liability to be incurred thereafter by them. The appellant, as widow of Joel Noah, deceased, commenced this proceeding by filing in the superior court, on the 12th of June, 1888, her petition praying that the decrees, settling the final account of the executors and distributing the estate, be vacated and set aside, and that she as such widow be allowed out of the estate of deceased, for her support and maintenance, the sum of $100 per month, to take effect from his death, on the 28th of August, 1883. The petition sets out all the proceedings in the former case, and then, to show that the petitioner is now entitled to the relief prayed for, proceeds to state "that the inventory and appraisement of the property of said deceased, returned and filed herein on the 13th day of November, 1883, by the executors of said estate as aforesaid, was false and untrue, in this: That said inventory and appraisement did not include and set forth the following described property belonging to said deceased, to-wit, cash in the hands of the said William M. Morris, one of the executors, to the amount of $8,550; United States bonds in the hands of said William M. Morris, belonging to said deceased, to the amount of $10,000; cash on deposit in the London & San Francisco Bank, Limited, belonging to said deceased, to the amount of $20,000, which was drawn out of said bank by said Morris, after the death of said deceased, on a power of attorney, which was rendered void by the death of said deceased;" "that, when the said inventory and appraisement was returned to and filed in this court, the said William M. Morris, one of said executors, knew that the money and property described in the last preceding paragraph belonged to said deceased, and knew that the same should have been described, set forth, and included in said inventory, but the said William M. Morris, knowingly, deceitfully, and fraudulently, and for the purpose of deceiving and defrauding your petitioner and the court, did not disclose his possession thereof, and omitted to include the sums, or any part thereof, in said inventory in order to impose upon the court, and in order that the action and decision of this court might be influenced and prejudiced against your petitioner, and in order that the court might be made to believe that the estate of said deceased was smaller than it really was; and the said William M. Morris then and there, and thereafter, connived and conspired with the devisees under the will of said deceased to deceive and impose upon this court, by agreeing upon a secret and clandestine distribution of said money and property in the hands and under the control of the said Morris, as aforesaid, and the same was, in pursuance of said fraudulent, collusive, and clandestine agreement, thereafter distributed by said Morris to said devisees, without the knowledge or consent of this court." The petition also states that the petitioner did not learn of these facts until on or about the 5th day of May, 1886, and, that, notwithstanding she exercised all the diligence in her power in searching for and collecting testimony to establish them, she did not succeed, and could not have succeeded in doing so, until immediately before the 12th of December, 1887, and that it was impossible for her to cause to be prepared and filed a new petition, asking for an allowance, before the decree of distribution was made and entered. The executors demurred to the petition on the ground that it did not state facts sufficient to entitle the petitioner to the relief prayed for, or to any relief; and when the petition came on to be heard the executors, by their counsel, moved the court for a dismissal thereof, upon the ground that a decree of distribution had been duly given, made, and filed; that the executors had been discharged from all their liabilities as such executors; that the court had no jurisdiction to hear the petition; and also because the whole matter was *res adjudicata*. The court granted the motion and entered an order dismissing the petition. From that order this appeal is prosecuted. In Willis v. Farley, 24 Cal. 491, it appeared that an action was commenced to foreclose a mortgage against the property of an estate, and process was served on one Shirley as administrator, after the estate had been distributed and the administrator discharged. It was said: "When that action was commenced and the decree was entered there was no such administrator, and hence the whole proceeding was of no binding validity,—it was to all intents and purposes a nullity; for, by the discharge of the administrators, they were as completely separated from the business of the estate as if they had been dead; and J. M. Shirley had no right to appear in or be a party to any suit as the representative of the estate which had passed from his hands, and respecting which his authority had long before then wholly ceased."

It is claimed for appellant that that case is unlike this, and not in point, because here there was a direct application to have the discharge set aside on the ground that part of the estate had been concealed and kept back. But, under the circumstances shown, we fail to see how this fact can in any way aid the appellant. On the former appeal it was held that, under the statute, only those who were the immediate family of the deceased, and were by law entitled up to his death to look to him for support and protection, could claim any allowance for support out of the estate. And the court, after reviewing the authorities, said, (73 Cal. 589, 15 Pac. Rep. 290:) "It is enough to say that—since the appellant voluntarily made an agreement with her husband for separation, such as our law authorizes, received and enjoyed the benefits of the money paid for her support during the separation, and voluntarily continued to live apart from him without any attempt to set aside the agreement, or assume again the matrimonial connection, or even to demand further means for her separate support—the court below was justified in holding that the petitioner did not constitute the immediate family of the deceased, to whom was to be continued, during the settlement of the estate, the 'reasonable support' which the husband in ordinary cases is presumed to furnish his wife." As is readily seen, the decision did not depend upon the amount or value of the estate, but rested solely upon the fact that the petitioner, under the statute, was not entitled to the relief demanded. Now conceding, as claimed, that it was the duty of the court below, when informed under oath, even by a stranger, that a large part of the estate had been concealed and withheld from administration, to arrest all proceedings, until the truth or falsity of the assertion should be ascertained, and, if found to be true, to vacate its order of distribution and discharge, still appellant's rights were in no way affected by the action of the court, and she was not thereby "aggrieved." It results, we think, that the appellant's petition was properly dismissed, and we advise that the order be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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88 Cal. 483

PEOPLE v. O'BRIEN. (No. 20,767.)

(*Supreme Court of California.* March 30, 1891.)

ROBBERY — JURY — TRIAL—RECORD ON APPEAL—INSTRUCTIONS.

1. Pen. Code Cal. § 1207, makes the judgment roll which will constitute the record of an action consist of the indictment or information, and a copy of the minutes of the plea or demurrer, "a copy of the minutes of the trial," instructions, and a copy of the judgment. *Held*, that the return of the sheriff on the *venire* is not part of the record.

2. The fact that the sheriff's return on the *venire* shows two names of jurors summoned as "Garwin" and "Zena," and that two jurors who were sworn and served were "Ganivan" and "Zina," is no ground for reversing a judgment, where it is in no other way made to appear that all the jurors who sat at the trial were not summoned.

3. Failure of the court to inform defendant, as provided by Pen. Code Cal. § 1066, that if he desires to challenge any particular juror he must do so before the juror is sworn, is not ground for reversing the judgment, if it appears that defendant and his counsel were fully aware of his rights. Following People v. Mortier, 58 Cal. 262.

4. Defendant's affidavit that his trial was continued in his absence, and that he was not present at the trial of his co-defendant, shows no ground for reversal of judgment, under Pen. Code Cal. § 1181, providing that defendant is entitled to a new trial, "when the trial has been had in his absence, if the indictment is for a felony."

5. On indictment for robbery, a charge to find defendant "guilty or not guilty" is not erroneous, as withdrawing from the jury the right to determine defendant guilty of petit larceny only, if the evidence shows that, if guilty at all, he is guilty of robbery.

Department 2. Appeal from superior court, city and county of San Francisco, F. W. VAN REYNEGOM, Judge.

Carroll Cook, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

SHARPSTEIN, J. The point presented by the brief of appellant's counsel is "that the defendant was tried by at least one, if not two, jurors who were never summoned as jurors in the case." The two jurors who are alleged to have sat upon the jury without being summoned were G. H. Ganivan and Theodore Zina. Among the names of those duly summoned, the two which most nearly resemble the two above mentioned were "G. H. Garwin" and "Theodore Zena." How a person whose name was not upon the list of those summoned by the sheriff could be called, accepted, sworn, and permitted to sit as a juror in the trial of a case is not explained. Nor is it shown that the person who sat as a juror was not the person summoned, or that the apparent difference in the names was not caused by a clerical or typographical error. We think the return of the sheriff upon the *venire* constitutes no part of the record, and if not it is not properly before us. The judgment roll, which will constitute a record of the action, consists of "(1) the indictment or information, and a copy of the minutes of the plea or demurrer; (2) a copy of the minutes of the trial; (3) the charges given or refused, and the indorsements thereon; and (4) a copy of the judgment." Pen. Code, § 1207.

No one will contend, we think, that the return of the sheriff upon a *venire* could be included in either of these enumerations, unless it be within the second, as a part of "the minutes of the trial." And, as the minutes of the trial are a memorandum of what takes place in court, they would not properly include the acts of the sheriff in the service of process. What he did would appear in his return upon the process, which would constitute no part of the minutes of the court. There is no definition of the minutes of a court that would include a sheriff's return upon the process placed in his hands for service. But, if it did constitute a part of the record, we are not prepared to hold that it would constitute a sufficient ground for reversing the judgment. It is not a ground for granting a new trial or arresting a judgment. People v. Fair, 43 Cal. 137. Here a mere dissimilarity of names is alone relied on. In no other way is it made to appear that all the jurors who sat at the trial were not actually summoned. The point raised here may rest wholly upon a clerical or typographical error, which could not have affected or prejudiced in any manner the rights of appellant. Upon such a showing we could not, according to established principles, reverse the judgment.

The point presented by appellant's brief is that "it appears by the record that at the time the judgment was pronounced the defendant was not informed by the court of the nature of the charge against him, or of his plea, or of the verdict of the jury." The recitals in the judgment show that the defendant was informed of all these things, and it nowhere appears in the record that he was not. This point appears to be based upon a misconception of the record. The Code provides that, "before a juror is called, the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror he must do so when the juror appears, and before he is sworn." Pen. Code, § 1066. In the bill of exceptions we find the following: "The court, without instructing the defendant as to his right to challenge the jurors, proceeded to and did impanel a jury, said defendant, O'Brien, not offering to challenge and not challenging any of said jurors." It appears by the minutes of the court, which constitute a part of the record, that 12 persons, whose names are given, were drawn, sworn, and examined, and that six of them, whose names are given, were "peremptorily challenged by defendant," and three of them, whose names are given, by the people. This seems to conflict with the statement, in the bill of exceptions, that the defendant did not challenge any of said jurors. We shall accept the statement in the minutes as true, and dispose of the point as a similar one was disposed of in People v. Mortier, 58 Cal. 262, in which the court said: "The next point in the case is that the failure of the court to instruct the prisoner upon his rights as to challenging jurors was error. It is true that section 1066 of the Penal Code does provide that 'before a juror is called the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror he must do so when the juror appears and before he is sworn.' The object of this provision of the law is to protect the rights of the defendant in the matter of challenging jurors. He should be informed of the fact that, if he desires to challenge any particular juror, he must exercise that right before the juror is sworn; but it appears from the record in this case that the defendant's rights in this respect were fully understood by him and his counsel, and the privilege of challenging jurors was exercised to a large extent in the case. It is true that the court omitted a duty imposed by law, but it clearly appears that the defendant was not in any manner prejudiced by the error complained of, and, such being the case, the omission of the court in the matter referred to constitutes no sufficient ground for reversing the judgment. 'After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.'" Pen. Code, § 1258.

One of the specified grounds of the motion for a new trial is the following: "That defendant was not present at every stage of the proceedings in said action." A defendant against whom a verdict has been rendered is entitled to a new trial "when the trial has been had in his absence, if the indictment is for felony." Id. § 1181. The defendant does not state in his affidavit that his trial was had in his absence, but states that he was not present at the trial of his co-defendant, Sullivan, and that his (O'Brien's) trial was continued when he was not present in court. The affidavit fails to show that the trial (his own trial) was had in his absence, and therefore fails to show any ground for a new trial, as the Code clearly excludes all other grounds than those enumerated in said section. People v. Fair, 43 Cal. 137.

The court in its charge defined "robbery" as it is defined in the Penal Code, and then explained the fear, by means of which, if property is taken through its influence, will constitute the taking robbery. The contention of appellant's counsel is that there is no evidence of the existence of any such fear at the time of the alleged taking of the property in this case, and therefore that the verdict is contrary to the charge of the court and against law. We think there is some evidence tending to show that the taking of the property in this case was accomplished by means of both force and fear. As we view it, there is nothing in the definition of robbery as given by the court in its charge that was calculated to confuse the jury, and we think it is easy to determine from the charge the correct definition of the crime with which the defendant was charged. There is no misdirection in the charge, and we think the court charged the jury upon all matters of law necessary for their information.

The court in its charge instructed the jury that their verdict would be "guilty or not guilty." Appellant's counsel insists that it was error to so instruct the jury, because, he says: "The crimes of grand and petit larceny are both included in the offense charged against the defendant, and it was the province of the jury to determine from the evidence whether the elements which would constitute it the crime of robbery existed or not." The evidence all tended to prove that the defendant, if guilty of any crime, was guilty of robbery. People v. Madden, 76 Cal. 521, 18 Pac. Rep. 402. We are satisfied that the evidence is sufficient to justify the verdict, and that the court below did not err in denying the motion for a new trial on the ground that it was not. Judgment and order affirmed.

We concur: De Haven, J.; McFarland, J.

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88 Cal. 568

Miller v. Mayo. (No. 13,978.)

(*Supreme Court of California.* April 1, 1891.)

Public Improvements—Assessments—Liens.

1. Where Act Cal. March 18, 1885, authorizing the improvement of a street, provides that the expense incurred "shall be assessed upon the lots fronting thereon * * * in proportion to the frontage," a complaint in an action to foreclose a lien for such assessments, which alleges that assessment was made "on property benefited by such street improvement," is bad on demurrer.

2. Such act further provided "that the street superintendent shall thereupon cause to be conspicuously posted along the line of said contemplated improvement, at not more than three hundred feet in distance apart, but not less than three in all, or, when the work to be done is the improvement of an entire crossing, in front of each quarter block liable to be assessed, notices" of the contemplated improvement. *Held*, that where the improvement contemplated is the grading of the street for several blocks, posting notices at intervals of 300 feet is sufficient, though the improvement includes several crossings.

3. The property owner cannot object to the assessment by reason of the street superintendent's omission to approve the contractor's bond.

In bank. Appeal from superior court, Sacramento county; J. W Armstrong, Judge.

Clinton L. White, for appellant. *Frank D. Ryan*, for respondent.

Per Curiam. This action was brought to foreclose a lien for a street assessment upon real property of the defendant. A demurrer was filed to the complaint, which was overruled, and answer filed. Trial was had, resulting in a judgment for the plaintiff as prayed for. From that and an order denying a new trial the appeal is taken.

1. The demurrer to the complaint should have been sustained. Section 7 of the act of March 18, 1885, under which the work was authorized, provides that "the expenses incurred for any work authorized by section 2 of this act * * * shall be assessed upon the lots and lands fronting thereon, * * * each lot or portion of a lot being separately assessed in proportion to the frontage." The complaint herein alleges "that, immediately after the completion of said street work, said street commissioner proceeded to and did make an assessment upon the property benefited by said street improvement." This was not a compliance with the statute, and, although it may be a fact that the lots and lands fronting upon the improvement were the only property which was benefited thereby, yet, for the purpose of alleging a cause of action, the complaint should have alleged that the assessment was made in the terms prescribed by the statute.

2. The board of trustees declared their intention to order Twelfth street, from J street to L street, to be improved by grading and graveling. This included the crossing of K and Twelfth streets. It is alleged in the complaint that, after the resolution of intention had been passed by the board of trustees, the street commissioner "caused to be conspicuously posted along said contemplated work more than three notices of said resolution, at less than three hundred feet in distance apart." The defendant, in his demurrer, objects to the sufficiency of the complaint in this respect. We think, however, that the complaint alleges a sufficient compliance with the statute. Section 3 of the act aforesaid provides that, after the resolution of intention has been passed, "the street superintendent shall thereupon cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than three hundred feet in distance apart, but not less than three in all, or, when the work to be done is the improvement of an entire crossing, in front

of each quarter block liable to be assessed, notices of the passage of said resolution." The appellant contends that, inasmuch as the work provided for included the crossing, it was necessary for the street superintendent to post the notices of the resolution not only at intervals of less than 300 feet along the line of the work, but also in front of each quarter block liable to be assessed. The statute, however, does not require such posting. The proviso in section 3, above quoted, "or, when the work to be done is the improvement of an entire crossing, in front of each quarter block liable to be assessed," is in the disjunctive, and is to be construed as being a separate direction from that with which it is connected. If the work ordered to be done "is the improvement of an entire crossing," then the notices of the resolution must be posted "in front of each quarter block liable to be assessed," but for any other work the direction is that the notices shall be posted "along the line of said contemplated work or improvement." In the present case "the line of the contemplated work or improvement" was Twelfth street from J to L, and the allegation in the complaint that the notices were posted along that line is a sufficient compliance with the requirements of the statute.

3. The testimony offered at the trial sufficiently proved that the official grade of Twelfth between J and L had been established by proper authority.

4. The allegation in the complaint that the bond given by the plaintiff at the time of executing the contract had been approved by the board of trustees, instead of by the superintendent of streets, is immaterial in this action. A failure to execute a bond that should be satisfactory to the superintendent of streets might be a sufficient reason for the superintendent to refuse to enter into the contract with the contractor, but, after the work has been completed to the satisfaction of the superintendent of streets, the property owner cannot object to the correctness of the assessment by reason of the omission on the part of the superintendent to approve the bond of the contractor. The judgment and order denying a new trial are reversed, and the court below is directed to sustain the demurrer to the complaint, with leave to the plaintiff to amend if he shall be so advised.

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88 Cal. 510

LASSEN COUNTY v. SHINN *et al.* (No. 13,819.)

(*Supreme Court of California.* March 31, 1891.)

COUNTY BOARD—EMPLOYMENT OF ATTORNEY.

The board of county commissioners have authority to employ counsel, other than the district attorney, to collect the money due to the county by the state for the support of indigent persons, and the choice of such counsel is a matter within their discretion, and cannot be reviewed.

Commissioners' decision. In bank. Appeal from superior court, Lassen county; M. MARSTELLER, Judge.

F. A. Kelley, for appellant. *Shinn & Masten*, for respondents.

BELCHER, C. This action was instituted by the district attorney of the plaintiff, to recover from the defendants the sum of $416.25, money alleged to have been paid to them out of the plaintiff's treasury, without any authority of law, and 20 per cent. damages for the use thereof, as provided in section 8 of the county government act. St. 1883, p. 300. The court below gave judgment for the defendants on demurrer to the complaint, and the plaintiff appeals. The facts alleged in the complaint are in substance as follows: That the defendants were attorneys at law, residing in the county of Lassen and doing business therein as partners; that on the 6th day of July, 1889, the plaintiff's board of supervisors made and caused to be entered on its minutes an order which read as follows: "It is ordered that Shinn and Masten be, and they are hereby, authorized to collect all moneys now due to Lassen county from the state of California on account of keeping indigent persons, and that the auditor draw his warrant in favor of Shinn and Masten for fifty per cent. of all moneys collected by them;" that the order was made against the express wishes, advice, and consent of the district attorney, and that the latter asked the board for a reasonable length of time to examine into the question whether there was any money due the county from the state for the support of indigent persons, but the board unlawfully and wrongfully refused his request; that in pursuance of the order the defendants proceeded to collect from the state the moneys due the county for the support of indigent persons, and obtained therefor comptroller's warrants for the sum of $832.50, which they delivered to the county treasurer; and that, in payment for their services, the county auditor then drew his warrant on the county treasurer for the sum of $416.25, which sum was paid to them in full. And as ground for equitable relief, it is alleged that, at the time the order above referred to was made, the defendant Masten appeared before the board of supervisors, and stated to them that he did not know, but thought there might possibly be some money due the county from the state, for the support of indigent persons by the county; but as it was very uncertain whether anything could be collected, and there were considerable risks in such undertaking, if the board would enter into an agreement to allow and pay defendants 50 per cent. of all moneys collected, they would undertake the collection and get all they could; that these statements were falsely and fraudulently made, with intent to deceive and mislead the board, and did deceive and mislead and induce the board to make the order, when it would not otherwise have done so; that before that time the supreme court of the state had decided in the case of Yolo Co. v. Dunn that all of the counties were entitled to receive aid from the state for the support of aged persons in indigent circumstances, and that the defendants knew of that decision, and of the mode of procedure to obtain the money, but that the district attorney did not know of the decision till some time afterwards. In our opinion, the ruling of the court upon the demurrer was proper.

It is settled law that, where a county has legal business to be transacted, its board of supervisors may employ counsel, other than the district attorney, to transact the business, if in the judgment of the board the public interest will thereby be subserved. This is rested upon the ground that the district attorney may be incompetent, or sick, or absent from the county, or engaged in other business, so that he cannot attend to it, or the business to be transacted may be outside of the county. Smith v. Mayor, 13 Cal. 533; Hornblower v. Duden, 35 Cal. 670. Here the county had a claim against the state for its *pro rata* share of the money appropriated by the state for the support of aged persons in indigent circumstances. But the claim could only be enforced and the money obtained by preparing proper proofs and presenting them to the state board of examiners, and, after the claim should be audited and allowed, obtaining the comptroller's warrant for the same. This was business which might well have been supposed to require the services of a competent attorney; and to transact it the board of supervisors seems to have been authorized to employ counsel other than the district attorney, and to pay them such reasonable fee as might be agreed upon. Whether the board exercised good judgment in employing the defendants, and agreeing to pay them as it did, is a matter which cannot be considered here. Of course, supervisors have no right to waste or give away moneys belonging to the county, or to expend them otherwise than in the interest of the public. In a case like this, however, their judgment and discretion are not open to review by the courts. Hornblower v Duden, supra. The matters set up in the complaint for the purpose of obtaining equitable relief add nothing material to that instrument. The Yolo County Case, referred to, was decided by this court on the 27th of September, 1888, (77 Cal. 133, 19 Pac. Rep. 262.) The defendants, doubtless, knew of that decision before the 6th of July, 1889, and it would seem that the district attorney ought to have known of it. The statements alleged to have been made by Masten to the supervisors were that "he did not know, but thought there might probably be some money due the county from the state for the support of indigent persons by the county." This might be true, notwithstanding he at the time knew of the decision in the case referred to; and in it and what follows we see nothing which necessarily deceived or misled the board. The case of Scollay v. County of Butte, 67 Cal. 249, 7 Pac. Rep. 661, cited and relied upon by the appellant, is not in conflict with what has been said. On the contrary, it approves and reaffirms the rule declared in Smith v. Mayor, and in Hornblower v. Duden, supra. It follows that the judgment appealed from should be affirmed, and we so advise.

We concur: Temple, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

88 Cal. 557

Heinlen v. Phillips. (No. 13,925.)

(*Supreme Court of California.* April 1, 1891.)

Jurisdiction of Supreme Court—Certiorari—Powers of Justice of the Peace.

1. Code Civil Proc. Cal. § 52, subd. 2, limiting the appellate jurisdiction of the supreme court in certain cases to controversies involving not less than $300, does not apply to an appeal from an order of the superior court granting a writ of *certiorari* to ascertain whether a justice's court had power to make an order annulling a judgment therein. Overruling Bienenfeld v. Milling Co., 82 Cal. 425, 22 Pac. Rep. 1113.

2. A justice of the peace has no power to annul a judgment rendered in his court after a regular trial. Following Weimmer v. Sutherland, 74 Cal. 341, 15 Pac. Rep. 849.

3. Code Civil Proc. Cal. § 892, relative to justices' courts, provides that "when the trial is by the court judgment must be rendered at the close of the trial," but attaches no penalty or consequence to a violation thereof. *Held*, that such provision is merely directory, and that a judgment rendered by a justice six weeks after trial is valid.

McFarland, J., dissenting.

In bank. Appeal from superior court, Tulare county; W. W. Cross, Judge.

G. A. Heinlen, for appellant. *R. Irwin* and *B. C. Mickle*, for respondent.

Sharpstein, J. This is an appeal from an order of the superior court, made on *certiorari*, annulling an order of a justice of the peace by which a judgment previously rendered was set aside. The cause appears to have been submitted in the superior court upon the return made to the writ. At any rate there is nothing in the record before us to show that the return was controverted, and for the purpose of the present appeal it must be taken to be true. The material facts shown by the petition and the return are as follows: John Heinlen, the appellant here, brought an action in the justice's court of J. B. Runyon, of Mussel Slough township, Tulare county, against the respondent, P. C. Phillips, to recover the sum of $150 for services rendered. An answer was put in, and a trial was had before another justice who was called in by Justice Runyon to sit in his place. Both the parties were represented at such trial, and witnesses were sworn and examined. The case was submitted on December 16th, and on the 29th of the following January judgment was rendered for the plaintiff for $60 and costs. On the 20th of the following March the plaintiff moved the court to set aside this judgment. The motion was heard by Justice Runyon, and was granted. The defendant then moved to have the order granting such motion set aside, but, failing in this, obtained a writ of *certiorari* from the superior court, which, after a hearing, annulled the order vacating the judgment. The appeal is from this order of the superior court.

1. A motion is made to dismiss the appeal, upon the ground that, since the amount involved is less than $300, this court is without jurisdiction. And the case of Bienenfeld v. Milling Co., 82 Cal. 425, 22 Pac. Rep. 1113, decided by department 2 of this court, sustains the position. But that case is in conflict with the prior decisions which, in the pressure of busi-

ness, were overlooked, and we think it is best to return to the settled rule. The point was decided in Winter v. Fitzpatrick, 35 Cal. 269, which overruled a prior case. The opinion was delivered by SANDERSON, J., who said: "The jurisdiction of this court in proceedings of this character does not depend upon the amount in controversy. Our review does not embrace the merits of the action. We look into the case no further than may be necessary to ascertain whether it is a case in which the inferior tribunal, board, or officer from which it comes had jurisdiction, and, if not, whether there is any other plain, speedy, or adequate remedy. For that purpose we may or may not have occasion to look to the amount in controversy, but not for the purpose of adjudicating the amount, or any question involving the right of either party to a judgment upon the merits." This case was approved and followed in Morley v. Elkins, 37 Cal. 456, and Palache v. Hunt, 64 Cal. 474, 2 Pac. Rep. 245. This would seem to be sufficient to establish the rule; and, as the department did not have before it the case mentioned, we think that Bienenfeld v. Milling Co. must be overruled. The motion to dismiss is therefore denied.

2. Upon the merits we think that the judgment should be affirmed. The judgment rendered in the first instance was not by default, but after a regular trial; and it has been held that in such case the justice has no power to set it aside. Weimmer v. Sutherland, 74 Cal. 341, 15 Pac. Rep. 849. It is argued, however, that the first judgment in the justice's court was void because it was not rendered until six weeks after the case had been submitted. The provision of the Code of Civil Procedure is as follows, (sec. 892:) "When the trial is by the court, judgment must be rendered at the close of the trial." It is to be observed that no penalty is prescribed, or consequence attached, to a violation of this section; and we think that if the legislature had intended that the delay of a day by the justice (for that would be a violation of the provision) should subject the parties to the expense of a retrial it would have said so in express terms. A similar but much stronger provision was enacted in relation to the district courts; but it was held to be merely directory. McQuillan v. Donahue, 49 Cal. 157. It is true that the superior court is a court of general jurisdiction, while the justice's court is one of limited jurisdiction. But the decision did not proceed upon the power of the court, but upon the intention of the legislature. The judgment is affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; DE HAVEN, J.; PATERSON, J.; GAROUTTE, J.

I dissent: MCFARLAND, J.

(88 Cal. 560)

HAYS v. GLOSTER *et al.* (No. 13,790.)

(*Supreme Court of California.* April 1, 1891.)

CONSTRUCTION—TRUSTS—PAROL EVIDENCE—FRAUD.

In an action to have a trust as to certain real and personal property declared and enforced, plaintiff alleged that, being so far deranged that he was entirely incompetent to transact any business, he was induced to convey the property to defendant by his false and fraudulent representations that he would take care of and manage it, pay off plaintiff's debts, and then retransfer the property to plaintiff; that there was no other consideration; that defendant knew the representations to be false and untrue, and made the same with intent to deceive and defraud plaintiff. *Held*, that the facts alleged show a trust arising from fraud under Civil Code Cal. § 852, providing that trusts may be created by writing or "by operation of law," and parol evidence was admissible to prove the allegations tending to establish the fraudulent acts.

In bank. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Spencer & Raker and *C. A. Raker*, for appellant. *Goodwin & Jenks* and *Ewing & Claflin*, for respondents.

MCFARLAND, J. This action was brought for the purpose of having a trust as to certain real and personal property declared and enforced, and for an accounting, reconveyance, etc. An answer was filed, in which the material averments of the complaint were denied. There was no demurrer to the complaint,—probably because it did not appear that the alleged promises and undertakings of defendant D. M. Gloster, upon which the cause of action is based, were not in writing. But at the trial nearly all the evidence offered by plaintiff was excluded upon the grounds that the alleged trust was void under the statute of frauds unless in writing; that a written instrument cannot be contradicted or changed by parol evidence; and, generally, that the alleged trust could not be proven by parol testimony. A jury had been called to try some of the issues; but as plaintiff, under the rulings of the court, failed to get in any material evidence, the jury was discharged, and the court gave judgment for defendants, from which, and from an order denying a new trial, plaintiff appeals. So that the question presented is practically this: Would the complaint have stated a cause of action if it had appeared on its face that the things averred as the basis of the alleged trust were not evidenced by writings? It is averred in the complaint (substantially) that on November 23, 1883, plaintiff was, and for a long time previous thereto had been, the owner in fee and in possession of certain described land, which, with the improvements thereon, was of the value of $10,000; and also a large amount of personal property on said land, consisting of horses, mules, cattle, hogs, wagons, plows, mowers, threshing-machine, and other farming implements, grain, hay, bacon, lard, household furniture, and other personal property, of the value of $10,000; that at said time plaintiff was in very poor health and in a feeble condition physically and mentally, and that his mind was, and for some time prior thereto had been, so far deranged that he was entirely incompetent to transact any business; and that the defendant D. M. Gloster well knew of plaintiff's said weakness and incompetency. It is further averred that at and before said November 23, 1883, said defendant made frequent visits to plaintiff at his home on said land, and frequently and falsely represented to plaintiff that he was plaintiff's special and warm friend; that plaintiff was being robbed and wronged by others, and that defendant was very anxious to befriend, protect, and aid plaintiff, and to take care of him in his feeble condition; that defendant falsely represented to plaintiff that he was worth $1,000,000, and could easily advance money to pay any debts then owing by plaintiff, and would do so if plaintiff would turn over his property to defendant, and requested and persuaded plaintiff to transfer all said real and personal property to defendant, and to let him into possession thereof jointly with plaintiff; that defendant promised and agreed "that if plaintiff would so transfer and let him, said defendant, into the possession of said property, he, the defendant, would protect and take good care of and preserve the said property, and would manage the same for plaintiff, and in plaintiff's interest, and out of the proceeds of said property he would pay plaintiff's debts; and that he would provide plaintiff a pleasant and comfortable home upon said property, and would take good care of the plaintiff in his then feeble condition, and would advance any money necessary for such purposes; and that when he had paid plaintiff's debts, and had so managed his business affairs as to relieve him from his then present embarrassments, he would retransfer all of said property to plaintiff." It is further averred that, induced solely by said false promises, representations, and pretenses, "and without any other or further consideration whatever therefor," plaintiff, on said 23d day of November, 1883, executed and delivered to said defendant D. M. Gloster a deed of conveyance of said real property and a bill of sale of all said personal property, and allowed defendant to take control of the same, and that defendant thereupon entered upon said land and took entire charge of all of said real and personal property; that from said date to the fall of 1887 defendant and plaintiff jointly occupied the dwelling-house upon said land; and that during said time neither said defendant nor his family made any effort to make plaintiff comfortable, or to restore his health, but, on the contrary, neglected and ill-treated him, and very poorly provided him with clothes and food, so that his health was thereby injured, and his chances for recovery greatly lessened. It is further averred that defendant afterwards fraudulently, and in violation of said trust and confidence, conveyed without consideration a part of said land to his daughter, Mary E. Gloster, and another part to Henry O'Toole, both of whom are made parties defendant; that said defendant D. M. Gloster has sold the principal part of said personal property, and converted the proceeds thereof to his own use, and has apportioned to his own use the rents and profits of all said real and personal property, and has never paid any of plaintiff's debts; and that he now repudiates said trust and all said promises, and claims to be the owner of all said property not yet sold free of all trust, and is now holding the same adversely to plaintiff. It is further averred as follows: "That all the statements and promises and representations made by the defendant D. M. Gloster to plaintiff as set out in the complaint were false and fraudulent, and said defendant D. M. Gloster knew said representations to be false and untrue, and the same were made by said defendant to plaintiff with intent to deceive and defraud said plaintiff, and thereby to obtain possession of plaintiff's property for the sole purpose of defrauding plaintiff thereof," etc. There is an averment that plaintiff did not discover the fraud until within three years before the commencement of the action; and there are also many other averments, in detail, of matters not necessary to be here mentioned.

We think that the matters set forth in the complaint, if true, constitute a cause of action, assuming that the alleged undertakings of defendant D. M. Gloster were not in writing. The case is not one to which the rules that a trust in real property must be in writing, and that a writing cannot be varied by parol evidence, apply. Trusts may be created by writing or "by operation of law," (Civil Code, § 852;) and trusts which arise from fraud, either actual or constructive, are not within that part of the statute which requires a trust to be declared by a written instrument. The averment in the complaint last above quoted is, we think, a sufficient statement that the promises alleged to have been made by defendant D. M. Gloster were made without any intention of performance, and therefore there was actual fraud within the meaning of the phrase "a promise made without any intention of performing it," as used in section 1572 of the Civil Code. But, if that were not so, we think that the other facts stated show a case of trust arising out of fraud within the authorities of Broder v. Conklin, 77 Cal. 330, 19 Pac. Rep. 513; Brison v. Brison, 75 Cal. 525, 17 Pac. Rep. 689; Murray v. Dake, 46 Cal. 645; Sandfoss v. Jones, 35 Cal. 481; and Newman v. Smith, 77 Cal. 22, 18 Pac. Rep. 791. See, also, Humphrey v. West, 40 Mich. 597; Tracey v. Sacket, 1 Ohio St. 55; Reid v. Burns, 13 Ohio St. 49. In some of the cases above cited there was a peculiar confidential relation, as that of husband and wife, parent and child, or attorney and client; but that was not the fact in all the cases. The case at bar is very similar to those of Humphrey v. West, Sandfoss v. Jones, and Broder v. Conklin, supra.

The alleged mental weakness of plaintiff is a matter to be seriously examined. Upon this subject the supreme court of Ohio, after a review and citation of authorities, say as follows: "Those who from imbecility of mind are incapable of guarding themselves against fraud and imposition are under the special protection of the law. The rule to be collected from all the authorities, I take to be this: Where there is imbecility or weakness of mind arising from old age, sickness, intemperance, or other cause, and plain inadequacy of consideration, or where there is weakness of mind, and circumstances of undue influence and advantage, in either case a contract may be set aside in equity."

As first above stated, the questions involved in this case arose on rulings of the court sustaining objections of defendants to evidence offered by plaintiff. The statement on motion for a new trial consists mainly of questions asked by plaintiff of witnesses, objections by defendants, rulings sustaining the objections, and exceptions by plaintiff, and of offers by plaintiff to prove certain facts, and objections to such offers sustained. It would be useless labor to notice all of such rulings in detail. They all seem to have gone upon the theory that plaintiff was bound by the terms of the deed and bill of sale, and could not prove the averments of the complaint by parol evidence. One or two examples of the rulings will be sufficient. While plaintiff was on the witness stand he was asked by his counsel,—referring to the time the deed was made: "What was the matter with your physical organization, whether you were sick, weak, or disabled?" The question was objected to by the defense as "irrelevant and immaterial," and the objection was sustained. Counsel for plaintiff then said: "We offer to prove that plaintiff at the time of the transfer set out in the complaint was of weak and unsound mind, and incompetent to transact business, on the 23d day of November, 1883. We offer to prove that defendant must have known of such mental weakness and sickness, and that he took advantage of such weakness and sickness to persuade plaintiff to such contract set out in the complaint. (Objected to as irrelevant and immaterial. Objection sustained. Plaintiff excepts.)" This ruling was erroneous. Again: "Question. What induced you to make that transfer of property? (Objected to as incompetent, immaterial, and irrelevant; it appearing that the transfer was in writing, and expresses the inducement, and it is the best evidence what the inducement was.) The Court. That brings up the same question. The objection is sustained. (Plaintiff excepts.)" This ruling was erroneous. Again: "Question. State what consideration, if any, you received for turning over that property to defendant Gloster? (Objection as irrelevant, immaterial, and incompetent. It is evidenced by the bill of sale itself. It is entirely irrelevant and immaterial whether there was any other consideration outside of the writing; the writing speaks for itself. It is the same thing you have been to work on twenty-four hours. Objection sustained. Plaintiff excepts.") These examples show the general nature of the 25 specifications of error contained in the statement. Plaintiff sought in various ways—by questions put to witnesses and by offers of proof—to introduce evidence tending to prove the averments of his complaint; but he was prevented by the rulings of the court from doing so. His offers were not objected to because they were in the form of "offers to prove;" but because the things offered to be proven were inadmissible. It is possible that some of the evidence offered to be introduced was objectionable under the general rules of evidence; but the main basis of the rulings was that parol evidence was not admissible to establish the averments of the complaint. Therefore it is sufficient for the guidance of the court below on another trial to say generally that plaintiff is entitled to prove (if he can) the material averments of his complaint, his mental condition at the time of the transfer, the advantage taken of his mental weakness by defendant, and undue influence by the latter, the real consideration of the transfer, the condition of the property and the circumstances of the transaction, the alleged fraudulent acts of the defendant before, at the time of, and after the transfer, and all facts which reasonably tend to establish the alleged fraudulent acts; and these things may be proven by parol testimony, subject, of course, to the general rules of evidence. For the reasons above given the judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; DE HAVEN, J.; HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.

88 Cal. 553

RODGERS v. WITTENMYER. (No. 13,416.)

(*Supreme Court of California.* April 2, 1891.)

MORTGAGES—PAYMENT—PLEADING—EVIDENCE—DURESS.

1. A complaint alleged that, plaintiff and defendant differing as to the amount due upon a mortgage, defendant agreed that if plaintiff would pay the amount claimed by defendant to be due, and it afterwards transpired that the amount so paid was in excess of the amount due, defendant would repay to plaintiff such excess; and, further, that the amount so paid was more than was due, but that such excess had not been repaid. *Held* sufficient to constitute a cause of action.

2. Such complaint is not ambiguous or uncertain.

3. The following testimony given by plaintiff was insufficient to prove the agreement to repay: "The day the money was paid, * * * of course I was prepared to pay under protest. I went to [defendant] when I saw the mistake. * * * She agreed to come up here and see about it. * * * I notified her of the mistake, and she told me she would come up here and see" her agent, "and, if I was right, it would be right."

4. Where, in order to put an end to foreclosure proceedings, a mortgagor agrees to pay the amount due, together with interest, attorney's fees, and costs, but, a dispute arising as to the total amount due, he pays, under protest, more than he believes to be due, such payment is not under compulsion.

Department 2. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

W. S. Tinning, for appellant. *Smith & Murasky* and *F. Van Norman*, for respondent.

SHARPSTEIN, J. This action was brought to recover $427.50, alleged to have been paid in excess of the sum due from plaintiff to defendant upon a certain mortgage held by defendant upon the land of plaintiff. The jury rendered a verdict in favor of plaintiff for $300, and defendant has appealed from the judgment and an order denying his motion for a new trial. The allegations of the complaint are that the defendant had a mortgage upon land of the plaintiff to secure the payment of $6,-

000, and interest thereon, and about February 21, 1887, defendant commenced an action to foreclose said mortgage; that in May, 1887, while said action was still pending, plaintiff being desirous of terminating said action and saving further costs to himself therein, and of liquidating and discharging his indebtedness to the defendant under said mortgage and said action, offered to pay to the defendant the mortgage money, interest, costs, and counsel fees due and payable thereunder; that all that was then lawfully due to the defendant by reason of the premises was the sum of $4,000 principal, and the sum of $2,127.50 interest, $150 counsel fees, and $25 costs, making in all $6,302.50, which defendant offered to pay, but defendant demanded $6,730; plaintiff protested against paying more than the said sum of $6,302.50, but said defendant refused to take less than said sum of $6,730, and agreed that she would recoup to plaintiff the difference between said sums, to-wit, the sum of $427.50, if it afterwards transpired that a mistake had been made in the calculation of principal and interest and costs aforesaid, that plaintiff thereupon paid to defendant said sum of $6,730, under protest as to said sum of $427.50. The plaintiff alleges that defendant did make a mistake of $427.50 in said calculation, and, although often requested by plaintiff to pay him said sum of $427.50, defendant has not paid the sum or any part thereof to plaintiff, wherefore he demands judgment for that sum. Defendant demurred to the complaint on the ground (1) that it does not state facts sufficient to constitute a cause of action; (2) that it is ambiguous and unintelligible. The demurrer was overruled, and appellant claims that the court erred in overruling it.

The complaint, as we construe it, alleges in substance that, the plaintiff and defendant differing as to the amount due upon the mortgage, defendant agreed that if plaintiff would pay the amount claimed by defendant to be due, and it afterwards transpired that the amount so paid was in excess of the amount due, defendant would repay to plaintiff such excess. That was sufficient to constitute a cause of action, and we fail to discover any ambiguity or uncertainty in it. We think the demurrer was properly overruled. The defendant in her answer denies that she ever at any time agreed that she would recoup or repay to plaintiff any part of said sum of $6,730, or any sum of money in any event or for any cause; denies that said sum of $427.50, or any sum paid by plaintiff to defendant, was excess or in excess of the amount due defendant under said mortgage. Several other of plaintiff's allegations are denied in the answer. Among the particulars specified by appellant in which the verdict is not justified by the evidence is the following: "The evidence failing to show any agreement on the part of the defendant to recoup or repay to the plaintiff any sum of money, or any part of the amount claimed in the complaint in any event, the verdict should have been for the defendant." The evidence of the plaintiff in support of his allegation that the defendant agreed that she would recoup to plaintiff the difference between the sum of $6,302.50 and $6,730, to-wit, the sum of $427.50, if it afterwards transpired that a mistake had been made by defendant in her calculation of principal and interest and costs, is extremely meager. It is as follows: "The day the money was paid by Dr. Strentzel, of course I was prepared to pay under protest. I went to Mrs. Riley when I saw the mistake,—to her house; me and my son. She lived on Minnie street, and she agreed to come up here and see about it. This was in '87. I notified Mrs. Riley of the mistake, and she told me she would come up here and see Mr. Wittenmyer,—he attended to her business,—and if I was right it would be right." We think this evidence fails to prove any agreement of defendant to recoup or repay to plaintiff any sum of money whatever, in any event. Precisely what it does mean we will not undertake to explain. But it is insufficient to constitute an agreement of the kind alleged in the complaint, and that is all that we are called on to decide. It is only fair to respondent's counsel to state that his main contention is that the payment of the sum in excess of the sum which he admits was due, was under compulsion. That contention, in our opinion, is unsupported either by the allegations of the complaint or the evidence on the trial. We think the exceptions to the charge of the court were none of them well taken, and we do not discover any other errors than that the evidence is insufficient to justify the verdict, for which a new trial should be had. For that error defendant's motion for a new trial should have been granted. Judgment and order reversed.

We concur: McFarland, J.; De Haven, J.

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88 Cal. 530

DONLON v. JEWETT. (No. 14,334.)

(*Supreme Court of California.* April 1, 1891.)

COUNTIES—CLASSIFICATION—SALARIES OF COUNTY OFFICERS.

St. Cal. 1883, p. 299, § 162, divides counties into 48 classes; the thirty-ninth being counties having a population of 5,600 and under 6,000; the fortieth, those having 5,300 and under 5,600; the forty-first, those having 5,000, and under 5,300. By section 163 the salaries of the various officers of the several classes was fixed. By Act March 18, 1885, said section 163 was amended and divided into new sections numbered consecutively from 163 to 210. The salaries of the officers of said three classes were fixed, respectively, by sections 201, 202, and 203. St. 1889, p. 232, amends said original section 162 so as to define class 39 as counties having a population of 5,640 and under 6,000. It added a class,—39½,—defined as counties having a population of 5,000 and under 5,640. In all other respects, including the clauses defining classes 40 and 41, section 162 was re-enacted in precisely its original terms. A new section, numbered 201½, was inserted between sections 201 and 202, by which the salaries of officers of class 39½ were prescribed. *Held*, that the legislature did not intend to abolish classes 40 and 41, but merely to create a new class, which they intended to describe as embracing counties with a population of 5,600 and under 5,640.

In bank. Application for *mandamus*.

Aylett R. Cotton, for petitioner. *Black-*

stock & Shepherd and *H. L. Poplin*, Dist. Atty., for respondent. *M. E. Sanborn*, *amicus curiæ*.

BEATTY, C. J. The petitioner is assessor, and the respondent auditor, of Ventura county, and it is the duty of the latter, prescribed by law, to draw his warrant at the end of each month for a monthly installment of the salary of the former. At the end of the month of January, petitioner demanded a warrant for his January salary, claiming that Ventura was a county of the thirty-ninth and one-half class, and that his annual salary as assessor of a county of that class was $3,200. But the respondent, being in doubt whether Ventura was, according to a correct construction of the statute, a county of the thirty-ninth and one-half class or of the forty-first class, in which the assessor's salary is less than $3,200, refused to draw his warrant on that basis. Thereupon this original proceeding was commenced here for a writ of mandate to compel the auditor to perform his supposed duty.

There is an entire agreement between the parties as to all matters of fact, and the only question in the case is one of statutory construction. Section 5 of article 11 of the constitution enjoins upon the legislature the duty of providing for a uniform system of county government, but for the purpose of regulating the compensation of county officers permits a classification of counties according to population. In pursuance of this provision an act was passed March 14, 1883, entitled "An act to establish a uniform system of county and township governments," (St. 1883, p. 299, by which (section 162) the counties of the state were divided into 48 classes, according to their population as established by the federal census of 1880, the thirty-ninth, fortieth, and forty-first classes being defined as follows: "Counties having a population of five thousand six hundred, and under six thousand, shall belong to and be known as of the thirty-ninth class; counties having a population of five thousand three hundred, and under five thousand six hundred, shall belong to and be known as counties of the fortieth class; counties having a population of five thousand, and under five thousand three hundred, shall belong to and be known as counties of the forty-first class." Ventura, having a census population of 5,073, fell into the forty-first class.

By section 163 of the same act the salaries of the several county officers of the respective classes of the counties were fixed. By an amendatory act passed March 18, 1885, this section 163 was amended, and divided into new sections, numbered consecutively from 163 to 210. In this amendatory act the salaries of officers of the thirty-ninth class were regulated by section 201, those of officers of the fortieth class by section 202, and those of officers of the forty-first class by section 203. Another amendatory act was passed in 1887, (St. 1887, p. 178,) and finally, on March 16, 1889, the act was passed (St. 1889, p. 232) which gives rise to the present controversy. By this last amendatory act section 162 of the original act was so amended as to change the definition of the thirty-ninth class, and add a new class, numbered 39½. A new section, numbered 201½, was also inserted between sections 201 and 202, by which the salaries of officers of the thirty-ninth and one-half class of counties were regulated. By this amendment the definition of counties of the thirty-ninth class was changed so as to read as follows: "Counties having a population of five thousand six hundred and forty, and under six thousand, shall belong to and be known as counties of the thirty-ninth class." And the following definition was made of counties of the thirty-ninth and one-half class: "Counties having a population of five thousand, and under five thousand six hundred and forty, shall belong to and be known as counties of the thirty-ninth and one-half class." In all other respects, including the clauses defining the fortieth and forty-first classes, section 162 was re-enacted in precisely its original terms. The effect of this legislation was to produce a conflict in the terms of the statute, rendering it necessary to resort to construction in order to ascertain the intention of the legislature. The thirty-ninth and one-half class, by its definition, embraces all counties having a population of 5,000 and under 5,640,—that is to say, all counties formerly embraced in classes 40 and 41, and any county formerly embraced in class 39 with a population of 5,600, and under 5,640. By reason of the amendment to the definition of class 39, it is brought into perfect conformity with the definition of the new class, but the literal re-enactment of the clauses defining classes 40 and 41 creates the conflict; for, as above shown, they consist of counties having a population, respectively, of 5,300, and under 5,600, and of 5,000 and under 5,300; both of which classes are embraced in the definition of class 39½. Such being the terms of the statute, and the circumstances of its enactment in its present form, the petitioner contends that we must hold the intention of the legislature to have been to repeal the clauses defining classes 40 and 41, and to substitute for those classes, and a part of class 39, the newly-defined class, 39½. On the part of respondent it is contended that the intention was to preserve classes 40 and 41, and to make the new class consist of those counties only—formerly embraced in class 39—containing a population of 5,600, and under 5,640. It is certain that the legislature intended one thing or the other, but either construction of the statute convicts it of a blunder, and the question to be solved is whether the mistake consisted in the inadvertent use of the number 5,000 instead of 5,600 in defining class 39½, or in the re-enactment of the clauses defining classes 40 and 41.

The principle of construction relied on by petitioner in support of his contention is that in cases of repugnancy a later statute controls an earlier one; from which he argues that the clause defining 39½ being new, and those defining 40 and 41 being a mere republication of the terms of the original act, the former must govern. But in view of the constitutional provision prescribing the method of revising and amending statutes and sections of statutes, can we, for the purpose of construing an amendatory act, consider its new features as being later in point of time than those parts of the original which are merely republished? The constitution, art. 4, § 24, provides that "no law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended." The effect, and the only effect, of this requirement, is to compel the republication of so much, and so much only, of the old law as the legislature intends to continue in force along with the amendment, and it would seem that one object of the provision must have been to prevent conflict and repugnancy between the new and the old portions of the statute by requiring the incorporation of all amendments in the revised text of the statute or section amended; for, necessarily, the legislature by this method is compelled not only to scrutinize the amendment itself, but all other parts of the statute which are at the same time presented to view in their connected sequence; and we are not entitled to assume that the intention to enact the new portion was any more clear and distinct than the intention to modify its operation by the effect of such portions of the original act as have been thus deliberately preserved. The duty of a court is, therefore, to endeavor to construe the revised or amended act in the same manner it would construe a new and original piece of legislation,—viewing all its parts, giving to every part, if possible, some effect consistent with the whole, and as little as possible repugnant to other parts, "*ut res magis valeat, quam pereat.*" If, however, it is found that there is an irreconcilable conflict between the amendment, and some portion of the old statute that has been preserved and republished in the revision, so that no effect can be given to one without destroying the operation of the other, and there is nothing else to indicate the probable intention of the legislature it might be necessary to hold that full effect is to be given to the amendment and the re-enactment of the conflicting portion of the original act treated as a mistake. It may be conceded that the cases cited by petitioner sustain his contention to this extent, but certainly they go no further, and in this case we think it not only unnecessary, but for many reasons inadmissible, to solve the difficulty in the mode suggested. If it had been the intention of the legislature to abolish the fortieth and forty-first classes, and to consolidate them, along with a part of the thirty-ninth, into a new class, the short and simple and obvious means of accomplishing such intention was to amend the clause defining class 39, as was done; to amend the clause defining class 40 so as to make it embrace all counties containing a population of 5,000 and less than 5,640, and to drop the clause defining class 41. In addition to this, it would only have been necessary to amend section 202, regulating the compensation of officers of class 40, with or without a repeal of section 203, which, even though not repealed, would have been left with nothing to operate upon. There was no need to resort to the use of a fractional number, (39½.) to designate a new class if 40 and 41 were to be abolished, for in that case there were whole numbers enough and to spare, for the purpose of such designation. And so was it equally unnecessary to resort to the fractional number 201½ to designate the section regulating the compensation of officers of the new class of counties. This is, to our minds, very conclusive proof that the legislature did not intend to abolish classes 40 and 41, but only to create a new class between 39 and 40, comprising one or more counties formerly included in class 39. Instead of being guilty of the elaborate and superfluous series of blunders imputed to it on the theory of petitioner, the legislature made the simple and comparatively natural mistake of using a wrong number in a single clause of the act,—the number 5,000, instead of the number 5,600, in the clause defining the new class, 39½. This view affords a simpler and more probable explanation of the discrepancies in the statute than any other, and has the merit of satisfying the cardinal rule of construction which requires that some effect shall be given, if possible, to every clause of the contract, or substantive provision of a statute, consistent with its entire scope and object. And this view is corroborated by the fact that section 202, regulating the compensation of officers of the fortieth class, was not merely re-enacted, but was amended by the act we have been considering, so as to increase the salary of superintendent of schools from $700 to $1,500. If there was no intention to preserve the fortieth class, why this amendment?

Our conclusion is that Ventura remains a county of the forty-first class, and that the petitioner can claim only the salary provided for assessors in that class of counties. Writ denied.

We concur: PATERSON, J.; HARRISON, J.; McFARLAND, J.; GAROUTTE, J.; DE HAVEN, J.

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88 Cal. 579

Ex parte ERDMANN. (No. 20,818.)

(*Supreme Court of California.* April 2, 1891.)

CRIMINAL LAW—IMPRISONMENT TO ENFORCE FINE.

Since Pen. Code Cal. § 1205, providing for imprisonment in the county jail to enforce a fine, at the rate of one dollar a day, has been amended to provide that such imprisonment must not exceed the time for which defendant might be sentenced to imprisonment for the offense of which he has been convicted, defendant, convicted of simple assault and fined $500, cannot be imprisoned more than three months, which is the term of imprisonment fixed for the offense. Pen. Code Cal. § 241.

In bank. Application for *habeas corpus.*

L. E. Phillips, for petitioner. *J. A. Hosmer*, for the People.

PER CURIAM. On February 14, 1890, the petitioner was convicted of a simple assault in police court No. 2 of San Francisco, and sentenced under section 1205, Pen. Code, to pay a fine of $500, and in default of payment to be imprisoned in the county jail at the rate of one dollar for each day until the fine should be satisfied. The maximum of imprisonment for said offense is "not exceeding three months," (Pen. Code, 241,) although a fine of $500 may also be imposed. Under the sentence of fine imposed by the court, petitioner has already been in jail considerably over a year; and he contends that, for the purpose of enforcing the fine, he cannot legally be imprisoned longer than the maximum term of three months. The question has been presented to us heretofore, when there was some difference of opinion in regard to it. As the legislature, at its recent session, amended said section 1205 so as to expressly provide that imprisonment to enforce a fine must "not exceed, in any case, beyond the time for which the defendant might be sentenced to imprisonment for the offense of which he had been convicted," we think that former doubts on the subject should, in justice, be resolved in favor of the petitioner. It is ordered that petitioner, Frank Erdmann, be discharged from custody.

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88 Cal. 478

In re BAUQUIER'S ESTATE. (No. 13,979.)

(*Supreme Court of California.* March 28, 1891.)

ADMINISTRATORS—APPOINTMENT—DISQUALIFICATION.

The fact that a brother is prejudiced against his sister does not disqualify him to act as administrator of his father's estate.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Johnson, Johnson & Johnson, for appellant. *Robert Devlin, A. L. Hart*, and *J. C. Tubbs*, for respondent.

TEMPLE, C. Joseph Bauquier died, leaving an estate estimated at about $20,000. In his will he named his daughter, Mrs. Rode, executrix. Letters having been refused her, Frank Bauquier, a son of the deceased, the public administrator, and one Smith, severally applied for letters. At the hearing a contest was inaugurated between Bauquier and the public administrator. The court denied the application of Bauquier and Smith, and appointed the public administrator, and thereupon Bauquier took this appeal. An appeal had been previously taken by Mrs. Rode from the order denying her application to be appointed executrix. Since the submission of this case here, that order has been reversed, and thereby the right of Mrs. Rode to be appointed executrix apparently settled. The matters involved in this appeal, therefore, have become practically of little consequence. We think, however, it must be held in this case that it was error to hold that the fact that Frank Bauquier was prejudiced against his sister disqualified him to act as administrator. Therefore the order denying his application and appointing the public administrator should be reversed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed.

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88 Cal. 616

In re CARMODY'S ESTATE. (No. 13,822.)

(*Supreme Court of California.* April 18, 1891.)

ADMINISTRATOR—APPOINTMENT—WANT OF INTEGRITY.

1. Under Code Civil Proc. Cal. § 1365, providing that the relatives of a decedent can administer only when they are entitled to succeed to the personal estate or some part of it, and section 1386, subd. 5, providing that the whole estate shall go to the surviving husband or wife if decedent leave neither issue, father, mother, brother, nor sister, letters of administration should not be granted to a wife's nephew when she leaves a husband surviving, but no issue, father, etc.

2. A husband, who is the sole distributee of his wife, under Civil Code Cal. § 1386, is not disqualified to act as her administrator because he claims the whole estate as a gift from his wife, under section 1369, providing that no person shall be competent to serve as administrator who shall be adjudged incompetent for want of integrity.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Grove L. Johnson and *Albert M. Johnson*, (*Thornton & Merzbach*, of counsel,) for appellant. *Chas. F. Hanlon*, for respondent.

BELCHER, C. Fannie Carmody died intestate in the county of Sacramento on the 4th day of September, 1889. She left surviving her John Carmody, her husband, and five children of a deceased sister, of whom Niel Grant was one, but no issue, father, mother, brother, or sister. On the 24th of October, 1889, Niel Grant filed in the superior court of the county a petition asking that letters of administration on the estate of decedent be issued to him. In his petition he stated, among other things: "That said deceased left estate in the said county of Sacramento, consisting of real and personal property. That the value and character of said property, so far as known to your applicant, are as follows, to-wit: $800, or thereabouts, in Sacramento Savings Bank; real estate in California, value unknown; furniture and personal effects, value unknown." Two days later the surviving husband filed his petition for letters of administration on the estate. He stated in the petition, among other things: "That she [decedent] left estate in said county, which consists of an interest [it is claimed] in certain moneys in the Sacramento Bank, on deposit therein; that the value of said estate is unknown to said petitioner, and the same consists wholly of personal property." When the petitions came on to be heard, Carmody was called as a witness, and testified to certain facts which tended to show that during her last illness his wife made or attempted to make to him a gift of the money she had on deposit in the Sacramento Bank. He was then, on cross-examination, asked and answered certain questions as follows: "Question. Mr. Carmody, do you want to be administrator of Fannie Carmody's estate? Answer. Well, of course. I did not think when she made this assignment—she said there would be no need of an administrator. Those were the words she spoke. Q. Do you want to be administrator of your wife's estate? A. Yes, sir; of course. Q. Well, what estate did she leave? A. I do not know as she left any." Counsel for Grant then offered and read in evidence a complaint, filed by Carmody, on October 9, 1889, in an action instituted by him against the Sacramento Bank to recover the moneys deposited therein by Fannie Carmody. The complaint contained, among others, the following averments: "That on the 22d day of August, 1889, the said Fannie Carmody sold, transferred, conveyed, and delivered unto this plaintiff, by and with the consent of this defendant, the said bank-book, together with all the moneys as aforesaid deposited by her in said bank, and the plaintiff has ever since been and now is the owner and holder of said bank-book and of the moneys so deposited by her in said bank. That since the transfer as aforesaid, one Niel Grant, who asserts that he is a nephew of said Fannie Carmody, has notified said defendant not to pay said moneys to the plaintiff, and has demanded that the said bank pay the same to him, said Niel Grant, and has claimed and still claims to be the owner of said money so deposited, by reason of which claim, notice, and demand of said Niel Grant the said defendant is in doubt as to its rights in the premises, and as to whether or not the plaintiff is the true owner and holder of said book and moneys, and declines to pay the same to him unless it shall be determined by the judgment of this court that the plaintiff is such owner and holder," etc. The above was all the testimony introduced, and, as will be seen, there was nothing to show that there was any property of the estate, other than the bank deposits, or that there were any creditors of the estate. The court made the following finding: "That the petitioner, John Carmody, is incompetent to serve as administrator, and that he denies said deceased left any property or estate whatever; and the said John Carmody claims all the estate of said deceased; and the court finds that the said application of said John Carmody is made not in good faith, but for the purpose of obtaining possession of the estate of deceased for his own, and to deprive the heirs and creditors of said estate from any participation therein; and that said John Carmody is wanting in integrity in that regard." An order was accordingly entered, denying the petition of Carmody, and directing that letters of administration on the estate be issued to Niel Grant. From that order Carmody appeals.

The provisions of the statute, bearing upon the question, are as follows: "Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof; and they are, respectively, entitled thereto in the following order: (1) The surviving husband or wife, or some competent person whom he or she may request to have appointed; (2) the children; (3) the father or mother: (4) the brothers; (5) the sisters; (6) the grandchildren; (7) the next of kin entitled to share in the distribution of the estate." Code Civil Proc. § 1365. No person is competent or entitled to serve as administrator or administratrix who is "(4) adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity." Code Civil Proc. § 1369. "If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife." Civil Code, § 1386, subd. 5. It is clear from these provisions that Niel Grant was not entitled to succeed to any portion of the estate, and was therefore not entitled to letters; and it is equally clear that the surviving husband was entitled to the whole estate. In re Ingram, 78 Cal. 586, 21 Pac. Rep. 435. The finding that the surviving husband was incompetent to serve as administrator for want of integrity was evidently based upon the fact that he claimed the whole estate as his own, and the question is, was the finding justified? We do not think it was. There was nothing in the fact named which showed a want of integrity or disqualification. See Estate of Bauquier, ante, 178, (decided March 18, 1891.) We advise that the order appealed from be reversed.

We concur: Fitzgerald, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the order appealed from is reversed.

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88 Cal. 597

Hinkel v. Donohue *et al.* (No. 13,318.)

(*Supreme Court of California.* April 16, 1891.)

Notice of Appeal—Parties—Dismissal.

Where an action of ejectment against several defendants is dismissed by plaintiff before defendants are served, or answer, and afterwards two of the named defendants file a cross-complaint seeking affirmative relief, which is dismissed on plaintiff's motion, it is not necessary for the defendants who joined in the cross-complaint to serve the other defendants with notice of appeal from the order dismissing it, as such other defendants are not adverse parties, within the meaning of Code Civil Proc. Cal. § 940.

In bank. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Michael Mullany, (*W. C. Burnett*, of counsel,) for appellants. *O'Brien, Morrison & Daingerfield*, for respondent.

McFarland, J. This is a motion to dismiss an appeal upon the ground that the necessary parties were not all served with notice of appeal. The action is, in form, ejectment, and several persons are named in the complaint as defendants. Before either of the defendants had been served with or had appeared, plaintiff's attorney filed with the clerk of the court a dismissal of the action. Afterwards two of the named defendants—Patrick Donohue and Mary Donohue—filed an answer, and also a cross-complaint, asking affirmative relief. Thereafter, on motion of plaintiff, the court made an order dismissing the action, with costs to defendants. From this order or judgment the said defendants Patrick and Mary Donohue appeal. They did not serve the other defendants with their notice of appeal; and for this reason respondent contends that the appeal should be dismissed. We do not think that the other defendants were adverse parties, within the meaning of section 940 of the Code of Civil Procedure. They would be entirely unaffected by any judgment that might be rendered on appeal. The plaintiff in this action had a clear right to dismiss as to any of the defendants who had not been served, or who had not appeared and set up an adverse claim. None of the authorities cited by respondent cover the case at bar. If, on this appeal, the judgment of dismissal should be reversed as to the defendants who appeal, "it would still stand unreversed as to" either of the other defendants, "and therefore they would not be affected by a reversal." Randall v. Hunter, 69 Cal. 80, 10 Pac. Rep. 130. See, also, Williams v. Mining Ass'n, 66 Cal. 193, 5 Pac. Rep. 85. We think, therefore, that this present motion to dismiss the appeal should be denied. But, of course, nothing is determined here that will affect the questions which will arise at the hearing of the appeal. The motion to dismiss the appeal is denied.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; HARRISON, J.; DE HAVEN, J.; GAROUTTE, J.

88 Cal. 581

HORTON v. GALLARDO. (No. 13,963.)

(*Supreme Court of California.* April 3, 1891.)

WRITS—SERVICE OF SUMMONS—AFFIDAVIT.

An affidavit of service of summons, which does not show that the person serving it was over 18 years old when he served it, is insufficient to prove service.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Willis & Appel, for appellant. *J. M. Damron*, for respondent.

VANCLIEF, C. This is an appeal by the defendant from a judgment against him by default, and his counsel makes the point here that the summons in the action was not served on him. The only evidence contained in the record from which the court could have found service of summons upon the defendant is the following affidavit, indorsed on the summons: "Office of the Sheriff of Los Angeles Co. I hereby swear that I received the within summons on the 26th day of February, A. D. 1890, and personally served the same on the 27th day of February, A. D. 1890, by delivering a copy and having this read to the defendant in person, being Y. Gallardo, the defendant named in said summons, by delivering to him, the said defendant, personally, in the city and county of Los Angeles, Cal., a copy of said summons, and a certified copy of the complaint in the action named in said summons, attached to said copy of summons. Dated this 28th day of February, A. D. 1890. J. S. CHADWICK." As this affidavit does not state or show that Chadwick was over the age of 18 years at the time of the alleged service of summons by him, it is insufficient to prove such service. Maynard v. MacCrellish, 57 Cal. 355; Howard v. Galloway, 60 Cal. 11; Weil v. Bent, Id. 603; Doerfler v. Schmidt, 64 Cal. 265. I think the judgment should be reversed and the cause remanded.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded.

88 Cal. 491

BOARD OF HARBOR COMMISSIONERS OF PORT OF EUREKA v EXCELSIOR REDWOOD CO. (No. 13,293.)

(*Supreme Court of California.* March 30, 1891.)

CONSTITUTIONAL LAW—LEGISLATIVE ACTS—DELEGATION OF POWER.

Under Pol. Code Cal. §§ 2568, 2569, subd. 6, empowering the board of harbor commissioners of the port of Eureka to make rules and regulations for the protection of navigation in Humboldt bay, and to impose penalties, not exceeding $500 for any one violation, for the violation of such rules, the harbor commissioners cannot impose a penalty, as its imposition is a legislative act, and the legislature cannot delegate such power to any other body.

Department 1. Appeal from superior court, Humboldt county; JOHN ELLSWORTH, Judge.

J. H. G. Weaver and *J. N. Gillett*, for appellant. *S. M. Buck*, for respondent.

GAROUTTE, J. This is an action to recover a penalty of $500, imposed by the plaintiff upon the defendant for the violation of certain rules and regulations made by plaintiff. Section 2568, Pol. Code, provides that "the board of harbor commissioners of the port of Eureka are authorized and empowered to make such rules and regulations and take such action as may be necessary for the protection of navigation in Humboldt bay." Section 2569, subd. 6, provides: "Impose penalties for violation of such rules and regulations not exceeding for any one violation the sum of five hundred dollars, to be recovered by action." Section 5 of the rules and regulations made by plaintiff in pursuance of the above sections of the Code imposes a penalty in the sum of $500 for the violation of certain of these rules. We do not believe the plaintiff has the power to impose a penalty as provided in the rule just mentioned. The imposition of a penalty is in the nature of a *quasi* criminal proceeding, as it only follows from the violation of some law. In U. S. v. Montell, Taney, 52, referring to the character and object of penalties, we find this language: "It is not damages, therefore, that are intended to be secured, but punishment intended to be inflicted upon those who are justly and properly responsible for any improper use of the vessel's register. * * * In other words, it is a fixed penalty imposed by law as a punishment for breach of duty enjoined by law, and must be treated as such," etc. The board of harbor commissioners is a creature of the statute, and purely an executive body, and the fixing and imposing of penalties are matters of which the legislature alone has cognizance. An act providing that, if a person does or does not do a certain thing, he shall pay a penalty of $500, is legislation; and it is a cardinal principle of representative government that the legislature cannot delegate the power to make laws to any other authority or body. Cooley, Const. Lim. 116, 139. Conceding that the legislature could delegate to the plaintiff the authority to make rules and regulations with reference to the navigation of Humboldt bay, the penalty for the violation of such rules and regulations is a matter purely in the hands of the legislature. The act of the legislature in fixing the maximum of such penalty is of no avail; the vice of the whole matter is in not itself fixing the penalty, and in delegating such legislative power to the plaintiff. Justice AGNEW, in Locke's Appeal, 72 Pa. St. 491, says: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things, upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government." And it would seem that the establishment of rules as to the navigation of Humboldt bay would be simply acts of executive administration which the legislature could delegate to the plaintiff as an executive body under the foregoing authority; but, when the executive body has made such rules and regulations, it has exhausted all the authority which the legislature had power to confer upon it. In the case at bar the legislature attempted to go further than in the case of Ex parte Cox, 63 Cal. 21. Under an act of the legislature approved March 4, 1881, the viticultural health officer, with the approval of the board of viticultural commissioners, was empowered to declare and enforce rules in the nature of quarantine to prohibit the importation of diseased vines, etc.; and further provided that any willful violation of these rules should constitute a misdemeanor. The petitioner, Cox, was discharged upon *habeas corpus* by this court, he having been convicted of violating certain of these rules and regulations. The court said: "For the purpose of local legislation, legislative functions may be conferred upon and exercised by municipal corporations; but the act before us is in no sense a conferring of powers for municipal purposes. The legislature had not authority to confer upon the officer or board the power of declaring what acts should constitute a misdemeanor." In that case the legislature delegated the power to the board to make the rules, but expressly provided in the act itself the punishment for the violation of such rules. But in the case at bar the legislature not only delegated the power to the plaintiff to make the rules and regulations, but went far beyond that, and attempted to delegate the power to the plaintiff to punish for the violation of such rules and regulations. This could not be done. Let the judgment be affirmed.

We concur: HARRISON, J.; PATERSON, J.

(88 Cal. 602)

People v. Deegan. (No. 20,764.)

(*Supreme Court of California.* April 18, 1891.)

CROSS-EXAMINATION OF WITNESS—MISCONDUCT OF JURY—DRUNKEN JUROR.

1. Where, in a trial for larceny, a witness for the prosecution testifies to having seen defendant on the night of the stealing, but says nothing about any conversation with defendant, it is inadmissible for defendant to cross-examine him in respect to a conversation had at that time.

2. A conviction will not be reversed because it appears from affidavits that one of the jurors drank intoxicating liquor during the trial, and that during a recess of court he was intoxicated, when counter-affidavits by the other jurors, and the officer in charge of the jury, show that the juror was rational and sober at all times while hearing the trial and deliberating on the verdict.

3. If during the trial a juror appears to be intoxicated in court, defendant should object to his serving before the jury retire. De Haven, J., dissenting.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J B Campbell, Judge.

Hinds & Merriam and *A. J. Burns*, for appellant. *W. D. Tupper* and *H. H. Welsh*, for the People.

Foote, C. The defendant was convicted by a jury of the crime of larceny, the theft of a calf. From the judgment rendered in the premises, and an order denying him a new trial, he appeals. The evidence upon which he was tried is mainly circumstantial, but we see no reason to declare, as the defendant contends we should, that the jury were not warranted in returning the verdict of guilty.

In the progress of the trial a witness for the prosecution, Mr. Zeilor, testified that he saw the defendant and those claimed to have been with him, on the night of the alleged stealing, at Selma, in Fresno county, between 8 and 9 o'clock in the evening. Then, upon cross-examination by defendant's counsel, the witness said he had no conversation with them. When his memory was refreshed by a further question, he was about to state what he had said to them, and presumably what they said to him, when the district attorney objected, on the ground that the testimony sought to be elicited was not in cross-examination of any thing brought out by him in his examination in chief. The court sustained the objection, and the defendant excepted, and assigns this ruling of the court as prejudicial error. If the people, for the purpose of criminating the defendant, had asked for this conversation, it would have been admissible, and then the defendant could have cross-examined the witness in relation to the matter. This was not done, and as the defendant's conversations could not be introduced by him in chief, for the reason that it is not permissible for a man charged with crime thus beforehand to manufacture evidence for himself, so it could not be admissible in cross-examination, if brought out by the defendant for the first time. Besides, what appears to have been said, and which it was the evident purpose of defendant's counsel to bring before the jury, is testified to by defendant afterwards. So that no prejudicial error was committed as to the matter.

The last and most important ground upon which the appellant bases his contention for a reversal of the judgment and order is that one of the jurors was guilty of the misconduct of drinking intoxicating liquors during the progress of the trial, and to such an extent as to disqualify him for the performance of his duty in such capacity. The affidavit of the juror himself, seeking to impeach his verdict, is not admissible. People v. Gray, 61 Cal. 183. There were other affidavits introduced on the part of the defendant which went to show that during the recess of the court, from 12 to 2 o'clock on the day when the verdict was rendered, the juror in question was intoxicated in a saloon in Fresno; that he had been during that week under the influence of intoxicating liquors, and that on the day of the verdict, during recess of court, as heretofore stated, he came home greatly under the influence of such liquor, stupid and irrational; that he went to sleep, and was awakened by the deputy-sheriff, and taken back to court in a condition not fitting him for the service of a juror; that he drank a tumbler full of whisky, and was intoxicated during the recess above mentioned; that the juror was drunk in a saloon between the hours of 12 and 2 on the day in question.

There is no doubt of the fact that the juror drank the intoxicating liquor during the recess. But the affidavits for the people, mainly by the fellow-jurors of the one charged with misconduct sufficient to vitiate the verdict, are to the effect that at no time during the trial did they perceive that the juror was intoxicated in any degree, but that, on the contrary, he was sober, intelligent, and perfectly able to consider evidence, and exercise judgment in deliberating thereon; and that on the day of the rendition of the verdict, after they had retired to consider it, the juror Wade discussed in a reasonable and sensible way the different facts as shown by the testimony in the case, and in every way indicated that he was thoroughly able and in a condition to perform his duty as a juror. The affidavit of Deputy-Sheriff Pickett shows that he saw the juror Wade come into the court-house where the trial was had with George Z. Moore, another deputy-sheriff, at half past 2 o'clock of the day of the verdict; that he has known the juror for about 20 years; that he particularly observed him from that time until about 5 o'clock P. M while on the jury, and that there was nothing in his appearance and actions to indicate intoxication; that he was placed in charge of the jury at 5 P. M., and remained in charge of them until about 5:30 P. M., until they arrived at a verdict, when he returned with them to the court-room; that he met the juror in question about 15 minutes after the verdict had been returned, and had a conversation with him, and that he then appeared thoroughly sober. Deputy-Sheriff Moore swore that during all the days of this trial, 18th, 19th, and 20th of June, 1890, he was in the court-room, and observed the juror Wade; that he appeared to be thoroughly sober and intelligent, and in a condition to perform his duties as juror; that he has known Wade personally about 10 years; that on the 20th of June, 1890, at about 2:15 o'clock P. M., he went to Wade's house, and entering it saw Mrs. Hill, and asked where Wade was, to which she replied, "There he is; just wake him up;" that he did wake him, and that they proceeded to the court-house, a distance of a quarter of a mile, together; that during that walk he talked with Wade, and he was sober and intelligent, and did not appear in any way under the influence of intoxicating liquors; that they reached the court-house about 2:30 o'clock P. M.; that he remained there in the court-room some time before the case was submitted to the jury, and observed no action or appearance on the part of Wade indicating that he was drunk or intoxicated.

It thus appears that the court was justified in believing that while sitting as juror in the box, or considering the verdict, Wade was sober, intelligent, and in a fit condition to understand and deliberat upon the evidence, apply the instructions of the court, and form an express and fair opinon as to what the verdict should be There is no doubt that he did drink intoxicating liquors out of court, and that at th recess at least he was for a time under its influence. The question, then, is whether as a matter of law, the verdict in which h concurred, and which he assisted in making, was vitiated by his drinking and its effect upon him outside of the court, wher not sitting as a juror. We cannot say that it was. If, while in his capacity o juror, he was sober, heard the evidence, understood and appreciated it, and the instructions of the court and argument o counsel, and was then able intelligently to understand, deliberate, and determine what should be the verdict with his fellow-jurors, we are unable to perceive that the verdict was arrived at accompanied by misconduct on the part of the juror while performing his duty. He was guilty of drinking more than he ought when out of court, but does not seem ever to have been under its influence while sitting or deliberating as a juror. At those times his mind was clear, and no misconduct is shown to have occurred. We do not think that there is anything opposed to this in the case of People v. Gray, 61 Cal. 164, or People v. Lee Chuck, 78 Cal. 318, 20 Pac. Rep. 719. If, as the defendant seems to think, the juror was palpably intoxicated in court, and he or his counsel perceived it, objection should have been made before the jury was permitted to retire. Ipswitch v. Fernandez, 84 Cal. 639, 24 Pac. Rep. 298. But, as we have seen, the trial judge was justified under all the evidence before him in believing the juror sober during the performance of his duty as a juror on the trial, and while deliberating upon the verdict. For these reasons we advise that the judgment and order be affirmed.

We concur: Vanclief, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

De Haven, J., (*concurring.*) I concur in the judgment. The affidavits as to the condition of the juror Wade, on the afternoon when the case was submitted to the jury for decision, were conflicting; and the judge who presided at the trial, and must have personally observed the juror at the time referred to, was in a far better position than we to determine the truth of the matter, and that he did not believe the juror to have been under the influence of liquor, as charged, is implied from the order denying appellant's motion for a new trial. I do not, however, give my assent to that part of the foregoing opinion which seems to intimate that, if the juror was in the condition claimed by defendant, the objection now urged was waived because not made before the retirement of the jury. Whatever may be the rule in civil cases, in which it may be said, in a general sense, only the parties thereto are interested in the verdict, the principle of waiver of the right to object to misconduct, which in judgment of law disqualifies a juror for the performance of his duties as such, has no application to a criminal trial for a felony. In such a case the constitution guaranties to a defendant the right to a trial by 12 competent jurors, and his express consent to be tried by a less number will not bind him. People v. O'Neil, 48 Cal. 257. And there must be this number of competent jurors throughout the trial. The people of the state, equally with the defendant, are interested in having this constitutional right secured in every case, and it is of infinitely more importance to the people than to the defendant that no conviction for a grave offense shall be had, except as the result of a trial which commands the respect of those who witness it or are informed of the manner in which it is conducted. No juror is, in judgment of law, competent to sit during the trial who is not in a condition to intelligently receive the evidence, the arguments of counsel, and the charge of the court; and, while it may be true that intoxication does not affect all men alike,—some retaining their judgment and ability to weigh and deliberate upon the effect of evidence, and to understand an argument, or the instructions of the court,—still the law takes no account of these exceptions, and holds no person competent to sit as a juror while in a state of intoxication. And I am of the opinion that, if a juror is in court intoxicated to such a degree as to be painly noticeable, the defendant is not required to bring himself into antagonism with such juror by entering any formal protest or objection to proceeding with the trial while the juror is in such condition. This would present a case affecting not only a substantial right of the defendant, but also the dignity and decorum of the court itself, and should be disposed of by the court of its own motion, and that, too, so as to preserve the rights of the defendant.

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88 Cal. 422

People v. Gordon. (No. 20,737.)

(*Supreme Court of California.* March 24, 1891.)

Assault with Intent to Kill — Instructions — Matters of Fact.

1. On trial for assault with intent to murder it is error for the court to charge: "Upon a trial for an assault to commit murder, the assault and the intent being proved, the burden of proving circumstances of mitigation, justification, or excuse therefor devolves upon accused, unless the proof upon the part of the prosecution tends to show that the crime committed only amounted to an assault with a deadly weapon with intent to inflict * * * bodily injury, * * * or that defendant was justified or excused," as such instruction is contradictory and meaningless.

2. Where, in such case, there is a conflict in the evidence as to how the difficulty started, it is error for the court to charge that the prosecuting witness testified, in substance, "that defendant came up and addressed him in a sharp tone, and immediately made a demonstration to draw a pistol on him. * * * Other witnesses corroborated in whole or in part that portion of the prosecutor's statement of the transaction after the conflict had commenced,"—since such charge is one as to matters of fact, which is prohibited by the constitution of the state.

Department 1. Appeal from superior court, Santa Clara county; F. E. Spencer, Judge.

H. V. Morehouse and *Hiram D. Tuttle*, for appellant. *S. G. Tomkkins*, *G. W. Herrington*, and *W. H. H. Hart*, Atty. Gen., for the People.

Garoutte, J. This is an action charging the defendant with an assault with a deadly weapon upon the person of one Charles H. Potter, with intent to kill and murder said Potter. The defendant was convicted of an assault with a deadly weapon, and fined $2,500, and, in default of the payment thereof it was ordered that he be imprisoned in the county jail of Santa Clara county at the rate of one day for each $4 of said fine, and not exceeding in the aggregate 625 days. This appeal is from the judgment and the order denying defendant's motion for a new trial.

Among the grounds relied upon by defendant's counsel to support this appeal, it is claimed the court misdirected the jury as to the law of the case. The court gave the jury the following instruction: "Upon a trial for an assault to commit murder, the assault and the intent being proved, the burden of proving circumstances of mitigation, justification, or excuse therefor devolves upon the accused, unless the proof upon the part of the prosecution tends to show that the crime committed only amounted to an assault with a deadly weapon with intent to inflict upon the person of the prosecuting witness a great bodily injury, or of a simple assault, or that the defendant was justified or excused." The learned judge of the lower court has attempted by the foregoing instruction to apply the principle found in section 1105 of the Penal Code as to the shifting of the burden of proof in cases of homicide to the present case,—a charge of assault with intent to commit murder. Such an application of that section of the Code cannot be made, for it only treats of cases of homicide. People v. Cheong Foon Ark, 61 Cal. 527; People v. Rodrigo, 69 Cal. 605, 11 Pac. Rep. 481; People v. Mize, 80 Cal. 45, 22 Pac. Rep. 80; Com. v. McKie, 1 Gray, 61. This principle of the shifting of the burden of proof in cases of homicide is purely a creation of the statute, and must be limited to the words of the statute. It is based upon the theory that certain presumptions shall take the place of evidence, and was not intended to change the rule of evidence. But, aside from any authority upon the question, it does not appear that the burden of proof could possibly shift at any stage of the proceedings, or under any state of circumstances in a case similar to the one under discussion. The presumptions which follow from the act of killing in a case of homicide, and which are impliedly recognized by section 1105, are inapplicable to, and have no relationship with, the offense of assault with intent to commit murder; and this is fully exemplified by a cursory examination of the instruction heretofore quoted, for such an examination proves the instruction to be misleading, contradictory, and practically meaningless. The language of the instruction is: "The assault and the intent being proved, the burden of proving circumstances of justification, excuse," etc., "rests upon the accused, unless," etc. If the assault and the intent to commit the murder are proven, the offense is made out perfect and complete in every portion, and the foregoing instruction can only be correct in the sense that when the prosecution has proven the defendant guilty it behooves him to do something in his own behalf, or suffer the consequences of his proven guilt. The serious vice in the instruction then follows. "Unless the proof on the part of the prosecution tends to show that the crime committed only amounted to an assault with a deadly weapon with intent to inflict upon the person of the prosecuting witness a great bodily injury, or of a simple assault, or that the defendant was justified or excused." This proviso or exception never could exist in connection with the previous assumption that the guilt of the defendant of the crime of assault with intent to commit murder had already been established by the evidence of the prosecution, and it has no signification whatever when taken in connection with the former part of the instruction. If the defendant had been convicted of an assault with intent to commit murder, he would have been entitled to a new trial by reason of error in the foregoing instruction, but, having been found guilty of the crime of "assault with a deadly weapon" only, he is acquitted of the higher offense, to which the instruction alone is pointed, and consequently is acquitted of the intent to murder, and necessarily was not prejudiced thereby. People v. Swift, 66 Cal. 349, 5 Pac. Rep. 505; People v. O'Neal, 67 Cal. 378, 7 Pac. Rep. 790; People v. Boling, 83 Cal. 380, 23 Pac. Rep. 421.

The court gave the following instruction to the jury: "The prosecutor, Potter, has testified in substance that at the time in question he was sitting in front of the Lamolle House, in a chair on the sidewalk, unarmed. That the defendant came up, and addressed him in a sharp tone, and immediately made a demonstration to draw a pistol upon him. That he, Potter, thereupon sprang up from his chair, and grappled with the defendant, and struck him in the face. * * * Other witnesses corroborated in whole or in part that portion of the prosecutor's statement of the transaction after the conflict had commenced." All the testimony of the prosecuting witness, Potter, as to these matters is as follows: "Examination in chief: I was seated in a chair in front of the Lamolle House, on Santa Clara street, near San Pedro street. I was seated looking east, and thinking about something. I had been there about twelve or fifteen minutes, when some one came up and addressed me as, 'Ah, there!' or 'Hullo, there!' I looked quick, and H. L. Gordon, the defendant, was standing about two feet from me. As I jumped around in this way, he started for his overcoat pocket with his right hand. I immediately jumped up and grabbed him. * * * I saw him make a motion for his side coat pocket, and I immediately grabbed his hand. Cross-examination: The first time I saw him was when he was standing in front of me at the Lamolle House. I first saw defendant when he got in front of me on the sidewalk, about three or four feet from me. * * * When he came up he said: 'There!' or 'Ah, there!' or 'Hullo, there!' I don't know which, but I heard the word 'there,' which was significant. When he spoke to me I had my legs crossed, and I looked round, and he immediately attempted to step back, and started his right hand for the side of his overcoat pocket. I raised up and grabbed him, * * * I grabbed him with my left hand on his right wrist as he had his hand in his pocket. * * * He was trying to get his pistol out of his pocket. He had his right hand in his pocket. * * * The first time I saw Gordon he was endeavoring to get his pistol in his hand." It appears by the record that there was a wide difference between the testimony of the prosecuting witness and the defendant as to the matters which occurred at the immediate inception of the difficulty between those parties; and, as the defendant in this case insisted at the trial that the shooting was done in self-defense, it was a matter of vital importance to the jury to know who began the affray, and this was essentially and solely the province of the jury to determine from the testimony of all the witnesses. While section 19, art. 6, of the constitution allows judges to state the testimony to the jury, yet this principle has always been strictly enforced, and necessarily so, for that judges must not charge juries with respect to matters of fact is a constitutional prohibition which has been jealously guarded and rigidly upheld from the earliest judicial history of the state. In the case of People v. Williams, 17 Cal. 147, Justice BALDWIN used the following language, which is as trite now as when used in that early case: "The experience of every lawyer shows the readiness with which a jury frequently catch at the intimations of the court, and the great deference which jurors pay to the opinions and suggestions of the presiding judge, especially in a closely-balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the court. A word, a look, or a tone may sometimes in such cases be of great or even of controlling influence. A judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts." As we have seen, in this case the judge undertook to state to the jury the substance of the prosecuting witness' testimony, which is a very dangerous thing to do, for it is essentially the province of the jury to decide what the substance of the prosecuting witness' testimony was. Selecting what constitutes the substance of a witness' testimony is to a greater or less extent a matter of opinion, and the jurors and the judge may have held widely different views as to what the substance of the prosecuting witness' testimony really was in this case. In the instruction under consideration the court states that the witness Potter testified: "That the defendant came up and addressed him in a sharp tone, and immediately made a demonstration to draw a pistol upon him." This goes to the very gist of the main inquiry in the case, and, while the foregoing may be in a certain sense and to a limited extent the substance of what the witness said happened at the commencement of the trouble, yet the witness in his testimony says that "some one came up to me, and addressed me as 'Ah, there!' or 'Hullo, there!'" Now some one is not necessarily the defendant; and it appears nowhere in the testimony of the witness that he was addressed in a sharp tone of voice. Now, this is significant, for if the remark was made in a "sharp tone" it might indicate anger, animosity, and ill will towards the witness, and it was for the jury to decide whether the tone of defendant's voice was sharp or not. Again, the court makes the witness say, "and immediately made a demonstration to draw a pistol upon him." Now, the witness really did say: "As I jumped around in this way, he started for his overcoat pocket with his right hand;" and surely it is for the jury, and the jury alone, to determine the full meaning of these words, as actually used by the witness. And if in other portions of the witness' testimony he made statements contradictory to those just quoted, or which more fully coincided with the views of his testimony as expressed by the court in his charge to the jury, then it is pre-eminently the duty of the jury to say from all his statements what is the substance of his testimony as to what did occur at the moment when these two parties met. At the conclusion of this instruction to the jury the court used this language: "Other witnesses corroborated in whole or in part that portion of the prosecutor's statement of the transaction, after the conflict had commenced." It appears the parties came to blows, were separated, and then the shooting followed. This is the very moment of time at which the crime was committed, if committed at all; and for the court to tell the jury that the testimony of the witness Potter as to these important matters is corroborated by other witnesses surely prejudiced the rights of the defendant to his great disadvantage, and violated that constitutional prohibition that juries must not be charged as to matters of fact. Upon an examination of the other points relied upon by appellant, we find no error. For the foregoing reason let the judgment be reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; PATERSON, J.

(88 Cal. 450)

WINSLOW v. GOHRANSEN. (No. 13,114.)

(*Supreme Court of California.* March 26, 1891.)

APPEAL—JUDGMENT ROLL—FINDINGS — PRESUMPTIONS.

Where, in ejectment, the court recites that, having heard the proofs of the parties in support of the issues, it finds the facts as alleged in the complaint, and defendant appeals on the judgment roll alone, the judgment will not be reversed because there were no findings on the issues raised by the answer, as in the absence of a statement or bill of exceptions preserving the evidence, it will not be presumed that evidence was offered in support of the issues upon which there were no findings.

Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Wm. L. Gill, (*A. S. Kittredge*, of counsel,) for appellant. *S. O. Houghton*, for respondent.

HARRISON, J. The appeal in this case is direct from the judgment upon the judgment roll alone. The appellant seeks its reversal upon the ground that the court below did not make findings upon all the issues in the case. The complaint is in the ordinary form of a complaint in ejectment. The answer denies its several allegations, alleges title in the defendant, pleads the statute of limitations, and sets up an equitable defense. The court found only the facts which were alleged in the complaint, and rendered judgment in favor of the plaintiff. In Himmelman v. Henry, 84 Cal. 104, 23 Pac. Rep. 1098, it was held that "a failure to find upon some issue, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue." Appellant seeks to distinguish the present case from Himmelman v. Henry by the fact that it is recited in the findings herein that "the court proceeded to hear said cause upon the issues made by the complaint and the answer of the defendant thereto; and the court, having heard the proofs of the parties in support of the issues last aforesaid and the arguments of counsel, makes the findings of fact and conclusions of law;" and he contends that this recital is a sufficient compliance with the rule laid down in Himmelman v. Henry. If we should concede that this statement in the findings is sufficient to authorize us to assume that evidence was received upon the issues presented by the answer, it would not follow that the failure to make a finding upon such issues was error available to the defendant upon this appeal. The opinion of the court in Himmelman v. Henry, that a judgment would not be reversed for failure to find upon an issue, "unless it was shown that evidence was submitted in relation to such issue," necessarily implied that the evidence so shown must be sufficient to authorize such a finding as would "have the effect of invalidating a judgment fully supported by the findings made." Such a finding would not be authorized if the evidence introduced was insufficient to sustain the allegations presenting the issues, any more than it would if there was no evidence introduced in reference thereto. In either case the finding of the court could only be against the allegation, and consequently would not "invalidate" the judgment rendered in accordance with the other findings; and, inasmuch as the failure to make such finding would not affect the substantial rights of the appellant, the judgment ought not to be reversed. Code Civil Proc. § 475. The appellant is not prejudiced unless the court shall fail to make such findings in his behalf as will countervail its other findings; and, as error in the court below is not to be presumed, but must be shown by him, it is incumbent on him to produce before this court the evidence that was presented to that court, in order that we may determine whether any error was committed in failing to make such findings. If the omitted findings must have been adverse to the appellant, their omission is not error sufficient to authorize the reversal of the judgment. Hutchings v. Castle, 48 Cal. 156. The issues upon which the court made no finding in the present case were issues tendered by the answer, and it was incumbent on the defendant to introduce evidence in their support. There is no presumption that such evidence was introduced, and, unless the defendant did introduce evidence which, unless controverted, would sustain his allegations, the court was not required to make any findings thereon. It is not enough for him to show merely that evidence was introduced, but it must also be shown that the evidence which was introduced was sufficient to support his allegations. The recital by the court that it "heard the proofs of the parties in support of the issues" does not imply that any particular proof was heard, nor does it have reference to proof upon any particular issue. It certainly does not imply that the proofs which it heard were sufficient to sustain the allegations of the answer. In Himmelman v. Henry it was recited in the findings that "the court, having heard the allegations and proofs of the respective parties, finds as matters of fact as follows." This recital was not deemed sufficient in that case to justify the presumption that any evidence was offered upon the issues on which no finding was made, and we do not perceive any substantial distinction between the recital in that case and in the one before us. The judgment appealed from is affirmed.

We concur: DE HAVEN, J.; GAROUTTE, J.

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88 Cal. 480

ERLANGER v. DANIELSON. (No. 14,058.)

(*Supreme Court of California.* March 28, 1891.)

APPEAL-BOND—DISMISSAL.

Under Code Civil Proc. Cal. §§ 946, 965, providing that when appellant is an administrator, acting in another's right, or appeals from a judgment in proceedings had upon the estate, he need file no bond, an administrator who appeals from an order revoking his letters is not relieved from giving an appeal-bond, as such appeal is a personal matter, and not one in which the estate is interested.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Justin Jacobs, for appellant. *C. G. Lamberson*, for respondent.

TEMPLE, C. J. H. Danielson died intestate and unmarried, leaving two brothers in this state. March 13, 1890, the appellant, who was not a relative of the decedent, filed a petition asking for letters, and at the same time the written consent of Theodore Danielson, a brother of deceased, to his appointment. March 24, 1890, Theodore Danielson filed a petition asking for letters for himself. April 7, 1890, the court appointed both petitioners administrators, and both qualified. April 29, 1890, William Danielson, another brother of the decedent, who had been temporarily absent from the state, filed a petition asking that Erlanger's appointment be revoked, and that he be appointed in his stead. July 9, 1890, the court, after due notice, made an order revoking the letters to Erlanger, and appointed William Danielson. In making this order the court assumed to be acting under section 1383, Code Civil Proc. From these orders Erlanger appeals. July 16, 1890, the notice of appeal was served and filed. No undertaking on appeal was filed, but according to a statement in the transcript an order was made September 15, 1890, dispensing with security on appeal. Such order is supposed to be authorized by section 946, Code Civil Proc. It is also contended that no bond was required under section 965, Id. We cannot agree with this contention. Plainly, on this appeal the appellant is not acting in another's right in the sense of section 946, Id., and we think it equally evident that section 965 has no application to this case. This is not a proceeding upon the estate of which he was administrator within the purview of that section. In the first place, he was not administrator. Whatever effect his appeal, when perfected, would have upon the order removing him, it was in full force until then. It follows that when he filed his notice he was not such officer and then had no administrator's bond. Suppose the contrary were held, and the order removing him was affirmed. How could his sureties be held for costs incurred after his duties as administrator had ceased? But the section has reference to matters in which the estate is interested. This is his personal matter. The undertaking of his sureties is that he shall faithfully perform the duties of his office. How can he be said to be discharging official duty in appealing from an order relieving him from such duty? It is true, the legislature has the power to provide for obligations not mentioned in the bond, or entirely outside of its apparent scope, and one becoming surety after the law has been enacted will be bound accordingly, for he will be presumed to know of the law; but this is a harsh rule, and the legislature will not be presumed to have intended such consequence unless the intent is clear. Here the intendments are all the other way. We think the appeal should be dismissed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal is dismissed.

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88 Cal. 495

IRVINE *et al.* v DAVY *et al.* (No. 13,188.)

(*Supreme Court of California.* March 30, 1891.)

SETTING ASIDE DEFAULT—PLEADING.

Filing an answer after a default has been entered does not affect the default.

Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM WALLACE, Judge.

Moses G. Cobb, for appellants. *W. C. Belcher* and *J. W. Mastick*, for respondents.

SHARPSTEIN, J. The demurrers to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, were properly overruled. The default of the defendants for failing to answer the complaint, within the time allowed by law for answering, was properly entered. The filing of an answer after the default had been entered did not affect the default. The motion to set aside said default was properly denied, no ground appearing for setting said default aside. Judgment affirmed.

We concur: MCFARLAND, J.; DE HAVEN, J.

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88 Cal. 454

FULTON v. BRANNAN *et al.* (No. 13,603.)

(*Supreme Court of California.* March 26, 1891.)

PUBLIC LANDS—SWAMP—SUITABLE FOR CULTIVATION.

Const. Cal. art. 17, § 3, providing that state lands which are "suitable for cultivation" shall be granted only to actual settlers, and in quantities not exceeding 320 acres to each settler, applies to swamp lands granted to the state by Act Cong. Sept. 28, 1850, when such lands are "suitable for cultivation," and can be reclaimed and cultivated by an actual settler.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Freeman & Bates, for appellant. *Chas. Lamberson*, for respondent.

TEMPLE, C. This is a contest for the purchase of land from the state, instituted in the land-office. The court awarded the land to plaintiff, and defendant appeals. The land belongs to the class designated "swamp land," title to which was acquired by the state under act of congress approved September 28, 1850. The plaintiff was an actual settler upon the land, and the defendant was not. Under the finding of the court that the land in controversy was suitable for cultivation, this became the turning point in the case; the court holding that section 3, art. 17, of the state constitution was applicable. Whether it applies to swamp land at all is the only question of importance in this appeal. That the state had a clearly-defined policy upon the subject generally is quite evident from the section in question and the preceding. They are as follows: "Sec. 2. The holding of large tracts of land, uncultivated and unimproved, by individuals or corporations, is against the public interest, and should be discouraged by all means not inconsistent with the rights of private property. Sec. 3. Lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law." The policy of the state is here declared to be against selling any lands suitable for cultivation in tracts in extent exceeding 320 acres, or to other than actual settlers; and this policy is greatly emphasized by the preceding section, which plainly declares that the holding of large tracts, uncultivated, is against the public interests, and should be discouraged by all means consistent with private rights. In view of such declarations, it must be manifest that it was intended that all land within this state should, so far as governmental action could accomplish it without violating private rights, be held in small tracts, and constitute homes for its owners. No narrow construction of the only words in the section open to construction—"suitable for cultivation"—should limit the operation of this policy. The effect should be rather to extend than to restrict; for the policy is plainly that the section should include all, so far as possible. The constitution classifies all lands as suitable or not suitable for cultivation. For the purposes of this section, neither the legislature nor the courts can classify them otherwise; and it must follow that whether a particular tract belongs to one class or to the other must always be a question of fact. The courts cannot exclude any other class of lands from the effects of this limitation or prohibition, except, in fact, unsuitable for cultivation; nor can the courts declare any class, as a class, unsuitable for cultivation, unless it knows judicially that no tract of the class in extent amounting to 320 acres is suitable for cultivation. Nothing less than this would justify such a judicial rule. Now, this court is presumed to know, what every intelligent man does know, that swamp lands are liable to be reclaimed by natural causes, and that since the congressional swamp-land act, called the "Arkansas Act," many thousands of acres of these lands have been so reclaimed, and had been when this constitutional provision was adopted. There are now pending in this court several cases in which the court has found as a fact that the lands in question had been so reclaimed at the time of the several applications to purchase. These lands, when reclaimed, are often the most fertile we have, and entirely adapted to habitation. Section 3 was construed in Manley v. Cunningham, 72 Cal. 236, 13 Pac. Rep. 622, "to provide that the public lands should be held and disposed of, so far as possible, to those who will live upon and cultivate them; that they should be used to encourage the immigration of industrious people who will utilize and improve the lands, and, by building up homes and engaging in husbandry, add permanently to the wealth and prosperity of the state. The phrase 'suitable for cultivation' includes all lands ready for occupation, and which by ordinary farming processes are fit for agricultural purposes." If this decision is to stand as expressive of the law of this state, all swamp lands which at the time application was made for their purchase were fit for human habitation, and by ordinary farming processes can be made suitable for cultivation, can be sold only to actual settlers, and in quantities not exceeding 320 acres. As already stated, the only language in section 3 which is open to interpretation is the phrase "suitable for cultivation." In Manley v. Cunningham, supra, the phrase is construed as a similar expression by the secretary of the interior in a letter of instruction to Commissioner McFarland: "All timber lands are unfit for cultivation in their natural condition; but, if they may be reclaimed by ordinary farming process, they are not, in my opinion, within the purposes of the act." In this case it is found that the lands have already been reclaimed by natural causes, and the facts show that the land is as nearly fit for human habitation as wild, unimproved lands can well be.

It is claimed that the state is morally bound not to assert that these lands are suitable for cultivation, or perhaps is estopped from so doing, because it received them under the Arkansas act, which only granted such lands as were "swamp and overflowed, and made unfit thereby for cultivation." Counsel says: "The duty of examining the public lands, and determining what parts thereof were swamp and overflowed, was confided to the officers of the land department of the United States; and their decision upon this subject, being the decision of a court of special jurisdiction upon a subject unquestionably within the limits of that jurisdiction, is binding upon all persons, and conclusively establishes that the lands are of the class to which such officers have found them to belong. With respect to each tract of land now before this court, the proper officers have made due investigation, and have determined that it vested in the state under the statute of 1850. This determination was therefore a decision not only that it was 'made thereby unfit for cultivation;' for, under the statute, it was not granted to the state unless 'unfit for cultivation.' When the present constitution was formed and adopted, the state was entitled to various classes of lands, the chief of which were school and swamp lands. The lands of the first class were partly suitable for cultivation and partly not; but the lands of the latter class could not, unless obtained in defiance of law, be otherwise than 'unfit for cultivation.'" That is, because the officers of the United States, in a proceeding to which the state was not a party and was not represented, acting under rules made by themselves, determined that on the 28th of September, 1850, these lands were swamp and overflowed, and therefore segregated them as such to the state, therefore the state cannot be understood as intending to include them in this section, although every member of the convention knew as a fact that millions of acres had at that time been reclaimed by natural causes. The test, applied under the Arkansas act, to determine whether lands passed to the state, has always been their condition on the 28th of September, 1850. The very existence of such a test implies that it was well known that their condition as to being swamp and overflowed, and thereby rendered unsuitable for cultivation, was liable to change. The rulings of the land department of the United States have recognized the fact that some of the lands have been in fact reclaimed before the survey segregating them to the state. Commissioner McFarland said: "A survey made in California in February, 1880, as of all swamp land when part had become dry from natural causes, it appearing that it was all swamp in 1850, was properly so designated by the survey." 1 Dec. Dep. Int. 324–330. And, as stated above, the members of the convention, and the people when they adopted it, must be held to have known of such natural reclamation. That some of these lands might be suitable for settlement was recognized by the statutes of the United States and of this state prior to the constitutional amendment. By Act Cong. March 5, 1885, provision was made for pre-emption of homestead locations upon these lands. As to the state, see sections 3442, 3443, Pol. Code. If one proposing to purchase from the state may be supposed to be concerned as to how the state shall discharge the obligation, if any, imposed upon it to reclaim these lands, such apprehension may well be set at rest by the fact that a fund has been provided, available for that purpose, made up of the proceeds of the sale of the lands, and by this very section 3, which aims to place them, so far as possible, in the hands of actual settlers, who must reclaim them as a means of getting a livelihood.

So far the argument has proceeded upon the assumption that lands which are in fact swamp lands or subject to overflow, so that they cannot be cultivated until reclaimed, are also to be considered unsuitable for cultivation, within the meaning of section 3, now under consideration. But this proposition cannot be admitted. We see no reason why the rule laid down in Manley v. Cunningham should not be universal in its application. The matter should be looked at from the point of view of an intending settler. If the land is of such a character that such person is likely to be willing to settle upon it in its present condition, and to undertake its reclamation for the purposes of agriculture, and can do so successfully, with such outlay as the circumstances would justify, it should be held to be suitable for cultivation, within the meaning of this section. The drainage of land so as to render it fit for the plow is an ordinary farming process, much more so than clearing land for timber, or grubbing up trees and brush. The latter is mostly confined to new land; the former is a perpetual subject of interest in agriculture. Probably, there are few farms in this state, thoroughly cultivated, some portion of which has not been drained; and the drains must be constantly looked after. The state is in no way bound to apply, as between herself and purchasers, the test found in the Arkansas act. There it is used for a purpose altogether different, and evidently, also, with a very different meaning. The primary purpose seems to have been to enable the state of Arkansas to control the margins of streams for the erection of levees. The meaning of the phrase there used undoubtedly is, "not suitable for cultivation until reclaimed." It is not used in that general sense by which lands would be classed by settlers, or by the land-officers under another law making the fact of suitability material in the discharge of official duties. This we have already shown. All such laws, as well as the section of the constitution, must be understood as applying to wild and unimproved lands, which are known not to be fit for cultivation generally until something is done to reclaim them. The section must be construed as intending this. Are the lands suitable for cultivation in the sense in which portions of the unreclaimed public domain in its wild condition can generally be said to be suitable for cultivation? The necessity for reclamation is taken for granted in the constitution. The contrary doctrine would almost amount to a judicial repeal of the provision, and would sound strange before the declared policy that the holding of lands in large tracts and without cultivation is against the public interests, and stranger still in the face of the many cases already argued here, and now pending for decision, in which the lower court had found the fact of the suitability and present inhabitance. The debates in the constitutional convention show that it was there understood that the provision in question would include swamp and overflowed lands, and that the lands mainly regarded as unsuitable for cultivation were grazing lands, which it was said must be held in larger tracts than 320 acres to be utilized profitably. We can think, at present, of only three cases in which swamp lands can be truly said to be unsuitable for cultivation, within the meaning of this section: *First*, where the lands cannot be made fit for cultivation; *second*, where, although they can be so reclaimed, it cannot be done without co-operation of others, unless by an expenditure greater than can reasonably be expected from a settler upon a tract of 320 acres,—this would be a case for a reclamation district; and, *third*, where the lands are not fit for human habitation until reclaimed; for of course it is necessary, in order to comply with this section, that the settlement be made before the purchaser can acquire any rights in the land. We understand this conclusion to be in entire accord with the decision in Manley v. Cunningham. It is claimed that this conclusion is at variance with the case of McIntyre v. Sherwood, 82 Cal. 134, 22 Pac. Rep. 937. The question was not presented there as here. There seems to have been no issue upon the subject in the court below, and it was not found as a fact that the land was suitable for cultivation. Probably, it was not very fully argued; but we do not care to draw nice distinctions. If there be anything in that really inconsistent with this opinion, it ought to be overruled. We advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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88 Cal. 519

MCNEE v. LYNCH, (WARNER *et al.*, Intervenors.)

(No. 13,944.)

(*Supreme Court of California.* March 31, 1891.)

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Chas. E. Wilson and *T. M. McNamara*, for appellant. *N. O. Bradley* and *G. E. Lawrence*, for respondent. *W. B. Wallace*, for intervenors.

TEMPLE, C. On the merits, this case is on all fours with the case of Fulton v. Brannan, ante 506, (just decided by this court, March 26, 1891.) A further question is raised as to the right of the intervenors to be heard as such. The bill of exceptions only shows the action of the court on a motion to strike out the petitions of intervention, or some portions of them. There was no error in refusing to strike out the petition of Warner. Cutler's petition shows no right to intervene. It amounted simply to a request to be permited, as *amicus curiæ*, to show that neither party to the contest was qualified to purchase. The duty is cast upon the court, in such cases, to inquire whether either party is entitled to purchase, and, if neither is so entitled, to adjudge accordingly. In such circumstances we think it would be no abuse of discretion to allow an *amicus curiæ* to produce evidence to enlighten the court. The intervenors take nothing by the judgment, and, as the bill of exceptions does not show what occurred at the trial, we do not know that either of them appeared or took any part whatever therein. So far as we can know, the plaintiff has not been injured. Judgment should be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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88 Cal. 497

NATIONAL BANK OF D. O. MILLS & CO. v. UNION INS. CO. OF SAN FRANCISCO. (No. 13,722.)

(*Supreme Court of California.* March 31, 1891.)

INSURANCE—WARRANTIES — INSURABLE INTEREST.

1. Although Civil Code Cal. § 2607, provides that "a statement in a policy of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof," yet, where it appears from the whole policy that such an expression was not intended as a warranty, it will not be held to be such; and where the policy recites that "it is understood and agreed that the within described premises have been leased by * * *," and it turns out that the premises were not then so leased, though they had previously been, the policy is not avoided, it appearing that there was no intentional misstatement by the assured.

2. Where the loss is payable to the mortgagee of the property, and occurs after sale under fore closure, but before the time for redemption has elapsed, the mortgagee is entitled to recover the loss, as the foreclosure is no extinguishment of his debt until the deed has been made and the time for redemption has expired.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Sidney V. Smith and *Smith, Wright & Pomeroy*, for appellant. *Denson & Oatman*, for respondent.

FOOTE, C. On the 27th day of December, 1886, the appellant, a fire insurance company, issued to the Johnston Brandy & Wine Manufacturing Company a policy of insurance against loss or damage by fire, upon certain property therein mentioned, to the amount of $3,000. On the face of this policy was attached the following indorsement: "Loss (if any) payable to National Bank of D. O. Mills & Co. as herein provided. It is hereby agreed that this policy, as to the interests of the mortgagee or trustee only therein, shall not be invalidated by any act or negligence of the mortgagor or owner of the property insured, nor by occupation of the premises for purposes more hazardous than are permitted by the terms of this policy, nor by any change in title or possession of the property insured: provided, however, that whenever the said mortgagee or trustee shall become aware of any act or negligence of the mortgagor or owner which would, except as to such mortgagee or trustee, invalidate this policy, or of any occupation of the premises for purposes more hazardous than are permitted by the terms of this policy, or of any change in title or possession of the property insured, he will at once notify this company thereof: and provided, also, that he will on demand pay to this company the additional premium charged by this company on account of any increased risk for the entire term of this policy; and failure to so notify this company, or to so pay said additional premium, shall avoid this contract." It further appears that there was an indorsement made thereon that on the 2d of March, 1887, the National Bank of D. O. Mills & Co. had notified the insurance company that it as mortgagee had instituted a suit for foreclosure on the property embraced in the policy, and that the same had been accepted by that company without prejudice to the policy. On the 25th of May, 1887, the same insurance company issued a policy of insurance of the same character and to the same parties, and the loss made payable in the same way and upon like conditions, for the sum of $2,000. It appears that the property insured was destroyed by two successive fires in the month of September, (about the 3d and 20th, in the year 1887,) and that the value of the building and other property burned at said times was fully equal to the amount of the insurance. The National Bank of D. O. Mills & Co., to whom the loss was made payable, and who held a mortgage for $6,000 on this property, brought this action to recover for the loss, interest, and costs, and obtained judgment as prayed for; from which, and an order denying a new trial, this appeal is taken.

The appellant urges in support of its contention that the first finding of the trial court, "that all and singular the averments of the complaint are true;" and the second finding, "that all and singular the matters and things stated in defendant's amended answer and the general averments, and both of the general and special defenses therein set forth, are untrue, excepting," etc.,—are unsupported by the evidence. The point made in this behalf is that at the time of the issuing of the policy dated the 25th of May, 1887, it was made an express warranty therein by the insured that the premises were then leased to Messrs. Walden & Co., when, in fact, they were not so leased, and that therefore, by its terms, the policy was void for such misrepresentation. Conceding that the statement in the policy, if taken by itself, and without reference to other portions of that statement, viz., "it is understood and agreed that the within described premises have been leased by Messrs. Walden & Co.," is an express warranty, under section 2607 of the Civil Code, which reads, "A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof," nevertheless if, taking the entire policy in all its terms and language, it can be perceived that such was not the intention of the parties, such an expression will not be held to be an express warranty; and, where there is any doubt as to the construction to be given to language in such a matter, "the court should lean against that construction which imposes upon the assured the obli-

gation of a warranty." National Bank v. Insurance Co., 95 U. S. 679.

In another part of this policy there occurs this clause: "Fraud, false swearing, misrepresentation, or concealment of a material fact by the insured, whether in the application for this policy, proofs of loss, or otherwise, shall render this policy void." Thus it seems that it is the intentional misstatement or concealment of a material fact which rendered the policy void, and not the mere fact that a statement therein as to the material matter is untrue. The evidence in this case shows that there was no intentional misstatement as to the leasing of the property to Walden & Co. These parties did have a verbal lease of the premises up to the 30th of April, 1887, and this fact, and the further fact that the language of the policy is "have been" leased, goes far to create the impression that, as the lease had been so recent, the Johnston Brandy & Wine Manufacturing Co., having that in mind, might have been of the impression that these parties still had a lease, or perhaps meant to say that they had had a lease. This view of the matter in hand seems to be in accord with previous adjudications of the appellate court. In Wheaton v. Insurance Co., 76 Cal. 419, 18 Pac. Rep. 758, a somewhat similar question was involved, and it was contended that the statement of the insured, in his application as to the value of the property, was an express warranty. The alleged warranty was in this language: "Special reference being made to the assured's application and survey No. 261,707, which is his warranty, and a part hereof." In another part of the policy there was this clause: "If any false representation is made by the assured of the condition, situation, or occupancy of the property, or any overvaluation, or any misrepresentation whatever, either in a written application or otherwise, this policy shall become void." The appellate court said, (page 422, 76 Cal., and page 761, 18 Pac. Rep.:) "In Helbing v. Insurance Co., 54 Cal., 156, it was held that a provision in a policy of insurance that the application shall be considered a warranty, and, if the property insured is overvalued in it, the policy shall be void, applies only where the statements as to value are intentionally false; that the question of fraud is one of fact; that although, where the discrepancy between the statement in the application and the actual value of the property is so great as to convey the conviction of fraud to the reasonable mind, the jury may and ought to find fraud, yet, where the discrepancy is not very considerable, the jury may find the application not to have been fraudulent, even in the absence of explanatory evidence. * * * Moreover, the language of the provision in the policy here sued on, that if any false representation is made by the assured, etc., the policy shall become void, when read as a whole, very clearly shows that a willful misrepresentation as to the value of the property, or one made with such gross and reckless carelessness as in the law would be treated as willful, was in the contemplation of the parties. If so, the previous clause does not make the valuation a warranty. Even when the statements in the application are declared to be warranties, they will not be regarded as such if qualified by other stipulations, which afford a fair inference that the parties themselves did not so intend them." Page 423, 76 Cal., and page 762, 18 Pac. Rep. By the findings it has been determined by the trial court as a fact that the assured did not intentionally misrepresent any fact to exist material to the risk which did not exist, and, as heretofore stated, we think the findings on this point are sustained by the evidence.

The appellant claims also that the policy of the 27th of December, 1886, was void as to the Johnston Brandy & Wine Manufacturing Co., because the lessees, Walden & Co., were warranted to be the tenants then, and in possession, and that when these tenants abandoned the possession of the premises, without notice given by the assured to the company, the policy became void. This statement of the existence of the lease to Walden & Co., if it stated such existence, was not a warranty in either of the policies, as we have seen, and the change of possession, if it took place without notice, did not concern the plaintiff here; for it was not to be affected by any act of this kind, unless notice was brought home to it of such change of possession, and it further failed to notify the company. The evidence is sufficient to show that the plaintiff had no knowledge of any change in the possession of the property from Walden & Co., back to the Johnston Brandy & Wine Manufacturing Co., nor that the premises were vacated or unoccupied, even conceding that such was the fact, under a proper interpretation of the language of the policies on these points. If it had no such knowledge, it was not bound to communicate it, and was protected by the indorsement on the policy. It follows, therefore, that unless the plaintiff here has lost its right by reason of something which is shown by the evidence to have transpired before the loss, by which the rights of the plaintiff under the terms of the indorsement on the policies are affected, there was no error committed in the rendition of the judgment and the refusal to grant a new trial.

In this connection the appellant contends "that the interest of a mortgagee in insured property is measured by the amount of his mortgage debt at the time of the loss, and if at such time his debt is extinguished, either wholly or in part, his interest as a mortgagee is also extinguished either entirely or *pro tanto;*" and that "the mortgage debt" of the plaintiff "having been *pro tanto* extinguished to the extent of $6,000, by reason of the foreclosure sale and the application of the proceeds to the mortgage indebtedness, the mortgage clause operated as a protection to the plaintiff only to the extent that its indebtedness remained unpaid after the sale." It is true that the plaintiff proceeded to foreclose the mortgage, and that of this intention the defendant had notice, and that the property was bought in at sheriff's sale for the plaintiff, a credit of $6,000 made upon the judgment, and a certificate of purchase issued. But when the fire occurred the deed had not been executed, and the legal title had not been passed, the time for redemption not having elapsed. It is not pretended that there was any payment of money on the judgment. The bid of the plaintiff was credited on the judgment, and a receipt given to balance the sheriff's account of the foreclosure sale. But there would never have been any actual payment of money received by the plaintiff unless it had been paid in upon the redemption of the property, or it had upon the failure of redemption received a deed. In fact, the plaintiff never got a deed until after the loss had occurred, no redemption having taken place.

In this connection the argument by the appellant is that the legal effect of the foreclosure was to pay the plaintiff's debt *pro tanto*, and to that extent to extinguish its interest as a mortgagee in the insured property. It has been held by the appellate court of this state that the foreclosure of a mortgage embraces the sale of the property, and the execution of the sheriff's deed, as well as the decree of the court ordering the sale. A mortgage cannot be said to be foreclosed, even in the sense of our Code, until the mortgagor's right of redemption is cut off. Goldtree v. McAlister, 86 Cal. 105, 24 Pac. Rep. 801. Tested by this rule, since the time for redemption had not elapsed, when the foreclosure took place, and loss occurred, and no deed had been made to the mortgagee, there had been no foreclosure of the mortgage. And so far as the question of payment of the mortgage debt is concerned, as bearing upon the matter of the extinguishment *pro tanto* of the insurable interest of the mortgagee, it was held in Bragg v. Insurance Co., 25 N. H. 298, that where, in a policy such as this, the insurance is effected on the property of one person, and the loss made payable to the mortgagee, another person, that even upon a foreclosure, where the property is sold and a deed made to the mortgagee, there is not such an alienation of the title as to forfeit the right to recover on the policy; for if the mortgagee thus acquires an additional interest in the property, it is a potential reason why he would be more interested in protecting the property insured; and such a change of title, although within the language of the proviso against change of title or sale or transfer, is not within its spirit and purpose, and will not vitiate the policy; and the instance of a case where the title becomes absolute in a mortgage by foreclosure is cited by Mr. May in his work on Insurance, to illustrate this principle. May, Ins. § 275. To much the same effect is it held in Heaton v. Insurance Co., 7 R. I. 508. Unless the right of redemption has been extinguished, there is no payment *pro tanto* by the mortgagor at the sale. West v. Chamberlin, 8 Pick. 338. Where no deed has passed, as we have seen, the foreclosure is incomplete, and no payment has been made. If the deed had been made when the fire occurred, and the right of redemption had been cut off, there would have been a payment made by the bid. But even then, under the authorities, it seems as if there would have been no change of title or extinguishment of interest which would have affected the policy. For these reasons we advise that the judgment and order be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

BEATTY, C. J., being disqualified, did not participate in the above opinion.

88 Cal. 590

DYER v. BRADY. (No. 13,165.)

SAME v MARTIN. (No. 13,166.)

(*Supreme Court of California.* April 4, 1891.)

APPEAL—BOND—DISMISSAL—NOTICE OF MOTION.

1. An undertaking on appeal, which incorrectly recites the date of the order from which the appeal was taken as being December 11th instead of December 8th, is sufficient if it correctly describes the appeal and order in all other respects.

2. Under Cal. Sup. Ct. Rule 13, requiring that a notice of motion to dismiss an appeal for failure to file a transcript in accordance with the rules of the court shall specify the objections to the transcript, an appeal will not be dismissed because of appellant's failure to number the folios of the transcript, as required by the rules, if the notice of motion to dismiss does not specify the objection.

In bank. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Campbell & Wright, for appellant. *Pillsbury & Blanding*, for respondent.

BEATTY, C. J. In each of these cases respondent moves to dismiss the appeal on two grounds: *First*, that no undertaking on appeal has been filed; *second*, that no transcript of the record has been filed, as required by the rules of this court, and that the time for such filing has expired. The point of the first objection is that, whereas the order appealed from was made on December 8th, and was so correctly described in the notice of appeal, the undertaking on appeal recites that an appeal has been taken from an order made December 11th. But since there was but one order and one appeal, both correctly described in the recital in the undertaking in all other respects except the date of the order, there can be no question that the sureties would be bound in case of a dismissal of the appeal or affirmance of the order, and therefore the undertaking is sufficient. Swasey v. Adair, 83 Cal. 136, 23 Pac. Rep. 284. The point of the second objection is that the folios of the transcript (which was on file when the notice to dismiss was served) are not numbered, as required by our rule. But this was an objection that should have been distinctly specified in the notice of motion to dismiss, in order to give the appellant an opportunity to amend the defect. It was not so specified in the notice, and therefore cannot be regarded. Rule 13. For our own convenience in examining the record we might still require the appellant to number the folios of the transcript on file, but, as it is extremely brief, such an order seems unnecessary. Motions denied.

We concur: DE HAVEN, J.; MCFARLAND, J.; HARRISON, J.; SHARPSTEIN, J.; GAROUTTE, J.

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88 Cal. 591

BUCHANAN v. NAGLE *et al.* (No. 13,705.)

(*Supreme Court of California.* April 4, 1891.

SWAMP LANDS—SEGREGATION—RIGHT OF ENTRY.

The swamp lands granted to the state by Act Cong. Sept. 28, 1850, are not subject to application for purchase until they have been segregated to the state by a United States survey, and an application filed prior to such segregation confers no rights on the applicant, though it is subsequently approved, and a certificate of purchase issued after segregation.

In bank. Appeal from superior court, Fresno county; WILLIAM W. CROSS, Judge. *Garber, Boalt & Bishop* and *Chas. G. Lambertson*, for appellants. *Freeman & Bates*, for respondent.

MCFARLAND, J. This is an action to determine a contest arising in the state land-office as to the right to purchase from the state a certain section of swamp and overflowed land in Tulare county. Judgment went for plaintiff, and defendant appeals from the judgment and from an order denying a new trial.

The court below found, among other things, that the land in controversy was not segregated by the United States to the state until October 14, 1884; that defendant Nagle's application was made on December 14, 1883, and filed in the state land-office on April 1, 1884,—all before the segregation; and that, as the land was not subject to application before segregation, no rights attached by reason of the application, nor by reason of the subsequent approval and certificate of purchase made after the segregation, but based on said application. Counsel for appellant argue very fully and ably that there is nothing to prevent the filing of an application to purchase swamp land before segregation; but the contrary was held in Garfield v. Wilson, 74 Cal. 175, 15 Pac. Rep. 620, and in the recent case of Wren v. Mangan, ante, 100, (No. 13,424, decided since the present case was submitted.) Counsel attack the correctness of the conclusion stated in Garfield v. Wilson; but we are satisfied with that conclusion and with its approval in Wren v. Mangan. We do not see that the question involved is at all changed by the adoption of the theory that the act of September 28, 1850, was a grant *in præsenti* to the state of the swamp lands within her territory; for, that being so, the state has still the power to provide how they may pass into private ownership; and she has made no provision for an application to purchase before segregation. Indeed, the provisions of the Code on the subject clearly contemplate that no steps towards a purchase are to be taken, and no advantage or preference to be gained by an application, prior to such segregation. It is difficult to see how the requirements of the Code with respect to applications to purchase could ordinarily be complied with at all before the approval of the United States survey, which constitutes the segregation. For instance, section 3443, Pol Code, which establishes the method of making an application to purchase swamp land, provides for an affidavit of the applicant in which, among other things, he must describe the land which he desires to purchase, and must swear that "he knows the land applied for, and the exterior boundaries thereof." But can an applicant swear to such knowledge—or have it—prior to the survey and segregation by the United States? In the case at bar the applicant undertook to make application for land described as a certain section 9; but how could he have known where section 9 was, or "the exterior boundaries thereof," before there had been an approved survey of even the township in which said section was supposed to lie? The lines of townships are "created" by the United States survey, and have no existence before it. Robinson v. Forrest, 29 Cal. 318; Middleton v. Low, 30 Cal. 596. Section 3445, Pol. Code, is in accord with the doctrine heretofore declared by this court. It refers to the application described in section 3443, and evidently assumes that it applies only to segregated land, and provides that where lands have been segregated by the authority of the United States, but "have not been sectionized by the same authority," an applicant to purchase said lands may have them sectionized by the county surveyor. But there is nowhere any provision for an application before segregation; and such an application is out of harmony with the clear intent of the legislature; and we are satisfied with the former decisions that the approval of the United States survey constitutes the segregation. We are also satisfied that in this case there was no such segregation of the land in contest until October 14, 1884. It is also urged strenuously by counsel for respondent that appellant's application was void because it appears, and is found by the court, that appellant had never been upon, and had never seen, the land applied for; that, therefore, his statement in his affidavit that he "knows of his own knowledge that there are no settlers thereon" is necessarily untrue; and that the things required by section 3443 must not only be in the affidavit, but must be true. But it is not necessary here to determine this somewhat important question, because, for the reasons above given, the judgment must be affirmed. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; PATERSON, J.; HARRISON, J.; GAROUTTE, J.

88 Cal. 632

STONY HILL TURNPIKE ROAD CO. v. BOARD OF SUPERVISORS OF PLACER COUNTY. (No. 14,044.)

(*Supreme Court of California.* April 28, 1891.)

TOLL-ROADS—DUTY OF COMMISSIONERS TO FIX RATES.

Civil Code Cal. § 514, provides that "wagon road corporations * * * may take such tolls only * * * as are fixed by the supervisors of the proper county through which the road passes." *Held*, that the board of supervisors had no authority arbitrarily to refuse to fix such rates for a corporation which had been in operation over 12 years.

In bank. Appeal from superior court, Placer county; B. F. MYERS, Judge.

Mandamus by Stony Hill Turnpike Road Company against the board of supervisors of Placer county, to compel the fixing of toll-rates. Civil Code, Cal. § 514, provides that "wagon road corporations * * * may take such tolls only * * * as are fixed by the board of supervisors of the proper county through which the road passes."

F. P. Tuttle, for appellant. *Hale & Craig* and *J. E. Prewitt*, for respondent.

GAROUTTE, J. This is an appeal from an order granting a writ of mandate. The findings are in consonance with the allegations of plaintiff's petition for the writ, and, in effect, are as follows: The plaintiff was a corporation duly organized December 26, 1877, under the provisions of the laws of this state providing for the construction of toll-roads, and its period of existence was fixed in its articles of incorporation at the term of 25 years. That plaintiff, about said time, constructed a toll-road in Placer county, Cal., commonly known as the "Stony Hill Turnpike," and ever since has been, and now is, the sole and exclusive owner and in the possession thereof, using the same as a toll-road, and collecting tolls therefrom; that the board of supervisors of Placer county, from time to time, fixed its rates of toll, and the 13th day of January, 1888, was the last time said board established said rates; that plaintiff demanded of said board, on April 27, 1889, that it fix and reestablish said rates of toll, but said board refused, and still refuses, so to do; that on January 11, 1890, said board rescinded the said order of January 13, 1888, and no other order has been made since said last-mentioned date. That plaintiff has no speedy, plain, and adequate remedy at law, and that the defendants are the duly elected, qualified, and acting board of supervisors of Placer county. We are at a loss to see upon what authority or theory the appellant refused to establish the rates of toll upon plaintiff's toll-road. Plaintiff's property is worthless unless tolls can be collected, but tolls cannot be collected unless the board of supervisors fix the rates. Section 514, Civil Code. It certainly cannot be contended that the board of supervisors, as prescribed by the provisions of the Political Code, (section 2779 et seq.,) can advise, assist, and authorize a corporation to build and construct a toll-road, perchance at great expense, and then have the legal right arbitrarily to refuse to fix rates of toll, and thus practically confiscate the corporation's property. The case of People v. Davidson, 79 Cal. 170, 21 Pac. Rep. 538, is a different character of action, and under an entirely different state of facts, and is not applicable nor authority in a case where a corporation has been organized under the provisions of our codes for the construction of toll-roads, and has in good faith, as appears by the record in this case, proceeded with the construction thereof. The case of Weaverville, etc., Road Co. v. Board of Sup'rs of Trinity Co., 64 Cal. 69, is conclusive of this case, if authority were necessary, but under the facts here disclosed it was clearly the duty of the board of supervisors, upon the application of the plaintiff, to establish rates of toll for its toll-road. Let the judgment be affirmed.

We concur: SHARPSTEIN, J.; PATERSON, J.; HARRISON, J.; MCFARLAND, J.; DE HAVEN, J.

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88 Cal. 634

VOLCANO CANYON ROAD CO. v. BOARD OF SUPERVISORS OF PLACER COUNTY. (No. 14,033.)

(*Supreme Court of California.* April 28, 1891.)

TOLL-ROADS—DUTY OF COMMISSIONERS TO FIX RATES—MANDAMUS.

1. Civil Code Cal. § 514, provides that "wagon road corporations * * * may take such tolls only * * * as are fixed by the board of supervisors of the proper county through which the road passes." *Held*, that the board of supervisors had no authority arbitrarily to refuse to fix such rates for a corporation which had been operating a toll-road for 15 years.

2. On *mandamus* by a toll-road company to compel the board of county supervisors to fix its rates of toll, the board cannot raise any question as to whether plaintiff was lawfully incorporated, or whether it is the owner, and entitled to the possession, of the toll-road, when it has held possession for 15 years.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. MYERS, Judge.

Mandamus by Volcano Canyon Road Company against the board of supervisors of Placer county, to compel the fixing of toll rates. Civil Code Cal. § 514, provides that "wagon road corporations * * * may take such tolls only * * * as are fixed by the board of supervisors of the proper county through which the road passes."

F. P. Tuttle, for appellant. *W. H. Bullock* and *J. E. Prewitt*, for respondent.

BELCHER, C. The plaintiff is a corporation duly organized under the laws of this state, and for more than 15 years has been, and now is, the owner and in possession of that certain toll-road situate in Placer county, known as the "Volcano Canyon Toll-Road." During all the time of its ownership of the road up to October 14, 1889, the plaintiff collected tolls from persons passing over the same, under orders made from time to time by the board of supervisors of the county, fixing the rates of such tolls. The last order fixing the rates of tolls for the road was made on January 13, 1888, and this order was rescinded and set aside by the board on October 14, 1889. The plaintiff afterwards demanded that the board again fix the rates of toll to be by it collected for travel over its road, but the board then and there refused, and still refuses, to comply with the demand. The plaintiff then commenced this proceeding to obtain a writ of mandate compelling the defendant board to fix rates of toll for its road. After trial the court below found the facts to be as above stated, and rendered judgment granting the writ. From that judgment this appeal is prosecuted on the judgment roll.

We think that the judgment entered was proper. The case is not materially different from that of Stony Hill Turnpike Road Co. v. Board of Supervisors of Placer Co., ante, 513, (just decided.) The questions attempted to be raised as to whether the plaintiff was ever lawfully incorporated, and as to whether it had ever been or was the owner, and entitled to the possession, of the toll-road, of which it had had actual possession for more than 15 years, were matters which could not be inquired into by the board of supervisors on an application to fix its rates of toll, or in a proceeding by *mandamus* to compel the board to fix rates. Weaverville, etc., R. Co. v. Board of Supervisors, 64 Cal. 69.

It is true that the right to collect tolls on a toll-road is a franchise, and that tolls can only be collected after the board of supervisors has fixed the rates; but a board of supervisors has no authority to arbitrarily refuse to fix rates, and thereby destroy the value of the toll-road property. We advise that the judgment be affirmed.

We concur: Vanclief, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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88 Cal. 609

Yore *et al.* v. Bankers' & Merchants' Mut. Life Ass'n of United States. (No. 14,057.)

(*Supreme Court of California.* April 18, 1891.)

Insurance — Loci Contractus — Jurisdiction — Venue.

Where an application is for a policy to be payable in accordance with the terms of a future will, and, pending that, to stand in favor of the lawful heirs, and in the policy as issued and forwarded to the agent who took the application the legal heirs are to be the beneficiaries, the contract is not consummated until it is accepted by the insured, and suit can be brought thereon, under Const. Cal. § 16, only in the county where the application was made and accepted, as the place of the contract, and not in the county where the policy was issued.

In bank. Appeal from superior court, Yuba county; Phillip W. Keyser, Judge.

Mastick, Belcher & Mastick and *Forbes & Dinsmore*, for apellants. *Haggin & Van Ness*, (*George C. Gorham, Jr.*, of counsel,) for appellee.

De Haven, J. Appeal from an order changing the place of trial. The action is one to recover the amount named in a policy of insurance, issued by the defendant, a corporation, on the life of one Peter Yore, and was brought in the superior court of Yuba county. The defendant is a corporation formed and existing under the laws of the state of California, and its principal place of business is in the city and county of San Francisco. By section 16, art. 12, of the constitution of this state, plaintiffs are entitled to bring this action either in the county where the contract was made or in the county where the principal place of business of the defendant corporation is situated, and the only question for determination here is as to the place where the contract sued upon was made; the appellants claiming that it was made in the county of Yuba, while the respondent insists that it was made in the city and county of San Francisco. The motion was heard upon affidavits. It appears from the affidavits filed on behalf of respondent that the deceased, Peter Yore, made application in writing to the agent of respondent at Marysville, in Yuba county, for a life insurance policy, and said application was forwarded by said agent to San Francisco, and upon its receipt the officers of said respondent issued and caused the policy sued upon to be mailed to the agent of the company at Marysville, with instructions to deliver it to said Yore.

1. It is claimed by the respondent that upon this state of facts the contract was, in judgment of law, made in San Francisco, and this would be so, if the policy issued was in exact accordance with the terms proposed in the application. May, Ins. §§ 50, 66. A policy which in its terms is different from the application is not a completed contract, and, until accepted by the insured, is no more than a proposal to contract upon the terms stated in it. Insurance Co. v. Young, 23 Wall. 85; May Ins. § 50; Insurance Co. v. Carrington, 3 Conn. 357. It appears to us, from the affidavits used upon the hearing of this motion in the court below, that the policy as issued was not an unqualified acceptance of the terms embodied in the application of the deceased, Yore. The application itself is not set out, but its terms sufficiently appear from the letter forwarding it to San Francisco, which letter is made a part of one of the affidavits filed by respondent. In this letter the defendant's agent writes: "You will observe, by answer to question 6 he desires to dispose of proceeds of the policy by future will, pending which he desires to have it stand in favor of lawful heirs. I presume policy can be so written." The expression of such a "desire" in an application is to be construed as a proposal for insurance in accordance with the expressed wish of the applicant. Insurance Co. v. Carrington, 3 Conn. 363. The policy as issued is "payable to legal heirs or to order of ———, county of ———, state of ———, if then living; otherwise to ———." The substance of Yore's application, as appears from the above letter, was for a policy which should be payable to such person or persons as he might appoint by will, and, if no such appointment should be made, then to his legal heirs; but under the policy issued the legal heirs are to be the beneficiaries. The difference between such a policy and the one applied for is very apparent. Mr. Bliss, in his

work on Life Insurance, in discussing the question as to who is entitled to claim the proceeds of a life insurance policy, says: "When a policy designates a person to whom the insurance money is to be paid, the person who procures the insurance, and who continues to pay the premiums, has no authority by will or deed to change the designation or title to the moneys. He is under no obligation to continue to pay the premiums, unless he has covenanted so to do; but, if he does so, the person originally designated in the policy will derive the benefit." Bliss, Ins. § 337; see, also, Id. §§ 317, 318; May, Ins. § 392; Wilburn v. Wilburn, 83 Ind. 56; Drake v. Stone, 58 Ala. 133. In the case of Harley v. Heist, 86 Ind. 204, the court say: "It is further said that to deny to the husband, who has paid the premiums, the right to dispose of the policy to his own use, after the death of the wife, imposes upon him a hardship and a wrong. A sufficient answer to this is that, if he wishes to retain to himself the control and ownership of the policy in such case, he may so provide in the policy." There are some cases, however, which seem to hold that one who procures a policy of insurance upon his life for the benefit of another, and pays the premiums thereon, may dispose of it by will or otherwise, to the exclusion of the beneficiary named in the policy. Clark v. Durand, 12 Wis. 224; Kerman v. Howard, 23 Wis. 108. And in the later case of Foster v. Gile, 50 Wis. 603, 7 N. W. Rep. 555, and 8 N. W. Rep. 217, the court say the beneficiary named may be changed with the consent of the company issuing the policy.

It makes no difference, in the decision of this case, which of these conflicting views is adopted as a correct statement of the law relating to the respective rights of the insured and the beneficiary named in a policy of life insurance. If the section above quoted from Bliss on Life Insurance states the true rule of law on the subject it is clear there was no completed contract of insurance in this case until the policy as issued by respondent was accepted by the applicant; and we think the same conclusion must be reached if it should be assumed that the contrary doctrine announced in the above-cited decisions of the supreme court of Wisconsin is the correct one. The conclusion as to the formation of the contract must be the same, because the applicant had an undoubted right to propose to make a contract in the very terms which he selected, and thus to apply, as he did, for a policy which would give him, in express terms, the power to say by his will to whom its proceeds should be paid, thus excluding all future controversy as to his right to do so; and, having asked for one so written, he was under no obligation to accept a policy which omitted such express terms of contract, and which left his right to dispose of the money to be paid thereunder, if he retained such right at all, to be simply implied by law. It is immaterial what his reasons were for making the application in the form he did, or why he desired a policy expressly reserving to himself, as a part of his contract with respondent, the right to say by his will to whom should be paid the amount for which he was insuring his life. It is enough that he thought such a provision was of sufficient importance to form a part of the express terms of the policy, and an acceptance of this term of the application, unless he consented to accept a policy in the form issued, was indispensable to the formation of a contract. "Until the terms of the agreement have received the assent of both parties the negotiation is open, and imposes no obligation on either." Eliason v. Henshaw, 4 Wheat. 225. "An acceptance, to be good, must of course be such as to conclude an agreement or contract between the parties. And to do this it must in every respect meet and correspond with the offer; neither falling within, nor going beyond the terms proposed, but exactly meeting them at all points, and closing with them just as they are stated." Potts v. Whitehead, 20 N. J. Eq. 55. It follows that there was no binding contract in this case until Yore assented to the terms given in the policy by accepting the same; and, as this act of acceptance occurred in Yuba county, the contract must be considered as having been made there. May, Ins. § 66.

2. The letter of defendant's agent, transmitting the policy, saying: "Mr. Yore can dispose of the insurance in his will proportionately as he chooses,"—cannot be deemed any part of the contract itself, and was not intended as anything more than an expression of the writer's opinion of Yore's legal right to do so. Order reversed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; HARRISON, J.

DISS v. LONG *et al.* (No. 13,739.)

(*Supreme Court of California.* April 18, 1891.)

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Garber, Boalt & Bishop, for appellant. *Lambertson & Taylor*, for appellee.

PER CURIAM. On the authority of Buchanan v. Nagle, ante, 512, (No. 13,705,) and Fulton v. Brannan ante, 506, (No. 13,603,) the judgment and order appealed from are affirmed.

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88 Cal. 543

CAVANAUGH v. CASSELMAN. (No. 13,958.)

(*Supreme Court of California.* April 2, 1891.)

STATUTE OF FRAUDS—MEMORANDUM—CONTRACT.

1. A written memorandum of a contract, whereby defendant agrees to sell plaintiff certain real and personal property, which names the parties and price, and gives a complete description of the property, and is signed by the defendant, who is the party to be charged, is not insufficient because it is not also signed by the plaintiff.

2. Nor will the fact that the instrument is expressed on its face to be *inter partes*, and yet is only signed by the party to be charged, render it insufficient as being merely an inchoate agreement, incapable of enforcement, in the absence of any showing that it was to be signed by the other party before it became operative.

3. Where in execution of such a contract a

deed to a portion only of the land described is tendered, and it is accepted under protest and as a part performance only, it cannot be contended that the contract is merged in the deed, since the obligation cannot be satisfied by the conveyance of a part of the land.

4. Evidence of witnesses pointing out to the court and defining the property in controversy, which was imperfectly described in the contract, was properly admitted to enable the court to determine whether defendant's conveyance and bill of sale were a full compliance with his agreement.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Chauncey Dunn and *Taylor & Holl*, for appellant. *Grove L. Johnson*, for respondent.

HARRISON, J. The plaintiff brought this action to recover damages from the defendant for the non-fulfillment of the following contract: "This indenture, made and entered into this 16th day of May, 1888, by and between Ezra Casselman, of the county of Sacramento, party of the first part, and W. B. Cavanaugh, of the city of Saramento, party of the second part, witnesseth: The party of the first part hereby agrees to sell to the party of the second part, and the party of the second part hereby agrees to buy from the party of the first part, the following described premises belonging to the party of the first part, to-wit. [Description of land and certain personal property.] The price to be paid hereunder is $24,000, of which $1,000 have already been paid at the signing of this agreement, $8,000 shall be paid on the 15th day of October, 1888, and the balance of $15,000 shall be paid on that date by the execution unto the party of the first part by the party of the second part of a mortgage upon said premises, payable five years from that date. * * * Upon the payment on said 15th day of October, 1888, of said sum of $8,000, and the execution of the mortgage herein provided for, the party of the first part will make, execute, and deliver unto the party of the second part a good and sufficient deed of all said real estate and improvements, conveying the same to the party of the second part free and clear from all incumbrances, and will also make, execute, and deliver unto the party of the second part a good and sufficient bill of sale of all the personal property hereinbefore referred to. This agreement is binding upon the heirs, administrators, and assigns of the parties hereto. In witness whereof the parties hereto have hereunto set their hands this 16th day of May, 1888. EZRA CASSELMAN. ANNIE CASSELMAN." The cause was tried by the court without a jury, and in its decision the court finds that the parties entered into the contract on the 16th day of May, 1888, and that the plaintiff at that time paid to the defendant $1,000 in pursuance thereof, and that on the 15th day of October, 1888, he paid to the defendant the further sum of $8,000, and executed to him the mortgage for $15,000 provided for in the contract, and that on that day the defendant made to the plaintiff a deed for a part of the land described in said agreement which expressly excluded from its operation a portion that was included within the boundaries and description given in the contract, and also that the defendant did not deliver to the plaintiff all of the personal property specified in the contract. The court found that the value of the omitted land and of the personal property not delivered to the plaintiff was $625, and gave judgment for that amount in favor of the plaintiff. The court further found: "That on said 15th day of October, 1880, when plaintiff and defendant met to carry out said executory contract of May 16th, the defendant tendered to plaintiff the deed mentioned in finding 2, and also a bill of sale purporting to be in accordance with the terms of said contract; but the plaintiff then discovered that said deed did not include all the land described in said contract, but expressly excluded the said Garvey tract. * * * That plaintiff then refused to accept said deed and bill of sale, or either of them, in execution of said contract, because they did not convey the property last above described, and plaintiff then tendered to defendant to be executed by defendant a deed and bill of sale prepared by plaintiff, which conformed to the terms of said contract, and offered on his part to perform fully said agreement; but the defendant refused to execute said last-mentioned deed and bill of sale, or either of them, and refused to give plaintiff any deed or bill of sale other than those he [defendant] had tendered as above stated. That plaintiff had arranged to lease the premises so contracted for to third parties from said 15th day of October, and desired to get possession thereof without delay; and he finally informed defendant that he would accept said deed and bill of sale tendered by defendant, under protest, and only in part satisfaction of said contract, to the extent to which they complied therewith, and should at once sue defendant for damages for his failure to comply with said contract in the particulars above set forth; and the defendant then delivered the said deed and bill of sale to the plaintiff with a full understanding that they were not accepted as a full performance of said contract, but that plaintiff reserved the right to sue defendant for said breach. That plaintiff did so accept said deed and bill of sale in part satisfaction as aforesaid, and thereafter, on the 17th day of said October, he commenced this action." At the trial the plaintiff offered in evidence the contract of May 16, 1888, to which the defendant objected, upon the ground "that it showed upon its face that it had never been executed by the plaintiff, and that therefore it never was a perfect agreement, but was only an attempted agreement which was never consummated;" and also upon the further ground "that if it ever was an agreement, it had become merged in a subsequent agreement in the nature of a deed and of a bill of sale, and that it had been entirely superseded by such deed and bill of sale." The court overruled the objections, and allowed the instrument to be read in evidence. When the plaintiff rested the defendant moved for a nonsuit upon substantially the same grounds, which was denied. The ruling of the court with reference to this contract is presented by the appellant as the principal ground for a reversal of the judgment.

1. It was not necessary that the plaintiff should himself sign the agreement of May 16, 1888, in order to enable him to enforce it against the defendant. The statute of frauds requires the contract, or some note or memorandum thereof, to be in writing, but it need be subscribed only by the party to be charged. Reed, St. Frauds, § 359. This principle was established in this state in the case of Vassault v. Edwards, 43 Cal. 458. See, also, Worrall v. Munn, 5 N. Y. 246; Justice v. Lang, 42 N. Y. 493. The "writing" in question is sufficient to satisfy the statute. It sufficiently names the parties and the price, and gives a complete description of the property. It is also subscribed by the defendant, who is the party to be charged.

2. It is also claimed by the appellant that, inasmuch as the instrument in question purports in terms to be executed by the plaintiff, it is until such execution only an inchoate agreement, and not capable of enforcement by either party. It is competent for parties to insert such conditions in their contracts as they desire, and to make contracts that shall be operative only upon the happening of some event, but when the terms of the instrument are in themselves clear, it is necessary that the conditions upon which only it is claimed that the instrument is to have effect should be equally clear. It is not the rule that a contract which on its face purports to be *inter partes* must invariably be executed by all whose names appear in the instrument before it shall be binding upon any. One reason why it is held in many of the cases that an agreement which is not to be operative upon one until it has been signed by another is that such signing is the consideration upon which the first signer agrees to be bound; but when a sufficient consideration for the agreement on the part of the first signer is shown to authorize its enforcement, he cannot be released therefrom unless he shall show clearly that there were other considerations for his signing the agreement than those named in the instrument. Bishop, in his treatise on Contracts, § 348, says: "If by parol stipulation, or, *a fortiori*, if by the writing itself, the contract was not to be deemed complete until other signatures should be added, it without such addition will not bind those who have signed it; but if nothing of this appears, the parties signing will be holden, though even on the face of it the signatures of others were contemplated by the draughtsman." See, also, in support of this principle, Parker v. Bradley, 2 Hill, 584; Scott v. Whipple, 5 Greenl. 336; Dillon v. Anderson, 43 N. Y. 231; Los Angeles v. Mellus, 59 Cal. 444; People v. Stacy, 74 Cal. 373, 16 Pac. Rep. 192. In Chouteau v. Suydam, 21 N. Y. 181, it is said: "It is very well settled that where a bond, a deed, or other written instrument is executed by a portion only of those who appear in the body of the instrument as parties, the question whether those who have executed it are bound depends upon the circumstances under which the instrument was delivered. Those circumstances are open to proof by parol, and if it appears that at the time of the delivery by any party whose signature is affixed anything was said indicating that such party did not intend to be bound unless other parties also signed, the delivery will be considered as not absolute, but in escrow merely; * * * but it rests upon the party who has signed and delivered the instrument to establish that the delivery was intended to be in escrow."

In the present case no attempt was made on the part of the defendant to show that at the time the instrument was delivered by him to the plaintiff there was any agreement or understanding on his part that it was to be signed by the plaintiff before it became operative. It is true that in his answer he alleges that he would not have signed the agreement with the plaintiff unless the plaintiff also signed the same, and that such was the understanding and agreement between them at the time it was signed; but at the trial there was no testimony offered in support of this averment, and the court does not find that any such statement or agreement was made, the finding being that the plaintiff and defendant did enter into the contract on the 16th day of May, 1888, and "that plaintiff inadvertently omitted to sign said contract, but that he always considered himself and intended to be bound thereby." The agreement was prepared by the direction and in the presence of both parties on the 16th of May, 1888. It was at that time signed by the defendant, who received from the plaintiff the sum of $1,000 as part consideration for its execution, and who then delivered it to the plaintiff. The plaintiff accepted the same from the defendant, and caused it to be recorded in the office of the county recorder. These acts made a contract binding upon both parties, even without the signature of the plaintiff. Necessarily the oral negotiations between the parties preceded the formulation of their agreement into the written instrument. When the terms of their agreement were reduced to writing, the contract became definite, and, in the absence of the statute of frauds, became binding upon both parties. Dutch v. Mead, 36 N. Y. Super. Ct. 427. The signature of the vendor was all that was required to satisfy the statute of frauds. The delivery of this instrument, and its acceptance by the vendee, made the contract binding upon him also. The execution of the agreement by the vendor, and its delivery to the vendee, created an obligation upon the vendor which was a consideration sufficient to make the verbal agreement on the part of the vendee to pay the purchase price of the land binding upon him also. Vassault v. Edwards, 43 Cal. 464; Reed, St. Frauds, § 391; McDonald v. Huff, 77 Cal. 279, 19 Pac. Rep. 499; Lowber v. Connit, 36 Wis. 183; Manufacturing Co. v. Morse, 48 Vt. 322; Reuss v. Picksley, L. R. 1 Exch. 352; Grove v. Hodges, 55 Pa. St. 504. In Grove v. Hodges the agreement, as executed, was binding upon the vendor only. It was delivered to and accepted by the vendee, and its validity was assailed upon the ground that it was not executed by the vendor. The court, however, held it valid, saying: "If Irwin accepted the grant, he accepted it with its expressed conditions, and the contract became binding upon him to precisely the same extent as it would have been binding if he had personally signed and sealed the instrument. The mode of enforcing his obligations is different, but the duty is the same. It is assuredly plain law that if a party who has not put his name to a written contract accepts it when signed by the other party, it binds him the same as if he had signed it. The legal principle that contracts must be mutual, that they must bind both parties or neither, does not mean that in every case each party must have the same remedy for a breach by the other. Covenant may lie against one when only *assumpsit* can be maintained against the other. Nor does the principle mean that when a contract is written each party must sign it. The engagement of one may be in writing, and that of the other rest in parol even when the contract is wholly executory."

3. The contention of the defendant that the contract was merged in the deed is also untenable. The plaintiff by the execution of the contract of May 16th had a valid obligation against the defendant for the conveyance of a tract of land. That obligation could not be satisfied by the conveyance of a part of the tract any more than would the payment of a money obligation be satisfied by the payment of a part thereof. Whether the conveyance of a part was made with or without controversy between the parties is immaterial. Unless it was accepted in satisfaction of the agreement, the unexecuted part of the original agreement remained in full force. An agreement for the conveyance of 100 acres of land, except by an agreement between the parties, cannot be satisfied by a conveyance of 50 acres. Civil Code, §§ 1477, 1524.

4. There was no error in admitting in evidence the testimony of the witnesses objected to. Their testimony was for the purpose of pointing out to the court and defining the property which was the subject of negotiation between the parties, and which was imperfectly described in the contract, in order that the court might determine whether the defendant, by the conveyance and bill of sale which he had executed, had fully complied with his agreement. Code Civil Proc. § 1860. The judgment and order denying a new trial are affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; PATERSON, J.; SHARPSTEIN, J.

(88 Cal. 522)

DUNSMOOR v. FURSTENFELDT *et al.* (No. 13,917.)

(*Supreme Court of California.* April 1, 1891.)

GARNISHMENT—MONEY IN CUSTODY OF THE COURT.

Though money belonging to an estate in bankruptcy, in the hands of the clerk of the court as a master in chancery, to be held pending the settlement of the respective rights of the creditors by litigation, is in the custody of the court, and cannot be reached by garnishment, yet, where an order of distribution has been made, the rights of the respective creditors become in effect a debt due to each of them by the clerk, and a creditor of one of the creditors may levy upon it by garnishment.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Wilson & Bulla and *George A. Rankin*, for appellant. *V. Montgomery* and *F. O. Daniel*, for respondents.

VANCLIEF, C. The plaintiff (clerk of the superior court) brought this action to compel the defendants, Furstenfeldt and Geinger, to interplead as to their respective adverse claims to be paid a sum of money in the possession and custody of the plaintiff, which he was willing and ready to pay to the one to whom the court should determine it was due. The court adjudged that Furstenfeldt was entitled to the money, and Geinger brings this appeal from the judgment upon the judgment roll, and contends that, upon the facts found, the judgment should have been in his favor. The material facts found are substantially as follows: (1) In January, 1888, Peter Eschelbach made an assignment of his property to one Lewis, for the benefit of his creditors. (2) Thereafter, Sichler, one of the creditors of the insolvent, brought an action in the superior court of Los Angeles county against Lewis, the assignee, to compel him to account to the creditors. (3) In this action against the assignee he was ordered by the court (April 11, 1889) to deposit with the clerk thereof, Dunsmoor, (plaintiff herein,) about $8,000, to be held pending the litigation as to the proper distribution thereof among the creditors; and thereupon the said sum was so deposited by the assignee. (4) On the same day (April 11, 1889) the court ordered a distribution of said sum among the creditors, one of whom was Antone Miller, to whom the court ordered the clerk (plaintiff herein) to pay from said money the sum of $305.32. (5) On July 3, 1889, Miller assigned all his right and title to the last-mentioned sum, then in the custody of the clerk, to the defendant Furstenfeldt, who, on the following 9th day of July, demanded it of the clerk, but the clerk then refused, and ever since has refused, to pay the same to Furstenfeldt. (6) On the 6th day of April, 1889, the defendant Geinger obtained a judgment in the superior court of San Francisco against Antone Miller for the sum of $1,319, upon which execution was issued to the sheriff of Los Angeles county on June 18, 1889, and was duly served by copy and garnishment upon Dunsmoor, the plaintiff, and upon Lewis, the assignee of the insolvent, on June 20, 1889. (7) Dunsmoor, on June 21, 1889, answered to the garnishment notice that he held, subject to the order of the court, $305.32, which had been distributed, by order of the court, in the case of Sichler v. Lewis, to Antone Miller, as above stated. (8) On July 1, 1889, defendant Geinger demanded of Dunsmoor said sum of $305.32, which the latter refused to pay, and which he still holds in his custody, subject to the judgment of the court in this action, as alleged in his complaint herein. (9) Thereafter the defendant Furstenfeldt petitioned the superior court of Los Angeles county for an order commanding Dunsmoor to pay to him said sum of $305.32, on the ground that it had been assigned to him by Antone Miller, to whom it had been ordered to be paid in the case of Sichler v. Lewis, Assignee; but the court, after "due hearing," denied his petition "upon the ground that said court had no further control or jurisdiction over said sum of money by reason of the order of distribution previously made by said court." Whether Geinger had notice of this petition is not stated; nor does it appear that he participated in the hearing. It will be seen that the garnishment by virtue of Geinger's execution was 13 days prior to the assignment by Miller to Furstenfeldt, and, therefore, if the money ($305.32) in the hands of Dunsmoor, or a debt from Dunsmoor to Miller for the same sum of money growing out of the transactions, was subject to the garnishment, the judgment should have been in favor of the appellant; otherwise, the judgment in favor of Furstenfeldt should be affirmed. Section 544 of the Code of Civil Procedure provides that "all persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be * * * liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied." Respondent contends (1) that no part of the money in the possession of Dunsmoor belonged to the defendant Miller; (2) that the money, of which Dunsmoor acquired the possession by the order of the court, was, at the time of the service of the writ, in the custody of the law, and therefore not subject to garnishment; and (3) that Dunsmoor owed no debt to Miller.

1. We think it must be conceded that the $8,000, while in the custody of Dunsmoor, did not belong to the creditors of the insolvent. Lewis, the assignee of the insolvent, held it in trust for those creditors, to be distributed among them ratably in payment of their several demands against the insolvent. In his hands, no one of the creditors could have lawfully claimed any part of the money as his individual personal property; nor could all the creditors jointly have so claimed all the money, as it was not a special deposit by or for them. Wade, Attachm. §§ 329, 407. The transfer of the money from the assignee to Dunsmoor in obedience to the order of the court gave the creditors no more title to it than they had before.

2. Whether the money was ordered to be delivered to Dunsmoor in his official capacity as clerk of the court, or as a receiver or master in chancery, he held it for the same purposes (though not by the same title) for which it had been held by the assignee, and for no other purpose. For such purposes, and until they were accomplished, no doubt the money was in the custody of the law, in the ordinary sense of the term; but, so far as the court was concerned, such purposes were fully accomplished by the final decree in the case of Sichler v. Lewis, Assignee, determining the share of the money to which each creditor was entitled, and ordering Dunsmoor (as clerk or receiver) to pay to each creditor a specific certain sum from the fund. That was the end of the judicial proceedings in the case of Sichler v. Lewis. The execution of the decree by paying the money to the creditors was all that remained to be done. The only reason assigned by the authorities for the rule prohibiting the attachment of property in the custody of the law is that such attachment would generally delay and embarrass judicial and other official proceedings in the administration of such property; and that this is a sufficient reason for the rule, as applied to all judicial proceedings in regard to such property, is generally admitted; and to this extent the weight of authority admits no exception to the rule. But, according to a great preponderance of the modern cases, there are some exceptions to the rule as applied to property in the custody of purely executive officers, based upon the maxim that the rule should not be applied "when the reason of the rule ceases." Civil Code, §§ 3509, 3510. After speaking of the rule and the exceptions thereto in Maryland, Mr. Wade, in his work on Attachment, (section 424,) says: "It is elsewhere held, and, as it appears, with considerable unanimity, that when defendant has a right to a certain distributive share of the fund in the hands of a receiver, master in chancery, or trustee of court, the officer may be effectually garnished by a creditor of the party so entitled, after the court has ordered it to be paid. * * * The authorities seem to concur in holding receivers and similar officers liable to garnishment when they have in their hands a definite sum to which the defendant or judgment debtor is clearly entitled, and the officer has nothing more to do with the fund than to pay it over. Some of them may go beyond, but none, so far as they have been examined, fall short of, this conclusion." See, also, Freem. Ex'ns, § 129; Gaither v. Ballew, 69 Amer. Dec. 764. In speaking of assignees in bankruptcy and insolvency, and after admitting that the property in their hands is not subject to garnishment before an order of distribution, the same author (section 423) says: "It is another matter when, in the course of the administration of his duties, the assignee has in his hands a sum due one of the creditors, and a creditor of such creditor seeks to charge him as garnishee in respect thereto. In such case the exemption could be maintained, if at all, only on the ground of the official capacity in which the money of the defendant was held. It is no longer the property of the assignee. In case of his refusal to pay it over to the party entitled thereto, the latter could maintain an action for it. It is not apparent how, in such case, the assignee would occupy ground more favorable to his exemption than would a sheriff in possession of a surplus due an execu-

tion defendant." As to sheriffs, see section 421, same author. In cases of garnishment of executors and administrators in respect to the property of legatees and heirs the exception to the rule of exemption applies after an order of distribution of the property has been made whereby the share or portion of the defendant in attachment is rendered definite and certain. Wade, Attachm. §§ 425, 426; Freem. Ex'ns, § 131; Estate of Nerac, 35 Cal. 392. I think the case at bar comes fairly within the exception to the rule that property in the custody of the law is not subject to garnishment.

3. Having conceded that no part of the money in the hands of Dunsmoor—that is, no particular coins or bank-bills—could be said to be the personal property of Miller, a delivery of which to himself he was entitled to demand of Dunsmoor, it remains to answer the objection that "Dunsmoor owed no debt to Miller." If, as contended and conceded, no particular money in Dunsmoor's hands belonged to Miller, and Dunsmoor might have paid Miller the sum ordered by the court to be paid him in any lawful money, it would seem to follow that Dunsmoor owed Miller $305.32; and, surely, what Dunsmoor owed Miller was a debt, (Rodman v. Munson, 13 Barb. 197,) the payment of which Miller could have enforced. Indeed, it was a debt in the strict legal sense,—a judgment,—a debt of record. Burrill, Law Dict. For a full exposition of the word "debt," as used in law, and particularly in statutes, see Insurance Co. v. Meeker, 37 N. J. Law, 300, and authorities there cited. Any kind of obligation of one man to pay money to another is a debt. "A debt signifies what one owes. There is always some obligation that it shall be paid; but the manner in which * * * it is to be paid, or the means of coercing payment, do not enter into the definition." Rodman v. Munson, 13 Barb. 197. Perhaps Miller might have coerced payment by motion in the same court that ordered the payment. If not, he certainly could have recovered the debt by action upon the judgment rendered in the case of Sichler v. Lewis. I think the judgment should be reversed, and that the lower court should be directed to render judgment on the findings of fact in favor of appellant.

We concur: FOOTE, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to render judgment on the findings of fact in favor of the appellant.

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88 Cal. 430

RUGGLES *et al.* v. BOARD OF TRUSTEES OF CITY OF WOODLAND. (No. 14,396.)

(*Supreme Court of California.* March 24, 1891.)

OFFICERS OF MUNICIPAL CORPORATIONS—TENURE OF OFFICE—MANDAMUS.

1. By general Municipal Incorporation Act Cal. March 13, 1883, § 4, it is provided that officers chosen at a special election to be held within two weeks after the vote in favor of reorganization shall hold their respective offices only until the next general municipal elections. By section 752, it is provided that all elective officers of cities of the fifth class shall be chosen at a general municipal election to be held therein in each odd-numbered year; the marshal, assessor, etc., to hold office for two years, and the trustees for four years; but there is a further proviso that the first board of trustees elected under the provision of this act shall so classify themselves by lot that three of their number shall go out of office at the expiration of two years, and two at the expiration of four years. *Held*, the elective officers, except members of the board of trustees, are to hold office for two years, and they for four years, and that an election must be held every two years.

2. A *mandamus* will lie to compel the board of trustees to provide for such election.

In bank. Petition for *mandamus.*

A. C. Ruggles and *J. H. Magoffey*, for petitioner. *Charles W. Thomas*, City Atty., for respondent.

BEATTY, C. J. *Mandamus* to compel the respondents to call and provide for the holding of an election of city officers. Prior to May 6, 1890, the city of Woodland, in Yolo county, was a municipal corporation under a special charter. On that date a proposition to reorganize as a city of the fifth class, under the general incorporation act, approved March 13, 1883, was duly submitted to the electors of said city, and approved by a majority vote. Thereafter, on June 16, 1890, at a special election held in obedience to the provisions of section 4 of said act, the respondents, and other city officers enumerated in section 751, —*i. e.*, the officers of a city of the fifth class, —were duly elected, and have ever since been acting as such. The petitioners, who are citizens, tax-payers, and electors of said city, have demanded that the respondents call a general city election, to be held on the second Monday of April, 1891, for the choice of successors to themselves, and the other officers enumerated in section 751; but the respondents, on March 9, 1891, by formal resolution entered upon their minutes refused to call such election, whereupon this proceeding was commenced. It is proper to say that this refusal of the respondents to call an election for the choice of their successors does not appear to have been inspired by any wish to prolong their own tenure of office beyond the term fixed by law, but only by the desire to secure an authoritative construction of two apparently conflicting provisions of the statute, in order that the city may proceed regularly and lawfully under its new charter. By section 4 of the act referred to it is provided that the officers chosen at the special election to be held within two weeks after the vote in favor of re-organization is declared, shall hold their respective offices "only until the next general municipal election to be held in such city and county, city, or town, and until their successors are elected and qualified." By section 752 of said act it is provided that all the elective officers of cities of the fifth class shall be chosen at a general municipal election to be held therein on the second Monday in April in each odd-numbered year. The marshal, assessor, etc., are to hold their offices for two years from and after the Monday following the day of their election, and the members of the board of trustees are to hold for four years from and after the same date, and until their successors are elected and qualified. So far all the provisions of the statutes are perfectly consistent, and unqualifiedly support the contention of petitioners that an election must be held on the second Monday of April of this year. But section 752 contains a proviso that the first board of trustees "elected under the provisions of this act shall at their first meeting so classify themselves by lot as that three of their number shall go out of office at the expiration of two years, and two at the expiration of four years." It cannot be denied that the respondents are embraced by the terms of this proviso, for unquestionably they are the first board of trustees elected under the provisions of this act. But, if the proviso is construed literally, it is directly in conflict with the provision of section 4, that the trustees elected at the first (the special) election are to hold only till the next general municipal election, and until their successors are elected and qualified. To reconcile this conflict, and to render the various provisions of the act sensible and coherent, it is necessary in place of the words "this act," in the proviso, to read "this section," or "this chapter;" and this accords with the evident intention of the legislature, which was that all the elective officers of the city should be chosen at the same time, and enter upon their respective offices at the same time. As to all other officers, except members of the boards of trustees, education, etc., there is no doubt that they must be elected on the second Monday of April of the odd-numbered years, and hold their respective offices for two years from the following Monday. We think it clear that the trustees (except those drawing the short term after the first general election, and those elected provisionally at the special election) are to hold four years from the same date. From these views it follows that a peremptory writ should issue as prayed. So ordered.

We concur: DE HAVEN, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.; HARRISON, J.

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88 Cal. 582

SMITH *et al.* v. OLMSTEAD *et al.* (No. 13,125.)

(*Supreme Court of California.* April 3, 1891.)

DESCENT AND DISTRIBUTION—CHILDREN OMITTED FROM WILLS—RIGHTS.

Under Civil Code Cal. § 1306, providing that, where any testator omits to make provision for any of his children, and the will does not show that such omission was intentional, such child succeeds to such portion of the estate as he would have received if the testator had died intestate, the estate descends to him at once, and he becomes vested with such interest, subject only to a sale for the payment of debts; and where a will gives to the testator's wife all his property, with absolute power to sell any and all of it without application to or approval by the court, but omits to make provision for a child, a sale under such power will not convey a valid title, as against the right of the child.

Affirming 22 Pac. Rep. 1143.

On rehearing.

DE HAVEN, J. This is an action for the purpose of determining conflicting claims to real property. The record shows that one Z. B. Smith, now deceased, in his lifetime made his last will, by which, after directing the payment of his debts, he in terms gave to his wife all of his property, with "absolute power to sell any or all of said real and personal property, at public or private sale, with or without advertisement, and without application to any court, and without approval or authority of any court whatever." In a subsequent clause the wife was also named as executrix of the will. She duly qualified as such, and sold to the defendants the property described in the complaint. Such sale was made without any previous order therefor, but was afterwards confirmed by the court in which the administration of her deceased husband's estate was pending. The land was community property. The record does not show that the sale was necessary for any of the reasons stated in section 1536 of the Code of Civil Procedure; that is, in order "to pay the allowance of the family, or of the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or legacies." The plaintiffs are minor children of the said Z. B. Smith, deceased, and are not provided for in said will; nor does the will show that the omission to provide for them was intentional. There has never been any distribution of this property, and the administration of the estate of said Smith is still pending. The judgment of the court below was in favor of plaintiffs, and the defendants appeal. This judgment was affirmed by Department 1 of this court, on January 25, 1890, (22 Pac. Rep. 1143,) but a rehearing was granted, and the case is now before the court in bank for determination.

The question for decision is whether, upon the facts as here stated, the power of sale contained in the will is so far operative against the plaintiffs that a sale made under it, and confirmed by the court, transferred to the defendants the title to the land in controversy. To determine this, a brief reference to the plain language of the law, relating to wills, and the right to succession of property of a decedent in the absence of a will disposing of it, is necessary. By section 1307 of the Civil Code it is provided that where a testator omits to provide in his will for any of his children, unless it appears that such omission was intentional, such child "must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto, as provided in the preceding section." That is, "the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate." Civil Code, § 1306.

We are unable to construe these sections otherwise than as declaring that the pretermitted child succeeds immediately, by operation of law, to the same portion of the testator's real property as if no will had been made; that as to such portion the testator is to be regarded as dying intestate, and its succession is directed by law, and not by the will. And, as a necessary legal consequence of this construction, it would follow that very provision in the will, directly or indirectly attempting to dispose of such portion of the estate, except for the discharge of the decedent's debts, or other charges accruing in due course of administration, is inoperative as against such child. As to the rights of a pretermitted child, under these sections, this court has heretofore held: "In other words, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate." Estate of Wardell, 57 Cal. 489. Sections 16 and 17 of the act concerning wills, (Hit. Gen. Laws, p. 1086,) and section 1 of the statute of descents and distributions, (Id. p. 323,) are substantially the same as the provisions of our Civil Code relating to the same subjects; and this court, in Pearson v. Pearson, 46 Cal. 609, basing its decision on these statutes, held, explicitly, that the pretermitted child takes the same share in the estate, and holds by the same title, as though the testator had died intestate.

Now, in the case of a person dying intestate, his estate descends and vests immediately in his heirs, subject only to the payment of the debts of decedent, the expenses of administration, and the family allowance. This is not only clear from sections 1383, 1384, 1386, and 1402 of the Civil Code, but was so expressly held by this court in Brenham v. Story, 39 Cal. 188, under statutes substantially the same, the court saying: "Upon the death of the ancestor, the heir becomes vested at once with the full property, subject to the liens we have mentioned; and, subject to these liens and the temporary right of possession of the administrator, he may at once sell and dispose of the property, and has the same right to judge for himself of the relative advantages of selling or holding that any other owner has." The respondents in this case were, immediately upon the death of their father, clothed by operation of law with such a title to the property in controversy, and, this being its nature and extent, it is clear that such title was not divested by the sale made by the executrix of their father's will, under the circumstances disclosed by the record in this case. A title to property, which is so full and complete that its possessor has "the same right to judge for himself of the relative advantages of selling or holding that any other owner has," cannot co-exist with the right of another to transfer such property at discretion, and the power exercised by the executrix in this case being inconsistent with the title which the law vested in the respondents upon the death of the father, cannot be upheld. These views are in harmony with the decisions of other states where statutes relating to wills and right of succession are similar to our own. See Northrop v. Marquam, 16 Or. 173, 18 Pac. Rep. 449; Smith v. Robertson, 89 N. Y. 558. But it is urged by appellant that these cases are not in point, because in neither of the states in which the decisions were made was there a statute similar to section 1561 of the Code of Civil Procedure, which provides that when "authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine," but that "no title passes unless the sale be confirmed by the court." And it is claimed that the sale here, having been confirmed by the court, is valid under that section. But we think it is manifest that in determining the question whether, in judgment of law, authority to sell has in fact been given to an executor, the section can have no application. It is equally clear that the authority to sell therein referred to must be held to include only such a one as is operative and binding upon the person against whom it is asserted; and unless such an authority can be found in the will, when such will is read and construed with reference to the law which determines its meaning and legal effect, it must be held that it does not exist; and in that case there is nothing upon which this section of the Code can act. The case of Coates v. Hughes, 3 Bin. 498, cited and relied on by appellants, is not in conflict with the views we have announced. The power under consideration there was confined to a sale for the payment of the debts of the testator, and it appeared that there was a necessity for the sale for such purpose, and the court held, and we think rightly, that such a power was operative. The reason why, in such a case, the power of sale would be operative, is apparent. The child who succeeds to the estate of his ancestor, by inheritance, takes it subject to the payment of the debts of such ancestor, and his right of succession is in no wise affected by a provision in a will which goes no further than to authorize what the law would in any event direct to be done, if necessary to discharge such lien. In such a case the executor is only clothed with the ordinary powers incident to the administration of the estate; in fact, the precise power which the law gives an administrator of the estate of an intestate. The order of confirmation imparted no validity to the sale in this case; it only adjudicates that the power contained in the will had been followed, and that the sale was for a fair price. We are satisfied with the conclusion reached in department 1. Judgment affirmed.

We concur: GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

HARRISON, J. I concur in the order affirming the judgment, both for the reasons expressed in the opinion of Mr. Justice DE HAVEN, and also upon the following considerations: Section 1402 of the Civil Code provides that "upon the death of the husband one-half of the community property goes to the surviving wife, and the other half * * * goes to his descendants, * * * subject to his debts, the family allowance, and expenses of administration." These are the "purposes of administration" referred to in section 1384, Civil Code, and are also the objects for which the court is authorized under section 1536, Code Civil Proc., to direct a sale of the property of the decedent. The right of the children and the right of the surviving wife to the community property exist by virtue of the same section of the Code, and are declared in identical words, and, inasmuch as it is the settled rule that the right of the surviving wife to her half of the community property vests in her immediately upon the death of the husband, (Estate of Silvey, 42 Cal. 210,) it must also be held that the right of the children to their half of the same property vests in them at the same time. In King v. Lagrange, 50 Cal. 328, it was held that a power of sale in the will did not authorize a conveyance by the executor of the wife's share of the community property, and that a conveyance by the executor, under such power, of the real estate of the deceased, did not have the effect to transfer the interest of the wife as the survivor of the community. It is true that the conveyance in that case was only of the "right, title, and interest" of the decedent in the property, but the decision in the case does not turn upon this distinction, and in reality such a distinction does not exist. At the date of the conveyance, the testator, being dead, had, of course, no "right, title, or interest" in the property; and the conveyance by the executor under the power contained in the will, being like a conveyance under any other power of attorney, (Larco v. Casaneuava, 30 Cal. 561,) would necessarily be limited to such right, title, and interest as existed in his constituent at the date of his death, the point of time when the authority of the executor came into existence. If a conveyance under a power of sale given in the will is inoperative to transfer the interest of the wife, it must be equally inoperative to transfer the interest of the children. In accordance with the principles established by the decision in King v. Lagrange, it is the usual, if not the invariable, custom of conveyancers in this state, when community property of a decedent is sold by the executor under a power given by the will, to require a release or conveyance of the same property from the surviving wife. This rule or custom was followed in the present case, since it appears from the record that the purchaser took a deed of the land in question from the surviving wife individually as well as in her representative capacity.

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86 Cal. 1

LAST CHANCE WATER-DITCH CO. v. HEILBRON *et al.* (No. 13,161.)

(*Supreme Court of California.* Sept. 12, 1890.)

WATER-RIGHTS—APPROPRIATION—PLEADING—FINDINGS—RES JUDICATA.

1. In an action by the appropriator of the waters of a river to enjoin riparian proprietors from interfering with its rights, evidence as to the width and depth of the appropriator's ditch is insufficient to show its carrying capacity, in the absence of any evidence as to the velocity of the water or the grade of the ditch.

2. Where the complaint states that the water was appropriated "in pursuance of notice duly given and made," a finding that the appropriator is entitled to water in 12 times the amount claimed in the notice cannot be sustained, as it is in conflict with and in excess of the allegations of the complaint.

3. A finding that the appropriator for five years, during the low-water season, diverted a stated quantity of water peaceably, openly, notoriously, continuously, and adversely to the riparian proprietors and their grantors, is not supported by evidence which shows that for the first two years the appropriator's ditch drew no water during the low-water period, and that for the succeeding years, by wrongfully entering on the riparian owners' land, without their knowledge, and diverting the water therefrom, the appropriator succeeded in shortening the time in which its ditch ran dry to four months in each year.

4. Repeated and long-continued incursions on the riparian owners' land by the appropriator, for the purpose of diverting the water into the latter's ditch, give it no prescriptive rights, where the riparian owners restored the water to its natural channel as often as they discovered the diversion.

5. At a point above the appropriator's ditch a slough connects with and receives the waters of the river in question, carrying them over the riparian owners' land. To prevent this the appropriator constructed a dam at the head of the slough, and deepened the river bed, cutting off the water from the riparian owners' land. *Held*, that a judgment obtained by the riparian owners, preventing the maintenance of the dam at the head of the slough, and restraining the appropriator from interfering with or preventing the free flow of the water "into or down the channel" of the slough, was a determination that the appropriator had no right to interfere with the natural flow of the water, not only at the head of the slough, but through its entire channel, and that this question could not again be litigated in a subsequent action by the appropriator against the riparian owners for diverting the water of the river through the slough.

6. The fact that the riparian owners made no objection to the use of the water by the appropriator during seasons of abundance, when it naturally flowed down the river, gives the appropriator no prescriptive right to change the course of the flow in seasons of scarcity for the purpose of continuing the supply.

7. Where a director of the corporation which appropriated the water has testified, on his direct examination, that the corporation had used the water without interruption, it is error to exclude a question asked on cross-examination as to whether or not he had received notice from his agent that the diversion of the water had been interrupted.

In bank. Appeal from superior court, Tulare county.

Brown & Daggett, for appellants.

N. O. Bradley, *W. S. Goodfellow*, and *N. J. Atwell*, for respondent, cited the following cases on the question of *res judicata:* Gilbert v. Thompson, 9 Cush. 348; Eastman v. Cooper, 15 Pick. 276; McDonald v. Mining Co., 15 Cal. 147; Fulton v. Hanlow, 20 Cal. 486; Flandreau v. Downey, 23 Cal. 358; Mitchell v. Insley, (Kan.) 7 Pac. Rep. 203; Perry v. Dickerson, 85 N. Y. 347; Kerr v. Hays, 35 N. Y. 338; Crandall v. Woods, 8 Cal. 144; Water Co. v. Crary, 25 Cal. 509; Davis v. Gale, 32 Cal. 35; Gould, Waters, § 335.

FOX, J. This is an action for injunction to restrain the defendants from turning away from Cole slough or from King's river the waters which in their natural flow would run down to the plaintiff's ditch, and for damages. The case was tried before the court without the intervention of a jury, findings filed, and judgment rendered in favor of plaintiff, enjoining and restraining the defendants from damming up the southerly branch or channel of Cole slough, or from diverting or turning away from said southerly branch or channel any of the waters which in their natural flow would run down to or into said southerly channel or branch, and from in any manner obstructing or interfering with the free flow of the water into or down the said southerly branch or channel of Cole slough, or through the Dutch John cut. Motion for new trial was made and denied, and defendants appeal from the judgment and from the order denying said motion.

Plaintiff is a corporation, having no riparian rights, so far as shown in this case, but claiming the right, as appropriator, to take water from King's river, at the head of its ditch, to the amount of 14,400 cubic inches per second, under a 4-inch pressure, for purposes of irrigation. The head of plaintiff's ditch is located on and near the S. W. corner of section 26, township 17 S., range 21 E., Mt. Diablo meridian, and takes the water from and to be used exclusively on the southerly side of King's river. The defendants are riparian proprietors, in possession of the Rancho Laguna de Tache, containing about 48,800 acres of land, situate wholly on the northerly side of King's river, bordering upon and bounded by the river for the distance of about 30 miles, covering the land on the northerly side of said river for the entire distance here under consideration, and extending above and below the points herein mentioned. King's river flows, so far as its course here comes under observation, in a general course from north-east to south-west, but by a somewhat crooked and tortuous channel. It enters township 17 S., range 22 E., at the N. E. corner of section 1. At about the center of the S. ½ of the N. W. ¼ of the section it takes a sudden turn, and runs nearly due south about two miles, and from thence runs by a winding channel to a point in the N. ½ of the N. E. ¼ of section 25, township 17 S., range 21 E., where it is intercepted from the north by what is known as "Dutch John Cut." From here it runs by a winding course to a point in the S. W. ¼ of section 26 in the same township, where it is intercepted on the south side by plaintiff's ditch. From this point it runs by a nearly direct line to the north-west corner of said section 26, where it is intercepted from the north by what is called "Reynold's Slough," and from thence runs a nearly west course, so far as it is necessary to trace it for the purposes of this case. At the point of the first bend above mentioned, on section 1, township 17 S., range 22 E., Cole slough connects with and receives water from the river on the north side. This is shown to be a natural water-course, cut out by the high waters many years prior to the incorporation of plaintiff. It runs a general course from north-east to south-west, through the rancho Laguna de Tache, and wholly on said rancho, to a point on the N. E. ¼ of section 23, township 17 S., range 21 E., where its waters enter into what is called "Reynold's Slough," above mentioned, and through it find their way to King's river at a point one mile below the head of plaintiff's ditch, and by a course some miles shorter than that of the channel of the river. Cole slough, at its upper or northerly end, is divided into two channels for a distance of about two miles, or a little over; it then unites and flows in a single channel for about the same distance, when it is again divided into two channels, one called the "north channel" (sometimes called "Waggoner's Slough") and the other the "south channel." The north channel is much the shortest, running by the most direct route, and consequently has the most rapid current. The south channel bends down very much to the south, and runs within a few hundred yards of the bank of the river, at a point known as "Dutch John Cut." From there it turns again rapidly to the north, and reunites with the north channel about one-fourth of a mile above the point where the waters flow into Reynold's slough. Dutch John cut is not, and never was, a natural water-course. At the point where it connects with the south channel of Cole slough there was a natural depression in the ground, over which the waters would flow at seasons of high water, but the river bank opposite consisted of a high ridge, which prevented them from running into the river. The consequence was that they spread out over the alluvial lands to the westward, and formed a lagoon on what would otherwise be valuable meadow land. To obviate this a tenant on the grant, in 1868 or 1869, called "Dutch John," made a cut through the high river bank to drain off this water. This cut was gradually enlarged by the action of the water, and in later years was still further deepened and enlarged by the plaintiff so as to carry the waters of the south branch of Cole slough into the river above the head of its ditch. It also is located entirely upon defendants' land. It is shown that as early as 1868, by natural processes, the channel of King's river, at the head of Cole slough, had become so filled with sand, and Cole slough had become so enlarged and deepened, that during the dry season little, if any, water ran down the channel of the river, but all the water during the dry season found its way down Cole slough, and only found its way to the river again through Reynold's slough, at a point one mile below where the plaintiff subsequently connected its ditch with the river. During the season of high water, which does not exactly correspond to the rainy season, but is the season of melting snows, large bodies of water ran down both channels. It further appears that the defendants and their predecessors have, and for many years past have had, upon said rancho large numbers of cattle dependent upon the waters of Cole slough for water to drink, and also have under cultivation some 4,000 acres of said rancho planted to alfalfa and other crops requiring irrigation, and even before the incorporation of plaintiff had commenced to appropriate and divert the waters of Cole slough for purposes of distribution upon the ranch for the use of their cattle, and for the irrigation of parts thereof, by means of a ditch connecting with said slough at its junction with Reynold's slough; that as early as 1881 this ditch had been so enlarged and extended that it was 45 feet wide on the bottom, 4 feet deep, and was, with its distributing branches, 75 miles in length; that as early as 1871 the head of the south channel of Cole slough had become, from natural causes, partially filled with sand, so that at low water most of the water would run down the north channel, and the defendant's predecessors in that year built a dam of brush and sand to further facilitate the turning of the water into the northern and shorter channel, and to prevent it from going down towards Dutch John cut. The plaintiff was incorporated in October, 1873. It alleges in its complaint that on or about the 1st day of May, 1874, it, "under and in pursuance of notice prior to that time duly given and made, appropriated and acquired the right to divert, appropriate, and use, of the waters of King's river, * * * fourteen thousand four hundred cubic inches per second, under a four-inch pressure, of the water thereof, and still has the right to so divert, appropriate, and use said amount of the waters of said stream."

1. The first point made by defendants (appellants here) is that the evidence is insufficient to support the findings. The court finds that in 1874 plaintiff constructed a large water-ditch, connecting with King's river at a point below Dutch John cut, 24 feet wide on the bottom, and about 30 feet wide on the top, and about 4 feet deep, and has and had a capacity to carry 100 cubic feet of water per second; that in the spring of 1875 plaintiff appropriated and diverted from said King's river 100 cubic feet of water per second, and for a period of more than five years thereafter plaintiff appropriated and diverted from said river into its said ditch said quantity of water, publicly, openly, peaceably, continuously, notoriously, uninterruptedly, and adversely to the defendants and the whole world, under claim of right, and with the knowledge and acquiescence of the defendants and their grantors, and, except when prevented by the defendants, as hereinafter found, the plaintiff, ever since the spring of 1875, has appropriated and diverted from said river, into its said ditch, said quantity of water, and thereby the plaintiff acquired and still has the right to divert and use the waters of said river to the extent aforesaid, and said water has been used for irrigation.

This finding is entirely unsupported by the evidence in several particulars. There is to our minds no evidence whatever to show what the carrying capacity of this ditch was or is. That depends, not only upon the width and depth of the ditch, but also upon the velocity of the flow, and we are unable to find any evidence upon the subject of the velocity of this flow. It is true that one or two witnesses say they think it would carry about a hundred cubic feet per second, but it is perfectly apparent from their testimony that the only reason they have for this opinion is that in their judgment a cross-section of the ditch one foot in width would contain about a hundred cubic feet. No test of velocity is ever made, and no proof of grade is made to enable one to calculate the average velocity of the flow. Again, this finding is in direct conflict with and in excess of the allegations of the complaint. According to the complaint the appropriation made by plaintiff was made "in pursuance of notice duly given and made." If this means anything it means that it was done in pursuance of notice given as required by the provisions of the Civil Code. Those provisions require that the appropriator shall state in the notice the extent of the appropriation, giving the number of inches, under a four-inch pressure, and the place of intended use, which notice must be posted at the point of intended diversion. Section 1415. This is the first step in the act of appropriation, and the complaint shows that the appropriation was made in pursuance of this step duly taken. The extent of the appropriation, as set forth in the complaint, according to the notice, and as afterwards actually made, and as plaintiff now claims the right to make it, was and is 14,400 cubic inches per second. And yet the court finds that the extent of appropriation and diversion actually made, and which plaintiff is now entitled to make, was and is 100 cubic feet per second, 12 times the amount claimed in the complaint; and it enjoins the defendants from doing any act or thing that shall interfere with the right of plaintiff to divert the quantity which plaintiff is so found to be entitled to divert.

Nor is there any evidence to support the finding that this appropriation and diversion was made continuously, uninterruptedly, or adversely to the defendants or their grantors. On the contrary, the evidence without conflict shows that during most of the years since 1875, during the stage of low water in the river, there were periods of several weeks at a time when there was no water in plaintiff's ditch, and it is not shown that this did not occur for some portion of the time during every year. The only years in which it is not affirmatively shown that the ditch was dry a part of the year are the two last ones, during which time it is shown that plaintiff succeeded in getting water for a longer period than usual by entering upon the lands of defendants and turning the waters of the north channel of Cole slough down the south channel, and thence through Dutch John cut into the river; but even then it is not affirmatively shown that a continuous flow of water in the ditch was secured. And so far as relates to water that was taken from the river by first diverting it from the north channel of Cole slough and turning it into the river through the south channel and Dutch John cut, the finding that it was done with the knowledge and acquiescence of defendants and their grantors is in direct conflict with all the evidence upon the subject. The court then finds that prior to 1868 all the waters of King's river flowed down the old or main channel of the river; that ever since 1868, during the period of low water in each year, all the waters of the river have flowed down Cole slough; that since 1874 a large portion of the waters thereof have flowed down the southerly branch of Cole slough into Dutch John cut, and thence into the river above the head of plaintiff's ditch, and that ever since 1875 plaintiff has obtained its supply of water through said channel of Cole slough and Dutch John cut, and for more than five years after the spring of 1875 plaintiff appropriated and diverted into said ditch through said channel of Cole slough and Dutch John cut, during the low-water season, the said quantity of water claimed by plaintiff, peaceably, openly, notoriously, continuously, uninterruptedly, and adversely to the defendants and the whole world, under a claim of right, and with the knowledge and acquiescence of the defendants and their grantors, and, except when prevented by the defendants, as hereinafter found, the plaintiff, ever since the spring of the year 1875, during the low-water season, has appropriated and diverted from said King's river, through said channels of Cole slough and Dutch John cut, into its said ditch, its said quantity of water, which has been used for irrigation. This finding is unsupported by the evidence in this: The evidence given on the part of plaintiff shows, without any substantial conflict, that since 1877 plaintiff's ditch has drawn no water from King's river during the period of low water (which the court has found in another place to be from about the middle of August until the rainy season sets in, in the month of December in each year;) but by annual or biennial incursion made without right upon the lands of defendants, and the making of dams across the north channel of Cole slough, and scraping out the south channel and the channel of Dutch John cut, the plaintiff has succeeded, since 1877, in getting water a little later in the summer, and a little earlier in the following winter or spring, than it did get it in 1875 and 1876, or would have gotten it if such incursions had not been made and such work had not been done. Even by these methods, however, which were entirely unauthorized and without right, but which for some 9 or 10 years were not successfully carried to an extent which interfered with the supply of defendants, there were some four months in each year during which, according to the uncontradicted testimony of directors of plaintiff, no water flowed through the ditch of plaintiff. And the proof is uncontradicted that these incursions were made and these trespasses committed without the knowledge or acquiescence of defendants, except on the occasion, during a season of extreme low water unusually early, when a conference was had, and defendants consented that plaintiff might construct a certain kind of dam in the north channel, upon certain prescribed conditions, which would still leave a supply for defendants; but it is shown that the condition was not complied with, and the dam then constructed by plaintiff was immediately torn out by its own men, at the command of defendants, and no dam was ever afterwards constructed on the north channel, nor any work done on the south channel, with the consent of defendants.

The court also finds that Dutch John cut is now, and has been since 1875, a natural water-course, through which the waters of King's river and Cole slough have at all times flowed into plaintiff's ditch, as hereinbefore found. The evidence is insufficient to support this finding. Dutch John cut was a small, artificial cut, made as hereinbefore stated. In 1877, and annually thereafter, according to the uncontradicted testimony of plaintiff's own witnesses, plaintiff entered upon and enlarged it, and cut it deeper, for the purpose of turning the waters of Cole slough through it at a lower stage of water than it otherwise would have flowed through. The dam built in 1871, to turn the waters in the north channel, (referred to in our general statement of the facts,) was swept away by the first succeeding freshet, and before the organization of plaintiff, and at the time of plaintiff's appropriation there was no unnatural interruption to the flow down either channel. The court finds that on the 10th day of January, 1887, the defendants, against the will and without the consent of plaintiff, constructed a dam in and across the head of the southerly branch of Cole slough, and by means thereof turned away the waters which had been accustomed to flow from King's river through the said Cole slough, and through the said southerly branch and Dutch John cut back into King's river above the head of plaintiff's ditch, and through plaintiff's said ditch, and that the effect thereof was to deprive plaintiff's ditch of such water at the season of the year when all the waters of King's river flow down said Cole slough, and have thence hitherto diverted and turned away from plaintiff the said waters; and also that neither the defendants nor their predecessors have ever kept or maintained any dam across the said south channel of said slough, except as hereinbefore stated. There is some evidence to support these findings, but the findings do not state the whole truth, as shown by the evidence upon which they are based. The evidence shows that the plaintiff, with one or two exceptions, made annual incursions, from 1877 to 1887, upon the premises of defendants, and changed the natural condition of both channels of Cole slough, near the upper junction thereof, by scraping the sand and earth out of the south channel and placing it in the north channel. As soon as the supply of water in the north channel ran low by reason thereof, and the attention of defendants was thus attracted to the fact, they would go up to the junction, and, finding what had been done, would move the sand back again out of the north channel into the south one, and thus restore the channels practically to their natural condition. Sometimes the sand would thus be moved back and forth twice in the same year. And this kind of scrambling effort to change the course of the water at its lowest stages on the one side, and to preserve it on the other, was kept up until 1887. In that year the plaintiff again repeated the process of scraping out the south channel, and built a brush and earth dam across the north channel, and, this fact becoming known to defendants, they moved the whole thing over into the south channel, and thereafter did maintain a dam across the south channel to a sufficient extent to prevent water flowing down said south channel at all stages of water when it would not have flowed down there if both channels had been left in their natural condition, or as the elements would have left them if undisturbed. And it is for this act that the present action is brought, or, in other words, to enjoin the defendants from protecting themselves against the trespasses and wrongs of the plaintiff. Nothing in plaintiff's notice or act of appropriation authorized it to go, or justified it in going, upon the lands of defendants, and interfering with or altering the waterways situate thereon, for the purpose of increasing the flow of King's river at the head of their ditch, or of extending or prolonging the period thereof; and the evidence fails to show that the defendants, after the appropriation by plaintiff, interfered with or altered the channels, even upon their own land, so as to diminish that flow or shorten the period thereof; or that they interfered with said channels at all, except to restore them, from time to time, as near as practicable, to the condition that they would have been in had it not been for the changes wrongfully made therein by the plaintiff. It is also apparent from the evidence that the plaintiff knew when it made its appropriation what to expect as to quantity and continuance of flow; that the appropriation was made, and the ditch constructed, with reference to the use of, and with the intent to use, the water only at the periods of high and medium flow, with no expectation of using it at periods of low water. The ditch itself was constructed purposely and intentionally so as to let a stream some 150 feet wide and 14 inches deep run past the head of the ditch before any could be taken out, and this with a full knowledge that the channel of the river carried no water during the low stages, and that at extremely low water none ran in the south channel of Cole slough. The evidence tends to show that since then such changes have been made or have occurred in the bed of the river at that point as to enable the plaintiff to take the water so long as any comes to the head of the ditch; but this was not the original intention. No doubt, so far as any claim of these defendants is concerned, the plaintiff is entitled to take water from the bed of the river, at the head of its ditch, to the full extent of its appropriation, whenever the water comes there, from whatever source it may come, and reach the river-bed at that point; but this gives the plaintiff no right to enter upon private property, and tap other streams, for the purpose of securing water for its ditch, or of augmenting the flow of the river at the head thereof. And it is unnecessary for us in this case to discuss the measure of defendants' rights in the waters which naturally flow over and across their own lands. To those waters, while on the lands of defendants, the plaintiff is a stranger. It is only when the defendants prevent the water from running back into the river at or above the head of plaintiff's ditch, by an interference with the course of nature,—not simply by interrupting or stopping the trespasses of plaintiff,—that the plaintiff can complain; and the evidence does not justify the conclusion that there has been any such interference. The incursions of plaintiff upon defendants' land, for the purpose of obstructing the flow of water in the north channel and increasing the flow in the south channel of Cole slough, were never assented to by defendants, but as often as discovered the work of plaintiff in that behalf was undone by defendants. However long, therefore, those incursions may have continued, or however frequently they may have been repeated, they did not secure to plaintiff any prescriptive right in the water secured thereby. Hanson v. McCue, 42 Cal. 310; Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76.

2. The next point made by appellants is that the plaintiff is estopped, by matter of record, from claiming or diverting any of the waters of Cole slough, or interfering with the free flow thereof. This point, we think, is well taken. It appears that in 1885 the plaintiff, evidently dissatisfied with the result of its efforts to augment its supply by diverting the water from the north to the south channel, went up to the head of Cole slough, and scraped out and deepened the bed of the river, and constructed a dam so as to divert the flow of the water from the head of Cole slough. Thereupon these defendants commenced an action against the plaintiff, filing a complaint in which they set up the fact of their ownership and possession of the rancho Laguna de Tache; that Cole slough ran for its entire length over and across said rancho; of their use of the waters of Cole slough for their cattle, and their appropriation and diversion thereof by means of ditches at the lower end thereof for the irrigation of their lands as hereinbefore set forth; of the action of defendant therein (this plaintiff) in deepening the channel of the river and obstructing the flow of the water down the channel of Cole slough, and to and through the headgate and canal of plaintiffs, (these defendants,) and prayed an injunction forever restraining the defendant (this plaintiff) from entering upon the channel of King's river, or the channel of Cole slough, and from in any manner interfering with the channel of said river or of said Cole slough, or from in any manner interfering with the flow of water from the channel of said river into and through the channel of said Cole slough. In this action such proceedings were subsequently had as that on May 3, 1886, judgment was duly given and made forever enjoining and restraining the defendant (this plaintiff) "from digging out, enlarging, or lowering the channel of King's river at and immediately below the head of Cole slough, and from erecting or maintaining any dam or other obstruction in or across the channel of said Cole slough at or near its head; and from doing any act or thing which shall interfere with or in any manner prevent the free flow of water into or down the channel of said Cole slough." This judgment has become final. Respondent insists that this

judgment does not work an estoppel in this case, for the reason, as it claims, that the trespasses then complained of and enjoined were those, and those only, at the head of Cole slough. We do not so read either the complaint or the judgment in that case. The *locus in quo* was a mere incident of the cause of action or the relief sought. The substantive wrong complained of was the prevention of the water from flowing into and down the channel of Cole slough, and into the head of the ditch of plaintiffs in that case. The judgment restrained not only the acts at the place complained of, but any act which would have the effect of preventing the water from flowing into or down the channel of said Cole slough. The injunction, therefore, ran, not alone as to the head, but as to the entire length, of Cole slough, and in doing so it did not exceed the relief warranted by the allegations and the prayer of the complaint. The effect of the judgment in the present case is to restrain and enjoin these defendants (the plaintiffs in the former case) from interfering with such trespasses of the plaintiff herein (defendant in the former case) as are committed in violation of the former injunction, and are intended to and do defeat its purpose. In other words, the effect of this judgment is to enable the plaintiff to deprive the defendants of the fruits of the former judgment, rendered in their favor, and still remaining in full force. The right to have the water flow, according to the course of nature, through the channels of Cole slough, from end to end, not only might have been, but, as we read it, was, within the purview of that former action, both in respect to matters of claim and defense, and was there adjudicated and determined. That determination is *res judicata* as between these parties. Coburn v. Goodall, 72 Cal. 506, 14 Pac. Rep. 190; Freem. Judgm. § 249, and cases cited. Finding, as we do, that the question of this right was involved and passed upon in the former case between the same parties, the authorities cited by respondent are not in point.

3. Appellants assign as errors of law the rulings of the court in overruling defendants' objections to nine different questions propounded to witnesses by plaintiff. We do not deem it necessary to take these questions up in detail. The evidence elicited by the responses to them was incompetent to prove any fact in issue, or to show that plaintiff had acquired a prescriptive right to enter upon the lands of defendants, or upon any of the channels of Cole slough, for the purpose of interfering with the free and natural flow of the waters through the same, and its admission was therefore erroneous. The fact that plaintiff committed annual trespasses upon the rancho, or upon the channels of Cole slough, gave it no prescriptive right to continue such trespasses. The mere use of the water during seasons of abundance, when it naturally flowed down the south channel of Cole slough and Dutch John cut, without objection on the part of defendants, gave to plaintiff no prescriptive right to change the course of the flow in seasons of scarcity for the purpose of continuing its supply. Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185.

The court also erred in sustaining an objection to the question put by the defendants, upon cross-examination, to the witness Ayers. The question was: "As a director of the company, you understood and learned by your agents that the diversion of water had been interrupted, didn't you?" Plaintiff had sought to prove by the witness, on his direct examination, that it (plaintiff) had used the water through the south channel of Cole slough and Dutch John cut without interruption. The question was pertinent, and clearly within the line of cross-examination, and, if answered in the affirmative, would have charged the plaintiff with knowledge of such interruption, which was the purpose of the question.

Respondent makes a separate point, as follows: "Plaintiff has acquired the right, by adverse enjoyment and use for the period of five years, to divert one hundred cubic feet of water per second from King's river." The contest in this case is not so much as to the quantity which plaintiff has the right to divert from King's river as it is to the question of plaintiff's right to augment the quantity in King's river by diverting from Cole slough at a time when the water is so low that it would not naturally flow into King's river therefrom. For this reason it is not necessary for us to say more than we have already done on the question of quantity. The quotations which counsel makes from the testimony of his witnesses sustain us in what we have said on that subject, and they do not sustain the plaintiff in its claim of right to augment the flow in King's river by an unnatural diversion of the waters of Cole slough. Holding, as we do, that the evidence fails to show that the defendants have obstructed or diverted, or intend to obstruct, divert, or turn aside, the waters which in their natural flow would flow through Cole slough into King's river at or above the head of plaintiff's ditch, or have done, or intend to do, anything more than to prevent such natural flow being changed or diverted by the act of plaintiff, and that plaintiff has been and is estopped from changing, or claiming the right to change, the natural flow thereof, it follows that the judgment and order appealed from must be reversed. So ordered.

McFarland, Sharpstein, and Thornton, JJ., concur.

Paterson, J. I concur on the second ground discussed by Mr. Justice Fox, viz., that the record in Heilbron v. The Last Chance Water-Ditch Co. established an estoppel in favor of the defendants and against the plaintiff herein.

Works, J. I concur in the judgment.

Rehearing denied.

(86 Cal. 70)

In re Vinich. (No. 20,743.)

(*Supreme Court of California*. Sept. 19, 1890.)

Arrest—In Civil Action in Justice's Court—Affidavit.

1. Under Code Civil Proc. Cal. §§ 861, 862, which permit the arrest of defendant in an action

on contract, express or implied, brought before a justice of the peace, when plaintiff makes an affidavit that defendant is about to depart from the state with intent to defraud creditors, or that he has been guilty of fraud in contracting the debt, or that he has removed or disposed of his property with intent to defraud creditors, an affidavit for arrest, which shows that an action has been begun for the recovery of an "alleged" indebtedness owing by defendant, but which contains no averment that such indebtedness or cause of action exists, is fatally defective.

2. The affidavit should also set forth the facts constituting the fraud on defendant's part, and allegations on "information and belief" are not sufficient in an action in justice's court.

In chambers. On *habeas corpus.*

E. S. Pilsbury and *L. F. Smith*, for petitioner. *J. Edwards Marks*, opposed.

FOX, J. The prisoner is restrained of his liberty on an order of arrest issued in a civil action by a justice of the peace in Santa Cruz county. It is conceded that the action is for the recovery of moneys claimed to be due upon open account for supplies furnished to defendant while engaged in the restaurant business in Santa Cruz. The constitution provides: "No person shall be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud." Article 1, § 15. The only provisions of the statute pertaining to arrest in civil actions in justice's court, or applicable in such cases, are those found in sections 861 to 865 of the Code of Civil Procedure. Under these, before an order of arrest can be made by the justice in an action for the recovery of debt, it must be proved to the satisfaction of the justice that there is a cause of action arising upon contract, express or implied; and either that the defendant is about to depart from the state with intent to defraud creditors, or that he has been guilty of fraud in contracting the debt or incurring the obligation, or that he has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors. This proof may be made by the affidavit of himself or some other person. That it be made is jurisdictional, and without it there is no jurisdiction to issue such an order. The affidavit in this case shows that an action has been begun for the recovery of an "alleged" indebtedness, but there is no averment in the affidavit that such indebtedness or any cause of action exists. This defect is fundamental, and, whatever else may be averred, it leaves the court without jurisdiction to make the order of arrest.

The affidavit is also defective in several other important particulars. It alleges fraud, but fails to state the facts constituting the fraud; also removal and concealment of defendant's money, and a pretended sale of the balance of his property. These allegations are upon information and belief,—a form of averment which does not constitute proof, and is not authorized by law in this class of proceedings in justices' courts. In the superior court some of the facts may be alleged on information and belief, the party being required to state the source and character of his information, and that he believes it to be true. The judge of the superior court may then judge of and determine the sufficiency of the ground of belief. But the legislature has deemed personal liberty too sacred to allow a party to go into an inferior court and get an order of arrest on anything less than proof, and "information and belief" is not proof. Besides, a "pretended sale" is no sale, and does not prove that a party has sold his property with intent to defraud his creditors or otherwise. There is an averment that the defendant is about to depart from the state, with intent to defraud his creditors, but this also is made upon information and belief. I have pointed out these defects that they may be avoided in like cases, but the fundamental one is the want of any showing that there is a cause of action. For this, if for no other, the prisoner must be discharged. So ordered.

(88 Cal. 636)

CHADBOURNE *et al.* v. STOCKTON SAVINGS & LOAN SOC. (No. 13,947.)

(*Supreme Court of California.* April 28, 1891.)

SPECIFIC PERFORMANCE—SUFFICIENCY OF COMPLAINT.

1. A complaint for specific performance, which alleges that defendant executed a contract wherein it offered to convey lands at a certain price, and to keep the offer open for two years, provided plaintiff would insure the property for defendant's benefit, is insufficient, when it fails to allege that plaintiff did insure the property.

2. Where the contract provided that its offer should be kept open for two years, provided a certain yearly rental should be paid as specified in a certain lease, the complaint, drawn nearly a year after such rental is due, which fails to allege payment thereof, is insufficient.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; JOSEPH H. BUDD, Judge.

James H. Budd and *Baldwin & Campbell*, for appellant. *Joshua B. Webster* and *L. W. Elliott*, for respondents.

FITZGERALD, C. Appeal from a judgment of the superior court of San Joaquin county, and from an order refusing a new trial. This is an action to compel the specific performance of an alleged contract in writing for the conveyance of land. The so-called "contract," which is annexed to the complaint as an exhibit, is made a part thereof, and is in the words and figures following, to-wit: "The Stockton Savings and Loan Society, a corporation, does hereby offer to sell to Wm. Hart, or his assigns, all that certain piece or parcel of land situate and being in the county of San Joaquin, state of California, and known as the north half of section thirty-two, (32,) township four (4) north, range six (6) east, Mount Diablo meridian, for the sum of sixteen thousand six hundred and eighty-eight ($16,688) dollars in gold coin of the United States of America, said sale to be made subject to the foregoing lease. The Stockton Savings and Loan Society agrees to account for all rents received by virtue of the foregoing lease of said premises after this date, and prior to August 16, 1889, provided this offer is accepted upon said terms. The Stockton Savings and Loan Society agrees to keep this offer open until August 16, 1889: provided, however, that the rental for the first year, ending August 16, 1888, shall be paid as specified in foregoing lease, and, if not then accepted, this offer shall be withdrawn and considered as of no effect. Time is of the essence of this agreement; and the said William Hart, in consideration of the above offer to sell, agrees to keep the buildings on said land insured for at least six hundred dollars, and will assign to said Stockton Savings and Loan Society the policies of said insurance. Dated August 17, 1887." Defendant demurred to the complaint, upon the ground, among others, "that it does not state facts sufficient to constitute a cause of action." The demurrer was overruled by the court below, and, upon the case being tried, judgment was rendered in favor of plaintiffs, from which judgment and the order refusing a new trial defendant appeals.

The demurrer should have been sustained: *First.* Because the complaint does not show that Hart, or any one claiming under him, ever did anything in pursuance of said instrument, which was but a mere proposal to sell, and of which time was expressly made the essence, except the tender of payment, demand for deed, and offer to perform by plaintiffs on the 15th day of August, 1889, which was within two days of two years after the date of the execution of the said offer to sell, and more than 12 months after said Hart's alleged interest in said property had been sold at an execution sale by the sheriff of San Joaquin county. *Second.* Because we deem it essential, in order to entitle plaintiffs to maintain this action, that the complaint should allege performance, or offer to perform, or excuse nonperformance, within a reasonable time after the making of the said offer to sell. As there is no allegation in the complaint showing that the agreement of Hart to keep the buildings insured and to assign to the defendant the policies of insurance, as provided by the terms of said instrument, which was the only consideration of the offer to sell, was ever performed or excused, we advise that the judgment and order be reversed, with directions to the court below to sustain the demurrer.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, with directions to the court below to sustain the demurrer.

(88 Cal. xxi)

PEOPLE v. AHERN. (No. 20,446.)[1]

(*Supreme Court of California.* April 27, 1891.)

Department 1. Appeal from superior court, city and county of San Francisco; D. J. TOOHEY, Judge.

PER CURIAM. The transcript in this case was filed on June 16, 1888, and, no briefs having been filed on either side, it was ordered submitted for decision on February 12, 1891. It is ordered that the judgment and order appealed from be affirmed.

(88 Cal. 624)

Ex parte SOTO. (No. 20,833.)

(*Supreme Court of California.* April 24, 1891.)

FINE AND IMPRISONMENT—RECORDER'S COURT.

1. A recorder's court is a police court, within Pen. Code Cal. § 1446, providing that in justices' and police courts "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in proportion of one day's imprisonment for every dollar of the fine."

2. Under said section the court has discretion to direct imprisonment until the fine be satisfied at the rate of one day for two dollars of the fine. DE HAVEN, HARRISON, and GAROUTTE, JJ., dissenting.

3. Directing imprisonment until the fine be satisfied, at the rate of one day for two dollars of the fine, does not render the judgment void, and therefore authorize the discharge of the prisoner on *habeas corpus.* GAROUTTE, J., dissenting.

Habeas corpus.

Waterman & Broughton, for petitioner. *W. A. Bell* and *Edwin Meserve*, for respondent.

BEATTY, C. J. The petitioner was convicted in the recorder's court of the city of Pomona, upon a charge of violating a city ordinance, and sentenced to pay a fine of $150, and in default of such payment to be imprisoned in the city jail in the proportion of one day's imprisonment for each $2 of the unpaid portion of said fine. The punishment prescribed by the city ordinance under which the petitioner was convicted is a fine not exceeding $300, or imprisonment not exceeding three months, or both such fine and imprisonment; and it is claimed that a judgment imposing a fine only cannot be enforced by imprisonment, because the ordinance does not authorize imprisonment for that purpose. But it is not necessary that such authority should be found in the ordinance, if section 1446 of the Penal Code applies to cases tried in the recorders' courts of the fifth class. By that section it is provided that "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in proportion of one day's imprisonment for every dollar of the fine." It is contended, however, that since this provision only applies to proceedings in justices' and police courts, it confers no authority upon a recorder's court. But a recorder's court is none the less a police court because it happens to have been called by another name. The character of a court is determined, not by its name, but by the nature of its jurisdiction and functions, in which respect the recorders' courts of cities organized under the general municipal corporations act cannot be distinguished from other police courts.

Another ground upon which petitioner insists that his imprisonment is unlawful is that if it be conceded that the recorder's court of Pomona is a police court, and therefore authorized by section 1446 of the Penal Code to enforce payment of a fine by the alternative of imprisonment, this judgment is void as to the imprisonment which is prescribed, because, by the statute, the imprisonment must be at the rate of one day for every dollar of the fine, while this judgment only requires him to be imprisoned at the rate of one day for every two dollars of the fine. In support of this contention he cites the case of Ex parte Bernert, 62 Cal. 524, in which it was held that a sentence to pay a fine of $20, and in default of payment to be imprisoned 10 days, was void, because the law in question prescribed a fine of not less than $100, and allowed imprisonment only as an alternative for non-payment of the fine. The reasoning of the court was that since there could be no imprisonment except as an alternative of non-payment of the fine, and since the fine was less than the minimum prescribed by the statute, the imprisonment was necessarily unlawful. Upon the same reasoning it would seem to follow that, if this petitioner has been allowed to discharge his fine by a shorter term of imprisonment than the law warrants, he cannot be imprisoned at all. But we think there is sufficient difference between the terms of the law applicable to this case and those of the statute construed in Ex parte Bernert to enable us to escape a consequence which, upon common-sense views, appears so absurd.

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[1] Rehearing granted.

Section 1446 of the Penal Code does not imperatively require that the direction for imprisonment in case of non-payment of a fine shall be at the rate or in the proportion of one day for one dollar. It is in terms permissive,—the discretion of the magistrate is absolute whether or not to impose any imprisonment whatever,—and it can lead to no possible harm to hold that the law merely prescribes a maximum rate of imprisonment, leaving the magistrate full discretion to fix any rate within that maximum that seems to be just. It is certainly true, as argued by petitioner that, if this discretion exists, the magistrate may allow a fine to be discharged by imprisonment at the rate of $10 a day or $100 a day. But this does not seem to us to amount to a *reductio ad absurdum*. If the legislature deemed it wise to allow a police judge in his discretion to wholly omit the alternative of imprisonment, there seems to be no reason to assume an unwillingness to grant him the smaller discretionary power to vary the rate at which the fine may be discharged by that means. That such power has been conferred on the superior court by the express terms of section 1205 of the Penal Code is conceded, and this proves that the mere fact that it is a power capable of abuse by arbitrary or capricious exercise is no proof of its non-existence. It is no doubt true that the legislature might be supposed to have been willing to confide more to the discretion of the superior court than to inferior judicial officers, and it may be argued that the difference in the terms of the two sections referred to is proof of such disposition. But it is difficult to reconcile this assumption with the fact above stated, that the power conferred upon police judges to omit the alternative of imprisonment altogether is really more extensive and absolute than the power supposed to have been withheld. Certainly it is a power quite as capable of being abused to the detriment of the public, and as a means of unjust discriminaton in favor of individuals. The difference in the terms of two sections of the Code would, it is true, ordinarily require a difference of construction, but the subject of these provisions is such as to demand a construction which will give them a harmonious, rather than a discordant, operation. If there is no reason to suppose the legislature less willing to confer a discretion upon police courts than upon the superior court, as to the rate of imprisonment required to satisfy a fine, there is still less reason for supposing an intention to subject petty offenders to a harsher and more burdensome rule than is applied to more serious offenders. If one who has justly incurred a fine of $5,000 may, in the discretion of a superior judge, be allowed to satisfy such fine by undergoing imprisonment for 50 days, or even less, why should one who has justly incurred a penalty of only $100 be compelled, if imprisoned at all, to stay in jail twice as long? We find it less difficult to construe the two sections of the Code in the same sense than to ascribe to the legislature an intention not merely to permit, but in a measure to compel such gross inconsistency. But, aside from all this, it has lately been decided here that there can be no imprisonment in satisfaction of a fine for a term longer than the maximum term of imprisonment prescribed as a penalty, or part of the penalty of the offense. Ex parte Erdmann, ante, 372, filed April 2, 1891. This being so, petitioner could not have been imprisoned in satisfaction of his fine of $150 longer than 90 days, and therefore a sentence in the alternative, to imprisonment at the rate of one day for one dollar, would have been void as to 60 days. Can it be said that the recorder's court was compelled to pronounce a judgment that would have been void? Surely not. If the case referred to was correctly decided, section 1446 cannot mean what petitioner contends it means. It must be subject to a construction which will admit in many cases, and which in his case demanded, a sentence of imprisonment for the satisfaction of the fine at a rate greater than one dollar a day. There is no excess of jurisdiction. The prisoner is remanded, and writ discharged.

We concur: PATERSON, J.; MCFARLAND, J.

DE HAVEN, J. I concur in the judgment. Under section 1446 of the Penal Code, the court, after determining that its judgment of the fine should be satisfied by imprisonment, ought to have directed that the petitioner "be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the fine." This is the language of the statute, and, as it is definite and clear, there is no reason for placing upon it any other construction. The judgment under which the petitioner is imprisoned is not in this form, and is for this reason erroneous. But there is a wide difference between a judgment in which there is error which would be corrected on appeal and one that is void in the extreme sense; and it is only in this latter class that the court is authorized to discharge upon *habeas corpus* a defendant imprisoned thereunder. In my opinion, the judgment here assailed is not absolutely void. The court had jurisdiction of the subject-matter of the action and of the person of the petitioner.

its judgment that he pay the fine imposed was authorized by law, and it also had the right to direct imprisonment for the satisfaction of the fine and its judgment in this respect is not wholly unauthorized; it is within and not in excess of the authority given it by the statute; and while, as we have seen, it committed an error, such error was in favor of the petitioner, and its judgment was not wholly void. The distinction between such a judgment and one entirely without warrant of law, and therefore void, is obvious.

Harrison, J. I concur in the above opinion.

Garoutte, J. I dissent. In the case of Ex parte Bernert, 62 Cal. 524, where the judgment of the court was that "the defendant pay a fine of twenty dollars, and the minimum fine recognized by law for the offense charged was one hundred dollars," this court said: "The judgment of the police court in the case before us is certainly void, because it is not one which includes any judgment which that court has jurisdiction to render in such a case." And the judgment in this case under which the petitioner is held in custody is certainly void, because it is one which the court had no authority in law to render. The judgment consists of two distinct portions: *First*, that the defendant pay a fine; *second*, that, in default in the payment of the fine, he be imprisoned at the rate of one day for each two dollars of the fine. These portions of the judgment are of equal gravity, and equally require sound law upon which to stand. I thought this court went too far in its construction of section 1446 of the Penal Code in Ex parte Erdmann, and now the construction placed upon this section in the foregoing opinion would render it unrecognizable by the legislature that created it, and cannot be supported by any well-settled principles of statutory construction. Whatever power the recorder had to imprison for the nonpayment of the fine he got by virtue of this section of the Penal Code, and his power is measured by the section. The section is not mandatory in requiring him to render a judgment of imprisonment in case of default in the payment of the fine,—that is discretionary with the recorder; but when he exercises that discretion, as in this case, it is mandatory that he exercise it in the terms and in the manner fixed by the section. If petitioner can be imprisoned at the rate of $2 for each day of imprisonment, he can be imprisoned at the rate of $100 for each day of imprisonment, and the statute thus practically annulled. The section provides that the judgment shall be in the proportion of one day's imprisonment for every dollar of the fine. If the recorder has the discretion to disturb that proportion, by making the judgment one day for each two dollars of the fine, we see no reason why his discretion does not equally extend to the right of making the judgment two days for each one dollar of the fine. This court cannot by a decision, or by a line of decisions, repeal a statute, and the result of the construction given this section, in effect, is to repeal it, and create a new section in lieu thereof, providing that a judgment that a defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for as many dollars of the fine as the recorder in his discretion may deem proper. Ex parte Baldwin, 60 Cal. 435, supports the foregoing views. It would seem that the judgment is not simply erroneous, but void. Conceding the court had jurisdiction of the offense charged and the defendant, it had no jurisdiction to render such a jugdment; it was a judgment not authorized by law and therefore void.

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88 Cal. 302

In re Bauquier's Estate. (No. 14,080.)

(*Supreme Court of California.* April 3, 1891.)

Probate Proceedings—Denial of New Trial—Right of Appeal.

1. The provision in Code Civil Proc. Cal. § 963, subd. 2, authorizing an appeal to be taken to the supreme court from a superior court "from an order granting or refusing a new trial," embraces such orders made in probate proceedings, as well as those made in civil actions.

2. Where legatees file written opposition to the issue of letters testamentary to the person named as executrix in a will, setting forth therein certain facts, which they allege render her incompetent to receive the appointment, and she files a written answer denying such facts, and on the issues thus presented an extended trial is had, in which many witnesses are called, the weight and credibility of whose testimony the court is called upon to determine, this presents issues of fact, which the court, after deciding, is authorized to re-examine on a motion for a new trial, with a right of appeal from its order thereon.

Affirming ante, 178.

On rehearing.

Per Curiam. A rehearing is asked in this case upon the ground that the court, in deciding that the order denying a new trial is an appealable order, disregarded its former decisions upon the same point. In Estate of Wiard, 83 Cal. 619, 24 Pac. Rep. 45, the court used the following language: "Subdivision 3, § 963, Code Civil Proc., enumerates all the cases in which an appeal may be taken to this court from the superior court in probate proceedings; and an order refusing to vacate a decree of distribution and settlement of final account is not one of them." In this case, after the entry of a decree of distribution, the contestant gave notice of her intention to move the court "to vacate and set aside the decree of distribution, and for a new trial in the matter of said petition for distribution." The motion, when brought on for hearing, was denied, and an appeal was taken from that order, but the record brought here did not contain any statement of the case or bill of exceptions to enable this court to pass upon that portion of the order denying the motion for a new trial, and the appeal was dismissed. In support of what is said above in dismissing the appeal, the court cited Estate of Calahan, 60 Cal. 232, and Estate of Lutz, 67 Cal. 457, 8 Pac. Rep. 39. In Estate of Calahan an order had been made in 1875 purporting to settle the final account of the executor, and discharge him from his trust. In 1880, upon a petition therefor, the superior court made an order vacating the order made in 1875, and an appeal therefrom was dismissed by this court upon the ground that such order was not appealable. In Estate of Lutz an order settling the final account of the executor and distributing the estate was made in 1881, and a petition filed in 1884 to vacate that order was denied by the superior court. An appeal from this order was dismissed by this court upon the ground that it was not an appealable order. In each of the foregoing cases the court was simply called upon to determine whether an order vacating or refusing to vacate a decree of distribution is an appealable order, and its language must be construed in connection with the matter which it decided. Taken literally, the language of the court in each of those cases would imply that an appeal does not lie from an order made in probate proceedings granting or refusing a new trial; but, as such construction is in direct conflict with the expressed language of the statute, it must be disregarded. Prior to 1880, section 969, Code Civil Proc., provided that "an appeal may be taken to the supreme court from a judgment or order of the probate court. * * * (8) Granting or overruling a motion for a new trial." In 1880 the legislature, in order to adapt the provisions of the Code to the constitution, which had given to the superior court the jurisdiction previously exercised by the district and probate courts, repealed section 969, and added subdivision 3 to section 963, Code Civil Proc., in which are contained the provisions of section 969, excepting subdivision 8. The provision in subdivision 2, § 963, Id., which authorizes an appeal to be taken to the supreme court from a superior court "from an order granting or refusing a new trial," embraces all such orders, whether made in probate proceedings or in civil actions. In all cases in which the superior court, when sitting as a court of probate, is authorized to entertain a motion for a new trial, an appeal will lie from its order thereon. Section 1714, Id., provides: "The provisions of pt. 2 of this Code relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title." Section 656, Id., defines a new trial to be "a re-examination of an issue of fact in the same court after a trial and decision by a jury or court or by referees." And section 588, Id., declares the manner in which issues of fact arise upon the pleadings. It would be impracticable to enumerate the cases in which a motion for a new trial is appropriate in probate proceedings, but it may be stated generally that whenever the action of the court which is invoked is dependent upon the existence of certain extrinsic facts which are presented to it for determination in the form of pleadings, and are to be decided by it in conformity with the preponderance of the evidence offered thereon, an issue of fact arises which, after its decision, may be re-examined by the court upon a motion for a new trial. Under this rule a motion for a new trial was permissible in the present case. The respondents filed a written opposition to the appointment of the appellant as executrix, setting forth therein certain facts, which they alleged rendered her incompetent to receive the appointment. To this she filed a written answer, denying the facts which were alleged as rendering her incompetent, and upon the issues thus presented an extended trial was had before the court, in which many witnesses were called, the weight and credibility of whose testimony the court was called upon to determine. This presented issues of fact which the court, after deciding, was authorized to re-examine upon a motion for a new trial, and, as we have above stated, its order upon such motion is appealable. Appeals from orders made upon motions for new trial in probate matters were entertained by this court in Estate of Learned, 70 Cal. 140, 11 Pac. Rep. 587; Estate of Briswalter, 72 Cal. 107, 13 Pac. Rep. 164; and Estate of Doyle, 73 Cal. 564, 15 Pac. Rep. 125.

Rehearing denied.

(89 Cal. 42)

McDONALD v. WELSH. (No. 13,832.)

(*Supreme Court of California.* May 7, 1891.)

SWAMP LANDS—SETTLEMENT—EVIDENCE.

1. Const. Cal. art. 17, § 3, providing that state lands which are "suitable for cultivation" shall be granted only to actual settlers, and in quantities not exceeding 320 acres to each settler, applies to swamp lands granted to the state by Act Cong. Sept. 28, 1850, when such lands are "suitable for cultivation," and can be reclaimed and cultivated by an actual settler. Following Fulton v. Brannan, ante, 506.

2. Evidence tending to prove that plaintiff determined to settle on the land at the time he examined the boundaries, and then intended to proceed immediately to build his cabin and to complete it in a reasonable time, and that he commenced to build the cabin as soon as he could get the lumber, and in fact completed it within a week after making application, is sufficient to justify a finding that he was an actual settler at the time he made his application, where there was no pretense that defendant ever settled on the land.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Freeman & Bates, for appellant. *Chas. G. Lamberson*, for respondent.

VANCLIEF, C. This is a contest between the plaintiff and the defendants, Taylor and Welsh, for the right to purchase swamp land, referred by the surveyor general of the state to the superior court of Tulare county for trial. The judgment was in favor of the plaintiff. The defendant Welsh moved for a new trial, and, his motion being denied, he alone appeals from the judgment and from the order denying his motion for a new trial. The land in contest was segregated as "swamp and overflowed land," by authority of the United States, in October, 1884. The court found that the plaintiff settled upon the land, and in due form applied to purchase the same on the 9th day of December, 1887, and that the land then was, and ever since has been, suitable for cultivation. The court also found that the appellant on said 9th day of December, 1887, filed his application to purchase the land, but that he never was a settler on the land.

1. The principal point made by counsel for appellant is that section 3, art. 17, of the constitution has no proper application to "swamp and overflowed lands," because that class of lands must be considered as unsuitable for cultivation. On this point the very able argument of the learned counsel for appellant is a copy of their argument on the same point in the case of Fulton v. Brannan, (No. 13,603,) ante, 506, lately decided by this court. As it did not prevail in that case, it is unnecessary specially to reconsider it in this.

2. It is contended that the evidence does not sustain the finding that plaintiff was an actual settler on the land on the 9th day of December, 1887. The plaintiff testified that he had lived upon the land continuously ever since he built his cabin upon it, "which was about four or five days after making my application. I first saw the land in December, 1887. I went down from Hanford with a party of four. Mr. Diss, one of the party, showed me the corner stakes. The stakes he showed me were the south-west corner, the south-east corner, and the half-mile stakes. I returned to Tulare the same afternoon, and swore to the application. I went back to the land in four or five days, (about December 16, 1887, I think,) and built a cabin." H. H. Freeman testified: "I was with plaintiff when he went to look at the land. I helped him build his cabin. We built the cabin four or five days after he applied for the land. As soon as we could get the lumber there we built the cabin." There was no other evidence than the above as to the date of plaintiff's settlement on the land. There was no pretense that appellant ever settled on the land, and, therefore, no contest as to priority of settlement. If the land was suitable for cultivation the appellant was not entitled to purchase it, even though plaintiff had not applied for it. Dillon v. Saloude, 68 Cal. 268, 9 Pac. Rep. 162. The evidence tended to prove that plaintiff determined to settle on the land at the time he examined the boundaries thereof, December 9, 1887, and then intended to proceed immediately to build his cabin, and to complete the same within a reasonable time, and that he commenced to build the cabin as soon as he could get lumber on the land for that purpose, and actually completed it within a week after his application. This, I think, is sufficient to justify the finding as to plaintiff's settlement. Gavitt v. Mohr, 68 Cal. 507, 10 Pac. Rep. 337.

3. Appellant's counsel make the further point that the finding that the land was "suitable for cultivation at the time of the trial of this action, and at all times since plaintiff filed thereon," is not sufficient as against the defendant Taylor, whose application to purchase was filed in April, 1884, and against whom judgment was rendered for the reasons that his application was "made and filed before the land was subject to application or sale, and that said land is and was suitable for cultivation." If this is not a sufficient finding that the land "was suitable for cultivation" at the time Taylor made his application, yet it is a sufficient answer to the point made,—that there was no privity between the appellant and the defendant Taylor, and that the latter has not appealed from the judgment against him. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

88 Cal. 644

McLEAN *et al.* v. CROW. (No 13,465.)

(*Supreme Court of California.* May 1, 1891.)

FIRM NAME — CLAIMS AGAINST DECEDENTS — INSTRUCTION—NEW TRIAL.

1. A firm name showing only the surnames of the partners is not "a fictitious name," nor a "designation not showing the names of the partners," within Civil Code Cal. § 2466, requiring every firm doing business under such name or designation to file and publish a certificate showing the full names and residences of its members. Following Pendleton v. Cline, 85 Cal. 142, 24 Pac. Rep. 659.

2. Whether or not physicians' services were rendered during the last sickness of deceased, and so entitled to a preference, under Code Civil Proc. Cal. § 1646, is an immaterial issue in an action brought in the superior court by the physicians against the administrator for such services, as a judgment against the administrator can only have the effect of a claim duly allowed against the estate, and its order of payment must be determined on the marshaling of the assets in the probate court, where all the creditors may be heard.

3. Under Code Civil Proc. Cal. § 612, which provides that the jury, on retiring, may take with them all papers which have been received as evidence in the cause, except such as should not, in the opinion of the court, be taken from the person having them in possession, the court does not abuse its discretion by permitting the jury to take with them the claim on which the action is based, which forms a part of the complaint, and which has been received in evidence.

4. Where the court has charged that expert evidence as to the value of plaintiffs' services is not conclusive, and that it is only intended to supplement the general knowledge and experience of the jury in relation to the matters before them, and that they must exercise their own judgment upon the facts, independently of the opinion evidence, it is proper to refuse a further instruction that such evidence should be received with scrutiny and much caution.

5. The fact that the trial court denied defendant's motion for a new trial during the pendency of his application in the supreme court for leave to prove an exception cannot have prejudiced defendant, where his application was subsequently denied by the supreme court.

Commissioners' decision. In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

Code Civil Proc. Cal. § 612, provides: "Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the case, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession."

Stonesifer & Minor, for appellant. *Hatton & Fulkerth*, for respondents.

TEMPLE, C. This action was brought by S. McLean and C. W. Evans, partners doing business under the name and style of McLean & Evans, for services as physicians, rendered defendant's intestate during his last illness. The estate is said to be insolvent, and the answer denies that any such services were rendered the deceased during his last illness; that such services were worth more than $150; and that the plaintiffs had made, acknowledged, or published the certificate of copartnership and notice, as required by section 2466 of the Civil Code.

As the surnames of both partners appear in the firm name, and no part of the name is fictitious, the case seems entirely covered by the recent case of Pendleton v. Cline, 85 Cal. 142, 24 Pac. Rep. 659.

Whether the services were rendered during the last illness or not was an immaterial issue in the case. Generally it is an easy thing to determine, the claim being recognized as a debt against the estate, whether it is or is not a preferred claim, under section 1646, Code Civil Proc. In case of doubt, the administrator may refuse to pay until required by an order of the court. At last the assets must be marshaled and the order of payment determined by the probate court, where other creditors may be heard. Suits on claims against an estate may be brought in any court, including justices' courts. It would be an anomaly to allow a justice of the peace, in a proceeding where other creditors could not be heard, to give a preference to one claimant over others, and enter a judgment binding on the probate court when it shall come to pass upon the relative rights of all creditors. The judgment against the administrator can only have the effect of a claim duly allowed against the estate, (section 1504, Id.,) to be paid in due course, and cannot give the creditor any further rights. As already intimated, a claim may, on its face, be plainly a funeral expense, or an expense of the last sickness, and, if allowed at all, manifestly a preferred claim; but there is nothing in the mode of allowance which fixes its rank. As there is no mode of allowance that can give a claim priority, it must follow that there can be no judgment establishing the validity of a claim, which the administrator or court has refused to allow, which can have that effect In this case, had the administrator been satisfied that the claim was valid, though not for services rendered during the last illness, and therefore not entitled to rank as a preferred claim, his allowance would not have given it such rank, although on its face it purported to be for such services. It would still be an open question. This being so, we do not feel called upon to consider whether the phrase "last sickness" in section 1643, Id., means services rendered *in extremis*, although it would seem obvious enough that it must mean something more than that, and something more than the same phrase in statutes authorizing nuncupative wills.

Section 612, Id., we think, justifies the action of the court in allowing the jury to take with them the claim as presented, and upon which the suit is based, when they retired to consider their verdict. Besides constituting a portion of the complaint, it was a paper which had been received in evidence. It was a matter within the discretion of the court. Clark v. Insurance Co., 36 Cal. 168.

The defense asked an instruction in regard to expert testimony, in substance, that the jury were to exercise an independent judgment, giving to such evidence such weight only as they deemed it entitled to; that it did not preclude them from exercising their own judgment upon the subject, and, further, it ought, like all opinion evidence, to be received with scrutiny and much caution. We see no objection to the instruction asked, and the court might well have given it, but it does not necessarily follow that the judgment should be reversed for the refusal. The object of the testimony was to prove the value of the medical services. The only evidence upon the subject was the expert testimony, and the statement of the doctors as to the nature of the service, the length of time, and the other circumstances of the attendance. At the request of plaintiffs, the court had already instructed the jury that they should consider these facts, and, "when they have all the facts and circumstances attending and surrounding the transaction, the opinion of experts as to value, based upon the same evidence, is not conclusive; their opinions are not to be substituted for the common sense and judgment of the jury. The purpose of their introduction is to supplement the general knowledge and experience of the jury in relation to the matters before them, and thereby to aid them in the exercise of their own judgment, to the end that a more just and accurate conclusion as to the value may be drawn from the evidence."

This covers all the points upon which defendant asked the court to instruct the jury, except the closing admonition as to caution in receiving such evidence. This is the duty of the jury as to all evidence, and is understood, particularly so when the jury are told that they must exercise their own judgment upon the facts, independently of the opinion evidence.

The sixth instruction asked by the defendant was so clearly wrong that it does not merit discussion. Plainly, the jury were to find the value of the services, whether more than $150 or not.

The second instruction given at the request of plaintiffs is in exact accord with our ideas of the issues properly submitted to the jury.

The defendant objects to the order denying his motion for a new trial, on the ground that it was premature, as he had or was about to petition the supreme court for leave to prove his exception. The only evidence of this matter in the transcript is contained in the order denying a new trial, where it is recited, the "defendant objecting to the hearing of the motion at this time on the ground that defendant is petitioning the supreme court for leave to prove his exception." If the defendant had petitioned for leave to prove an exception which had been denied by the trial court, that court ought to have granted time for that purpose. There is here, however, no evidence of such fact, or any evidence that we can notice that such application was pending. The records of this court show that an application of that character was made June 8th, and was not successful. The motion for a new trial had been denied on the previous day, after due notice. Either party may bring such a motion to a hearing. What effect upon this order the allowance of an exception here would have had, if the application had been successful, we are not called upon to say. As it has turned out, the defendant has not been injured. We think the judgment and order should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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88 Cal. 600

CARLOCK *et al.* v. CAGNACCI. (No. 13,693.)

(*Supreme Court of California.* April 18, 1891.)

PARTNERSHIP — FILING CERTIFICATE OF FIRM NAME.

A firm name showing only the surnames of the partners is not "a fictitious name," nor "a designation not showing the names of the partners," within Civil Code Cal. § 2466, requiring every firm doing business under such name or designation to file and publish a certificate showing the full names and residences of its members. Following Pendleton v. Cline, 85 Cal. 142, 24 Pac. Rep. 659.

Department 2. Appeal from superior court, Kern county; A. R. CONKLIN, Judge.

Thomas Rhodes and *Wells Hendershot*, for appellant. *J. W. Mahon*, for respondent.

McFARLAND, J. This action was brought to recover $396.35 for certain personal property alleged to have been sold by plaintiffs to defendant. Defendant demurred to the complaint, and the court below sustained the demurrer. Plaintiffs appeal. The only ground of demurrer is that the complaint does not state that plaintiffs had filed a certificate of partnership, as required by section 2466 of the Civil Code. The complaint shows that the plaintiffs, F. M. Carlock and H. D. Robb, were copartners doing business under the firm name of Carlock & Robb. The firm name was therefore not a "fictitious name" nor "a designation not showing the names of the persons interested as partners," within said section of the Code. Pendleton v. Cline, 85 Cal. 142, 24 Pac. Rep. 659. Moreover, the proper way to raise such a point is by answer. The judgment is reversed, with direction to the court below to overrule the demurrer to the complaint.

We concur: BEATTY, C. J.; DE HAVEN, J

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93 Cal. 427

PEOPLE v. McNULTY. (No. 20,659.)

(*Supreme Court of California.* May 1, 1891.)

MURDER—INSANITY—BURDEN OF PROOF—NUNC PRO TUNC—AMENDMENT—INFORMATION.

1. Insanity, as a defense to a charge of murder, must be established by a preponderance of evidence. Following People v. Travers, (Cal.) ante, 88.

2. A judgment stating that defendant has been convicted of the "murder" of deceased is sufficient, though it does not show that it was murder in the first degree.

3. The trial court can amend its minutes *nunc pro tunc*, to show, in accordance with the fact, that, when defendant appeared for judgment, he was asked "if he had any legal cause to show why judgment should not be pronounced against him."

4. An information charging that defendant did kill and murder "one James Collins" suffi-

ciently charges that defendant murdered a human being.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Wilson & Troutt, for appellant. *H. H. Hart*, Atty. Gen., for the People.

Foote, C. The defendant, McNulty, was charged, by information, with the murder of "one James Collins." He was convicted as charged, and prosecutes this appeal from the judgment rendered against him, and from an order denying a new trial. "The defense set up at the trial was insanity. The bill of exceptions is the charge of the court." The grounds of error alleged are that the court in its instructions charged the jury that the defendant must establish the fact of insanity, after proof of the alleged killing, by a preponderance of evidence; his contention, in brief, being that sanity is a necessary ingredient in the guilt of one charged with murder; that such guilt must be proved beyond any reasonable doubt; and hence, if the evidence discloses a reasonable doubt as to whether a defendant is sane, he must be acquitted. The question which is exhaustively presented, and the authorities fully stated and discussed, has recently been settled by an opinion of the appellate court of this state in People v. Travers, (Cal.) ante, 88, which as to the matter in hand reads thus: "(3) In the instructions given upon the subject of insanity, there was no error prejudicial to appellant. They are somewhat voluminous; but the main proposition contained in them was that a person is presumed to be sane until the contrary is shown, and that the burden is on a defendant of showing insanity by a preponderance of evidence. This rule has been established in this state by a long line of authorities. People v. Myers, 20 Cal. 518; People v. Coffman, 24 Cal. 237; People v. McDonell, 47 Cal. 134; People v. Wilson, 49 Cal. 13; People v. Messersmith, 61 Cal. 246; People v. Hamilton, 62 Cal. 377; People v. Kernaghan, 72 Cal. 609, 14 Pac. Rep. 566; People v. Eubanks, 86 Cal. 295, 24 Pac. Rep. 1014. And this long line of decisions cannot be held to have been overruled by People v. Bushton, 80 Cal. 160, 22 Pac. Rep. 127, 549, where the defense was accident; and People v. Elliott, 80 Cal. 296, 22 Pac. Rep. 207, where the defense was self-defense. In those cases the court was dealing entirely with those 'circumstances' referred to in section 1105 of the Penal Code, which mitigate or justify or excuse an act done by a sane man who might commit a crime, and its attention was not called in any way to that unusual and peculiar mental condition called 'insanity,' which renders a man utterly incapable of committing crime at all. In the opinion of the court in People v. Bushton, reference is made to People v. Smith, 59 Cal. 607, and People v. Flanagan, 60 Cal. 3, in which the very doctrine of the Bushton Case was stated; but in those cases—where the defenses were self-defense and defense of property—the court certainly did not intend to overthrow the settled rule of the court on the subject of insanity. We are clear, therefore, that the undisturbed law of this state still is that the burden of showing insanity is upon a defendant who seeks shelter under it as a defense." 26 Pac. Rep. 90. This disposes of all the points made by counsel for the defendant.

An attorney, permitted to file a brief as *amicus curiæ*, has raised certain points as to the minutes of the court not showing that certain things were done which are required by law, and that the judgment was insufficient as not showing that the defendant had been convicted of murder in the first degree, although it does state that the sentence was "for the murder of James Collins on the 25th day of March, 1888, of which you have been duly convicted." The judgment was sufficient, as stating the general offense "murder" for which the defendant was convicted. People v. Murray, 43 Cal. 455; Ex parte Simpson, 47 Cal. 127. It appears that, upon a suggestion of the diminution of the record, there was filed here a certified copy of the minutes of the trial court, containing, among other things, an amendment of the minutes *nunc pro tunc*, as to the fact that when the defendant appeared for judgment he was asked "if he had any legal cause to show why judgment should not be pronounced against him." This amendment could be made by the trial court so as to conform to the true state of facts, even pending appeal. People v. Murback, 64 Cal. 372.

As to all other matters which it is complained were not done,—even if it be conceded, without deciding, that as the record originally appeared it affirmatively showed that they were not done,—the certified copy of the minutes of the proceedings show that none of the points made as to the sufficiency of the minutes are well taken; that everything was done which the statute required to save all the rights of the defendant when called up for sentence and judgment.

He also urges an objection to the sufficiency of the information in respect that it does not designate a human being as having been murdered by defendant in the allegation that the defendant "did then and there willfully, unlawfully, feloniously, and of his malice aforethought, kill and murder one James Collins;" the argument being that one James Collins might mean a horse as well as a person or human being. It is manifest that the defendant could not have been otherwise than informed by the language used that he was accused of the murder of a human being, when he was charged with having murdered "one James Collins." This is all that the law requires. Subdivision 6, § 959, Pen. Code; People v. Freeland, 6 Cal. 98. We therefore advise that the judgment and order be affirmed.

We concur: Vanclief, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

ROSS v. KENNEDY *et al.* (No. 13,664.)

(*Supreme Court of California.* May 2, 1891.)

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.
W. C. Kennedy, for appellants. *Wallace & Prewett*, for respondent.

PER CURIAM. The judgment in this case must be affirmed on the point that the filing of appellant was prior to segregation, on the authority of Garfield v. Wilson, 74 Cal. 175, 15 Pac. Rep. 620; Buchanan v. Nagle, ante, 512; and other recent cases. This makes it unnecessary to examine the other points made by respondent. The judgment and order denying a new trial are affirmed.

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87 Cal. 552

NORDHOLT v. NORDHOLT, (two cases.) (No. 13,962.)

(*Supreme Court of California.* Jan. 30, 1891.)

INFANCY—AVOIDANCE OF DEED—FULFILLMENT OF TRUST—DURESS.

1. One who takes and holds the legal title to land in trust cannot disaffirm or avoid his deed in execution of that trust on the ground of his minority.

2. In an action to avoid a deed on the ground of minority alone, there being evidence that plaintiff induced his mother to deed to him in trust for defendant, his brother, on his parol promise to convey it to him; that at the time he did not intend to keep his promise; that he afterwards conveyed it, with the secret intention of thereafter avoiding it on the ground of infancy,—it is error to admit evidence that the conveyance to defendant was induced by duress.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.
Gage & Robarts and *Brousseau, Hatch & Thomas*, for appellant. *Shinn & Ling* and *Anderson, Fitzgerald & Anderson*, for respondent.

VANCLIEF, C. The issues in these two actions were the same, and the actions were consolidated and tried together by the lower court on the same evidence. The court found for respondent on all the issues, and rendered judgment accordingly The appeals are from the final judgment, and from an order denying motion for new trial. It appears by the pleadings that the parties are brothers, and that on November 17, 1886, their mother conveyed to the respondent, William, by deed absolute on its face, expressing a nominal consideration of one dollar, an undivided fourth part of certain real property situate in the city and county of Los Angeles; that appellant, John, claimed that this conveyance was in trust for him, and demanded of William a conveyance of the legal title; that on February 10, 1887, William, who was then a minor, over the age of 18 years, conveyed to John, by a bargain and sale deed, expressing a nominal consideration of one dollar, the same undivided fourth of the property; that this conveyance was claimed by appellant, John, to have been made in execution of the alleged trust. The respondent denies the trust, and seeks to avoid his deed of February 10th, to John, on the ground that at the time of its execution he was a minor of the age of only 18 years. If the respondent took and held the legal title in trust for appellant, he cannot disaffirm or avoid his deed in execution of that trust, on the ground of his minority, since the execution of the trust was a duty which a court of equity would have compelled him to perform notwithstanding his infancy. Elliott v. Horn, 10 Ala. 348, and cases there cited; Starr v. Wright, 20 Ohio St. 97; Prouty v. Edgar, 6 Iowa, 353; Schouler, Dom. Rel. § 416. Therefore the respondent's right to disaffirm his conveyance of February 10th depends upon the issue as to whether he held the legal title in trust for the latter. Upon this issue the lower court found for the respondent, and the appellant contends that this finding is not justified by the evidence. There is nothing in the deed of the mother to respondent to indicate that the conveyance was in trust; nor is the alleged trust evidenced by any written instrument subscribed by the respondent or his agent. If the trust exists, it arises from fraud, and is therefore a constructive trust, not within the statute of frauds, which may be proved by parol; and this is the theory on which the case was tried. The evidence tended to prove that the mother, at the request of respondent, had been induced to convey the property in question to her four children, viz., respondent, appellant, and her two daughters, one undivided fourth to each; that William (respondent) had requested her to convey to him John's fourth in trust for the latter, on account of John's dissipated habits at that time, to be reconveyed to John when he should become temperate, or when William should become 21 years of age; that at first the mother consented to this, and, in the absence of John, William presented to her the draft of a deed to this effect, and requested her to execute it; that she refused to execute the deed as drawn, conveying John's fourth to William in trust, but did then (November 8, 1886) execute a deed to William and her two daughters, conveying to each one undivided fourth of the property; that afterwards (November 17, 1886) respondent again requested his mother to convey to him the other fourth, in trust for John, which she then did, without other consideration than the parol understanding with respondent and his express promise to her that he would reconvey that fourth to John, as above stated; that, at the time of making this promise to hold in trust and to reconvey to John, respondent did not intend to perform his promise, but intended to claim and hold that fourth absolutely for himself, as he does in these actions; that, upon John's claiming and demanding of him a conveyance of that fourth, he executed the deed of February 10, 1887, but with the secret intention of thereafter disaffirming it on the ground of his minority, as he is endeavoring to do in these actions. These facts, if proved, constitute such fraud as would justify a court of equity in declaring the respondent a mere trustee of the legal title for the benefit of the appellant. Brison v. Brison, 75 Cal. 525, 17 Pac. Rep. 689; Adams v. Lambard, 80 Cal. 426, 22 Pac. Rep. 180; Sandfoss v. Jones, 35 Cal. 481. And the evidence, positive and circumstantial, on the part of the appellant, seems *prima facie* sufficient to prove them. Indeed, they seem to be supported by a decided preponderance of evidence properly admitted.

But it was claimed by the respondent on the trial, without any foundation therefor in the pleadings, that his deed to appellant of February 10, 1887, was executed under duress *per minas*, which his testimony on the trial had some tendency to prove. This testimony of the respondent as to threats by John was objected to by counsel for appellant, on the ground that it was irrelevant to any issue made by the pleadings. The objection was overruled by the court, and counsel for appellants excepted. Thereupon respondent testified as follows: "Well, at that time John thought he had a quarter interest in this property, and he used to ask me for the property all the time. At that time he was drinking very heavily, and he told me several times if I did not give him up that property he would do me up, or something to that effect. I felt the influence of him, and I talked with Judge Ling about it, and he said if I gave him a deed I could disaffirm it after awhile, and keep him quiet for the present. So with that I made a deed to him of one-quarter interest in the property. John would speak to me about the matter, on an average, every other day. He would say that he had an interest—a quarter interest—in the property, and that he wanted it; he wanted a leed to that property." I think the court erred in overruling the objection to this testimony to the possible, if not probable, prejudice of the appellant. The conveyance of February 10, 1887, under the circumstances of John's claim and demand, tended to justify an inference that the respondent then recognized the trust and his obligation to convey the property to John, which corroborates and strengthens the other evidence of the trust; but, if the conveyance was coerced by duress of any kind, no such inference could be drawn. Why, if respondent did not recognize the trust, did he execute the deed of February 10, 1887? This question, so pertinent under the circumstances, is answered by evidence of duress. But, since the execution of the deed was expressly admitted by respondent's pleadings, and the duress sought to be proved was affirmative matter in avoidance of the deed, it should have been specially pleaded; else no evidence to prove it should have been admitted against the objection of appellant. McCreary v. Marston, 56 Cal. 403; McCreery v. Duane, 52 Cal. 262; Miller v. Sharp, 48 Cal. 394; McComb v. Reed, 28 Cal. 281. The only matter pleaded in avoidance of the deed is the minority of the respondent, which, we have seen, is not available if the respondent held the property in trust as alleged, and as the evidence tends to prove. For the error in admitting respondent's testimony as to duress, I think the judgment and order should be reversed, and the causes remanded for a new trial.

I concur: Belcher, C.

Hayne, C. I concur in the foregoing opinion, but go further. I think it would make no difference if the duress were pleaded in the fullest manner. The deed of the respondent can no more be avoided on the ground of duress than it can on the ground of minority. A court of equity will not lend its assistance to a man to set aside on the ground of duress an execution of a valid trust. That would be to assist a fraud. This question fairly arises, and, if it be not disposed of now, the case will probably come back again.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed, and the causes remanded for a new trial.

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88 Cal. 328

In re Wright *et al.* (No. 13,806.)

(*Supreme Court of California.* March 19, 1891.)

Insolvency—Petition—Verification.

1. The allegation in a petition in insolvency against a firm, alleging that A. and B., doing business under the firm name of A. & B., are indebted, instead of averring that the firm "A. & B." is indebted, is not insufficient, as showing that the indebtedness is by the parties as individuals, rather than by the partnership.

2. Where, in a petition, different creditors have joined, having several debts, and are required to join in the verification, some of the matters must necessarily be stated upon information and belief, and that form of verification is proper, although there are no allegations in the petition which are stated to be upon information and belief.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; William W. Cross, Judge.

O. L. Abbott, for appellants. *N. O. Bradley* and *G. E. Lawrence*, for respondents.

Temple, C. The only questions presented by this appeal are as to the sufficiency of the petition and the verification. They are as follows:

"In the superior court of the county of Tulare, state of California. In the matter of D. L. Wright and W. B. Wright, copartners doing business under the firm name of D. L. and W. B. Wright, insolvent debtors. To the Hon., the superior court of the county of Tulare, state of California. The petition of D. S. Cohn and S. Cohn, doing business under the firm name of Cohn & Co., Frederick Kern, Matthew McGovern, Frank T. Elam, and Geo. Wright, respectively, shows that petitioners are each residents of the state of California, and that D. L. Wright and W. B. Wright, copartners doing business under the firm name of D. L. and W. B. Wright, above named, are residents of the county of Tulare, state aforesaid, and are indebted to your petitioners as follows to the said firm of Cohn & Co. in the sum of $1,241.85, on a promissory note executed and delivered by said firm of D. L. and W. B. Wright to said firm of Cohn & Co. of date October 28, 1889, for the principal sum of $1,375, bearing interest at the rate of 10 per cent. per annum, no part of which has been paid, save and except the sum of $152.15, leaving now due on said note the sum of $1,241.85; to Frederick Kern in the sum of $60.75, for goods, wares, and merchandise sold and delivered to said insolvents within the last two years; to Matthew McGovern in the sum of $8.50, for care of team and livery bill, furnished within two years last past; to Frank T. Elam in the sum of $7.85, for blacksmithing and lumber, furnished within two years last past; George Wright in the sum of $6.00, for brick and mortar, furnished within two years last past,—in all $1,324.95; and each and all of said sums are now due, and the same or no part thereof has been paid, and neither of said petitioners has become a creditor of said firm of D. L. and W. B. Wright, by assignment within thirty days prior to the filing of this petition; that said D. L. and W. B. Wright, copartners as aforesaid, were on the 7th day of December, 1889, insolvent; that said firm of D. L. and W. B. Wright did, on or about the 7th day of December, 1889, transfer and convey to one E. E. Giddings and John Nance their certain livery stable outfit, and their stock belonging to said livery stable, and other property situate in the town of Dinuba and in Tulare county, with intent to delay, defraud, and hinder their creditors and your petitioners herein from collecting their just claims against said firm; that said firm of D. L. and W. B. Wright have transferred and conveyed all their property within thirty days last past, and now have no property, as your petitioners are informed and believe, subject to attachment. Wherefore your petitioners pray that the said court issue its order to said D. L. & W. B. Wright, copartners doing business under the firm name of D. L. & W. B. Wright, to show cause, at a time and place fixed by the court, why they should not be adjudged insolvent debtors, and the surrender of their estate be made for the benefit of their creditors in manner required of insolvent debtors.

his
"MATTHEW X MCGOVERN.
mark.

"Witness to signature of Matthew McGovern, N. O. BRADLEY.
FREDERICK KERN.
D. S. COHN & S. COHN,
Copartners as COHN & Co.
"FRANK T. ELAM.
"GEORGE WRIGHT.

"State of California, county of Tulare—ss.: D. S. Cohn, Matthew McGovern, and Frederick Kern, being each severally and duly sworn, says that he has heard read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except those matters therein stated on information and belief, and as to those matters that he believes it to be true, and said D. S. Cohn, above named, further says that he is now and was at all times herein mentioned a member of the firm of Cohn & Co., above named.

his
"MATTHEW X MCGOVERN.
mark.

"Witness to signature of Matthew McGovern, N. O. BRADLEY."
FREDERICK KERN.
D. S. COHN."

The objection to the petition is that it does not show that the creditors were creditors of the partnership, rather than of D. L. and W. B. Wright as individuals. The allegation is that D. L. and W. B. Wright, doing business as partners under the firm name of D. L. & W. B. Wright, are indebted, etc., and not that the firm of D. L. & W. B. Wright are indebted, etc. I think this averment can only be understood as charging that the indebtedness arose in the business of the copartnership. There is no provision in the insolvent act for adjudging two or more persons insolvent, and providing for a joint assignment, except section 35, which authorizes such proceedings in favor of or against partners in reference to partnership debts and assets. In such case the proceeding is properly for or against them individually as partners. This must be so, for the separate estate of each member of the firm also passes to the assignee. And such was the practice in bankruptcy in the federal courts. Partnership debts are, after all, only joint obligations, and the firm cannot be insolvent unless the individual members are so. It is, doubtless, necessary to show what the partnership debts are, for various questions are likely to arise between individuals and firm creditors in marshaling the assets and paying debts. The form adopted here in the averment of the partnership indebtedness is quite similar to that which has always been employed in pleading partnership indebtedness, and I think is sufficient. The objection to the verification is that it is in the usual form for the verification of a pleading, which includes matters stated on information and belief. There are no matters in the petition stated to be on information and belief, and the statute does not prescribe the form of the verification. Where different creditors, however, having several debts, are required to join in a verification, some of the matters must necessarily be stated upon the information and belief of each of the affiants. I think the petition and verification sufficient, and the judgment and orders appealed from should be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

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88 Cal. 384

MURDOCK v. CLARKE *et al.* (No. 13,977.)

(*Supreme Court of California.* March 19, 1891.)

PAYMENT—APPLICATION—COMPOUND INTEREST—ACCOUNTING BETWEEN MORTGAGOR AND MORTGAGEE.

1. Where mortgagees in possession of the mortgaged estate receive therefrom a net income over and above their expenditures, they are under obligation to so apply such payments to reduce the more onerous undertakings of the debtor if it can be done consistently with their receipt of all he has contracted to pay them; and where, of several obligations secured by such mortgage, one bears compound and the others simple interest, the payments must be applied so as to first extinguish the one bearing compound interest.

2. Where the court has made a finding upon settlement of the account of mortgagees in pos

session, stating it as of that date, and the decree is not entered until some time afterwards, it is not error for the court to make a supplemental finding showing the expenditures and receipts since the former account, and to modify it accordingly.

In bank. Appeal from superior court, Lassen county; KEYSER, Judge.

A. L. Hart and *Solen Hall*, for appellants. *J. D. Goodwin*, *D. W. Jenks*, and *W. N. Goodwin*, for respondent.

HARRISON, J. February 4, 1875, Adam Murdock borrowed from the defendant Clarke $8,500, and executed to him his promissory note therefor, "with interest thereon at the rate of one and one-fourth per cent. per month from said 4th day of February, 1875, interest payable semi-annually, and, if not so paid, to be added to the principal, and bear a like rate of interest;" and at the same time conveyed to him certain real property consisting of the "Big Valley Ranch" and the "Beaver Creek Ranch" "for the purpose of securing the payment of said promissory note according to the terms thereof." March 22, 1875, Clarke conveyed to his co-defendant, Cox, an equal one-half of the interest in said note and security, and on the same day Murdock borrowed from Clarke and Cox the further sum of $5,000, for which he gave them his promissory note for that amount, "with interest at the rate of one and a-half per cent. per month from date until paid." At that time it was agreed between Murdock and the defendants that the defendants "should have and hold the possession and control" of the said real estate, together with certain property "until the said promissory notes, with interest thereon, together with such further amounts or sums as should be advanced and paid out by said Clarke and Cox for said Murdock, should be fully paid to them." April 10, 1875, a bill of sale of said personal property was executed by Murdock to Clarke and Cox "in pursuance of said agreement, and as further security for the payment of said several amounts." The defendants took possession of the ranches aforesaid on the 22d day of March, 1875, and after the execution of the bill of sale therefor they also took possession of certain of the personal property therein described. After the execution of said bill of sale the defendant, at the request of Murdock, advanced and paid to and for his use and benefit other sums of money, for some of which he gave them his note, "with interest at the rate of one and one-half per cent. per month," and for a portion of which "no note or instrument in writing has ever been given." Murdock died intestate December 7, 1875, and thereafter his administratrix (the respondent herein) brought this action against the defendants for an accounting of the money received by them; and in the prayer to her complaint asked "that such sum as may be necessary for that purpose be appropriated to the payment of the said sums of money borrowed of the said defendants by the said Adam Murdock, with the interest thereon; and that said applications of said money to such payment be made as of the date at which the said money was received by the defendants." The case came on for trial April 30, 1888, and in its decision rendered February 18, 1889, the court settled the account of the defendants from the time they took possession of said property down to May 1, 1888. In its findings of fact the court found "that since they have been in the possession of the said property, as aforesaid, the total expenses of defendants in the necessary and proper management and care of said property, properly chargeable to said estate, has been $34,358.57, and their receipts from the products of said ranches, the sales of cattle and lease of hay land, have amounted to $48,160.45." The court also found that the defendants had, in addition to realizing the foregoing amounts from said property, made use of the property so held by them, for their own benefit, and that "the value of the use and occupation of the said ranches on the part of the defendants for their own stock since the 1st day of November, 1877, up to the present time is $1,000 per annum, and that the defendants are properly chargeable therewith." It also found "that no part of any money received by the defendants from the sale of stock or other products of the ranch, or from the leasing of the hay land, has been applied to the payment of the debts due to them by the estate of Adam Murdock;" and, in conclusion, "that upon a full accounting the plaintiff was indebted to the defendants on the 1st day of May, 1888, in the sum of $29,752.59, no credit for compounding of interest being allowed defendants." From these findings the court found as its conclusions of law that the plaintiff was entitled to a reconveyance of the property "upon the payment to said Cox and Clarke of the said sum of $29,752.59, with simple interest on the notes held by them against said estate since the 1st day of May, 1888, and such further sum as may have been expended by them for the benefit of said estate since said date, less such sum as they may have received from said estate by the sale of cattle and other products, and the leasing of hay land, and less a rental of $1,000 per annum since said date, for the use of said ranches for their own stock;" and directed a decree to be entered accordingly. Prior to the entry of the decree a supplemental account, rendered under the foregoing directions from May 1, 1888, was settled by the court, and in its decree, after settling said account, the court found that there was a total of $31,926.37 due and owing from the plaintiff to the defendants, and directed and decreed that "upon the payment by plaintiff to defendants of the said sum of $31,926.37, within thirty days after the entry of this decree, the defendants shall convey to the estate of Adam Murdock, deceased, all of said property then remaining in their hands. This decree was entered July 3, 1889, and thereafter the defendants appealed to this court "from the part of the judgment and decree rendered in favor of said defendants against said plaintiff, and which adjudges that no credits for compounding of interest be allowed the defendants, and which adjudges that there was due from the plaintiff to the defendants at the date of filing said decree, $31,926.37 only." The points presented on behalf of the appellants are that the court should have computed interest upon the $8,500 note by compounding the same according to its terms, and that the same rate of computation should be continued until the entry of the decree.

1. The rules governing the application of indefinite payments made by a debtor to his creditor, to whom he owes different obligations, had their origin in the civil law; but in those countries where the common law prevails the rules of the civil law have been greatly modified, and in some respects entirely repudiated. Both systems concur in giving to the debtor the right to designate at the time of the payment the debt to which he wishes the payment applied. Both systems also hold that, if the debtor shall not then designate the debt to which he wishes the payment applied, the creditor may make application of the payment; and that, if neither makes such application, it shall be made by the court. The principles upon which the application is to be made by the creditor or by the court differ widely in the two systems. By the rules of the civil law, if the debtor at the time of payment makes no application thereof, it is the duty of the creditor to make application in accordance with the supposed intention of the debtor, and to that debt upon which the creditor would have applied it had he been the debtor; and that any application by the court must be made to that debt which the debtor at the time had the most interest to discharge, irrespective of its effects upon the creditor. 1 Dom. Civil Law, book 4, tit. 1, § 4; 1 Evans, Poth. p. 528; Civil Code La., arts. 2163-2166. This rule has been recognized in some of the states of this country, but in the courts of the United States and of the greater number of the individual states it has been repudiated, and it may now be considered as the settled rule in this country wherever the common law prevails that when neither party to the transaction makes any application of the payment, and there are different debts due from the debtor to the creditor, the law will make the application in such a manner, in view of all the circumstances of the case, as is most in accordance with justice and equity, and will best protect and maintain the rights of both parties. Field v. Holland, 6 Cranch, 8; Logan v. Mason, 6 Watts & S. 9; Stone v. Seymour, 15 Wend. 19; Smith v. Loyd, 11 Leigh, 512; Allen v. Culver, 3 Denio, 284; Story, Eq. Jur. 459*b.*; 2 Greenl. Ev. § 533. One of the elements underlying the rule for the protection of each party in his rights is that the burden shall be made as light upon the debtor as is consistent with giving to the creditor all that the debtor has bound himself to pay. If the creditor by any application that may be made for him can receive all for which the debtor is under an obligation to him, it is but equity that it should be applied in such a mode as will be least onerous to the debtor. On the other hand, when the interest of the debtor cannot be promoted by any particular application of the payment, or when it is a matter of indifference to him in which mode the application is made, the law raises a presumption that the payment was actually received in the way that was of most advantage to the creditor. If the application can be so made as to discharge all the obligations of the debtor without increasing his burden, it will be deemed indifferent to him upon which obligation the payment shall be applied. The principles of this rule find their application in cases where it is held that a payment is to be applied to interest instead of principal; to an interest-bearing debt in preference to one bearing no interest; to the payment of legal interest instead of that which is usurious; to a debt that has matured rather than to one not yet due; to the payment of legal items in an account rather than of those which are illegal; and, on the other hand, for the purpose of protecting the rights of the creditor, a payment will be applied to the earlier items of an account in preference to later ones; to an unsecured debt in preference to one for which he holds security; and, when he has more than one security, to that debt for which the security is the most precarious. No specific rule can be laid down that will embrace all the cases that may arise for its application, inasmuch as the infinite variety of human transactions cannot be included within the limits of a formulated rule; and therefore courts must be governed by principles, rather than by fixed rules. In this state an attempt has been made for the guidance of courts in this matter, but the rules there prescribed are insufficient for all occasions, and do not embrace even the conditions of the present case. Section 1479, Civil Code, provides: "*First.* If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order; and, if there be more than one obligation of a particular class, to the extinction of all in that class ratably: (1) Of interest due at the time of the performance; (2) of principal due at that time; (3) of the obligation earliest in date of maturity; (4) of an obligation not secured by a lien or collateral undertaking; (5) of an obligation secured by a lien or collateral undertaking." Neither of these subdivisions is directly applicable to the facts in this case. All of the obligations of Murdock are equally secured, and the moneys received by the defendants were at no time sufficient to extinguish all of the interest then due upon the principal obligations. The obligations also bear different rates of interest, and upon one of them the interest is to be compounded semi-annually, while the others bear only simple interest. Hence, instead of having the Civil Code as a guide, the court was compelled to take as its guide the equitable principles found in the above rule. Under these principles it was its duty to apply the payments that had been from time to time received by the defendants to those obligations which were most onerous to the plaintiff, so long as none of those obligations were impaired. Ordinarily this rule would require the payment to be applied in extinguishment of the interest upon that obligation which

bore the highest rate, but, inasmuch as in the present case the obligation which bore a lower rate of interest provided for compounding that interest, that became the most onerous, and, within the principles above stated, was the first to be extinguished, especially since thereby the defendants would suffer no loss, but receive all that Murdock had obligated himself to pay to them.

The findings show that from the time the defendants took possession of the property they were in the annual receipt of an income therefrom far in excess of their expenditures for its care and preservation, and that from that date until the time of the accounting they had in their hands moneys belonging to the plaintiff, which, added to the amount of annual benefit which they derived from the property, and from which the court found they were indebted to the plaintiff, greatly exceeded the interest accruing upon the $8,500 note. It would be contrary to all principles of equity and justice for them to retain this money in their hands, and at the same time insist that the interest upon the $8,500 note which they held against Murdock should accumulate by being compounded according to its terms. It was their duty to apply these moneys as fast as they were received to keeping down the interest upon the obligations for which they held the property as security, and upon that obligation which was most onerous to Murdock, and upon which the court must presume he would have intended the application, as being most beneficial to him. In applying money that had been received by the defendants, first to the discharge of the interest upon the obligation which provided for its compounding, and whatever surplus there might be to the reduction of the interest upon the other obligation, the court acted in accordance with the principles of the above rule, making the burden upon the plaintiff the least onerous consistent with the obligations that had been made by Murdock, and at the same time giving to the defendants all the money that they could have received had Murdock paid them from time to time the semi-annual interest as it fell due, with the moneys which they held in their hands for him. This application of the money in the hands of the defendants to the discharge of the interest upon the $8,500 note, instead of being "a modification of the contract entered into between the parties," as is stated in appellants' points, is in reality an exact compliance with the contract. In this mode the interest on the note that was "payable semi-annually" was discharged in exact accordance with the terms of the note. The defendants received all that Murdock had agred to pay them, and at the very time that such payment was to be made, and at the same time the burden of the different obligations was made lighter upon the plaintiff than it would have been had the other course been followed. The findings do not show the tabulation or stating of the account between the parties, but merely give the amount of the receipts and disbursements for each year, and the result of the acounting, "without making any allowance for compound interest." This result is consistent with the rule we have above stated. Inasmuch as the evidence upon which the findings were made is not before us, and the findings themselves do not show the several dates at which the money was received by the defendants, or present any facts inconsistent with reaching this result, upon the principles herein laid down we must assume that it is correct. We do not understand that the appellants contest the accuracy of the computation upon this principle. They contend that the account should have been stated by allowing compound interest.

2. The settlement of the account by the court as of May 1, 1888, was an adjudication by it of the amount then due from the plaintiff to the defendants, and was in the nature of a verdict or finding for that amount. A finding by the court in an action upon a promissory note embraces the whole amount due for principal and interest thereon at the date of the finding, and bears interest therefrom as a whole at the legal rate, and not according to the rate of interest stipulated in the note. Alpers v. Schammel, 75 Cal. 590, 17 Pac. Rep. 708; Golden Gate Mill & Min. Co. v. Joshua Hendy Mach. Works, 82 Cal. 184, 23 Pac. Rep. 45. Section 1035, Code Civil Proc., prescribes that "the clerk must include in the judgment entered up by him any interest on the verdict or decision of the court from the time it was rendered or made." Under this rule the defendants had no reason to complain of the mode of computation adopted by the court in its conclusion of law. In the present case, the account having been originally settled as of May 1, 1888, but the decision of the court not having been made until February 18, 1889, and the defendants having in the mean time made expenditures and received income from the property, a supplemental account was required. When the court came to settle that supplemental account it found "that since the trial of said cause on the 1st day of May, 1888, and up to the said 19th day of June, 1889, the said defendants have expended on behalf of said estate the sum of $6,360.25, and have received as proceeds of said property the sum of $4,186.47, leaving due to the defendants for expenditures over and above receipts, in addition to the said sum of $29,752.59, the sum of $2,173.78, making a total of $31,926.37 now due and owing from the plaintiff to the defendants." We cannot say from this statement in the decree that a proper computation of the amount to which the defendants were entitled was not properly made by the court, inasmuch as it is not shown at what dates the moneys were respectively received or expended by the defendants. We find no error in that portion of the judgment from which the defendants have appealed, and it is therefore affirmed.

We concur: DeHaven, J.; Sharpstein, J.; Paterson, J.; Garoutte, J.

(89 Cal. 52)

CHAPMAN *et al.* v. DORAY. (No. 13.655.)

(*Supreme Court of California.* May 7, 1891.)

PENAL ACTIONS—MINING CORPORATIONS—FAILURE TO POST NOTICES.

In an action for a penalty against a gold mining company brought under St. Cal. 1880, p. 134, which provides that such corporation shall on the first Monday of each month make and have posted in the office of such company certain reports and accounts current for the previous month, an answer denying the allegation of the complaint that said company had an office for the transaction of business is insufficient to raise a material issue; Civil Code, §§ 290, 321*a*, contemplating that all corporations shall have a place of business.

Commissioners' decision. In bank. Appeal from superior court, Sierra county; F. D. SOWARD, Judge.

Gray & Sexton, *H. V. Rearden*, and *F. R. Wehe*, for appellant. *Smith & Ford* and *T. M. Osmont*, for respondents.

BELCHER, C. This action was brought to recover the sum of $1,000 liquidated damages, and costs of suit, under the provisions of an act of the legislature of this state approved April 23, 1880, (St. 1880, p. 134.) The complaint alleges that during the year 1889 the Pacific Gold Mining Company was a corporation, organized under the laws of this state, for the purpose of carrying on and conducting the business of mining; that the corporation owned valuable mining claims in the county of Sierra, and had its office for the transaction of business in the town of Howland Flat, in that county; that the plaintiffs and defendant were stockholders of the corporation, and the defendant was one of its board of directors, and its president and acting superintendent; that during the months of January, February, March, April, May, June, and July, 1889, the corporation was engaged in working its mines, and during each of said months it employed numbers of men therein, and incurred liabilities, and received and disbursed divers sums of money; that it became and was the duty of the defendant and his co-directors to make and have posted in the office of the company on the first Monday of each of said months, certain reports and accounts current for the previous month, as required by the act of the legislature before referred to, but that disregarding their duties and obligations in this regard, they failed, refused, and neglected to make, or cause to be made, or posted or filed, the reports and accounts required, or any of them. Wherefore judgment was asked for the penalty imposed by the statute. By his answer the defendant denied that the Pacific Gold Mining Company "had an office for the transaction of its business in the town of Howland Flat," or at any other place. He further denied that it was the duty of the directors of the corporation to cause to be made and posted the reports and accounts current, named and referred to in the complaint; denied that any duty or obligation was imposed upon the directors of mining corporations, by the act of April 23, 1880, to have made and posted reports and accounts current as alleged in the complaint, or any penalty for a failure to do so; denied that, by reason of the facts alleged, the plaintiffs had been damaged in the sum of $1,000, or in any sum, or at all. On motion of the plaintiffs, the court gave judgment in their favor on the pleadings, and from that judgment the defendant appeals.

The principal contention of the appellant is that the court erred in granting judgment on the pleadings, because the denial in the answer that the corporation had an office for the transaction of its business in the town of Howland Flat, or at any other place, raised a material issue. We do not think this contention can be sustained. The law contemplates that every corporation shall have an office. The Civil Code provides that when a corporation is formed its articles of incorporation must set forth the place where its principal business is to be transacted, (section 290;) and it may afterwards change its principal place of business from one place to another in the same county, or from one city or county to another city or county within the state, notice of such change being given by publication in a newspaper for three successive weeks, (section 321*a*.) It also provides that the by-laws of a corporation shall be kept in its office and be open to the inspection of the public during office hours of each day except holidays. Section 304. And the statute under which the plaintiffs seek to recover provides that "such account or balance sheet shall be verified under oath by the president and secretary, and posted in some conspicuous place in the office of the company." Now, if the appellant's contention should be sustained, it would be possible for the directors of every mining corporation to avoid the duties and penalties imposed upon them by the act. They could close up their offices, and then say, we have no office where the reports and accounts current can be posted, and therefore are under no obligation to obey the commands of the statute; or they could discharge their secretary, and then claim the same immunity, because there was no secretary who, in conjunction with the president, could verify the accounts and balance-sheets, and fit them to be posted, and therefore they need not be posted. But this would be simply an evasion of the mandates of the law. In Schenck v. Bandmann, 81 Cal. 231, 22 Pac. Rep. 654, the action was brought under the same statute to recover the declared penalty. The defendants sought to excuse themselves on the ground that they did not obtain the information necessary to enable them to make out the itemized account or balance-sheet for the month of October till the 15th day of November, and therefore they could not be held liable for not doing it on the first Monday of the month. The attempted excuse was held insufficient, and the judgment was affirmed. We think the defendant, and his co-directors here, had, or ought to have had, an office for the transaction of the business of the corporation, and the denial was therefore insufficient to raise a material issue. The other points discussed by counsel do not require any extended consideration. The statute complained of has been considered and upheld in the following cases: Loveland v. Garner, 71 Cal. 541, 12 Pac. Rep. 616; Beal v. Osborne, 72 Cal. 305, 13 Pac. Rep. 871; Schenck v. Bandman, 81 Cal. 231, 22 Pac. Rep. 654.

We advise that the judgment be affirmed.

I concur: FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(89 Cal. 55)

SCHOFIELD v. DORAY. (No. 13,656.)

(*Supreme Court of California.* May 7, 1891.)

PENAL ACTION—FAILURE OF MINING COMPANY TO FILE ACCOUNTS CURRENT—AMENDMENT.

It is not error to refuse an amendment to an answer in an action for a penalty, under St. Cal. 1880, p. 134, against a mining company for failing to post certain reports in its office enabling defendant to plead in bar a judgment for the recovery of a penalty in another case, as the offense is a continuing one.

Commissioners' decision. In bank. Appeal from superior court, Sierra county; F. D. SOWARD, Judge.

Gray & Sexton, *H. V. Reardon*, and *F. R. Wehe*, for appellant. *Smith & Ford* and *T. M. Osmont*, for respondent.

BELCHER, C. This case is similar in character to that of Chapman v. Doray, ante, 605, (No. 13,655,) just decided. The pleadings are the same, except that the penalty sought to be recovered here was for the failure to make and post on the first Monday of August, 1889, the reports and accounts current for the previous month, while the failures alleged in Chapman v. Doray were for the months of January to July, inclusive, for the same year. Judgment in both cases was rendered on the same day, and the proceedings up to judgment were similar. In this case, after judgment had been rendered in Chapman v. Doray, and before judgment herein, the defendant asked leave of the court to file an amended answer, to enable him to plead the recovery and judgment in the other case as a bar to a recovery here. The court denied the motion, and the defendant excepted. Judgment was then entered, from which the defendant appeals, on a bill of exceptions. The same points are made here for a reversal of the judgment as were made in Chapman v. Doray, and, on the authority of the decision in that case, they must be overruled. It is further urged that the court erred in denying the defendant's application to amend his answer. We see no error in this ruling. The proposed answer would have presented no defense. Each failure is a delinquency for which an action may be maintained. It is true that, when the stockholders forbear to sue till after several failures have occurred, only one penalty can be recovered up to the time such forbearance ceases, and the suit is brought. Loveland v. Garner, 71 Cal. 541, 12 Pac. Rep. 616. But an action may be maintained for such delinquency as it occurs. We advise that the judgment be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(88 Cal. 407)

PRINCE v. CITY OF FRESNO, (COUNTY OF FRESNO, Intervenor.) (No. 13,781.)

(*Supreme Court of California.* March 21, 1891.)

MUNICIPAL CORPORATIONS—RECORDER—FEES.

The recorder of the city of Fresno, under Deering's Pol. Code, p. 830, §§ 806, 807, is vested with concurrent jurisdiction with justices of the peace of all actions, civil and criminal, arising within the corporate limits of the city, and shall receive such fees for his services as may be allowed by law to justices of the peace for like services, except that for his services in criminal prosecutions for violations of ordinances he shall be entitled to receive only such monthly salary as the board of trustees shall by ordinance prescribe. *Held*, that he is vested with a dual jurisdiction as recorder and justice, and that the fines he receives for violations of the Penal Code are to be paid over to the county treasurer, and he must be paid for his services as in the case of justices.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

W. D. Tupper, Dist. Atty., and *H. H. Welch*, for appellant and intervenor. *Goucher & Jones*, for respondent. *C. C. Merriam*, for defendant.

FOOTE, C. This action was tried upon an agreed state of facts, under sections 1138 and 1140 of the Code of Civil Procedure. The plaintiff is the duly elected and qualified recorder of the city of Fresno, which is a city of the fifth class under the laws of the state. During the months of April, May, June, July, August, and September, 1889, he "collected fines in his court from parties convicted therein of violations of various provisions of the Penal Code of the state of California, as distinguished from violations of the ordinances of the city of Fresno, to the amount of $646.90." He presented to the city his bill for fees claimed to be due him, earned during that time, in substance as follows: For fees in cases where fines were collected for violations of the Penal Code of the state, $175; for fees in cases where fines were not collected for violations of the Penal Code, $319.25; total fees claimed, $494.25. The city refused to allow the bill in whole or in part. The county came in as an intervenor, claiming to be interested in the suit, and it is set out in the agreed facts that "if it be determined that the city is not liable to the recorder for said fees, then the county is liable, it being unquestioned that either the city or county is so liable; and if the determination of this suit is adverse to the recorder, the plaintiff, then the fines collected as aforesaid, to-wit, the said sum of $646.90, should be paid in to the county treasurer; wherefore it is prayed that the questions raised by the facts above stated be determined by this court, and judgment entered accordingly." Judgment was rendered "that plaintiff pay to the county treasurer of the said county of Fresno, intervenor herein, all fines heretofore imposed by him for violations of the provisions of the Penal Code, and paid after commitment, and the residue of all such fines paid before commitment, after deducting therefrom the expenses of the prosecution in cases in which said fines were imposed; and that the intervenor, by its proper officers, agents, and representatives, audit and pay to plaintiff for his services heretofore rendered in cases of violations of the provisions of the Penal Code the same fees and compensation as are allowed by law to justices of the peace in like cases." The recorder's court of the city of Fresno, its jurisdiction, rules, practice, and procedure, are established by section 806 of the act entitled "Municipal Corporation Bill," page 830, Deering's Pol. Code. "Said recorder's court shall have jurisdiction, concurrently with the justice's courts, of all actions and proceedings, civil and criminal, arising within the corporate limits of such city, and which might be tried in such justice's court; and shall have exclusive jurisdiction of all actions for the recovery of any fine, penalty, or forfeiture prescribed for the breach of any ordinance of such city, of all actions founded upon any obligations or liability created by any ordinance, and of all prosecutions for any violation of any ordinance." Section 807 (same page) reads: "The recorder shall be judge of the recorder's court, and shall have the powers and perform the duties of a magistrate. He may administer and certify oaths and affirmations, and take and certify acknowledgments. He shall be entitled to charge and receive for his services such fees as are or may be allowed by law to justices of the peace for like services, except that for his services in criminal prosecution for violation of ordinances he shall be entitled to receive only such monthly salary as the board of trustees shall by ordinance prescribe, which compensation, when once fixed, shall not be altered within two years." The jurisdiction conferred by section 806, supra, on the recorder's court here involved, is: *First.* Concurrent with justices' courts, as conferred by general laws according to section 4316 of the Political Code, and section 832 et seq. of the Code of Civil Procedure, as to all matters ordinarily cognizable in a justice's court, within the corporate limits of the city of Fresno. *Second.* Exclusive jurisdiction within the same territory as to certain matters growing out of the ordinances of that city. He may, in addition to presiding as judge of the recorder's court, perform all the duties and have the powers of an ordinary magistrate. He may, like a justice of the peace, take acknowledgments and affidavits. Section 179, Code Civil Proc. He is for his services when acting, in like manner as a justice of the peace, allowed "to charge and receive for his services" the same fees as such justices "are or may be allowed by law * * * for like services;" the only exception to this being that he is not entitled to receive fees in that way for anything done for his services in criminal proceedings under the city ordinances, but is for those services given a salary by the city trustees. It is not said expressly whom he shall charge, or from what source he shall receive the fees for his action when exercising the jurisdiction and performing the functions of a justice of the peace.

The main question for determination is, we think, whether as to all criminal matters, under the Penal Code of the state, the action of the recorder is that of a justice of the peace or not. The appellant seems to contend that the recorder is a mere officer of the city of Fresno, under the law authorizing charters for cities of the fifth class, and that under section 1461 of the Penal Code, which gives the definition of a police judge, this recorder is such judge, and as such is not required, under section 1570 of that Code, to pay over fines to the county treasurer, but must, under section 1457, pay them to the city treasurer, and must get his fees from the city. But we do not agree to this view of the matter. As to a very similar statute conferring jurisdiction upon a recorder, it was said in Curtis v. County of Sacramento, 13 Cal. 292–294: "The appellant was recorder of Sacramento city, and, as such, claims that the county is indebted to him for fees due him for convictions made by him of divers criminals prosecuted under the laws of the state. The only question presented by the record is whether he is to be considered as a justice of the peace in respect to this claim, and is entitled, as if he were, to the fees. It seems that the charter of the city of Sacramento (Comp. Laws, 966, § 35) provides that the recorder 'should exercise all the powers of a justice of the peace in regard to offenses committed within the city limits, subject to all the rules governing justices of the peace, and have power to administer all oaths known to the law.' * * * The point is made that the recorder is a judicial officer, and the constitution inhibits him from taking fees; but we think the constitution did not contemplate this class of officers as subjects of this inhibition. As a mere subordinate officer of the corporation, to carry into effect its by-laws or ordinances, he is less in dignity than a justice of the peace, and cannot be comprehended by a provision which expressly excludes justices; *and we think that the mere addition of the duties of justices in respect to criminal matters has no effect in depriving the office of the same qualities in this respect as that of justices. Besides, as to all this matter, he is really, and in fact, a justice of the peace; and the constitution, when it exempted justices from the operation of this restraint, meant to exempt all those, by whatever name called, who are intrusted with the duties assigned by the law to those officers.*" (The italics are our own.) The decision, while covering other matters besides the one in hand, seems to go to the point involved here,—that a recorder of a city may have a dual jurisdiction and functions, and may be a justice of the peace as to the certain matters and a recorder as to others. So here we think that the law under consideration confers this jurisdiction, and we know of no provision in the constitution which inhibits the legislature from creating such an official. Const. Cal. art. 11, §§ 1–13. It appears, therefore, that as to such matters as are given him in charge as a justice of the peace, the recorder is such an officer, and not a police judge. If the recorder imposed fines as a justice of the peace, and not as police judge, such fines by law are subject to be paid over to the county treasurer under section 1570 of the Penal Code, after payments of costs, etc. If, then, as we conclude, the recorder, as to all prosecutions under the Penal Code of which he has cognizance under the charter, is a justice of the peace, although section 807 of the municipal corporation bill does not in express terms declare that he shall charge the county for his fees when acting under that Code, it nevertheless gives him authority to charge and receive for his services such fees "as are or may be allowed by law to justices of the peace for like services." Section 225 of the county government act provides: "The following are county charges:" Subd. 5. "All charges and accounts for services rendered by any justice of the peace for services in the examination of persons charged with crime not otherwise provided for by law." Possessing, then, as the recorder does, the right to act and charge as a justice of the peace, and he being to all intents and purposes a justice of the peace, when acting under the Penal Code of the state as distinct from the city ordinances, he must be paid for such services as he may perform as such by the county, like any justice of the peace in a township of a county. And the fines are subject to the same disposition as if he had imposed them as such justice of the peace. For these reasons we advise that the judgment be affirmed.

We concur: Vanclief, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

88 Cal. 419

Chapman v. Bank of California. (No. 14,158.)

(*Supreme Court of California.* March 21, 1891.)

Appeal—Transcript—Not Filed in Time.

Where the transcript on appeal was not filed within the time prescribed, but it appears from the affidavits that the attorney of appellant, on the day the notice of appeal was served, was called to a distant state on account of the illness of his mother, and did not return until a few days before the time had expired, and that, owing to a press of business, by inadvertence he overlooked this case for a few days, but that within nine days after the time had expired he presented to the clerk a correct type-written copy of the record to be certified, but before it could be compared and certified the notice to dismiss was served, the motion to dismiss will be overruled.

In bank. Appeal from superior court, city and county of San Francisco.

T. M. Osment, for appellant. *Newlands, Allen & Herris*, for respondent.

Beatty, C. J. Motion to dismiss an appeal from a judgment and order denying a new trial on the ground that the transcript was not filed in time. The judgment in favor of defendant was rendered September 27, 1889. The order overruling plaintiff's motion for a new trial was made August 28, 1890. Notice of appeal from the judgment and order was filed and served September 25th, and undertaking on appeal filed September 27th. The time for filing the printed transcript prescribed by rule 2 of this court expired November 5, 1890. On November 15th, no transcript having been filed, respondent served notice of his motion to dismiss. On the same day, but subsequent to the service of said notice, appellant filed a written transcript, duly certified by the county clerk, which was thereafter printed and served. The fact that the transcript was filed the same day notice to dismiss was served, but at a later hour, does not bring the appellant within the protection of rule 2 of this court, (Hoyt v. Railroad, 25 Pac. Rep. 160, No. 14,066,) and the motion to dismiss must prevail unless the appellant has by his affidavit shown a sufficient excuse for his delay to call for some relaxation of the rule providing for the dismissal of appeals for failure to file the transcript within the time prescribed. As to this, the undisputed facts are that on September 25th—the very day the notice of appeal was served—the attorney for appellant was called to the state of Tennessee on account of the illness of his mother, and did not return to California until October 24th. On his return, owing to the demands upon his attention of a multiplicity of business that had accumulated during his absence, by mere inadvertence he overlooked this case for a few days; but within nine days after the time for filing the transcript had expired, viz., on the 14th day of November, he prepared and presented to the county clerk a correct type-written copy of the record to be certified. The clerk was not able to compare and certify this transcript until the following day, and in the mean time the notice to dismiss was served. This shows that the appeal was taken and prosecuted in good faith. The delay in filing the transcript was trifling, and the hearing and decision of the cause on its merits will not thereby be delayed, at least not appreciably. The circumstances which occasioned the delay and oversight of counsel were such as to appeal strongly to the discretionary power of the court, and would, without doubt, have procured an order extending the time for filing the transcript if they had been brought to our attention before the motion to dismiss was made. If so, there is no reason why we may not after the motion relieve the appellant from the consequences of his delay when the facts show that before service of the motion to dismiss he was proceeding with all expedition to rectify his mistake. Motion denied.

We concur: McFarland, J.; De Haven, J.; Paterson, J.; Sharpstein, J.; Harrison, J.

88 Cal. 640

Ex parte Spears. (No. 20,837.)

(*Supreme Court of California.* April 30, 1891.)

Extradition—Affidavit—Sufficiency.

An affidavit accompanying a requisition, which merely states that affiant "has reason to believe and does believe" that petitioner embezzled or fraudulently converted to his own use the property mentioned, is insufficient for the governor's warrant of arrest as a fugitive from justice, in that it is not positive in its charge. PATERSON, J., dissenting.

In bank. *Habeas corpus.*

G. E. Riley and *J. I. Caldwell*, for petitioner. *W. H. H. Hart*, Atty. Gen., for respondent.

DE HAVEN, J. The petitioner is before the court upon a writ of *habeas corpus*, the return to which shows that he is in the custody of the sheriff of Nevada county by virtue of a warrant for his arrest as a fugitive from justice, issued by the governor of this state, in compliance with a requisition from the governor of the state of Alabama. The governor of this state was not authorized to issue his warrant for the arrest of petitioner unless it was shown to him that the petitioner is substantially charged with a crime in the state from which it is alleged he has fled, and the law of congress (Rev. St. § 5278) requires that this fact must be made to appear by a copy of an indictment found, or an affidavit made before a magistrate of such state, certified as authentic by the goveror of the state making the demand. Roberts v. Reilly, 116 U. S. 95, 6 Sup. Ct. Rep. 291. And whether the alleged fugitive is so substantially charged with a crime is a question of law which is always open, upon the face of the papers, to judicial inquiry, on an application for discharge under a writ of *habeas corpus*. Roberts v. Reilly, supra. We have before us the copy of the affidavit accompanying the requisition of the governor of Alabama, and the sole question for determination is whether such affidavit substantially charges the petitioner with having committed any crime which would have justified his arrest in that state. The affidavit purports to have been made by one J. C. Orr, and charges that he (Orr) "has reason to believe, and does believe, that, within twelve months before making this affidavit in said county, W. A. Spears embezzled or fraudulently converted to his own use one carload mules, or the value of the same, to-wit, of two thousand dollars, the personal property of J. C. Orr, which came into W. A. Spears' possession by virtue of an employment to sell said mules." It is obvious that this affidavit does not directly charge that petitioner has committed any offense, and it would be a dangerous precedent to establish that any man may be deprived of his liberty and removed to another state upon such an accusation. The statement therein that affiant "has reason to believe, and does believe," that petitioner embezzled or fraudulently converted to his own use the property mentioned is not the statement of any fact, and for that reason the affidavit is fatally defective. The language of the supreme court of Michigan, in Swart v. Kimball, 43 Mich. 451, 5 N. W. Rep. 635, is applicable here: "Charges are not verified by an affidavit that somebody is informed and believes that they are true. This is mere evasion of the law. The most improbable stories may be believed of any one, and the man most free from any reasonable suspicion of guilt is not safe if he holds his freedom at the mercy of any man three hundred miles off, who will swear that he has been informed and believes in his guilt." That such an affidavit is insufficient to support the issuance of a warrant, under the laws of this state, was held by this court in Ex parte Dimmig, 74 Cal. 165, 15 Pac. Rep. 619. We there said: "But a mere affidavit in the form of an information, containing no evidence, and followed by no deposition stating any fact tending to show guilt, is insufficient to support a warrant. The liberty of a citizen cannot be violated upon the mere expression of an opinion, under oath, that he is guilty of a crime." In Ex parte Smith, 3 McLean, 121, the affidavit accompanying the requisition of the governor of Missouri for the arrest of Smith was made by one Boggs, and charged "that on the night of the 6th day of May, 1842, while sitting in his dwelling in the town of Independence, in the county of Jackson, he was shot with intent to kill; and that his life was despaired of for several days; and that he believes, and has good reason to believe, from evidence and information now in his possession, that Joseph Smith, commonly called the 'Mormon Prophet,' was accessory before the fact of the intended murder, and that the said Joseph Smith is a citizen and resident of the state of Illinois." This affidavit was held insufficient as a basis for the governor's warrant, upon the ground, among others stated, that it was not positive in its charge. See, also, 1 Bish. Crim. Proc. § 222. It is true that the courts are not authorized to discharge a prisoner because of formal defects in the indictment or affidavit charging the offense, and that the sufficiency of the charge, as a matter of technical pleading, is to be tried and determined in the state from which the alleged fugitive fled. Davis' Case, 122 Mass. 329; Kentucky v. Dennison, 24 How. 107. But the defect in the affidavit before us is not a mere technicality. The objection to its sufficiency is substantial, and it is that in judgment of law it does not make any charge at all. Upon the hearing the attorney general read as evidence, from a printed volume of the statutes of that state, section 4204 of the Criminal Code of Alabama, from which it appears that a warrant of arrest for a misdemeanor may be issued upon an affidavit in which the affiant states "that he has probable cause for believing, and does believe," that such offense has been committed; and it was argued that, inasmuch as no other section of this Code was formally offered in evidence, the court must presume that the affidavit here is sufficient under the laws of that state. We think, however, that we are not confined to this particular section, which is not applicable here, but are authorized to look into the volume in which it appears, and upon such examination we find the law of that state to be what, in the absence of all evidence, we would presume it to be, substantially like that of our own state, so far as relates to arresting one charged with a felony. It follows that the affidavit before us must be regarded as insufficient to justify the issuance of the executive warrant of arrest under which the petitioner is detained in custody. Petitioner discharged.

We concur: BEATTY, C. J.; GAROUTTE, J.; MCFARLAND, J.; HARRISON, J.

PATERSON, J., *(dissenting.)* I am unable to concur. "The warrant of the governor is *prima facie* evidence, at least, that all necessary legal prerequisites have been complied with," (Church, Hab. Corp. § 480,) and the petitioner has not made it appear to my satisfaction that the courts of Alabama could not hold him for examination on the affidavit charging him with embezzlement.

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89 Cal. 1

DERBY *et al.* v. JACKMAN *et al.* (No. 13,-835.)

(*Supreme Court of California.* May 1, 1891.)

APPEAL — REVIEW — RECITALS OF JUDGMENT— CLAIMS AGAINST DECEDENTS — PROOF OF PRESENTATION.

1. Recitals, in a judgment on the pleadings, of the motion, the grounds thereof, and the ruling thereon, and the entry of judgment as a consequence, though not necessary to the validity of the judgment, are properly there, and, in the absence of a bill of exceptions, are conclusive evidence on appeal of the action of the court.

2. Where, after the commencement of an action, defendant died, and, his executors being substituted in his place, the supplemental complaint averred that the claim, duly verified, had been presented, the affirmative averment of the answer that the claim was not verified or presented as required by the statute is a sufficient denial.

3. Under Code Civil Proc. Cal. § 1502, providing that, if an action is pending against one at the time of his death, the plaintiff must present his claim to the executor or administrators for allowance or rejection, authenticated as required in other cases, and no recovery shall be had in the action unless proof be made of the presentation required, there cannot be judgment for plaintiff on the pleadings, but the presentation must be proven.

Commissioners' decision. In bank. Appeal from superior court, Merced county; C. H. MARKS, Judge.

E. Jackman, in pro per. J. K. Law, for respondents.

TEMPLE, C. This action was commenced against the testator of defendants. The executors having been substituted for the original defendant, plaintiffs made out and presented their claim against the estate, and then filed an amended complaint in which no mention was made of the presentation of the claim. Some months later they filed a supplemental complaint, in which the death, probate of the will, appointment, and qualification of the executors, and presentation of the claim, are alleged. After answer both to the amended and supplemental complaints, the plaintiffs moved for judgment on the pleadings. The motion was granted, and the defendants appeal from the judgment. There is no bill of exceptions, and the respondents now raise the point that the correctness of the ruling cannot be reviewed here, as the motion and the order granting it, and for judgment, are not brought up, and, as they claim, cannot be without a bill of exceptions. As a matter of fact, the judgment includes all that a bill of exceptions could show,—all that is necessary for a review of this action of the court. The motion and the grounds of it are specifically recited, and the ruling upon it, and the entry of judgment as a consequence The question is not whether these recitals are necessary to the validity of the judgment, but whether they are properly there, and constitute, for the purposes of this appeal, evidence of the action of the court below. The recitals are similar to those usually contained in what was called the *postea* of a common-law judgment, giving a history of the action of the court which led to the judgment. We think they are properly in the judgment, and, in the absence of a bill of exceptions, are conclusive evidence here of the action of the court. Instances in our Reports, where such recitals are referred to, as constituting evidence of what was done in the court below, are numerous. If the answers constituted a defense, judgment could not have been entered without a trial, unless the answers were disposed of in some mode known to the law. It was certainly proper to show in the judgment how this was done, and why judgment was entered without a trial.

The pleadings are verified, and it is claimed that the denials contained in the answers are insufficient, and raise no issue. This contention we think well grounded as to most denials in the answers, but there is one fact necessary to the plaintiffs' case which we think sufficiently denied to raise an issue, and therefore judgment was improperly entered on the motion. In the supplemental complaint it is averred that a claim duly verified was presented. The traverse of this allegation is in the affirmative form. Defendants aver that the claim was not verified or presented as required by the statute. The denial of the verification seems as broad as the allegation, and if that be deemed sufficient, as we think it is, the denial must be held so.

For another reason the judgment ought not to have been entered without evidence. Section 1502, Code Civil Proc., is as follows: "If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required." The effect of that section plainly is that, although due presentation of the claim be not denied, still it must be proven. If, as claimed by respondents, this section still leaves the matter subject to the usual law of pleading, to be proven when denied, but not when admitted, the requirement serves no purpose. Such would have been the case without it. It is just possible that this requirement was inserted under the expectation that the trial might proceed upon the pleadings as they stood at the time of the testator's death, without any supplemental pleading. Still we must presume the law-makers familiar with the practice, and the language is broad enough, even on that supposition, to require proof in all cases. The case of Drake v. Foster, 52 Cal. 225, does not help the re-

spondents, but is an authority against them. By implication it is held that not to require such proof is error, but where there was a trial on the merits it is held that objection on this ground cannot be made for the first time in this court. Here the plaintiffs moved for judgment on the pleadings, without evidence, and the defendants resisted the motion. No opportunity was afforded them for making this specific objection. This point and this construction of the statute were sustained in Bank v. Howland, 42 Cal. 132. We think the judgment should be reversed, and the cause remanded, with leave to defendants to amend their answer if they desire.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with leave to defendants to amend their answer if they desire.

89 Cal. 5

HERMOCILLA v. HUBBELL *et al.* (No. 14,-045.)

(*Supreme Court of California.* May 2, 1891.)

MINERAL LANDS—GRANTS—EXCEPTIONS.

1. Act Cong. March 3, 1853, being an act "to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," section 6 of which grants to the state of California land sections 16 and 36 "for the purposes of public schools in each township," does not include the mineral lands in those sections, though they are not specially excepted from the grant. Following Mining Co. v. Consolidated Min. Co., 102 U. S. 167.

2. The grant by congress in 1853 being a grant *in præsenti*, lands that were mineral lands then were excepted, and the fact that they were afterwards worked out and abandoned as unprofitable does not pass title to them to the state.

3. In ejectment by plaintiff claiming under a patent from the state, defendants, who are in possession of the land as mining claims under locations made in accordance with the law and the local customs, can contest the patent, as they are in privity with the United States.

Commissioners' decision. In bank. Appeal from superior court, Placer county; J. M. WALLING, Judge.

F. P. & C. Tuttle, for appellant. *Hale & Craig* and *J. M. Fulweiler*, for respondents.

BELCHER, C. This action is ejectment to recover possession of the east half of the east half of the south-west quarter, and the west half of the west half of the south-east quarter, of a certain sixteenth section of land situate in Placer county. Other portions of the section are described in the complaint, but, as no contest was made as to them, they need not be referred to further. The defendants Hubbell, Shea, and California Quartz Mining Company alone answered. They denied all the averments of the complaint, and alleged that the portions of the section above described were in 1850, and ever since had been, and then were, mineral lands of the United States, having known valuable mineral deposits therein, consisting of placers containing gold in paying quantities, and quartz ledges or deposits of gold-bearing rock in place, carrying gold and other precious metals in paying quantities; and that during all the times mentioned the said placers and quartz ledges had been, from time to time, in the actual possession of citizens of the United States, who were working and exploring the same for the gold and precious metals they contained. They further alleged that in the year 1880 two quartz mining claims, which are particularly described, were located on the demanded premises by citizens of the United States, and in conformity to the laws thereof and the local rules, regulations, and customs of the mining district,—one by the grantor of defendant Shea, and the other by the grantors of the defendant California Quartz Mining Company,—and that the locators and the said defendants, as their successors in interest, had ever since held, possessed, and worked their respective claims as mining claims. The case was tried by the court without a jury, and judgment was entered that the defendants above named were the owners and entitled to the possession of their respective mining claims as described, and as to them that the plaintiff take nothing; and that the plaintiff was the owner and entitled to the possession of all the balance of the land sued for as against all of the defendants. From this judgment, so far as it was against her, and from an order denying a new trial, the plaintiff appeals.

The plaintiff claimed title under a patent from the state, issued to one Banvard, her grantor, in 1870; and the first question is, was title to this land vested in the state at the time of the issuance of the patent? If it was, then the plaintiff was entitled to recover, and if not, we think the proper judgment was entered. Whatever title the state had was acquired under the act of congress of March 3, 1853, "to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes." 10 St. U. S. 244. By this act (section 6) it is declared that sections 16 and 36 "shall be, and hereby are, granted to the state for the purposes of public schools in each township." In Higgins v. Houghton, 25 Cal. 253, it was held by the supreme court of this state that mineral lands were not excepted from the operation of the grant of the sixteenth and thirty-sixth sections, made to the state by the act of March 3, 1853, and that as fast as the townships were surveyed the state became the owner of these sections absolutely. And see Wedekind v. Craig, 56 Cal. 642. The rule declared by this court, as above stated, has not been approved by the supreme court of the United States. On the contrary, it was held by that court in Mining Co. v. Consolidated Min. Co., 102 U. S. 167, that the grant of the sixteenth and thirty-sixth sections of public land to the state of California by the act of March 3, 1853, was not intended to cover mineral lands, but that such lands were, by the settled policy of the general government, excluded from all grants. That decision is controlling, and must be followed here.

The question then remains, were the disputed premises at the time of the grant mineral lands,—that is, known to be valuable for minerals? Deffeback v. Hawke, 115 U. S. 404, 6 Sup. Ct. Rep. 95. Upon this question the court below found as follows: "That during all the year 1850, and at the time of the acquisition of the said lands by the government of the United States, and continuously ever since, and on the 10th day of December, 1870, when the said patent was issued to the said E. M. Banvard, and at the time of the survey of the said lands and the return thereof by the said United States, the said east half of the east half of the south-west quarter, and the said west half of the west half of the south-east quarter, of said section sixteen were, and have been, and now are, known public mineral lands of the United States, having therein known valuable mineral deposits, consisting of gravel or placer deposits, and of quartz rock in place, bearing gold in paying quantities, and ever since the 26th day of July, 1866, have been free and open to exploration and purchase, and to occupation and purchase as mineral lands by citizens of the United States, and such as have declared their intention to become such citizens." It is claimed by counsel for appellant that this finding as to the mineral character of the land was not justified by the evidence, and hence that the judgment should be reversed. We do not think this position can be sustained. It is true the evidence was somewhat conflicting, but, taken as a whole, it was amply sufficient, in our opinion, to justify the finding. It is further claimed that the placer mines had been worked out, and the quartz mines abandoned as unprofitable, before 1870, and that there was no evidence showing or tending to show a holding or working of any part of the land at the time of the issuance of the patent in 1870. Conceding this to be so, still it cannot aid the appellant. The grant of the sixteenth and thirty-sixth sections was a grant *in præsenti*, and the only question is, was the land in question known to be mineral in character at the time the grant was made? If it was, the title did not pass to the state, but the state took a right to other land in lieu thereof, and not a right to this land when its minerals should be exhausted. It is also claimed that the defendants were not in a position to attack the patent. But, as we have seen, the state had no title to the mineral land, and passed none to its patentee. The title still remained in the general government, and under its laws the land was open to occupation and purchase as mineral land. The defendants were in possession of their claims under locations which were made in accordance with the law and the local rules and customs. They were therefore in privity with the United States, and had a clear right to contest the patent and assert their rights. At the trial the defendants introduced evidence showing the work done on their claims after their location in 1880. This evidence was objected to by the plaintiff as irrelevant and immaterial, and the objections were overruled, and exceptions taken. The evidence was introduced to show that the claims were still valuable, and to overcome the plaintiff's theory that they were of no value. This, we think, they had a right to do. But, if the rulings were erroneous, the plaintiff was in no way prejudiced by them, as she had no title. It follows that the judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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89 Cal. 15

PEOPLE *ex rel.* MARIPOSA COUNTY *v.* COUNTS, Treasurer. (No. 14,029.)

(*Supreme Court of California.* May 4, 1891.)

COUNTY BONDS — NOTICE TO VOTERS — ORDERS.

1. Under the county government act, (St. Cal. 1883, p. 311, § 37,) providing that when the supervisors wish to create a bonded indebtedness they shall "by order specify the particular purposes for which the indebtedness is to be created, and the amount of bonds which they propose to issue," and shall submit the question of the issue of the bonds to the "qualified electors" of the county, an order and proclamation of election, stating that there is to be submitted the question of the issue of $75,000 of bonds for the construction of "two public wagon roads in said county, —one from Bear Valley to Coulterville, and one from Mariposa to Yosemite,"—sufficiently specified the particular purpose for which the indebtedness is to be created.

2. The fact that the order submits the question to "the people" does not invalidate it where the proclamation states that the question is to be submitted to the "vote of the people of this county," as it means the vote of only those people who are "qualified electors."

3. The board of supervisors, though required by the county government act to proceed by ordinance for some purposes, can proceed "by order" in such case, as section 37 of that act so provides.

Commissioners' decision. In bank. Petition for writ of mandate.

Garret W. McEnerney and *J. W. Congdon*, for petitioner. *L. F. Jones* and *Rosenbaum & Scheeline*, for respondent. *C. W. Cross*, *amicus curiæ*.

VANCLIEF, C. This is an original application to this court on the petition of Mariposa county for a writ of mandate to the treasurer of said county, commanding him to sell and dispose of, according to law, bonds of Mariposa county, alleged to have been issued in accordance with section 37 of the county government act, (St. 1883, p. 311,) for the purpose of constructing two public wagon roads in said county. An alternative writ issued, and the case stands upon a general demurrer to the petition. The section of the county government act above referred to is as follows: "The supervisors can only contract a bonded indebtedness other than such as is authorized by section twenty-six of this act as follows: They shall, by order, specify the particular purpose for which the indebtedness is to be created, and the amount of bonds which they propose to issue, and shall further provide for submitting the question of the issue of said bonds to the qualified electors of the county at the next general election, or at a special election to be called by the board for that purpose. If a special election, none but qualified voters of the county shall be permitted to vote thereat, and it shall be held as early as possible in conformity with the general election law of this state. Notice shall be given of such election, by publication in some newspaper or newspapers published in the county, for four weeks prior thereto. If there be no newspaper so published, then by posting notices for the same time in each election precinct in the county, and at the court-house door. The ballots shall be printed, 'For the issue of bonds,' or, 'Against the issue of bonds.' If two-thirds of the electors of the county voting at such election shall vote in favor of issuing bonds, and not otherwise, the board may proceed to issue the amount of bonds specified, in the manner provided in this act for funding the floating indebtedness of the county; and all the provisions of this act relating to the issue and payment of bonds in the latter case shall apply to bonds issued under this section, except that such bonds shall not run for more than twenty years; and the board shall levy the tax necessary to create a sinking fund for the payment of the principal of said bonds, in each and every year after their issue, until finally paid. The revenue derived from the sale of said bonds shall be applied to the purpose or purposes specified in the order of the board, and no other. Should there be any surplus, it shall be applied to ward the payment of said bonds."

1. Upon the argument of the demurrer the respondent specified several grounds of objection to the petition, the principal one of which is that the board of supervisors did not, as required by the section above quoted, "by order specify the particular purpose for which the indebtedness is to be created." The petition shows that on the 7th day of May, 1888, the board, in regular session, passed and adopted the following orders: "Petitions having been received, signed by 598 residents of Mariposa county, to call a special election early in July, and thereat to submit to the electors of the county the question of voting to issue bonds to the amount of $75,000.00, running twenty years, to be payable after the expiration of ten years, the funds raised from the sale of said bonds to be applied to the construction of two public wagon roads in Mariposa county,—one from Coulterville to Bear Valley, and one from Mariposa to Yosemite,—it is ordered that a special election be, and the same is hereby, called to be held Monday, July 9, 1888, for the purpose of submitting the issuance of bonds for the building of said roads to Coulterville and Yosemite to the people. It is ordered that the following proclamation be issued: Proclamation. Public notice is hereby given that in accordance with an order of the board of supervisors of Mariposa county, state of California, made on the 7th day of May, 1888, a special election be held throughout Mariposa county on Monday, July 9, 1888, for the purpose of submitting to the vote of the people of this county the question: Shall the board of supervisors of the county of Mariposa be empowered to issue bonds to the amount of $75,000, running 20 years, to be payable after the expiration of 10 years, for the purpose of constructing two public wagon roads in said county,—one from Bear Valley to Coulterville, and one from Mariposa to Yosemite; the ballots to be cast 'For the issue of bonds,' or 'Against the issue of bonds.' The polls must be opened at six o'clock in the morning of the day of election, and must be kept open until seven o'clock in the evening of the same day, when the polls shall be closed. It is ordered that the proclamation be published in the Mariposa Gazette for four weeks prior to said election." It will be seen that the order and proclamation of the board did state the purpose for which bonds of the county for $75,000 were to be voted and issued, viz., the construction of "two public wagon roads in said county, —one from Bear Valley to Coulterville, and one from Mariposa to Yosemite." This was equivalent to proposing to create an indebtedness of the county to the extent of $75,000 for the purpose expressed, since the issuing of the bonds of the county as proposed would necessarily create such indebtedness. The point most insisted upon under this head is that the purpose expressed is not a single purpose, but two distinct purposes. There is no complaint, however, that the expression of either of these purposes is not sufficiently explicit and definite. The roads were described as "public wagon roads," which the law requires to be at least 40 feet in width (Pol. Code, § 2620,) and the termini of each road were defined. This was as definite a description as could well be made without an actual survey of the routes and grades, the expense of which the board had no authority to incur, before it was determined that the county would construct the roads. The object of the statute in requiring the board to "specify the particular purpose for which the indebtedness is to be created, and the amount of the bonds," is simply to notify the electors of the county of these facts, to the end that they may be enabled thereby to form an intelligent judgment as to the propriety of creating the proposed indebtedness for such purpose; and it would seem that this object is as well accomplished by the specification in the order under consideration as it would have been if the purpose, specified in the same way, had been to construct only one road. Suppose the purpose to be specified had been to extend an existing road by adding 10 miles to each end thereof; or to construct two branches to an existing road; or (as in this case) to construct two roads to connect at different points with an existing road, (as that from Bear Valley to Mariposa,)—might not the purpose to create indebtedness for the construction of the two roads, in each of the supposed cases, be regarded as a single purpose? Few purposes are executed by the performance of a single act. The execution of the purpose to construct a single road may require the construction of numerous bridges and the performance of various kinds of labor in different places. In People v. Dunn, 80 Cal. 211, 22 Pac. Rep. 140, it was held that the act of 1889 entitled "An act to provide a permanent site for the 'California Home for the care and training of feeble-minded children,' and to erect suitable buildings, thereon," had but one

purpose, and that an appropriation therefor as but one appropriation for a single purpose. The court said: "It was not necessary that there should have been a separate appropriation for the purchase of the land, another for the erection of the buildings, another for the construction of fences, and another for each improvement necessary to the proper completion of the proposed work." In view of the object of the statute in requiring a specification of the purpose for which indebtedness is to be created, what is the substantial difference between a specification of the purpose to construct one road of 20 miles in length, and an equally definite specification of a purpose to construct two roads, each of 10 miles in length? Would not the electors be as well informed as to the particular purpose in one case as in the other? The only attempted answer to this question by counsel is: (1) That by submitting the question as to the propriety of two roads at one election, "a voter was put in the awkward position of either voting for both propositions, or against both propositions. While he may have been exceedingly anxious that one of these roads should have been built, he may not have been willing to tax himself for the building of the other; and yet, in order to get the one, he had to submit to the other." And (2) that, inasmuch as the order does not specify what portion of the $75,000 was to be expended on each road, "the board of supervisors might expend but the sum of $1,000 for the road from Bear Valley to Coulterville, and $74,000 on the other road." Might not these objections be urged with equal force against a purpose to construct a single road? A large portion of the electors might consider one-half of a proposed road very beneficial, and much needed by the public; while they might consider the other half, though perhaps more expensive, of very little public benefit. And might not the board of supervisors expend nine-tenths of the money appropriated for the construction of the whole road upon that half which will be least beneficial to the public? A statute of Arkansas authorized any county to subscribe to the stock of any railroad company in that state a sum not exceeding $100,000, after obtaining the consent of the inhabitants of the county at an election held for that purpose. At an election held under the act the electors voted in favor of a subscription of $100,000 to each of two railroad companies. The subscriptions and the bonds authorized by this election were held valid by the supreme court of the United States. County of Chicot v. Lewis, 103 U. S. 164. In McMahon v. Board, 46 Cal. 214, the purpose proclaimed to the electors was to raise $30,000 for "improving highways in said township, for building bridges, macadamizing and improving the old county road in said township, and also to macadamize and improve a portion of the new San Pedro public road in said township." The court said: "If such a proclamation was a compliance with the statute, it would have been equally so if it had omitted to mention any particular road or highway, and had specified only that the money was to be expended in the improvement of highways and the building of bridges generally in the township. The voters would have had no information as to what particular highways or bridges it was proposed to improve or build." This seems to justify the inference that, if the proclamation had specified each particular road and bridge to be improved, (though the purpose was to improve many,) it would have been sufficient. The proposal to improve two or more than two roads or highways in the township was not considered objectionable as being expressive of more than one object or purpose, although the accomplishment of that object, or the execution of such purpose, required the improvement of several roads and bridges. The decision in the case of People v. Baker, 83 Cal. 149, 23 Pac. Rep. 364, 1112, as a precedent, should be restricted to a state of facts substantially similar to the facts of that case. In that case the order expressed two purposes for which the money was to be expended: (1) "The purpose of constructing, grading, repairing, and maintaining bridges and public highways within the county;" and (2) "the purpose of erecting and maintaining a county jail, and poor-house, and hospital within the county." No particular bridge or highway was specified; nor was there any specification of the dimensions of the jail, poor-house, or hospital, nor of the site upon which either was to be built. From all the information given by the order and proclamation the electors could neither estimate the probable cost, nor form a judgment as to the necessity or usefulness of any one of the proposed improvements. The decision that the order in that case did not sufficiently specify the particular purpose or purposes for which the indebtedness was to be created, is undoubtedly correct, but it was based upon a state of facts widely and materially different from the facts of this case.

2. The order is said to be invalid, because it submits the question to the people, and not to the qualified electors. An election was called, at which "none but qualified electors of the county shall be permitted to vote." Section 37. And the petition states "that at said election none but qualified voters of Mariposa county were permitted to vote." Page 10. The proclamation prescribed by the order states "that, in accordance with an order of the board, * * * a special election be held throughout Mariposa county on Monday, July 9, 1888, for the purpose of submitting to the vote of the people of this county the question," etc. Undoubtedly the "vote of the people of this county" meant the vote of only those people who were qualified voters or electors, and could not have been otherwise understood by the qualified electors. It was not necessary to use the precise language of the statute.

3. It is claimed that the board should have proceeded by ordinance, and not by order. Conceding that the county government act for some purposes requires an ordinance, while for other purposes only an order is required, it is only necessary, in answer to this objection, to say that

for the purpose under consideration section 37 of the act requires the board to do what it is thereby required to do, "by order."

4. The order and the proclamation do show the purpose to create a bonded indebtedness of the county, and the amount of the bonds proposed to be issued. I think the demurrer should be overruled.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the demurrer is overruled.

(89 Cal. 35)

CROOKS *v.* MILLER *et al.* (No. 13,052.)

(*Supreme Court of California.* May 4, 1891.)

NEW TRIAL — INSUFFICIENCY OF EVIDENCE — DISCRETION.

The granting of a new trial, on the ground of the insufficiency of the evidence to support the decision, is in the discretion of the court, and will not be disturbed, unless there has been a manifest abuse of discretion.

Commissioners' decision. In bank.

Franklin P. Bull, Mich Mullany, and *Wm. Grant,* for appellant. *Estee, Wilson & McCutchen,* for respondents.

FITZGERALD, C. Appeal from an order of the superior court of Alameda county granting a new trial. This is an action of ejectment, which was tried by the court without a jury, and judgment rendered in favor of plaintiff. The order appealed from states no ground upon which the motion for a new trial was granted. But the record shows that the motion was made and urged upon the ground, among others, "that the evidence is insufficient to justify the decision." We have reached the opinion, after reading the evidence attentively, that it must have been upon this ground that the court below based its action in granting the motion, and, as there is unquestionably a substantial conflict in the evidence, the granting of a new trial was clearly within the discretion of the court. Every presumption will be indulged in favor of the proper exercise by the court below of its judicial discretion in granting a new trial upon the ground of the insufficiency of the evidence to support the decision; and as it is the well-settled rule of this court not to interfere unless there has been a manifest abuse of discretion, and as no such abuse is disclosed by the record as would justify such interference, it follows that the order should be affirmed.

We concur: FOOTE, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(89 Cal. 23)

CITY AND COUNTY OF SAN FRANCISCO *v.* PACIFIC BANK. (No. 14,146.)[1]

(*Supreme Court of California.* May 4, 1891.)

APPEAL—REVIEW—EVIDENCE—EXCEPTIONS.

A bill of exceptions containing all the evidence, but not specifying any particulars in which the evidence is insufficient to justify the decision of the court, does not bring up for review the sufficiency of the evidence under Code Civil Proc. Cal. § 648, providing that when the exception is to the decision on the ground of the insufficiency of the evidence to justify it the objection must specify the particulars in which the evidence is insufficient.

In bank. Appeal from superior court, city and county of San Francisco; J. P. HOGE, Judge.

R. B. Mitchell and *Henry C. McPike,* for appellant. *P. F. Dunne,* for respondent.

HARRISON, J. The judgment appealed from must be affirmed. The appeal is directly from the judgment, and is here upon the judgment roll alone. There is a bill of exceptions in the record purporting to contain all the evidence upon which the case was heard in the court below, but it does not contain any specification of errors wherein it is alleged that the evidence is insufficient to justify the decision of the court. Section 648, Code Civil Proc., declares: "When the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated with so much of the evidence or other matter as is necessary to explain it, and no more." The bill of exceptions in the present case does not "specify any particulars" in which the "evidence is alleged to be insufficient" to justify the decision of the court, but at the end thereof, after setting forth the evidence, is found the following statement: "The foregoing being all the evidence introduced on the trial, the cause was submitted to the court for decision, and, after considering the same, the court filed its findings of fact and conclusions of law, and ordered that judgment be entered in accordance therewith in favor of the plaintiff and against the defendant for the whole amount prayed for; to which order and decision the defendant then and there duly excepted." It has been repeatedly held by this court that such general exception is not a compliance with the foregoing section, and that the court cannot examine the evidence for the purpose of determining its sufficiency to justify the findings, but can only determine whether the findings support the judgment. Coveny v. Hale, 49 Cal. 552; Watson v. Railroad Co., 50 Cal. 523; Bonner v. Quackenbush, 51 Cal. 180; Coglan v. Beard, 67 Cal. 303, 7 Pac. Rep. 738. As the appellant does not question the sufficiency of the findings to support the judgment, it must be affirmed, and it is so ordered.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; GAROUTTE, J.; MCFARLAND, J.

(89 Cal. 11)

KEENA *v.* BOARD OF SUPERVISORS OF PLACER COUNTY. (No. 14,034.)

(*Supreme Court of California.* May 4, 1891.)

HIGHWAYS — ABANDONMENT — ORDER OF SUPERVISORS.

Under Pol. Code Cal. § 2643, subd. 3, providing that the board of supervisors must, "by proper ordinance," abolish such roads as are not necessary, and sections 2619, 2621, providing that roads may be abandoned by "order" of the board, a road may be abandoned by order, as the words "proper ordinance" require nothing more than a proper order.

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[1] Rehearing denied, post, 835.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. Myers, Judge.

E. P. Tuttle, for appellant. *A. K. Robinson* and *J. E. Prewett*, for respondent.

Belcher, C. The record in this case shows the following facts: In 1872 a certain road in Placer county was laid out and declared to be a public highway by the board of supervisors of the county. In October, 1887, the board made and caused to be entered in its minutes an order that a certain described portion of the said highway "be, and the same is hereby, abandoned." In January, 1890, the board made another order that its order of October, 1887, be set aside and canceled, and that that portion of the road described therein be opened for public travel, and that the road overseer proceed immediately to remove all obstructions therefrom. The plaintiff then commenced this proceeding in the superior court of Placer county, to obtain a writ of review of the last-named order. The writ was granted, and a return thereto made, showing all the proceedings and orders taken and made by the board of supervisors for the laying out, abandonment, and reopening of the said road. The court found and decided that the road was properly laid out and became a public highway in 1872, and that it extended across land then and ever since owned by the plaintiff, and which within the last year had been inclosed by him; that on the 7th of October, 1887, a petition in proper form, and signed by more than 10 persons, all of whom were citizens, residents, and tax-payers within the said road-district, and taxable therein for road purposes, was presented to the board of supervisors, asking that the road be abandoned, and thereupon the board made and entered its order declaring that the road be discontinued and abandoned; that on the 11th of January, 1890, the board made and entered an order setting aside and canceling the order of October 7, 1887, and directing that the road so abandoned be opened for public travel as a public highway; that the plaintiff has asked and requested the board to vacate and set aside the order last mentioned, but it refuses to do so; that the plaintiff has no plain, speedy, or adequate remedy at law; that the action of the board in making and entering the order sought to be annulled is an especial injury and damage to plaintiff in this, that, unless the order be annulled, the board and its road-master will proceed to open and use the road through his lands without giving him adequate or any compensation therefor, and without having acquired the lawful right so to do; and, as a conclusion of law, that the order made on the 7th of October was valid and operated a discontinuance of the road, and the order made on the 11th of January was in excess of the powers of the board, and should be vacated and annulled. Judgment was accordingly so entered, and from that judgment the defendant appeals, without any statement or bill of exceptions. It is argued for appellant that a board of supervisors has no power to cause a public road to be abandoned, except it be by a "proper ordinance," framed, passed, and published, as required by section 26 of the county government act, (St. 1883, p. 299;) and that as the attempted abandonment, here under review, was only by an order of the board, it was wholly ineffectual to accomplish the end intended, and the road still continued to be a public highway, notwithstanding the order. In support of this position, counsel rely upon section 2643, subd. 3, Pol. Code, which reads as follows: "The boards of supervisors of the several counties of the state shall have general supervision over the roads within their respective counties. They must, by proper ordinance: * * * (3) Abolish or abandon such as are not necessary." The chapter of the Political Code relating to highways was passed on the 28th of February, 1883, and there is nothing in it defining an ordinance, or showing how it differs from an order. The county government act was passed on the 14th of March following. The question then is, what was meant by the words "proper ordinance," as used in the section cited? In answering this question the county government act cannot be resorted to, but other parts of the Code can. Now, turning to section 2619 of the same chapter, we find a provision as follows: "All public highways, once established, shall continue to be public highways until abandoned by order of the board of supervisors of the county in which they are situated, or by operation of law, or judgment of a court of competent jurisdiction." And in section 2621 this language is used: "A road laid out and worked, and used as provided in this chapter, shall not be vacated or cease to be a highway until so ordered by the board of supervisors of the county in which said road may be located." In section 2643, supra, there are 11 subdivisions, prescribing the powers and duties of boards of supervisors in relation to roads; and to hold that most of these powers could not be exercised by ordinary order would evidently be absurd. For example, subdivision 10 is: "Audit all claims on the funds of the respective road districts when required to pay for right of way, or work or improvements thereon." The provisions of sections 2619 and 2621 clearly import that a highway may be abandoned by an order of the board of supervisors. In our opinion, therefore, the words "proper ordinance," as used in section 2643, mean nothing more, and require nothing more, than a proper order. It follows that the proceedings of the board in this regard were authorized and sufficient. It is further argued that the petition for the abandonment of the road was not accompanied by a bond, and was not in itself sufficient to meet the requirements of the statute, citing sections 2681 to 2695 of the Political Code. We do not think any bond is required by the sections cited, when the petition is only for the abandonment of a road. And, assuming that a petition is necessary in such a case, the court below decided that the petition presented to the board was sufficient, and we cannot say that its decision in this respect was erroneous. We conclude, therefore, that the judgment should be affirmed, and so advise.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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89 Cal. 31

PENNIE v. SUPERIOR COURT *et al.* (No. 14,257.)

(*Supreme Court of California.* May 4, 1891.)

APPEAL—BOND—STAY OF PROCEEDINGS.

Under Code Civil Proc. Cal. § 949, providing that upon an appeal the judgment or order appealed from shall be stayed when appellant gives an undertaking on appeal in the sum of $300, as required by section 941, an order requiring an administrator to pay intestate's adopted child a large sum of money as a "family allowance" is stayed by an appeal by other claimants of the estate, who execute the appeal-bond required by section 941.

In bank. *Certiorari* to superior court, city and county of San Francisco; J. V. COFFEE, Judge.

Naphtaly, Friedenrich & Ackerman, (*H. S. Brown, John R. Jarboe*, and *W. S. Goodfellow*, of counsel,) for petitioner. *T. I. Bergin, W. H. H. Hart*, and *Garber, Boalt & Bishop*, for respondent.

MCFARLAND, J. This is an original proceeding here by *certiorari*, brought to review and annul an order of the superior court requiring petitioner as administrator of Thomas Blythe, deceased, to pay a large sum of money to Florence Blythe. The latter had brought an action under section 1664, Code Civil Proc., to have herself decreed to be the adopted child and heir of said Blythe, deceased; and on October 22, 1890, a decree had been entered by the superior court (respondent here) declaring her to be such adopted child and heir. From that decree certain defendants, known generally as the "Williams claimants," took an appeal to this court. On October 31, 1890, the court made an order granting a large amount of money to said Florence as a family allowance; and from this latter order the Williams claimants also appealed, giving the usual statutory undertaking on appeal provided for in section 941, Code Civil Proc., in the sum of $300. Notwithstanding the appeal, the court afterwards, on November 19, 1890, made another order, directing the administrator to pay to Florence the amount of money mentioned in said order of October 31st; and the question presented is, does the appeal stay proceedings under the order appealed from?

We think that the question here presented was definitely settled in favor of petitioner's contention by the decision of the court in Re Estate of Schedel, 69 Cal. 241, 10 Pac. Rep. 334. In that case a legatee appealed from a decree of distribution, and gave the $300 undertaking provided by section 941 of the Code of Civil Procedure; and it was contended that such an undertaking did not stay proceedings upon the decree appealed from; but the court held otherwise, and said, among other things, as follows: "Sections 942 to 945, inclusive apply to appellants who are required to perform the directions of the judgment or order appealed from. This is manifest from their language. But the appellant in the present case is not required to do anything. It feels aggrieved by the decree, however, and has the right to appeal. The case is one 'not provided for in sections 942, 943, 944, and 945;' and, consequently, by the terms of section 949, the perfecting of the appeal by giving the undertaking mentioned in section 941 stays proceedings in the court below upon the judgment appealed from." We see no sound distinction between that case and the one at bar. Such a distinction is contended for by respondent on the ground that the policy of the law puts an order in the form of a "family allowance" on a different footing from any other order which gives property of the estate to one litigant against the claims of others; but the alleged distinction is not discernible. The main point of the litigation seems to have been whether there was any family; and it is difficult to see why, in such case, the right of an appellant to keep the property *in statu quo* during the appeal is not as effective against an order of "allowance," as against an order of distribution. But as to the main fact upon which the Schedel Case was decided, it is identical with the case at bar, namely, that in neither case was the appellant required to perform "the directions of the judgment or order appealed from." The general rule, as declared in section 949, is that the $300 undertaking mention in section 941 "stays proceedings in the court below upon the judgment or order appealed from." The exceptions are contained in sections 942 to 945, inclusive; and those sections apply to cases where the appellant has money or other property in his possession which has been adjudged by the lower court to belong to the respondent, or where the appellant has been directed to do some act for the benefit of respondent; and where it would be unjust to allow the appellant to retain the possession of the property, and perhaps dissipate it, or put it out of his power to perform the act required, without securing respondent by a bond. But in the case at bar the appellants are in no such advantageous position. They are in possession of no property or money which they could squander during the appeal, and are not required to do any act. During the appeal the money involved will merely remain in the hands of the administrator, secured by his bond. The case, therefore, does not come within any of the exceptions above mentioned; and the execution of the order of October 31st was stayed by the appeal. The subsequent order of November 19th was, therefore, made without jurisdiction. It is ordered and adjudged that the order of the respondents, the superior court and the judge thereof, made on November 19, 1890, requiring the petitioner, as administrator, to pay to Florence Blythe the sum of money mentioned in the said order of October 31, 1890, as set forth in the petition herein and every part thereof, be, and the same hereby is, set aside and annulled.

We concur: Beatty, C. J.; De Haven, J.; Garoutte, J.; Paterson, J.

Mr. Justice Harrison, deeming himself disqualified, did not participate in the foregoing opinion.

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89 Cal. 26

Gardner v. Stroever. (No. 13,776.)

(*Supreme Court of California.* May 4, 1891.)

Public Nuisance—Injunction—Suit by Private Person.

1. The owner of a slaughter-house, who slaughters a large number of animals daily, and has no other place for slaughtering, is specially injured by an obstruction in the highway which wholly cuts him off from access to the slaughter-house, and may enjoin the nuisance by a suit in his own name, under Civil Code Cal. § 3493, providing that "a private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise."

2. Though the obstruction exists at the commencement of the suit, it may be abated by a mandatory injunction, as well as by a judgment that the obstruction be removed and the nuisance abated.

Commissioners' decision. In bank. Appeal from superior court, Butte county; P. O. Hundley, Judge.

Rearden & Freer, for appellant. *Gray & Sexton*, for respondent.

Belcher, C. The plaintiff brought this action to obtain an injunction restraining the defendant from maintaining an obstruction upon a public highway and for damages. The complaint alleges that there is, and for more than 10 years has been, a public road, situate in Butte county, and about 70 rods in length, extending from the Oroville and Miner's Ranch public road to the residence of one Nancy Cooper; that plaintiff is in possession and entitled to the possession of a slaughter-house situate on the south side of the said road, "and that the only means of entrance and exit to and from said slaughter-house to the said public highway, leading from Oroville to Miner's Ranch, or any other public highway, is over and along the said highway leading to the residence of Nancy Cooper aforesaid; that the defendant on the 20th day of February, 1889, wrongfully, unlawfully, and fraudulently, and for the purpose of vexing, annoying, and preventing this plaintiff from reaching his said slaughter-house, entered upon said public highway leading from the Oroville and Miner's Ranch road to the residence of Nancy Cooper, aforesaid, at a point between plaintiff's slaughter-house and said Oroville and Miner's Ranch road, and caused to be erected across said public highway an obstruction, to-wit, a building which completely obstructed said road, for all uses of a road, and wholly prevented this plaintiff from reaching his said slaughter-house; that plaintiff has no other way, convenient or otherwise, by which he can reach his said slaughter-house; that plaintiff is engaged in the butchering business in the town of Oroville, and is compelled, in order to supply the wants of his customers, to slaughter a number of animals each day; that he has no other place for slaughtering said animals than the place heretofore described; that if the defendant is permitted to maintain his said obstruction across the public road as aforesaid, plaintiff's business will be entirely destroyed and broken up, to his damage in the sum of $5,000; that, by reason of the acts heretofore complained of, plaintiff has been damaged in the sum of $300." The prayer was for damages in the sum of $300, and a perpetual injunction. The defendant demurred to the complaint generally and specially, and, his demurrer being overruled, answered denying all its averments. After trial, the court found all the material allegations of the complaint to be true, except as to the damages sustained; and as a conclusion of law that the plaintiff was "entitled to damages in the sum of one dollar, and to an injunction restraining the defendant from obstructing or maintaining any obstruction upon said road, and for costs of suit." Judgment was accordingly so entered, and from it the defendant appealed, and has brought the case here on the judgment roll.

It is urged for appellant that the demurrer should have been sustained because it appeared that the obstruction complained of was a public nuisance, and it did not appear that it was specially injurious to the plaintiff, or that he had suffered or would suffer any injury therefrom, other than what was common, in kind and character, to himself and all others living on the road beyond the point of obstruction, though on account of his business his injury might be greater in degree than theirs. The Code contains the following provisions: "Anything which is * * * an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered." Code Civil Proc. § 731. "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." Civil Code, § 3493. In Blanc v. Klumpke, 29 Cal. 156, it was held that if a nuisance in a highway only affect the plaintiff in common with the public at large, in the use of the highway, he cannot have his private action; but if the free use of his private property is interfered with by such nuisance, he may have his private action to abate the same. And this seems to be the general rule, and well supported by the authorities. See Wood, Nuis. §§ 811, 830, and cases cited. Here it was alleged in the complaint, and found by the court, that the plaintiff had a slaughter-house where he was compelled, in order to carry on his business, to slaughter a number of animals each day, and that he had no other place for slaughtering the animals; that the obstruction was erected by the defendant for the purpose, and had the effect, to wholly prevent the plaintiff from reaching his slaughter-house, and, if continued, would break up and destroy his business, to his damage in the sum of $5,000. This, we think, clearly shows that the nuisance was specially injurious to the plaintiff, and that under the well-settled rules of law he had a right in his own name to commence and maintain an action to enjoin or abate it.

It is further urged that the injunction ought not to have been granted, because it appeared that the obstruction sought to be enjoined actually existed at and before the time of filing the complaint; citing Gardner v. Stroever, 81 Cal. 148, 22 Pac. Rep. 483. This position cannot, in our opinion, be sustained. An obstruction to the free use of property, so as to interfere with its comfortable enjoyment, is a nuisance, and the statute says it may be enjoined or abated. Such an obstruction must necessarily have an actual existence before it can be a nuisance. The judgment here might have been in direct terms that the obstruction be removed and the nuisance abated; but the mandatory injunction granted was evidently intended to have, and did have, the same effect. It was therefore an authorized and appropriate remedy. In the case cited the appeal was from an order refusing to dissolve a preliminary injunction granted on the complaint alone. The order was reversed on the ground that the obstruction complained of already existed. The court said that "mandatory preliminary injunctions are seldom granted, and only in a peculiar class of cases, of which this case is not one." We think the decision clearly right, but it in no way contravenes what has been said above. Obviously, alleged nuisances ought not, in ordinary cases, to be abated by preliminary injunctions; since it might appear on the trial that the alleged nuisance was not a nuisance, or that the plaintiff had no right to sue for its abatement in his own name. It results, in our opinion, that the judgment should be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(89 Cal. 36)

SPEAR v. LYON. (No. 14,007.)

(*Supreme Court of California.* May 5, 1891.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

Where, in an action for the balance due on a contract, the court finds from conflicting evidence that no false representations were made as alleged by defendant, its finding will not be disturbed.

In bank. Appeal from superior court, Sutter county; PHILIP W. KEYSER, Judge.

W. H. Cobb, for appellant. *Barney & Donohoe*, for respondent.

GAROUTTE, J. This is an appeal from the judgment and order denying defendant's motion for a new trial. On the 8th day of July, 1889, appellant bought of respondent several stacks of hay, unmeasured, and agreed to pay therefor at the rate of $6 per ton; the purchase price to be ascertained by the measurement of the hay upon the basis of 512 cubic feet to the ton. The hay was measured, and amounted to 275 tons. At the time of the purchase appellant paid $1,200 upon the contract, took possession of the hay, and forthwith proceeded to bale and remove it from the field. This is an action to recover the balance of the purchase price. Appellant's contention is that as a matter of fact there were only 185 tons of the hay as shown by the baler's weights, and asks judgment for $90 against the defendant, setting out that respondent represented to him that the hay was of such quality that 512 cubic feet thereof would make a ton; that appellant relied upon such representations, and that they were false, and therefore the agreement to measure the hay upon the basis of so many cubic feet to the ton should be set aside and disregarded. This contention of appellant as to a warranty is completely answered by the following finding of the court: "That the plaintiff did not make the defendant any false or fraudulent representations with regard to the quality or quantity of said hay, or as to its measurement, or as to the manner in which it was stacked; nor did he make any warranty as to the quality or quantity." The evidence of the plaintiff and defendant is conflicting upon this point, and consequently we will not disturb the finding. The order striking out the testimony of the defendant, Lyon, when he was recalled, even if error, was not prejudicial, as he had previously testified to the same matters upon his redirect examination in chief.

Let the judgment and order be affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.; HARRISON, J.; PATERSON, J.

(89 Cal. 38)

KELLEHER *et al.* v. CRECIAT. (No. 13,628.)

(*Supreme Court of California.* May 6, 1891.)

EXCEPTIONS—WHEN SETTLED—SUFFICIENCY OF NOTICE.

Under Code Civil Proc. Cal. § 650, providing that the exceptions taken at the trial, if the action were tried without a jury, must be settled, by the party desiring a bill of exceptions, within 10 days after receiving notice of the entry of judgment, and section 1010, providing that "notices must be in writing," a copy of the findings and judgment, served on the attorneys of the unsuccessful party by the attorneys of the prevailing party, is sufficient notice of the entry of judgment; and a bill of exceptions must be settled within 10 days after the service of such copy, unless the time is extended by order of court. Distinguishing Biagi v. Howes, 66 Cal. 469, 6 Pac. Rep. 100.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. WARD, Judge.

Wicks & Ward, for appellants. *Stephens & Appel* and *O'Melveny & Henning*, for respondent.

BELCHER, C. This case was tried by the court, and findings and judgment in favor of the defendant were filed on the 11th day of June, 1889. On the next day, after the entry of the judgment, a copy of the findings and judgment and a copy of defendant's memorandum of costs and disbursements in the action were delivered to the law clerk of plaintiffs' attorneys, at their office, and the following indorsement was then and there made by the clerk upon the memorandum of costs: "Received copy of the within memorandum of costs, together with copy of the findings and final decree in the within mentioned action, after filing of said findings and filing an entry of the decree, this June 12, 1889. Wicks & Ward, per C., Plaintiffs' Attorneys." On the 21st of the same month, the plaintiffs' attorneys served upon defendant's attorneys and filed a notice of intention to move for a new trial of the action, and that the motion would be made upon a statement of the case to be thereafter prepared and settled. On the 2d of July plaintiffs' attorneys obtained an order for 10 days' extension of time within which to prepare and serve their statement on motion for new trial, and on the 11th of the same month they obtained another order for an additional extension of 20 days within which to prepare and serve such statement. No statement on motion for new trial was ever served or filed, and no order extending the time within which to prepare or serve a bill of exceptions was ever obtained or applied for. On the 9th of August plaintiffs' attorneys had an order entered dismissing the motion for new trial, and thereafter, on the same day, served on defendant's attorneys their draft of a bill of exceptions in the action, and a notice of appeal from the judgment, stating therein that "said appeal is taken on the judgment roll and on bill of exceptions." On the 16th of August defendant's attorneys served on plaintiffs' attorneys notice that they would move the court to strike out plaintiffs' draft of a bill of exceptions, on the ground that the same was not prepared or served within the time required by law, or within any further time allowed by the court or a judge thereof. This motion subsequently came on for hearing, and was denied; and thereupon the judge of the court settled, allowed, and certified the bill as it is presented in the transcript. The foregoing facts are shown by a supplemental bill of exceptions, prepared, certified, and filed on behalf of defendant.

1. The first question presented here for decision is, was the plaintiffs' bill of exceptions prepared and served within the time allowed by law? Of course, if it was not, it must be disregarded. The Code provides as follows: "When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within ten days after the entry of judgment, if the action were tried with a jury, or after receiving notice of the entry of judgment, if the action were tried without a jury, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party." Section 650, Code Civil Proc. "Notices must be in writing." Section 1010, Id. The appellants contend that they never received any written notice of the entry of the judgment, and that their bill of exceptions was therefore served in time; citing Biagi v. Howes, 66 Cal. 469, 6 Pac. Rep. 100. On the other hand, the respondent contends that the copy of the findings and judgment served on appellants' attorneys, after entry of judgment, as shown by their acknowledgment of service above set out, was a sufficient notice to meet the requirements of the Code. We think the respondent's contention should be sustained. The case cited by appellants is not directly in point. The question in that case arose under a different section of the Code, and it was whether or not the defendants served and filed their notice of motion for new trial in time. The action was tried by the court without a jury, and the decision was announced on the 28th of March. The defendant's attorney was present in court at the time, waived findings, and asked for and obtained an order of court staying proceedings on the judgment for 20 days. No notice of the decision *eo nomine* was ever given, but notice of the rendition and entry of the judgment was given on the 5th of April following. On the 15th of the same month, the defendants gave notice of their intention to move for a new trial, and thereafter, within the time allowed by the court, prepared and served their statement. It was held that, under section 659 of the Code, a party intending to move for a new trial, when the action was tried by the court without a jury, has a right to wait for a notice in writing of the decision from the adverse party before giving notice of his intention; and he is entitled to such notice before he is called on to act, although he was present in court when the decision was rendered, and waived findings, and asked for a stay of proceedings on the judgment. In this case, written notice, in substance and effect, of the entry of the judgment was given, and the appellants acted on that notice in their proceedings to obtain a new trial. "The law respects form less than substance," (Civil Code, § 3528,) and, in our opinion, the notice should be held sufficient, (see Barron v. Deleval, 58 Cal. 95; Mullally v. Benevolent Society, 69 Cal. 559, 11 Pac. Rep. 215.) This being so, it follows that the appellants' bill of exceptions was not served in time, and hence that it must be disregarded.

2. The judgment roll discloses no error, and we therefore advise that the judgment be affirmed.

We concur: Vanclief, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

(89 Cal. 41)

In re Miller. (No. 20,843.)

(*Supreme Court of California.* May 6, 1891.)

Ordinances—Validity—Excessive Punishment.

Order No. 1587 of the board of supervisors of the city and county of San Francisco is not void for imposing an unreasonable punishment in providing as a penalty for the uttering, etc., of profane and obscene language, and words and language having a tendency to create a breach of the peace, a fine not exceeding $1,000, or imprisonment not exceeding six months, or both.

In bank. Application for writ of *habeas corpus.*

A. J. Spinetti, for petitioner.

PER CURIAM. The petitioner sets forth "that he is held under a warrant of arrest issued by the police court of the city and county of San Francisco, upon a complaint charging him with uttering, etc., profane and obscene language, and words and language having a tendency to create a breach of the peace, in violation of section 28, order 1587, of the board of supervisors of said city and county of San Francisco;" and alleges as a reason for the issuance of the writ "that said ordinance is null and void, as the penalty imposed for its violation by section 1 thereof is a fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or both, which is unreasonable, and renders the ordinance void." We can conceive of many cases in which a fine of $1,000 and an imprisonment for the term of six months would not be an unreasonable punishment for the uttering of profane and obscene language in the presence of other persons. Whether the offense in any particular case is sufficient to justify such punishment must be determined by the court before whom the offense is tried.

The application for the writ is denied.

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89 Cal. 62

DORRIS v. SULLIVAN. (No. 13,934.)

(*Supreme Court of California.* May 7, 1891.)

APPEAL — REVIEW — OBJECTIONS NOT RAISED BELOW.

Where there is no bill of exceptions, and it does not appear which party introduced upon the trial a verbal contract that should have been in writing, nor that either party objected to it, an appeal will not be entertained.

Commissioners' decision. In bank. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Spencer & Raker and *C. A. Raker*, for appellant. *Goodwin & Jenks*, for respondent.

VANCLIEF, C. This is an action for damages for diverting water from a ditch alleged to be the property of the plaintiff, and for a perpetual injunction restraining such diversion in the future. Judgment passed for the defendant, and the plaintiff brings this appeal from the judgment, upon the judgment roll, without any bill of exceptions, and contends that the court failed to find upon material issues of fact, and that the findings of fact do not support the judgment. There are 13 findings of fact, occupying 6 pages of the transcript, and 5 findings called "conclusions of law," which include some matters of fact. That the findings support the judgment is too obvious to require special consideration; and that there is either a direct finding, or a finding by necessary inference from facts found, on every material issue, seems quite as clear. As there is no bill of exceptions, the record affords no ground for the point made on the statute of frauds. It does not appear which party introduced the verbal contract, which, it is claimed, should have been in writing, nor that either party objected to it. I think there is no merit in the appeal, and that the judgment should be affirmed.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

89 Cal. 178

CHITTENDEN v. PRATT. (No. 13,799.)

SAME v. McRAE. (No. 13,800.)

(*Supreme Court of California.* May 21, 1891.)

PURCHASE OF MORTGAGED GOODS — ESTOPPEL OF MORTGAGEE.

Plaintiff held a mortgage on crops to secure his rent, and defendants, with full knowledge of his lien, sold goods to the tenant, and took hay, covered by the mortgage, in payment. At plaintiff's request the bank holding the note for the rent wrote defendants that the mortgage existed, and that for their own protection they should satisfy themselves that it had been paid. Plaintiff also wrote to his tenant that the sale to defendants was a good one, and advised the tenant to hold them to it. *Held*, that these letters did not estop plaintiff to require defendants to account to him for the value of the hay received.

In bank. Appeal from superior court, Placer county; B. T. MYERS, Judge

Clinton L. White, *Grove L. Johnson*, and *Albert M. Johnson*, for appellant. *Taylor & Holl* and *John M. Fulweiler*, for respondents.

PATERSON, J. Both of these cases present the same issues, were heard on the same evidence, and have been brought here on appeal in one transcript. In 1885 plaintiff leased to William Foster certain lands for the cropping season of 1885–86, and took from him a mortgage on the growing crop to secure the payment of the rent. By the terms of the mortgage the plaintiff "had the right to enter upon the leased premises, and to cut and harvest said crop, thresh, sack, remove, and sell the same, and out of the proceeds of such sale to retain, first, all cost and expenses incurred in cutting, harvesting, threshing, sacking, removing, and selling said crop; and also to retain out of such proceeds the principal and interest secured by said chattel mortgage." The mortgage was duly executed and recorded, and defendants had actual notice of its existence. After the execution and recordation of the mortgage, and before the crop was harvested, Foster purchased certain articles of personal property from each of the defendants, and promised to pay for the same in hay at $10 per ton. When the crop was ready for harvesting, the plaintiff did not avail himself of the privilege referred to in finding 3, set forth above, but permitted Foster to harvest the crop, and prepare it for market. The defendant McRae received from Foster 90,225 pounds of hay, and defendant Pratt received hay amounting in value, at $10 per ton, to $319.32; but the amount due each defendant from Foster was greater than the value of the hay each received at $10 per ton. On June 14, 1886, the California State Bank held the note and mortgage as collateral security; and at the request of plaintiff, who had heard that Foster intended to sell some of the hay to the defendants, sent a letter to each of the defendants, which was received on the following day, a copy of which follows: "Dear Sir: We hold a crop mortgage of Mr. Wm. Foster to Aretta Chittenden, on the crop raised on the Mrs. Chittenden ranch, to secure the payment of a note for twelve hundred and ninety dollars ($1,290) and interest. We understand that you have bought a part of the hay; hence, before you settle with Mr. Foster for the same, you will do well to satisfy yourself that the mortgage above spoken of has been paid; otherwise we shall hold you responsible. Yours truly, CALIFORNIA STATE BANK." One of the defendants showed the letter he had received to Foster, whereupon the latter wrote to plaintiff as follows: "Roseville, June 18, 1886. Mr. Chittenden—Sir: I write to you to inform you that the bank has notified Mr. Pratt and Mr. McRae that they must not buy anything off the ranch. I sold that hay for ten dollars ($10) per ton. Now they can take that hay for the same price. You or them have spoilt my sale, so either you or them must take that hay for the same price, and take it right away; for the hay is baled now, and the sun is bleaching it out, and the hay was sold on the ranch. Please let the bank know, for the hay must be moved; and, if not, either them or you will have to pay me damages. Respectfully, WM. FOSTER." The plaintiff, through his agent, replied, saying: "Sacramento, June 21, 1886. Friend Foster: I have just returned from the ranch. On my return found a letter from you. If I had received it before, would have come and seen you. I will be up again in about a week. You say in your letter that the bank had notified Pratt and McRae that they must not buy anything from the ranch. That is not so. I have just come from the bank, and saw a copy of the letter to them. They always reserve a copy of all they do. It is simply this: They wrote them they held a crop mortgage of $1,290 and interest on the crop. If you go to Pratt and McRae, and ask to see the letter, you will find that this is all there is about it. You have made a good sale of the hay, and probably they would like to crawl out of it if you were foolish enough to let them. You said you had it in black and white with them, and, if so, you will hold them to the bargain. No one has done anything to interfere with your deal. Yours, respectfully, W. A. CHITTENDEN." All of the hay taken by the defendants was part of the mortgaged crop. Foster has paid $673 on the note made by him to plaintiff, and the balance is now due. The correspondence referred to all occurred before any of the hay was removed from the ranch. The defendants credited the account of Foster with the amount each had received from him, and refused to account to plaintiff for any part of the hay. Plaintiff thereupon commenced this action to recover the value of the hay. The court below held that the plaintiff was estopped by her letter of June 21, 1886, to Foster, from claiming anything; that she therein authorized Foster to make the sale on his own account, and waived any claims he might otherwise have asserted under the mortgage; and such is the contention of respondents here. The defendants were charged with notice that the legal title to the hay was in the plaintiff, (Berson v. Nunan, 63 Cal. 550,) and that she could not be divested of her lien through a wrongful removal of the property from the land, (Wilson v. Prouty, 70 Cal. 196, 11 Pac. Rep. 608; Martin v. Thompson, 63 Cal. 4.) The defendants, as creditors of Foster, could not have taken the mortgaged property under an attachment, without first paying or tendering to plaintiff the amount of the mortgage debt, (Wood v. Franks, 56 Cal. 217;) and, as the lien continued, the taking by defendants was a conversion for which plaintiff has a right of action, unless she is estopped by the letter referred to, (Wilson v. Prouty, supra.) We are unable to give to the letters and acts of the parties the effect which was given to them by the court below. The defendants were notified that if they took the hay they would have to see that the mortgage debt was paid by Foster, or they would be held responsible. The letter of June 21st does not relieve them from this responsibility. The plaintiff evidently considered that the sale to defendants would be an advantageous one to all parties. She would receive the amount due her, and at the same time the mortgagor would obtain a good price for the property, and be enabled thereby to reduce his indebtedness. She did not desire to interfere with the sale, but she did nothing that was inconsistent with her rights, or which tends to show that she intended to waive her right as mortgagee, or to induce a change of position on the part of the defendants. Foster had written that "the bank has notified Mr. Pratt and Mr. McRae that they must not buy anything off the ranch." This was evidently a misapprehension of the terms of the letter which had been written by the bank, and the plaintiff proceeded in her letter of June 21st to correct his error. There is nothing in her letter indicating an intention on her part of permitting the defendants to appropriate her crop without paying the mortgage debt. There is no merit in the other contention of the respondent. It is not a case of variance, nor was there a failure of proof. It is well settled in cases of this kind that a party may waive the tort, and sue in *assumpsit* for the value of the property. Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. Rep. 161. No doubt respondents acted in the utmost good faith, and in the belief that they were entitled to the property under the circumstances, but plaintiff cannot be deprived of her property through a mistake of the defendants. The judgment and order in each case are reversed, and the causes are remanded for new trials.

We concur: HARRISON, J.; DE HAVEN, J.; GAROUTTE, J.; MCFARLAND, J.

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89 Cal. 115

HEIDT v. MINOR *et al.* (No. 12,947.)

(*Supreme Court of California.* May 18, 1891.)

NOTARY PUBLIC—MISCONDUCT—LIABILITY OF SURETIES.

1. A notary public, who was also engaged in negotiating loans, represented to plaintiff that certain persons desired to borrow and gave her what purported to be mortgages executed by them, to which he had appended his certificate of acknowledgment, and on the faith of which plaintiff gave him the money to be delivered to the mortgagees. The mortgages were forgeries. The notary converted the money to his own use, and absconded, and plaintiff brought suit on his bond. *Held* that, as receiving money is no part of the official duty of a notary, his sureties are not liable for that fraudulently retained by him, but only for the damages caused plaintiff by the falsehood of his certificate of acknowledgment.

2. The measure of plaintiff's damages from this element of the notary's fraud is the value of the mortgages if they had been valid.

MCFARLAND, J., dissenting.

In bank. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

Archer & Bowden and *A. L. Rhodes*, for appellants. *S. F. Leib*, for respondent.

SHARPSTEIN, J. The defendants were sureties on the official bond of a notary public by the name of Cordell. Cordell, while acting as notary public, also acted as real-estate agent and broker in the purchase and sale of lands, making loans, collecting interests, rents, etc. The plaintiff upon several occasions employed Cordell as such broker or agent to make loans for her, and in the purchase of property, and often consulted him as to such matters, and sometimes acted upon his advice in relation thereto. In several of the loans so made, Cordell produced to plaintiff a note and mortgage prepared and acknowledged before himself, and she would then go with Cordell to the bank and pay him the money for the borrower, and Cordell would deliver to her the note and mortgage. Upon the 28th of August, 1885, he, then being a notary public, exhibited to the plaintiff what purported to be a note and mortgage, signed by one Charles E. Wilson, for the sum of $1,000, the mortgage purporting to be of certain lands in the county of Santa Cruz, to secure the payment of the note. To the mortgage was appended by said Cordell, as notary public, a certificate of said Wilson's acknowledgment of the execution of said mortgage. Cordell represented to plaintiff that the note and mortgage was executed by said Wilson, and that he wished to borrow of plaintiff $1,000 thereon, and plaintiff thereupon received said note and mortgage, and paid to Cordell, for Wilson, the sum of $1,000. Afterwards, on the 8th of April, 1886, said Cordell, still being a notary public, procured of plaintiff $1,000 upon what purported to be the note and mortgage of one Joseph Curtis. The mortgage purported to be upon lands in San Benito county, to secure the payment of said note of said Curtis. Said Cordell had attached to said mortgage a certificate of acknowledgment made before him as a notary public, and attested to the same by affixing his official notarial seal thereto. By means of said forged notes and mortgages, and the false certificates of acknowledgments attached to said mortgages, plaintiff was induced to receive said notes and mortgages, and place in the hands of said Cordell, for said Wilson and Curtis, $2,000, which said Cordell fraudulently appropriated to his own use, and in the month of August, 1886, absconded, and has ever since been absent from the United States. Plaintiff did not know before the absconding of said Cordell that said notes and mortgages were forged. Upon the foregoing facts the court found that plaintiff was entitled to judgment against the defendants for the sum of $2,000, and interest on $1,000 from August 28, 1885, and on the further sum of $1,000 from April 8, 1886. Judgment was entered accordingly. From that defendants appeal.

The only question presented here is, do the facts found by the court support the judgment? The facts found establish beyond any question the civil and criminal liability of Cordell. But the liability of his sureties, the defendants, depends upon the terms and conditions of the bond which they executed. The sureties upon an official bond undertake for nothing which is not within the letter of their contract. "The obligation is *strictissimi juris*, and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent." Per Cooley, J., in Bank v. Ziegler, 49 Mich. 157, 13 N. W. Rep. 496. That is a clear and concise statement of a rule universally accepted, but as might naturally be expected, courts have differed as to the delinquencies of the principal for which the sureties made themselves liable. The defendants in this case undertook that said Cordell should well and faithfully perform all the duties of his said office as required by law, and the requirements of the statutes of this state, and faithfully execute and perform all the duties of such office required by any law to be enacted subsequently to the execution of said bond. The duty of notaries public is prescribed by the Political Code. Among other things, they are required "to take the acknowledgment or proof of powers of attorney, mortgages, deeds, grants, transfers, and other instruments of writing, executed by any person, and to give a certificate of such proof or acknowledgment indorsed on or attached to the instrument." Pol. Code, § 794. It is for a breach of the duty enjoined on their principal by this clause that the defendants are held to be liable to the plaintiff by the court below. The Code provides that, "for the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all the damages sustained." Id. § 801. It is no part of the duty of a notary public to receive money from or for anybody. It was misconduct, but not official misconduct, to fraudulently obtain it. And it is only against his official misconduct that the sureties consented to indemnify persons injured thereby. He did not receive any money in his official capacity.

Under a law of the state of New York, a supervisor, before entering upon the discharge of his duties as such, was required to give a bond, with sureties, for the faithful discharge of his official duties as such supervisor during his term of office, and well and truly keep and pay over and account for all moneys belonging to his town, and coming into his hands as such supervisor. The board of supervisors of Madison county, by resolution in due form, as authorized by law, levied the sum of $1,500 upon the town of Sullivan, in that county, for the temporary relief of the poor of that town, and $52 for highways and bridges; and in the warrant attached to the tax-roll of the town directed the collector to pay said sums to the supervisor of said town, which he did, but the supervisor did not account for or pay over the whole of said sum, and appropriated a portion thereof. An action upon his official bond for the recovery of the amount so appropriated was prosecuted against his sureties, and a judgment against them for said amount was entered against the defendants, and affirmed by the supreme court, and reversed on appeal by the court of appeals. In the opinion of the court of appeals it is said that "the only objection to the recovery is that the moneys for which a recovery was had are not within the condition of the bond." After quoting said condition, as before stated herein, and the statutes relating to the raising of moneys in towns for the support of highways and bridges and the poor, the opinion proceeds: "The supervisor has no authority under the law to receive moneys, even in trust, raised by tax for the support of highways and bridges, or of the poor. Moneys raised for such purposes are expressly excluded from those which he is authorized to receive or pay over." Further on in the opinion the court says: "The principal in the bond received, officially and as supervisor, precisely what the law authorized him to receive and no more. The appellant, in becoming surety upon the official bond of the supervisor, must be supposed to have known the law and the limit and extent of the liability in his case assumed." The judgment of the court below was reversed. People v. Pennock, 60 N. Y. 421. In Welsh v. Lumisden, 2 Hailes, 876, John Syme, messenger, was intrusted by Welsh with letters of horning and caption against one of his debtors. Instead of attaching the debtor's effects by poinding, the messenger received them from the debtor himself, sold them by public roup, to the extent of the debt, and applied the proceeds to his own use. He became insolvent, and Welsh, the creditor, pursued Lumisden, his cautioner, for the debt. "The lords found the cautioners only liable for the messenger's faithful execution of his office, but not for any money allowed to come into his hands."

In the case at bar the judgment against the sureties is for money which their principal fraudulently obtained from the plaintiff. It was not in the line of his official duty to receive money from any one for any purpose. His receiving of it was purely a voluntary act on his part, and one for which his sureties did not agree to be liable. The contention of respondent's counsel is that the sureties are liable because there was attached to the counterfeit mortgages a false certificate of their principal as notary public of the due acknowledgment of the execution of said mortgages by the persons whose names had been forged to them, and that but for that certificate the money received by said principal would not have been delivered to him. But it was no part of his official duty to receive money upon valid notes and mortgages, and if these notes and mortgages had been valid, and he had received money from the mortgagee for the mortgagors, and neglected to deliver it to the mortgagors, we think no one could contend that the defendants would be liable for such misconduct of their principal to any one who might be injured thereby. The official misconduct for which the defendants were liable to any one who was injured thereby consisted in his making and attaching to the counterfeit mortgages certificates of their due acknowledgments; and the plaintiff is not entitled to recover any more than her loss by reason of said certificates being false instead of true. If the mortgages had been valid in every respect, their value as securities would have depended upon the value of the mortgaged property. If its value had been as great or greater than the sums secured by them, then the loss to the mortgagee might, in case of a false or fatally defective certificate of acknowledgment, be equal to the sums secured to be paid by said mortgages. Otherwise they might be of less value, or no value at all, as in the case of McAllister v. Clement, 75 Cal. 182, 16 Pac. Rep. 775, in which the finding was that the property mortgaged was wholly valueless, and that plaintiff had not suffered any damage by reason of the defective certificate of acknowledgment. The judgment in that case, in favor of the defendants, was affirmed by this court on the ground that no action will lie to recover damages if no damages have been sustained. In that case the mortgage was given to secure the payment of a promissory note for $600. In that case the court found that the mortgaged property was valueless. In this case it did not find that it was of any value. And that distinguishes this case from People v. Butler, (Mich.) 42 N. W. Rep. 273, which more strongly supports respondent's contention than any other cited in her behalf. In that case it was found to be of sufficient value to constitute good security for the loan. If, as we have no doubt, the liability of the defendants is limited to losses sustained through the official misconduct of their principal, the judgment in this case is clearly erroneous. The official misconduct consisted in certifying falsely to the acknowledgments of the mortgages. The defendants are liable only for what would be the value of those mortgages if valid. The court has not found that they would be of any value if valid. Therefore the proper basis for determining the liability of the defendants is wanting. The findings do not support the judgment, and it must be reversed. Judgment reversed.

We concur: BEATTY, C. J.; DE HAVEN, J.; HARRISON, J.; GAROUTTE, J.

PATERSON, J. I concur in the judgment on the ground last stated in the opinion.

I dissent: MCFARLAND, J.

(88 Cal. xxi)

HEIDT v. MINOR *et al.* (No. 12,948.)

(*Supreme Court of California.* May 18, 1891.)

In bank. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

Archer & Bowden and *A. L. Rhodes*, for appellants. *S. F. Leib*, for respondent.

PER CURIAM. Upon the authority of Heidt v. Minor, ante, 627, (No. 12,947,) this day filed, the judgment is reversed.

(3 Cal. Unrep. 398)

MCCOY v. SOUTHERN PAC. CO. (No. 14,091.)[1]

(*Supreme Court of California.* May 20, 1891.)

RAILROAD COMPANIES — STOCK KILLING — NEGLIGENCE—FENCES.

1. The fact that a herder, after having rounded up his sheep a mile and a quarter from a railroad track, and after some of them have lain own as if for the night, takes his dog and goes home, is not such contributory negligence as will relieve the railroad company from liability if the sheep afterwards stray on the track and are negligently killed; and the admission of incompetent evidence as to the custom of rounding up and herding sheep is not prejudicial to the company.

2. In an action against a railroad company for negligently killing stock, an allegation that the damage was caused by defendant's failure to maintain a good and sufficient fence will include any defect in the fence without more particular reference to it.

3. One who has only a right to pasture his stock on another's land, adjacent to a railroad, is entitled to the protection of the statute requiring railroad companies to maintain a fence.

BEATTY, C. J., and MCFARLAND, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Chipman & Garter, for appellant. *John F. Ellison* and *A. M. McCoy*, for respondent.

TEMPLE, C. This action is for damages for killing plaintiff's sheep by the defendant's locomotive and cars. Plaintiff was the owner of a band of about 3,000 sheep, which he avers were lawfully grazing in a field adjoining defendant's railway, near Rawson's switch, in Tehama county;

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[1] Reversed in banc. See 29 Pac. 1110.

that, by reason of the failure of the defendant to make and maintain a good and sufficient fence, they, without his fault, strayed upon the track of the railway, and were run over and killed; also that defendant so negligently and carelessly ran and managed its engine and cars that they ran over and killed plaintiff's sheep. The defense is a general denial and a charge of contributory negligence. It appears that Boyd Bros. were in possession of what was known as the "Healey Ranch," as tenants of one Kraft. In the fall of 1889, they sold to plaintiff the stubble feed on the ranch after the grain was removed, and let him into such possession as was necessary to enable him to pasture the fields. Plaintiff was to take charge of his sheep while there, Boyd Bros. assuming no responsibility with reference to them. Boyd Bros. continued to live upon the place, and contracted with plaintiff to board his herder. Plaintiff had possession of no buildings, was not to reside upon the place, but kept his herder there to look after the sheep. Under this contract he drove his sheep on the place on or about the 16th day of September, and they were left there in charge of a herder. On the night of the 7th of October the herder "camped the sheep" about one mile and a quarter from the railroad. After "rounding them up" at this place, he remained until some of them had laid down, apparently for the night, and then went home. The night was rainy, and the sheep strayed from this place to an opening in the fence at Rawson's switch, and out upon the track, and were run over, and some of them killed, by a train running towards Red Bluff, at about half past 7 in the evening. The same train returned in the morning, and again ran over and killed some more of them at about the same place. Rawson's switch, where the sheep entered, was a flag station, and the land inclosed by the defendant at that point is wider than at other places. On the side next this field the fence is some 270 feet further from the the track. This extra width is 60 panels measured by the fence, or about 1,000 feet in length along the railway. Near the center of this the Rawson and Healey ranches join, and the opening is near the division fence. The defendant had quite recently constructed a new fence along the right of way and this extra width or reserve, which was evidently intended for use in connection with the station. The opening had been made by Boyd Bros. with the consent of the section boss or master. His duty in reference to such matters appears from the evidence of Davis, the division foreman, to be, if he finds any slight repairs required in the fence which he has the means to make, then to make such repairs, but defects which he has not the lumber or other means to repair it is his duty to report to the division foreman. Boyd Bros. desired this opening for their private accommodation. There was already a gate through which they could have had access to the station, but it was less convenient. They took down a panel 16 feet long, in March preceding the accident, and it had never been replaced, or the fence made good by a gate or any other device. The section master, when he gave consent to make the opening, promised to have a gate placed there, but it had never been done. The old fence, which had shortly before been replaced by the new one, had an opening at the same place, in which there had never been a gate. In short, there had always been an open road there leading from Boyd's house to the station. The field was a large one; how large is not shown. But it extended from the Sacramento river on the south to the railway on the north, and it is stated that the house was about one mile from the railway, and a mile and a half from the river; also that all the bottom land was in grain, and 400 acres of the upland. The plaintiff and his herder both testify that they had not seen this opening before the accident, and did not know of its existence. The plaintiff had seen two gates opening into the right of way, and had given special directions for extra care in keeping them closed. The sheep had been upon the place about 20 days before the accident, and during that time Boyd Bros. had done some hauling through this opening, as they had done before.

A motion for a nonsuit was made at the conclusion of plaintiff's evidence, on the ground of insufficiency, specifying the particular defect claimed; but as the motion was denied, and further evidence put in by both parties, it is not now necessary to consider whether this motion was properly denied; for all the points which can now be urged against this ruling arise also upon the objections to the sufficiency of the evidence to justify the verdict. At the trial very numerous exceptions were taken to the rulings, admitting, or refusing to admit or strike out, evidence. We have carefully examined the record as to these objections, and, as to most, it is sufficient to say there is nothing in them, or the evidence in question was so entirely immaterial that no harm could result either way. A few only we deem it necessary to specially notice. A large number of such exceptions have reference to opinion evidence, as to the proper herding of sheep and the custom of other herders in such cases. The matter in contention seems to have been whether the fact that plaintiff's herder "rounded the sheep up," as the phrase is, a mile and a quarter from the track, and, after some had lain down, took his dog and went off for the remainder of the night, was contributory negligence. But we think, as matter of law or of general knowledge, this would not constitute such negligence as would relieve the defendant of liability. Evidence, therefore, upon this point could not have been prejudicial to the defendant.

One source of damage stated in the complaint is the failure to maintain a good and sufficient fence. In McCoy v. Railroad Co., 40 Cal. 532, it is said: "The neglect of the defendant to build the fence certainly did not operate to dispossess the plaintiff of his entire field, or, what is the same thing, prevent him from making lawful use of it. Besides, he probably knew that, so long as the defendant chose to continue running its cars upon this open track, it undertook at its peril that no harm should come to the stock for the want of a proper fence." It must follow that adjoining proprietors may use their land whether fenced or not, or whether the fence is sufficient or not, and are not bound ordinarily to take any precautions, even when they know the fence to be insufficient, but may use their land in the ordinary manner, relying upon the responsibility of the railroad corporation in case of loss. Whatever complaint the owner of the sheep could have made on the subject of want of care on the part of his herder, as against dogs or coyotes, or panic from any source, the defendant was not interested in it. Had there been a good and sufficient fence, with no openings in it, there certainly would have been no negligence, in reference to the defendant, in leaving such a band of sheep overnight without a keeper, in a stubble field of the extent of this one. There was proof that neither plaintiff nor his herder knew of the open space in the fence. It appears that the fence along the right of way was in general a good one, and there is no allegation in the complaint in reference to the open space through which the sheep passed to get upon the track. Objection is made that, without such allegation, evidence of damage in such case is inadmissible. But it is evident, admitting that the defect in the fence is the fault of defendant, that the averment that defendant failed to maintain a good and sufficient fence would include such a defect, or any defect, which rendered the fence insufficient. The case of Jahant v. Railroad Co., 74 Cal. 9, 15 Pac. Rep. 362, does not sustain appellant. In that case there was no such allegation as to the insufficiency of the fence, but the damage was averred to result from the careless and negligent management of defendant's cars. The horses were on the track, therefore, presumably through the fault of the plaintiff. A remark was made, apparently not necessary for the decision of the case, that this presumption was not sufficiently negatived by the general averment that the animals escaped without his fault.

The court refused to give the second instruction asked by the defendant. It reads as follows: "I instruct you, gentlemen of the jury, that a person who pastures his sheep upon the land of another person, required by law to be fenced by a railroad corporation, upon an understanding or agreement with such owner or his tenant, by which it is agreed that such owner or tenant shall not, in any degree or manner, become responsible for the safe-keeping of said sheep, but that said sheep shall be taken care of exclusively by their owner and his herders, and such owner or tenant of the land shall remain in possession of the land, taking care of the fences, making and using openings therein, cultivating and tilling the soil, reserving the use of all buildings and farm implements, and in every way exercising acts of dominion and control over said premises, except merely permitting the owner of the sheep to keep his sheep upon the premises, for the sole purpose of eating the feed therefrom growing upon said lands, is not entitled to the protection of the statute requiring a railroad corporation to fence such lands." We think the court properly refused this instruction. Any person lawfully occupying the land is entitled to the protection of the statute. One who only has the right to pasture his stock temporarily upon the land, as admittedly the plaintiff in this case had, is as much entitled to its benefit as the owner of the land.

The third instruction was properly refused. The objections to it are numerous. It required the court to usurp the province of the jury, and draw conclusions from the evidence. It erroneously implies that there was a necessity of notice to defendant of the opening, although made with its knowledge and consent. It ignores the duty of the defendant to take constant care of its fences, which require it to know within reasonable time of defects, and to repair them. The evidence, we think, plainly tended to show that there was a mixed possession of the ranch by plaintiff and Boyd Bros. The principal dominion and control was doubtless in the plaintiff. But at the same time Boyd Bros. were also living upon the place with such limited possession and rights as would not interfere with the plaintiff. The defendant at the trial took the ground that, under such circumstances, plaintiff had no rights under the statute at all. In this we think it was wrongly advised. No doubt, however, under such circumstances, the parties having a mixed possession, under a contract, each, under certain circumstances, is liable to suffer for the acts of the other. If, for instance, the opening was in the fence through the fault of Boyd Bros. during such co-occupation, and through no fault of defendant, the plaintiff ought not to have recovered. Had an instruction embodying this proposition, and free from objection, been offered, it should have been given. But, although counsel for the defendant made the proposition in various ways, it was always accompanied with something which justified the court in refusing it. Generally, as in the third instruction asked, it was stuffed with an argument which counsel was anxious to have the court make to the jury,—a practice which has become altogether too common. An instruction should be a simple proposition of law, in form, if possible, specially applicable to the facts of the case. But the argument as to its effect should, in general, be left to counsel.

The sixth rejected instruction comes nearest to this simple legal proposition. But there the relation between Boyd Bros. and plaintiff which the jury were required to find, in order to apply the rule, was simply that plaintiff entered into the use of the pasture under contract with Boyd Bros. The fact of co-occupation was ignored. In this case counsel differ widely as to the rights acquired by plaintiff under his contract. Defendant insists that Boyd Bros. were left with full dominion and control, and plaintiff had not even a qualified possession. The instruction lays down no rule which the jury could understand. They are told plaintiff cannot recover if Boyd Bros. could not have recovered under similar circumstances. If similar means the same, the conclusion is quite obvious, and needed no indorsement from the court. If not the same, but in some respects like, in what respects? The jury are not told under what circumstances Boyd Bros. could not have recovered. But why refer to such hypothesis? The question was not as to the liability of Boyd Bros., but whether, under the circumstances, plaintiff could recover. An instruction could easily have been framed to the effect that a joint occupation, by mutual consent, being found from the evidence, plaintiff could not recover if the opening was made by Boyd Bros., without the consent of defendant, and there was no negligence on its part. Outside of the questions already discussed, the charge that the evidence is insufficient to sustain the verdict must depend upon the question whether there was evidence tending to prove the authority of Daly, the section master, to authorize the opening in the fence. We think there was sufficient evidence to justify such conclusion. In their business railroad companies require numerous agents, of whose authority the public knows nothing, save what appearances indicate. It is important both to the public and to the company that such appearances be implicitly relied upon. Unless they were so, the business of such companies would be greatly impeded. It was clearly the duty of the defendant to have some agent whose duty it would be to take care of the fences which it was bound to maintain. The facts show that the agent whose duty it was in this case to keep watch over the fences was Daly. The court and jury were not bound to take his disclaimer of authority as conclusive. We think the weight of the evidence was with the conclusion of the jury upon the subject. We think the judgment and order should be affirmed.

We concur: Vanclief, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J. I dissent. The Boyd Bros. were clearly in possession and control of the land and the fences. If they opened the fence, they certainly could not have recovered if their sheep had gone through the opening and been killed. Plaintiff's sheep were being pastured on the land subject to the general control of the land by the Boyds; and, if the sheep were injured by any misconduct of the Boyds, the latter were, perhaps, responsible to plaintiffs for such injury. But if the Boyds kept the fence open for their own convenience, neither they, nor any one temporarily occupying part of the land for a special purpose under them, can complain of the defendant. This proposition is practically admitted in the prevailing opinion of the court, but it is said that this proposition was not presented in the instructions asked by appellant. I think it was clearly presented, particularly in the sixth instruction asked. I think that the phrase, "if the Boyd Bros. could not themselves have recovered damages to their stock under similar circumstances," could not possibly have been understood by the jury in any other way than as meaning that if the sheep had belonged to the Boyd Bros., and had escaped onto the railroad under the circumstances under which plaintiff's sheep so escaped, and the Boyd Bros. could not recover, then plaintiff could not recover. I do not see how any intelligent jury could understand it in any other way. I think that the judgment should be reversed.

Beatty, C. J. I dissent.

(87 Cal. 532)

Williams v. Mitchell *et al.* (No. 13,762.)

(*Supreme Court of California.* Jan. 29, 1891.)

Rescission of Sales—Fraudulent Representations—Evidence.

1. In an action for the balance of the price of certain land and "water certificates," defendants alleged that plaintiff, through his agent, fraudulently represented that water was piped to the land; that the right to the use of a certain amount of water was appurtenant to it, otherwise than as expressed in the water certificates; and that plaintiff would assign to defendants shares of stock in the company other than the water certificates. The evidence showed that the agent's authority was only to find a purchaser at a fixed price, and he denied having made any such representations. One of the defendants, at the time of his interview with plaintiff's agent, visited the land, and there was nothing there to indicate either pipe or water anywhere upon it. The water certificates, which showed on their face what they were, were delivered to defendants with the deed. It was admitted that a short time after the sale defendants knew there was no water piped on the land. *Held*, that the finding that there was no fraud on the part of plaintiff was justified by the evidence.

2. As defendants claim that the invalidity of the water certificates "is stamped upon their face," their right to rescind, on the ground that the certificates are void, is lost by their unreasonable delay of 17 months after receiving the certificates, and until 2 months after commencement of action for the price, to offer to rescind.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Allen & Miller, Waters & Gird, and *Harris & Gregg,* for appellants. *George E. Harpham* and *H. M. Willis,* for respondents.

Vanclief, C. On June 11, 1887, the plaintiff sold and conveyed to the defendants six lots of land, containing 20 acres each, and at the same time assigned to the defendants certain written obligations of the Bear Valley Land & Water Company, (a corporation,) to furnish and deliver at a certain point a certain quantity of water, to be used on each of said lots, called "water certificates." The consideration to be paid by the defendants for the land and water certificates was $24,000, of which $6,000 was paid in hand. For the balance of the purchase money the defendants made two promissory notes to the plaintiff for $9,000 each, secured by their mortgage on said land. This action is brought to foreclose the mortgage. The answer of the defendants admits the execution of the notes and mortgage, and then proceeds as follows: "(2) That said notes and mortgage were executed and delivered as and for part of the purchase money of said real estate in complaint described, together with certain water-rights by plaintiff represented as appurtenant thereto, as well as for certain shares of stock in the Bear Valley Land & Water Company, a corporation organized and existing under the laws of the state of California, and for no other or further consideration. (3) That said defendants were induced to so purchase said lands and stock, and to execute and deliver said notes and mortgage, by means of false and fraudulent representations at the time and before that time made by plaintiff to defendants, in this, to-wit: That, at and before the purchase of said real estate, appurtenances, and shares of stock, the said plaintiff, by and through his duly-authorized agent, represented to defendants that water for irrigation purposes was actually piped on said land from the reservoirs of said Bear Valley Land & Water Company; that the right to use twelve miners' inches of said water was appurtenant to said land; that plaintiff would transfer and deliver to defendants shares of stock in said Bear Valley Land & Water Company, representing ownership of twelve miners' inches of water of said corporation; that plaintiff owned the land lying immediately adjacent to the premises in complaint described; that upon said lands plaintiff would at once cause to be constructed a large hotel building at a cost of $20,000, and numerous private dwellings; that the materials to be used in their construction were already purchased by plaintiff, and the contract for the erection thereof let. (4) Defendants, relying upon such representations and believing them to be true, and on the faith thereof, purchased said premises in complaint described, and said stock of plaintiff, and on the 11th of June, 1887, accepted from plaintiff a deed therefor, with six certain instruments in writing, issued under the seal of said Bear Valley Land & Water Company, and signed by its president and secretary, denominated 'water certificates,' and in consideration thereof paid to plaintiff six thousand dollars in cash, and executed the notes and mortgage as in complaint set out and described. (5) That at the date of the acceptance of said deed and said water certificates defendants believed that said water certificates were in fact shares of stock in said corporation, and entitled the defendants, as holders thereof, to the rights and privileges of stockholders in said corporation, and conveyed to defendants the rights and privileges so contracted to be conveyed and transferred by plaintiff, to twelve miners' inches of water of said corporation. (6) Defendants allege that notwithstanding said promises and representations of plaintiff, that neither at the time of said purchase, or now, or at any time or at all, was any water piped on said land from the reservoir of said Bear Valley Land & Water Company, nor from any water supply or source, and no pipes for conveying water were laid on said land at all, nor in the vicinity thereof. (7) That in truth and in fact no water-rights were appurtenant to said lands, and no hotel building or private dwellings or structures of any kind have been erected on said adjacent lands, in whole or in part, except a certain excavation alleged to be for a basement for an hotel, although more than one year has elapsed since said purchase, and no steps have been taken by plaintiff to cause said improvements, or any of them, to be made on said adjacent lands, although he has ever since remained and still remains the owner and holder thereof. (8) That said lands were at the date of said purchase and now are irrigable lands, and without water-rights appurtenant, or water for use in irrigation, are of little value and worth less than $5,000; that water-rights appurtenant to such lands, for purposes of irrigation, would be valuable, and worth $6,000 and more; that shares of stock in said Bear Valley Land & Water Company, representing twelve miners' inches of water, would be of great value, to-wit, of the value of $5,000 and more; that the erection and construction of said hotel buildings and private dwellings, as agreed upon, would enhance the value of said premises $10,000 and more; that, without said improvements on said lands adjacent, the premises so purchased by defendants are worth $10,000 less than with such improvements made as represented. (9) Defendants are informed and believe, and therefore allege the fact to be, that said written instruments, styled 'water certificates,' issued by said corporation to defendants, were and are issued without authority of law and are void; that said corporation had no authority in law to issue the same, and the issuance of the same conveyed and transferred no rights as stockholders or otherwise to defendants; that the same are not shares of stock, and do not transfer or vest in the defendants the privileges or rights of stockholders, and do not convey or vest in defendants twelve miners' inches of water of said corporation, or any water or rights whatsoever, and the same are of no value, and defendants allege that they were ignorant of the true character and value of said written instruments styled 'water certificates' until the commencement of this action, and defendants further allege that plaintiff never transferred, conveyed, or attempted to convey to said defendants any of said water-rights or shares of stock in said Bear Valley Land & Water Company whatever. (10) Defendants allege that the acts, commissions, and representations of plaintiff, above set forth, were done and made by him with intent to defraud, and that he thereby did defraud, defendants of their rights in the premises. (11) Defendants allege, further, that by reason of the acts, omissions, and representations, practices, and fraud of plaintiff, as above set forth, the consideration for said notes in complaint mentioned has wholly failed, and the same were obtained by fraud, and wholly without consideration, and plaintiff should not maintain his action thereon."

The defendants also filed what they denominate "a further answer to complaint, and by way of cross-complaint," in which they allege substantially the same facts alleged in their answer, with only the additional averment that on December 13, 1888, (nearly two months after the commencement of this action,) the defendants tendered to plaintiff a reconveyance of the land and reassignment of the water certificates, and demanded a surrender and cancellation of the notes, and a return of the cash payment of $6,000, all of which was rejected and refused by the plaintiff. The prayer of the cross-complaint is that the notes be canceled, and that defendants have judgment against the plaintiff for the $6,000 paid and interest.

The water certificates and the indorsements thereon are in the following form: "Class A 7,200 certificates. Issue of June 1, 1886. Number 113. Number of certificates, 20. Bear Valley Land and Water Company water certificate. These twenty certificates issued by the Bear Valley Land and Water Company, a corporation, to Rhodes, Mitchell, and Hoopes, for twenty acres, are guarantied by said company to entitle the holder hereof to receive a continuous flow of one-seventh of an inch of water to each acre of land to which the same shall be devoted, or multiple thereof, as is designated on the face hereof, for the six summer months in each year, for the contract times, beginning under the contracts of this company with the North and South Fork ditches, respectively. The inch mentioned herein is equivalent to a flow of one-fiftieth of a cubic foot per second. The holder of this certificate may elect to accumulate the use of water hereunder in any one or more months of said six months, the aggregate in any one month not to exceed one-fourth of the whole for that year; and the holder is also entitled to his proportion of the six months' winter water accruing under the contracts of the North or South Fork ditches on which it may be used in the proportion which this issue of certificates and those that may be hereafter issued bears to the whole of such benefits. The point of delivery of water used under this certificate shall be at the points designated in the contracts with the North and South Fork ditches, respectively. This issue or award of water is adopted as a method of distribution and of the use of the same to the company's stockholders, in consideration of the covenants contained in the indorsement hereon; and the interest represented by this certificate shall not become appurtenant to or pass by voluntary act or by operation of law with any land upon which the water represented may be used. A transfer hereof shall only be made by surrender of this certificate to the company and the reissuance of a new certificate, and upon the signature of the concurrent contract on the records of the company. J. G. Burt, President. E. A. Holt, Secretary. [Seal of said Company.]" Indorsement: "The holder of this certificate hereby accepts the same on the following conditions: That this certificate shall and is to be held subject to and in accordance with the terms of the contract signed by the holder hereof upon its issuance by the company." The contract mentioned in the indorsement on the certificate, to be signed by the holder, was signed by the defendants on July 7, 1887, and is as follows: "Know all men by these presents, that whereas, the Bear Valley Land and Water Company, a corporation, has this day issued to the undersigned, Rhodes, Mitchell & Hoopes, twenty certificates of said corporation, being certificate No. 113, in consideration of the agreements hereinafter contained, and subject to the conditions hereinafter set forth and contained in said certificate, and the undersigned has received and accepted said water certificates, subject to all such agreements and conditions: Now, therefore, we hereby agree that, in consideration of the issuance of said water certificates to us by said corporation, and in payment for the water which said certificates entitle us to receive each year from said corporation in accordance with the provisions of said certificate, we will, without notice or demand, pay to said corporation annually hereafter, and within thirty days after the first day of January in each year, the sum of $20, being $1 per year on each of said water certificates, such payment to be made at the office of said corporation in the city of San Bernardino, state of California. And if said sum of $20 be not paid to said corporation in full, at the time and in the manner hereinbefore provided, then said certificate No. 113, and all covenants and agreements therein contained, and the water certificates therein referred to, shall become and be null and void, and all rights thereunder shall be forfeited, and shall forever cease and determine, and the foregoing contracts shall be void. And whenever said certificate No. 113 shall be surrendered to and canceled by said corporation, then the foregoing contract shall be void. In witness whereof we have hereunto set our hands and seals this 7th day of July, A. D. 1887. Rhodes, Mitchell & Hoopes. By G. H. Condee, Agent." The court found for the plaintiff on all the issues, and decreed a sale of the mortgaged property in the usual form, and the defendants appeal from the final decree, and from an order denying their motion for new trial.

1. The appellants contend that the findings which negative the fraudulent misrepresentations charged in the answer and cross-complaint are not justified by the evidence. It will be observed that the averments are that the plaintiff made the false and fraudulent represenations by his agent. The evidence shows that the alleged agent was C. P. Condee, whose authority, if he had authority, extended no further than to find a purchaser of the property at a fixed price, and who, in his testimony on the trial, denied that he ever represented that water was piped or conducted to or upon the land sold; or that the right to the use of any water was appurtenant to the land otherwise than expressed in said water certificates; or that plaintiff would assign to defendants any shares of stock in the water company corporation other than said water certificates, though he may have called those certificates water stock; or that any con-

tract for the erection of an hotel or other buildings had been made by the plaintiff. Such representations as were made by Condee before the sale were first made to the defendant Rhodes (who was acting for the other defendants) at a place on the land where Condee is charged with having falsely represented that the water was then piped, yet there was nothing on the land to indicate that there was either pipe or water anywhere upon it. The water certificates, in the form above set out, were indorsed by the plaintiff, and delivered to the defendants' agent with deed for the land, on June 11, 1887, and received by defendants on July 11, 1887. It is admitted that defendants knew no water had been piped on the land as early as October, 1887, and the evidence strongly tends to show that the defendant Hoopes must have known the same in July, 1887; yet the defendants made no offer to rescind until December, 1888, about two months after the commencement of this action. There is no evidence nor pretense that the plaintiff personally made any false representation whatever. As the defendant Rhodes testified that he had been in the real-estate business a number of years, and had personally visited and examined the land on two occasions before he made the purchase, it is difficult to understand how he could have been deceived by the alleged representations of Condee as to water being piped on the land at the times he examined it, when he saw no signs of pipes, water, or hydrants, and asked no questions as to where they were; and it is still more difficult to conceive how the defendants could have been deceived as to the purport or nature of the water certificates at the time they accepted those certificates with the deed for the land. Considering these circumstances, which, to some extent, justify the application of the maxim, *caveat emptor*, in connection with the testimony of Condee, which denies all the material misrepresentations charged, I think the finding that there was no fraud on the part of the plaintiff is justified by the evidence.

2. Appellants contend that the water certificates are void and of no value, because (1) "they were issued gratuitously, and consequently amounted to a fictitious increase of the indebtedness of the company;" and (2) they "represent or evidence a division and withdrawal and payment to the stockholders of a part of the capital stock of the company;" and therefore, to the extent of the value of the water, the consideration for the notes and mortgage failed. There is no pretense that the water company has failed or refused to furnish or deliver the water as per certificates, or has denied its obligation to do so; and the only evidence relating to the matter is to the effect that the water company regards the certificates as valid obligations which it has always been ready and willing to perform; but it is claimed that their invalidity "is stamped upon their face." While I am inclined to the opinion that the certificates are valid for what they purport to be, I think it unnecessary, and certainly not desirable, to decide the question in this case to which the water company is not a party. As counsel claim that the alleged invalidity of the water certificates appears upon their face, and have pointed to no extraneous fact on which it depends or from which it may be inferred, the defendants must have known all the facts touching such invalidity on July 11, 1887, when they personally received the certificates, and were informed by Mr. Condee that he, as their agent, had executed for them the agreement above set forth,—to pay the water company $20 a year on each of the six certificates. It is not denied that Condee was authorized to execute this agreement. Under these circumstances, if the defendants desired to rescind their purchase on the sole ground that the water certificates were void, (and it appears that they had no other ground,) they should have offered to rescind promptly, within a reasonable time. A delay of 17 months, and until 2 months after the commencement of this action, and 38 days after the appearance of the defendant Rhodes, was unreasonable. The other points made by appellants' counsel require no special consideration, as those of them which are not founded upon a misconception of facts have no bearing upon the merits of the case as viewed here. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed

89 Cal. 57

JATUNN v. O'BRIEN *et al.* (No. 13,711.)

(*Supreme Court of California.* May 7, 1891.)

IRRIGATION—EASEMENT FOR DITCH — TAX-DEEDS.

1. In an action to enjoin the widening of an irrigation ditch it appeared that the ditch had been maintained prior to 1866, but was then allowed to fill up and be disused until 1874, when defendants opened it to a less capacity than formerly, and so used it until 1884, when plaintiff purchased the land through which it ran. There was no evidence to show who constructed and used the ditch before defendants opened it. *Held*, that defendants could not, after plaintiff's purchase of the land, increase the ditch to its former capacity.

2. A tax-deed reciting that it is based on an assessment to a certain person "and unknown owners" is void.

Commissioners' decision. In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

J. W. Cross and *P. F. Simonds*, for appellants. *Chas. W. Kitts*, for respondent.

VANCLIEF, C. The sole object of this action is to obtain a perpetual injunction against the defendants, restraining them from enlarging a water-ditch running through plaintiff's land. The case was tried by the court, and as a result of the trial an injunction was granted restraining defendants from enlarging their ditch to a greater capacity than 12 inches in depth, 14 inches in width on the bottom, and 20 inches in width at the top, with a carrying capacity of 123 inches of water, measured under a pressure of 6 inches. Defendants moved for a new trial on two grounds: "(1) That the decision of the court giving judgment for the plaintiff is against law;" and "(2) on account of errors occurring at the trial, and excepted to by the said defendants." The motion was made on a bill of exceptions. The court denied the motion, and defendants appealed from the judgment, and from the order denying their motion.

The findings show that the lands of plaintiff through which the ditch runs consisted of 80 acres, to 40 acres of which he acquired title by patent from the United States on July 20, 1874. The other 40 acres were conveyed to him by the Central Pacific Railroad Company on December 20, 1884, having been patented to the railroad company April 30, 1884. "That prior to 1862 there had been constructed on, over, and across the lands herein described [plaintiff's lands] a ditch known as the 'Camp Far West Ditch.' That the same was used up to the year 1866, at which time the further use of the same was discontinued,—the ditch was allowed to go to ruin, became filled up, and the flumes thereon allowed to rot, fall down, and in places to be carried away by strangers," and was totally unused from 1866 to 1873. That in May or June, 1874, and before plaintiff acquired title to any part of his land, defendants entered upon the ditch, and cleaned it out, and reconstructed it to the size and capacity above stated, viz., 12 inches in depth, 14 inches in width on the bottom, and 20 inches at the top, with a carrying capacity of 123 inches of water, measured under a pressure of 6 inches, and in that condition, and to that capacity only, used and conveyed water through it for irrigating purposes until 1888, when they commenced the enlargement of it complained of, and to enjoin which this action was brought. The defendants' right to the possession and use of the ditch to the full extent and capacity to which they reopened it in 1874 and used it until 1888 is not questioned by the action, nor infringed by the injunction granted. But appellants contend that they are entitled to enlarge it to the size and capacity which it had when originally constructed prior to 1862, and while used prior to 1867. The trial court decided as matter of law that defendants' property in the ditch was only such as they acquired by appropriation, possession, and user prior to 1885,—that is, prior to the conveyance of the land to the plaintiff,—because, as matter of fact, there appeared to be no privity between defendants and the person or persons who originally constructed, owned, and used the ditch prior to 1867. It was not proved, nor was there any evidence tending to prove, who constructed the ditch, or who owned or used it prior to the time, in 1874, when defendants took possession of and reopened it.

For the purpose of proving that they had acquired the title of the original constructors and former owners of the ditch the defendants offered in evidence a tax-deed to defendant Smith, dated September 2, 1875, based upon an alleged assessment therein recited, of "certain property, including the property" described in the deed, made, "between the first Monday of March and the first Monday of July, 1874, to R. M. L. Camden and unknown owners." The property sold for taxes thus assessed is described in the deed as "the property so as aforesaid assessed, situated in said county of Nevada, and described as follows, to-wit: Water right and ditch from Wolf creek to Camp Far West." In conection with this offer defendant Smith testified that there was only one ditch "which starts from Wolf creek and goes to Camp Far West." Plaintiff's counsel objected to the admission of the tax-deed on several grounds, and particularly on the grounds: (1) That the assessment to "Camden and unknown owners," upon which the deed rested, was void; and (2) that defendant was in possession of the ditch from May, 1874, until after the sale thereof for taxes, and therefore it was his duty to pay the taxes. The court sustained the objection, and counsel for defendants excepted; and the principal point made by the appellants is that the court erred in excluding the tax-deed. I think the objection to the deed was properly sustained on the ground that the assessment therein recited was void. Grotefend v. Ultz, 53 Cal. 666; Grimm v. O'Connell, 54 Cal. 522; Hearst v. Egglestone, 55 Cal. 366. The bill of exceptions states that "in support of their case the defendants offered testimony tending to show that prior to 1874 said ditch was 2 feet wide on the bottom, with flumes 32 inches in width;" and it does not appear that this testimony was disputed. Upon this counsel for appellants base their point that the decision is against law. But, since defendants failed to connect themselves with the title of the former owners or original constructors, it is immaterial what was the size or capacity of the ditch as originally constructed and used. The defendants are entitled to maintain and use the ditch and flumes on plaintiff's lands to no greater width or depth than they reconstructed and used them between 1873 and 1885. I think the judgment and order should be affirmed.

We concur: Foote, C.; Temple, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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89 Cal. 46

Kilburn v. Kilburn. (No. 12,981.)

(*Supreme Court of California.* May 7, 1891.)

Divorce — Civil Marriage — Legality — Evidence.

1. In a suit for divorce, it appeared that plaintiff and defendant, after the birth of an illegitimate child, entered into an agreement for a present marriage. Plaintiff's mother testified to the agreement, and that defendant asked her to take plaintiff to an adjoining county, and authorized her to introduce her as his wife, and that he said he wanted it kept quiet in the county where he lived. Defendant at no time after the alleged agreement cohabited with plaintiff, though on a few occasions they had sexual intercourse, and he only contributed $70 to the support of plaintiff and the child. There was no evidence that any one knew of the relations between the parties except themselves and plaintiff's mother and sister. *Held*, that there was not such an assumption of marital rights as could constitute a civil

marriage, under Civil Code Cal. § 55, requiring that consent to the marriage must be followed by a mutual assumption of marital rights, duties, and obligations.

2. In such case, no marriage having been shown between plaintiff and defendant, evidence of defendant's marriage to the woman with whom he is charged in the bill as having committed adultery is properly excluded as immaterial.

In bank. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

H. V. Morehouse, for appellant. *Wm. H. Webb*, for respondent.

DE HAVEN, J. Action for divorce. The court below, approving and adopting the special verdict of the jury on this point, found that on May 23, 1886, the plaintiff and defendant entered into a contract of marriage, by which they agreed then and there to a present marriage, and that this contract was followed on their part by a mutual assumption of marital rights, duties, and obligations. The defendant, who is the appellant here, contends that the finding is not justified by the evidence. It appears that the parties first met at a skating-rink in Salinas city, in August, 1885. At their second meeting, which was about a week afterwards, this acquaintance ripened into an act of illicit intercourse, followed by other similar acts at opportune times, until, as a fruit of this relation, the plaintiff gave birth to a child on May 16, 1886. One week thereafter defendant went to see plaintiff at the residence of her sister, where she was stopping. Here the plaintiff met defendant in the parlor alone, and at this meeting the plaintiff testifies that she and defendant agreed upon a present marriage, and that it was to be kept secret in Salinas city, but not elsewhere, and the baby was to be named after him. As stated, no witnesses were present; but plaintiff's mother and sister each testifies that she came into the parlor afterwards, and that defendant then repeated to her the said agreement made with plaintiff in reference to a present marriage, and also said that he wanted plaintiff to go into a neighboring county and live for a while, the mother to go with her. The mother also testified that she was authorized by defendant to introduce plaintiff as his wife, and she did so, "only he wanted it kept quiet, so that it would not get back into the valley. He didn't care about it elsewhere." The plaintiff and her mother then went to the city of San José, and there remained until March following. During this period the defendant called to see her once, remaining from 9 or 10 o'clock in the morning until 1 o'clock in the afternoon. From the time of the alleged contract of marriage until the commencement of this action the plaintiff and defendant never cohabited together,—that is, lived together in the same house,—although upon a few occasions they had sexual intercourse with each other; nor is there any evidence that they were generally reputed to be husband and wife in the community where both lived, and defendant never contributed but $70 to the support of plaintiff and her child. There is nothing to show that, if such relation existed, it was known to any one except the parties, and the mother and sister of plaintiff. It is true, the mother testifies that she introduced plaintiff as the wife of defendant, but she does not name the person to whom such introduction was made, nor does such person or persons give evidence in the case. The defendant himself, in his testimony, denies that he ever agreed to marry plaintiff, and there is other evidence which tends to corroborate him on this point; but, as the finding of the court below was in favor of plaintiff, we have only thought it necessary to give the foregoing general outline of the case, as shown by the testimony offered by her, and upon which the court must necessarily have based its findings. With this general statement of the nature of the evidence, we proceed to consider whether it is sufficient to show the existence of a marriage between the parties.

1. Section 55 of the Civil Code provides: "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations." As there is a substantial conflict in the evidence as to the contract or agreement for a present marriage between the plaintiff and defendant, we cannot, under the settled rule here, disturb the finding of the court below on this point. This consent being established, our next inquiry is whether the evidence is sufficient to establish the fact that such consent was followed by a mutual assumption of marital rights, duties, or obligations, and in order to answer this it is necessary to first determine what is meant by the words "marital rights, duties, or obligations," as here used. We have no doubt that they refer to such rights, duties, and obligations as arise from the contract of marriage, and constitute its object, and therefore embrace what the parties to such contract mutually agree to perform towards each other and to society. "Marriage is considered in every country as a contract, and may be defined to be a contract according to the form prescribed by the law, by which a man and woman, capable of entering into such a contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and his wife." Shelf. Mar. & Div. 1. The mutual agreement of the parties to live together in the professed relation of husband and wife is essential to create a contract of marriage, and the contract, when made, imposes upon the parties to it the obligation to do so, and there can be no assumption or entering upon the discharge of such duty or obligation, as contemplated by section 55 of the Civil Code, without the cohabitation of the parties consenting to a present marriage. And by cohabitation is not meant simply the gratification of the sexual passion, but "to live or dwell together; to have the same habitation, so that where one lives and dwells there does the other live and dwell also." Yardley's Estate, 75 Pa. St. 207. This was in effect so held in Sharon v. Sharon, 79 Cal. 670, 22

Pac. Rep. 26, 131, the court there saying: "The commencement of true and open matrimonial cohabitation under such an agreement is a mutual assumption of marital rights, duties, and obligations, while mere copulation, without such cohabitation, is insufficient." The evidence in this case falls far short of showing that, after the alleged consent to marry, these parties ever assumed the marital rights, duties, or obligations of the marriage relation as we have defined them. There was no cohabitation, such as almost universally accompanies marriage, and nothing to indicate to the community that they had assumed such relation.

2. The defendant offered to prove that he was on September 3, 1887, regularly united in marriage with Nellie Rowe, he woman with whom he is charged in the complaint to have committed adultery, and for this purpose offered to introduce a marriage license in due form, authorizing such marriage, and the certificate of a clergyman, showing its solemnization. These papers were excluded by the court. This ruling was correct. This kind of evidence has been considered sufficient to rebut the presumption of marriage which otherwise would follow from proof of cohabitation and general reputation that such cohabitation was matrimonial in its nature. Case v. Case, 17 Cal. 598; Jones v. Jones, 48 Md. 391. We are not called upon here to either affirm or dissent from the rule announced in these cases. It is sufficient to say that it does not apply to the facts of this case. There was no proof of cohabitation in this case, and we do not see how the excluded evidence, in connection with the other evidence in the case, could have any legitimate or logical tendency to disprove the statements of witnesses who testified directly to the fact that more than a year previous thereto the defendant agreed to become the husband of the plaintiff. This offered evidence, however, demonstrates the wisdom of the law in requiring an open matrimonial cohabitation of the parties thereto as evidence of marriage, where there is no solemnization, so that those contracting this relation may have some reasonable assurance that its validity, and the legitimacy of their children, will not be overthrown by proof of a prior secret marriage upon the part of either the husband or wife, and of which the other had no notice or suspicion.

Judgment and order reversed.

We concur: Beatty, C. J.; McFarland, J.; Harrison, J.; Garoutte, J.; Paterson, J.

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89 Cal. 79

Ex parte Smith. (No. 20,844.)

(*Supreme Court of California.* May 15, 1891.)

Criminal Law—Bail Pending Appeal—Habeas Corpus.

1. Unless extraordinary circumstances intervene, a person convicted of a felony ought not to be admitted to bail pending appeal.

2. On petition for *habeas corpus* by one convicted of a felony, for the purpose of ordering that he be admitted to bail, the supreme court will pass on the merits of the petition irrespective of an inflexible rule not to admit any person convicted of a felony to bail, adopted by the trial court, in whose discretion the allowance of bail is placed by Pen. Code Cal. § 1272.

3. On such petition the supreme court will not pass on errors of law committed on trial in which conviction was had.

In bank. Application for *habeas corpus*. *S. J. Hinas* and *Frank Short*, for petitioner.

Garoutte, J. This is an application for the issuance of a writ of *habeas corpus* for the purpose of ordering that the defendant be admitted to bail pending his appeal. The petition for the writ sets forth that "the petitioner was charged by information, in the superior court of Fresno county, of the crime of murder. That thereafter he was convicted of the offense of manslaughter, and sentenced to imprisonment in the state prison for ten years. That a motion for a new trial was denied, and the judge of the trial court issued a certificate of probable cause; and an appeal upon the merits of the case is now pending in this court. That the trial court committed errors of law that appear from the face of the record, and that the evidence at the trial was insufficient to justify a conviction. That the trial court has established a uniform rule that it will not admit any defendant to bail pending appeal, upon conviction for felony." In this class of cases, bail is allowed as a matter of discretion, and not as a matter of right. Section 1272, Pen. Code. In Ex parte Smallman, 54 Cal. 36, this court outlined the general character of facts necessary to exist, upon which to base an exercise of this discretion, and held that, except where circumstances of an extraordinary character had intervened, a person convicted of a felony ought not to be admitted to bail pending an appeal; and to the same effect is Ex parte Marks, 49 Cal. 681, and Ex parte Brown, 68 Cal. 183, 8 Pac. Rep. 829. The petition in this case shows no such circumstances. We cannot, in this proceeding, examine into the alleged errors of law committed by the lower court, and thus prejudge the case before it comes before us upon its merits. The fact that the trial court has adopted an inflexible rule not to admit any defendant to bail who has been convicted of a felony can have no weight with us, however inconsistent such rule may be, when compared with section 1272 of the Penal Code. This court passes upon the merits of the petition as presented to it, and regardless of any action or rule the trial court may have adopted.

Application denied.

We concur: Beatty, C. J.; De Haven, J.; Harrison, J.; McFarland, J.; Paterson, J.

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89 Cal. 81

Dougherty v. Ward *et al.* (No. 13,392.)

(*Supreme Court of California.* May 16, 1890.)

Trial—Ambiguous Findings.

A finding of law "that plaintiff is entitled to judgment, that plaintiff take nothing by this action, but that defendants * * * have judgment against plaintiff for their costs herein," is sufficiently clear to support a judgment for defendants.

Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Wm. T. Daggett, for appellant. *Wm. M. Pierson* and *Ben Morgan*, for respondents.

MCFARLAND, J. Plaintiff appeals, and the only point made by him is that the findings do not support the judgment, because, as appellant contends, the court finds as a conclusion of law "that plaintiff is entitled to judgment," while judgment is rendered for defendants. But the whole finding of law from which appellant takes the above quotation is as follows: "That plaintiff is entitled to judgment, that plaintiff take nothing by this action, but that said defendants, Hubert Ward and Annie Ward, have judgment against plaintiff for their costs herein." This roundabout way of expressing the conclusion that plaintiff should take nothing by his action, and that defendants should have judgment against him for costs, was probably the result of inadvertence, or, perhaps, the word "not" was accidentally omitted after the word "is;" but the sentence, as it stands, clearly enough expresses the meaning that plaintiff should take nothing, and that defendants should have judgment against him. The judgment is affirmed, with $100 damages, and the superior court is directed to include that sum of money in the judgment, in addition to other costs.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

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89 Cal. 101

In re DENNERY. (No. 13,646.)

(*Supreme Court of California.* May 16, 1891.)

INSOLVENCY—PETITION—PARTIES—PLEADING.

1. Under the insolvent act of California, (1880,) § 8, providing that an adjudication of insolvency may be made on the petition of five or more creditors, whose debts amount in the aggregate to not less than $500, a petition setting forth that the demand is for a certain sum, and accrued for goods sold and delivered at a certain place by petitioners to respondent, within one year last past, at his request, sufficiently states the debt.

2. A proceeding under the insolvent act to declare a debtor insolvent is a special proceeding, and not an action, within the meaning of Civil Code Cal. §§ 2466, 2468, requiring partnerships doing business in the state, under a designation not showing the names of the partners, to file a certificate with the clerk, etc., before they shall be allowed to maintain "an action."

3. A partnership doing business in the state, three of whose members are residents of the state, though the other is a non-resident, is a resident of the state, within the meaning of the insolvent act of California, (1880,) providing for declaring a debtor insolvent on petition of five or more creditors, "residents" of the state. HARRISON, J., dissenting.

4. It is not necessary that the petition in insolvency proceedings state the names of the members of the firms signing the same as creditors.

In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Johnson, Johnson & Johnson, for appellant. *Naphtaly, Friedenrich & Ackerman*, for respondent.

GAROUTTE, J. This is an appeal from an order of the superior court of Sacramento county, adjudging appellant an insolvent debtor upon petition of his creditors. In the lower court a demurrer was interposed, which was overruled. The defendant then answered, setting up, among other things, a failure by the petitioning copartnership firms to make, file, or publish any certificate of their copartnership. Petitioners' demurrer to the answer was sustained, and an amended answer was filed, and the matter was heard upon the petition and amended answer. The demurrer to the petition was properly overruled. The petition sets forth every fact required to be set forth by section 8 of the insolvent act, and in addition alleges that the petitioners are creditors of the said Dennery, and the nature of their respective demands is as follows: "The demand of said G. L. Jones & Co. is for $206.25, United States gold coin, and accrued for goods, wares, and merchandise, sold and delivered at San Francisco aforesaid by them to said respondent, within one year last past, at his request." The claims of the other petitioners are set out in the same manner. We think the foregoing statement sufficient. "Involuntary proceedings in bankruptcy are not in any sense proceedings merely for the collection or security of the particular demand of the petitioning creditors. They are for the benefit of all the creditors. * * * The fact that the petitioning creditor has a provable debt to the requisite amount is necessary to be shown for two purposes only, viz.: *First*, to show that the alleged debtor occupies that relation; and, *second*, to show that the petitioner has the requisite qualification to commence the proceeding. Its office is then exhausted, and it has not and is never given any other force or effect." In re Sheehan, 8 N. B. R. 345. The form of the petition in the case at bar is practically the same as found under the United States bankrupt act, and which is designated "Form No. 54." Bump. Bankr. (9th Ed.) 933. A creditor who can file a petition for involuntary bankruptcy is one whose demand is provable under the act. Phelps v. Clasen, 3 N. B. R. 87. Section 37 of the insolvency act provides that all debts not payable until a future time may be proved against the estate of the debtor; hence it follows that a creditor may join in the petition, although his demand is not yet due. And for these reasons it does not appear necessary to allege in the petition of insolvency a breach of the insolvent's contract, namely, that the debt is due and unpaid; but, be that as it may, these petitioners each allege a demand against the insolvent, and set out the nature of it, which would seem to be ample to put the insolvent upon his defense. In the case of Campbell v. Judd, (Cal.) 7 Pac. Rep. 804, the court held the petition sufficient, where the facts alleged as to the nature of the demand were much more meager than in the present case. The case of In re Russell, 70 Cal. 132, 11 Pac. Rep. 622, cannot be held to overrule Campbell v. Judd; but, upon the contrary, seems to cite it with approval. The facts alleged in that case were far more meager than were found in Campbell v. Judd, and the petition was clearly fatally defective. The insolvent should have an opportunity to deny and contest the claims of petitioning creditors prior to an adjudication of his insolvency, and it is equally true that he should have notice of the facts on which the claims of indebtedness are based, in order to properly make such contest, and when those facts are stated the requirements of the statute are satisfied, even under the principle laid down in Re Russell, supra. As to whether the facts set out in the petition are sufficient upon which to recover in an action for the indebtedness, it is unnecessary to decide.

As to the point raised by the demurrer, that the petition fails to state the names of the members of the firms petitioning, the facts are to the contrary, and, again, this court has already decided it has no merit. Campbell v. Judd and In re Russell, supra. The demurrer to the answer was properly sustained.

Sections 2436, 2468, Civil Code, providing that partnerships doing business in this state, under a designation not showing the names of the partners in such business, must file a certificate with the clerk, etc., or shall not be allowed to maintain an action, etc., is not applicable to the signers of a petition in involuntary insolvency. A proceeding in insolvency is not an action, as defined by section 22, Code Civil Proc., but is in the nature of a special proceeding, and is included within section 23 of that Code. Section 2468, Civil Code, has been so strictly construed by this court that it has been held not to apply to actions for tort. Ralph v. Lockwood, 61 Cal. 155. It does not by express terms include special proceedings, and the court will not by intendment enlarge the inhibition for the purpose of defeating a remedy to which the party otherwise would be entitled.

It is urged that the California Jewelry Company cannot be a petitioning creditor because one member of the firm resides in Germany. It is a copartnership doing business in this state, and three members of the firm reside here. We have already held that it is not necessary to set out the names of the members composing the firms in order to constitute a valid petition, and not necessary to file the certificate required by the Civil Code in order to give a partnership the right to petition, and the mere non-residence of one of the partners should certainly not defeat the right of the firm to become a petitioning creditor. The firm is regarded as an entity, and when the statute speaks of the petitioners being residents of this state it must be construed with reference to the person who may be a petitioner. A copartnership composed of four persons, as in the case of the California Jewelry Company, must be regarded as a resident, within the meaning of the statute, when its business is carried on in this state, and three of its members are residents of this state. The authorities cited by appellant have been carefully examined, and do not overthrow the foregoing views. Let the judgment be affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; PATERSON, J.; MCFARLAND, J.

HARRISON, J. I dissent. The right of a court to adjudicate an individual to be insolvent is purely of statutory creation, and can be exercised only in the terms and under the conditions prescribed by the statute. Any attempt to confer the control and management of the estate of one person upon another, against the will of the owner, even for the purpose of subjecting the same to the payment of his liabilities, is an extraordinary interference with the natural right of the individual to the management and control of his property, and can be upheld only by some positive statute authorizing such proceeding. Such power is not to be presumed to exist, nor is its exercise to be sustained by any forced or unusual construction of the terms of a statute, but must find its support in clear and explicit language. Section 8 of the insolvent act of 1880 provides that "an adjudication of insolvency may be made on the petition of five or more creditors, residents of this state, whose debts or demands accrued in this state, and amount in the aggregate to not less than five hundred dollars;" and section 9 provides: "Upon the filing of such creditors' petition the court shall issue an order requiring such debtor to show cause, at a time and place to be fixed by the court, why he should not be adjudged an insolvent debtor; and at the same time, or thereafter, upon good cause shown therefor, said court may make an order forbidding the payment of any of the debts and the delivery of any property belonging to such debtor to him or for his use, or the transfer of any property by him." The court acquires no jurisdiction to take any step or make any order, until after there shall have been filed with it "such" a petition as is prescribed by section 8. One of the essential requisites of this petition is that it be made by five or more creditors "who are residents of this state." Although, for the purpose of making such petition, a partnership is a creditor, within the meaning of this section, such "creditor" is not a resident of this state, unless all the members of the partnership are residents of this state. Neither of the individual members of the partnership is a "creditor" of the insolvent, within the meaning of this statute, but such "creditor" is the partnership made up of all of its members. No action can be maintained against a debtor upon a partnership obligation unless it be brought by all of the partners, and, as the debtor is not liable to an action by either member of the partnership, such member is not his "creditor" for the purpose of making a petition that he be adjudicated an insolvent. The insolvency laws of a state are enacted for the benefit of its own citizens, and are limited in their operation to the citizens of that state. It is in recognition of this principle that the statute above quoted requires that the petitioning creditors shall be residents of this state. But, if it should be held that the petition can be made by partnerships of which some or any of the members are non-residents, this legislation would be for others than residents of this state. Such purpose of the legislature should be specifically declared, rather than that the court should so decide from any uncertain language found in the statute. The fact that the business of the partnership is carried on in this state does not make, or tend to make, the partnership itself a resident of this state, and whether one or any number less than all of its members are non-residents is immaterial, if once it be admitted that it is not essential that all of its members be residents here. It might be, and often is, the case, that the non-resident is the chief member of the partnership, while the resident members, although a majority in number, have but a slight interest in the business, and consequently might not represent a sufficient amount of the debt to bring their interest within the minimum requirement of $500. In the present case the court finds that one of the petitioning creditors was the California Jewelry Company, a partnership consisting of four members, and doing business in this state; and that H. Levison, one of its members, was not a resident of this state at the time the petition was signed, but at "all said times was and is a resident at Hamburg, Germany." The California Jewelry Company was not, therefore, a creditor authorized to sign a petition for the adjudication of the debtor as an insolvent, and, inasmuch as the petition was not signed by five creditors, "residents of this state," it was insufficient to confer any jurisdiction upon the court to adjudicate him an insolvent.

89 Cal. 98

CURRAN *v.* KENNEDY *et al.* (No. 13,759.)

(*Supreme Court of California.* May 16, 1891.)

ADMINISTRATORS—FAILURE TO ACCOUNT — SUFFICIENCY OF FINDINGS—TIME FOR APPEAL.

1. By the express provisions of Code Civil Proc. Cal. § 939, an exception to a decision, on the ground that it is not supported by the evidence, cannot be reviewed, where the appeal is not taken within 60 days after the rendition of judgment.

2. In an action against the executors of intestate's administrator for his failure to account for a sum received from a certain insurance company on a policy on intestate's life, conceding that it is a material issue whether the company was ever incorporated or had an existence, a finding that intestate had insured with said company, "a corporation formed by special act of congress of said United States," is sufficient.

3. On the issue of the administrator's failure to account for the sum received on the policy, a finding that he, in his capacity as administrator of intestate's estate, and for the use of the estate, received $2,672.25, the proceeds of said policy, and failed to account with the estate for $2,642.25, a portion of said proceeds, is sufficient.

4. A finding that on a certain day letters of administration of intestate's estate were issued by a certain court to "plaintiff herein, that said letters have not since been revoked," is sufficient on the issue that an order of said court was duly given, made, and entered appointing plaintiff administrator of said estate.

In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Chas. F. Hanlon, for appellants. *James Gartlan*, for respondent.

SHARPSTEIN, J. The plaintiff, as administrator of the estate of Thomas Cushing, deceased, sues the defendants as executors of the last will and testament of Phillip Kennedy, deceased, and alleges, in substance, that said Phillip Kennedy, in his life-time, was the duly-appointed administrator of the estate of said Thomas Cushing, deceased, and that said Phillip Kennedy, as such administrator, received $2,670.93 from the National Life Insurance Company of the United States of America, on a policy of insurance upon the life of Thomas Cushing, for which he, said Phillip Kennedy, never accounted to the estate of said Thomas Cushing, and that said Phillip Kennedy died before the completion of his duties as administrator of the said estate of said Thomas Cushing. For a separate and second cause of action plaintiff alleges that said Phillip Kennedy, as administrator of the estate of said Thomas Cushing, received other personal property of the appraised value of $130, for which he never accounted. The complaint was demurred to on various grounds, and the demurrer overruled, and properly overruled, we think. A motion to strike out the amended complaint, and the amendments thereto, was properly denied. Conceding that the objections to questions put to the witness Garness should have been sustained, and that the court erred in overruling them, the error was a harmless one. The witness did not contradict or vary anything contained in the copy of the policy attached to the complaint which the defendants admitted to be a true copy. Whether the court erred in denying the defendants' motion for a nonsuit depends upon the evidence then before the court, and we think there was sufficient to justify the order denying said motion. The appeal was not taken within 60 days after the rendition of the judgment, and the exception to the decision on the ground that it is not supported cannot be reviewed. Code Civil Proc. § 939.

Appellants assign as error the failure of the court to find upon material issues, which are specified as follows: "The court fails to find on the issue on the first cause of action alleged, as to whether or not the alleged insurance company was ever incorporated, or had an existence." Conceding that this was a material issue, which we do not, the court found "that Thomas Cushing, plaintiff's intestate, had insured his life for $3,000 with the National Life Insurance Company of the United States of America, a corporation formed by special act of congress of said United States," which we deem a sufficient finding upon that issue; and we think it a sufficient finding that the said Thomas Cushing entered into a written contract of insurance, as alleged in the complaint and denied in the answer. A copy of the alleged contract was attached to the complaint, which was admitted by the answer to be a true copy of said contract. Upon the issue raised by the allegation and denial, that Phillip Kennedy did not account for the sum received by him upon said insurance policy, the court found that Phillip Kennedy, in his capacity of administrator of the estate of said Cushing, and for the use of said estate, received $2,672.25, the proceeds of said policy, and failed to account with the estate of said Cushing for

$2,642.25, a portion of said proceeds. We think this a sufficient finding on that issue. The finding "that on the 9th day of July, 1887, letters of administration of the estate of said Cushing, deceased, were issued by the superior court of Marin county, state of California, to plaintiff herein; that said letters have not since been revoked,"—is a sufficient finding upon the issue raised by the allegation and denial that an order of said court was duly given, made, and entered appointing said plaintiff administrator of said estate of said Thomas Cushing, deceased. Judgment affirmed.

We concur: De Haven, J.; McFarland, J.; Paterson, J.; Garoutte, J.; Harrison, J.

89 Cal. 82

People v. Merkle. (No. 20,770.)

(*Supreme Court of California.* May 16, 1891.)

Homicide—New Trial—Newly-Discovered Evidence — Communications of Husband and Wife.

The affidavit of defendant's husband that he, and not defendant, killed deceased: that before the trial he told her of it, but refused to allow her to use the communication; and the affidavit of defendant that this fact was communicated to her by her husband, but that he did not give her permission to use it,—are not *per se* grounds for a new trial.

Department 2. Appeal from superior court, Napa county; R. Crouch, Judge.

Henry Hogan and *Wm. Gwynn*, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

De Haven, J. The defendant, Margaret Merkle, was charged by information with the murder of one Joseph Von Wyl. Upon her trial the jury returned a verdict finding her guilty of manslaughter, and she was thereupon sentenced to imprisonment in the state-prison for the term of five years. From this judgment, and an order denying her motion for a new trial, she appeals. The ground upon which appellant chiefly relies for a reversal of this judgment and order is her contention that the court erred in not granting her motion for a new trial on account of newly-discovered evidence, which she was not able to produce upon the trial. The nature of this evidence fully appears in the affidavits of herself and husband, filed in support of her motion in the court below. The affidavit of the husband is in substance that he, and not the appellant, committed the homicide; that he told her of the fact that he had done this before the trial, but that he refused to allow her to use the communication in any way in her defense; and that the fact was not during the trial made known to the attorneys for appellant. This affidavit sets out in minute detail the circumstances under which the affiant claims that he inflicted upon Von Wyl the wound which resulted in his death. The affidavit of appellant is to the effect that before her trial her husband told her that he himself had cut Von Wyl, and then proceeds: "I did not see him cut Von Wyl, and all I know about Von Wyl being cut is from what my husband then said to me, and he has never given me permission to state, in court or otherwise, what he confided to me. I asked him if he did not think it would be best for me to state what he had told me about his cutting Von Wyl, and he replied: 'No, do not state that which I told you; you are innocent of any crime, and they will not convict you.' I know that the law cannot compel a wife to testify against her husband, except with his consent, except in cases of criminal violence upon one by the other. I knew that I was innocent, and I did not believe that I would be convicted, and never told any person what my husband had told me relative to his cutting Von Wyl, and I thought it was my duty not to say anything about it." The husband was a witness upon the trial, and testified with particularity as to what he then claimed took place between himself, Von Wyl, the appellant, and others, immediately preceding the death of Von Wyl. We do not consider the fact that appellant could not have produced upon her trial the evidence set out in the affidavit of her husband without his consent, and that such consent was refused, as one which would conclusively entitle her to a new trial. But, undoubtedly, it was the duty of the court below, in passing upon appellant's motion, to give most careful consideration to these affidavits, and if, when weighed in connection with the evidence given upon the trial, there would be in the mind of the judge a reasonable doubt as to the justice of the verdict, a new trial should have been granted. The supreme court of Mississippi, in Cavanah v. State, 56 Miss. 310, in which case a new trial was asked, upon the ground that a person incompetent to testify upon the trial had since been rendered competent, and that his testimony could be had for the defendant on another trial and might secure the acquittal of the defendant, use this language, which we consider equally applicable here: "We do not consider this as *per se* a ground for a new trial. It is to be considered. It is an important element, and may be entitled to much weight, as one circumstance in determining a motion for a new trial, but it has no higher character than this. In some cases it would be more persuasive than in others. In no case is it alone sufficient to entitle a party to a new trial. Each case must be determined by its circumstances, and the new trial granted or refused, according to the view taken of the whole evidence, in connection with the evidence of the acquitted party, now made competent as a witness for the other." Granting or refusing a new trial must necessarily rest largely in the discretion of the court in which the trial has been had, and we cannot say from the record before us that the court below failed to exercise a fair and reasonable judgment in denying appellant's motion for a new trial. The court was not bound to accept as true the confession of the husband that he alone committed the homicide, and which exonerated the appellant from the charge against her, so far as his affidavit could do so, but it was the duty of the judge to consider the probability of its truth when placed beside all the other evidence in the case. In thus viewing it, the court must necessarily have passed upon the credibility of Hancock, the main witness for the prosecution, who testified clearly to the fact that appellant had a knife, and with it struck at the deceased, in the rencounter immediately preceding his death, and whose testimony, if true, makes it hard to believe that any other than she could have inflicted the wound which caused the death of Von Wyl. In addition to this positive testimony of the witness Hancock, it was proper for the court to consider that no one of the witnesses to the occurrences immediately preceding the death of Von Wyl saw the husband engaged in the conflict at the time when he now says that he cut Von Wyl, and that no one of those present during the altercation and fight, immediately preceding his death, appears to have suspected that the husband did the cutting. It is sufficient, however, to say that the whole question presented by appellant's motion for a new trial necessarily involved a consideration of the credibility of the witnesses who testified upon the trial, and we cannot say that the court erred in its judgment as to the witnesses to whom credit should be given. Judgment and order affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.

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89 Cal. 86

COHN v. WRIGHT *et al.* (No. 14,068.)

(*Supreme Court of California.* May 16, 1891.)

MECHANICS' LIENS—FINDINGS AS TO TIME—ABANDONMENT OF CONSTRUCTION—FURNISHING MATERIAL—PLEADING—NOTICE OF LIEN—TERMS OF CONTRACT.

1. In an action to enforce a mechanic's lien, the right to which depends on the filing of a notice within a certain number of days after the completion of the building, a finding that the building was completed "on or about" a certain day is insufficient.

2. A finding that parties, after commencing the construction of a building, abandoned the construction, is insufficient, where it appears that such abandonment was only on their conveyance of the property, and there is no finding that their grantee abandoned the construction.

3. Conceding that a notice of lien attached to a complaint and marked as an exhibit may, by reference, be made part of a complaint, and treated as a sufficient averment of the terms and conditions of the contract, by an allegation that the materials were furnished on the terms and conditions therein set forth, there must still be a direct allegation in the complaint that the materials were furnished to be used in the construction of the building on which the lien is claimed.

4. The allegation of the notice of lien that it was "agreed that the price of all materials furnished * * * should be due on the delivery of the same" is a sufficient statement of the terms of the contract.

In bank. Appeal from superior court, Tulare county; W. W. CROSS, Judge.

O. L. Abbott, for appellants. *N. O. Bradley* and *G. E. Lawrence*, for respondent.

PATERSON, J. This is an action to foreclose a material-man's lien. It is alleged in the complaint that the barn and *corral* mentioned in the notice of lien were completed on the 25th day of November, 1889, and that the store-room had not been completed because the defendants had abandoned the work, and did not intend to complete it. The defendants denied that the barn, or *corral*, was completed at any time subsequent to November 22, 1889, and alleged that the store-room was completed before said date. The court failed to find on the issues thus raised. The only finding on these issues is as follows: "That said shed and store-room were completed on or about the 22d day of November, 1889, and on or about the 27th day of November, 1889, said defendants D. L. and N. B. Wright commenced the construction of said store-room building; * * * that on the 6th day of December, 1889, said defendants D. L. and N. B. Wright sold and transferred to said defendant E. E. Giddings all of said real property above described, and thereupon said defendants D. L. and N. B. Wright abandoned their intention to complete said store-room." Inasmuch as the notice of lien was not filed until December 23, 1889,—31 days after the time when defendants claim the buildings were completed,—the exact date of the completion of the buildings is a material fact to be determined by the court below. "On or about the 22d day of November, 1889," is too indefinite and uncertain. "On or about" is a relative term. It is sufficiently definite in certain connections, but in cases of this kind, where the right of a person depends upon his doing a particular thing within a definite number of days after a certain event, it is necessary for him to allege and prove that the acts were performed within the time required by law. An allegation that the plaintiff had filed his notice of lien "on or about" a certain day would not be good, and a finding in those words is equally insufficient.

The court found that D. L. and N. B. Wright had abandoned the construction of the store-room. This would have been sufficient if they had continued to own the property, but it appears that they conveyed to Giddings, and it does not appear whether the latter had or had not completed or abandoned the construction of the building.

There is no allegation in the complaint that the materials were furnished for or to be used upon the property sought to be charged with the lien. It is not enough to allege that the materials were furnished by plaintiff, and actually used by defendants in the construction of the building. Bottomly v. Grace Church, 2 Cal. 90; Houghton v. Blake, 5 Cal. 240; Holmes v. Richet, 56 Cal. 310. There is an allegation in the complaint that "the materials were furnished upon the terms and conditions set forth in plaintiff's notice of lien hereto attached, marked 'Exhibit A,' which is hereby referred to and made a part hereof;" but, conceding that an exhibit of this kind may be thus made a part of the complaint, and treated as a sufficient averment of the terms and conditions of the contract, there should be a direct allegation in the complaint that the materials were furnished to be used in the construction of the building or structure upon which the lien is claimed.

The demurrer of Giddings pointed out the particular defect and uncertainty referred to, and should have been sustained. The complaint refers to the exhibit, and makes it a part of the pleading, simply for the purpose of showing the terms and conditions of the sale to defendants, viz., the price of the materials, and when payable.

We think that the notice of lien is sufficient in form and substance, and, if filed in time, would support a judgment in favor of the plaintiff. Tredinnick v. Mining Co., 72 Cal. 80, 13 Pac. Rep. 152. It states it was "agreed that the price of all materials furnished by said firm of Cohn & Co. should be due on the delivery of the same." In Hooper v. Flood, 54 Cal. 221, the notice of lien under consideration stated simply that the terms and conditions of the contract "are and were cash." The judgment is reversed, and the cause is remanded for a new trial, with directions to sustain the demurrer to the complaint, and to allow the plaintiff a reasonable time in which to amend, and the defendant a reasonable time in which to answer.

We concur: SHARPSTEIN, J.; DE HAVEN, J.; HARRISON, J.; GAROUTTE, J.; MCFARLAND, J.

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89 Cal. 122

SMITH v. HILL *et al.* (No. 13,853.)

(*Supreme Court of California.* May 18, 1891.)

TOWN-SITE LANDS—EXISTING MINES—CONVEYANCE TO COUNTY JUDGE—CHANGE IN COURTS.

1. Under Rev. St. U. S. § 2392, providing that "no title shall be acquired" under the provisions relating to town-sites, and the sale of lands therein, "to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws," the grantee of such lands cannot be deprived thereof because of the discovery of minerals in them subsequent to the grant, but there must be at the time of the grant a paying mine known to exist, or one which there is good reason to believe exists.

2. Under Const. Cal. art. 6, §§ 5, 6, (St. 1880, pp. 2, 23,) making the superior courts the successors to the county courts, and clothing the judges of the superior courts with the powers formerly exercised by the county judges, where land was patented to the county judge under the town-site act, to be held in trust for the use and benefit of the inhabitants of a town, the superior court judge who succeeds him is the proper person to convey the land, as the trust is an official one.

In bank. Appeal from superior court, Placer county; J. M. WALLING, Judge.

Wallace & Prewett and *D. W. Spear*, for appellants. *John M. Fulweiler*, for respondent.

PATERSON, J. This is an action to quiet title. The answer denies that the plaintiff is the owner or ever was entitled to the possession of any lands in block 1, except as a miner under the mining laws of the United States, and avers that any right he ever had was lost by reason of his failure to comply with the provisions of section 2324 of the Revised Statutes of the United States; alleges that defendant Belle Hill is the owner and entitled to the possession of the property. In further defense, the defendants alleged that the lands in controversy are part of section 10, township 12 N., range 8 E., Mt. Diablo base and meridian, and are, and for 20 years last past have been, mineral lands; that in 1871 the lands were, and ever since have been, generally and well known to contain, and did in fact contain, a valuable mine of gold-bearing quartz, and since said year have been worked as such under valid mining locations, and large quantities of gold have been from time to time extracted therefrom; that on June 1, 1887, and while the lands were open to location as public mineral lands, the defendant Belle Hill duly located the mine and ground as a quartz mining claim by posting a notice in due form, and filing a copy thereof in the office of the county recorder, as required by the mining customs of the district; that she took possession under her said location, and has ever since, and for more than five years last past, held the same, and has complied with the provisions of said section 2324. The court found that on April 15, 1879, a patent was issued to J. I. Fitch, county judge of Placer county, for the lands in controversy, among others, to be held by him in trust for the use and benefit of the inhabitants of the town of Auburn; that thereafter the lands were surveyed and platted in blocks and lots, and the lands were described therein as lot 2, block 1, in N. W. ¼ of said section 10, and were designated as surveyed to and claimed by M. Dodsworth, (plaintiff's grantor;) that at the time of the issuance of the patent to said county judge there was no mine of gold, silver, cinnabar, or copper therein, or any valid mining claim or possession; that on June 8, 1881, B. F. Myres, judge of the superior court of the county of Placer, a successor of said Fitch, conveyed the land to said Dodsworth, and at that time there was no such mine or mining claim thereon; that on April 18, 1888, said Dodsworth conveyed to plaintiff; that on January 1, 1887, defendant Belle Hill posted a notice of location on the lands as mining lands, and on September 29, 1888, posted an amended notice claiming the lands as mining lands, copies of which were recorded; that plaintiff and his grantors held the possession of the lands, claiming the same under the town-site patent and the deed from Judge Myres, from April 15, 1879, until the 1st day of January, 1887; that defendants have no claim to the lands other than through the location and improvement of the land under the mining locations referred to. The court rendered judgment for the plaintiff. The defendants' motion for a new trial was denied, and they have appealed.

Appellants contend that the lands contained a mine of gold at the time they were patented to Judge Fitch, and therefore no title passed to Dodsworth. In support of this contention, they cite section 2392 of the Revised Statutes of the United States. That section reads as follows: "No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws." The evidence shows that from 1872 to 1874 some mining was done on the land, but there is nothing to show that on April 15, 1879, when the patent was issued, the land was regarded as valuable for mining purposes. Long prior to that time mining on the land had ceased because it would not pay. The mine appeared to be worked out. As the land was not known to be mineral land at the time of the issuance of the patent, and as there was no good reason to believe at that time that the land contained any mine of gold, silver, cinnabar, or copper which would pay to work, it is unnecessary to consider whether the evidence shows the subsequent discovery of a valuable mine on the lands. The term, "mine of gold, silver, cinnabar, or copper," as used in the exception found in the act, and in the reservation of the patent, means a paying mine known to exist at the time of the grant to the county judge, or one which there was good reason to believe then existed. A similar question was presented in Francoeur v. Newhouse, 40 Fed. Rep. 618, 43 Fed. Rep. 236. In that case Judge SAWYER held that where a grant to a railroad excepts mineral lands, the term "mineral lands" means land known to be mineral land when the grant took effect, or which there was then good reason to believe was mineral land. And in a town-site case recently decided by the supreme court of the United States, it was held that the grantee of the county judge could not be deprived of the lands because of the discovery of minerals in them subsequent to the grant. Justice FIELD, delivering the opinion of the court, said: "It is true the language of the Revised Statutes touching the acquisition of title to mineral lands within the limits of town-sites is very broad. The declaration that 'no title shall be acquired,' under the provisions relating to such town-sites and the sale of lands therein, 'to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws,' would seem on first impression to constitute a reservation of such mines in the land sold, and of mining claims on them, to the United States; but such is not the necessary meaning of the terms used. In strictness they import only that the provisions by which the title to the land in such town-sites is transferred shall not be the means of passing a title also to mines of gold, silver, cinnabar, or copper in the land, or to valid mining claims or possessions thereon. They are to be read in connection with the clause protecting existing rights to mineral veins, and with the qualification uniformly accompanying exceptions in acts of congress of mineral lands from grant or sale. Thus read, they must be held, we think, merely to prohibit the passage of title under the provisions of the town-site laws to mines of gold, silver, cinnabar, or copper, which are known to exist, on the issue of the town-site patent, and to mining claims and mining possessions, in respect to which such proceedings have been taken, under the law or the custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The exceptions of mineral lands from pre-emption and settlement, and from grants to states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness, and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining states which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral,' in the sense of this statute, is applicable. * * * In connection with these views it is to be borne in mind also that the object of the town-site act was to afford relief to the inhabitants of cities and towns upon the public lands, by giving title to the lands occupied by them, and thus induce them to erect suitable buildings for residence and business. Under such protection, many towns have grown up on lands which, previously to the patent, were part of the public domain of the United States, with buildings of great value for residence, trade, and manufactures. It would in many instances be a great impediment to the progress of such towns if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits upon their surface. If their title would not protect them against a discovery of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals, and, being thus subject to indiscriminate invasion, the land would be to one having the title poor and valueless, just in proportion to the supposed richness and abundance of its products. We do not think that any such results were contemplated by the act of congress, or that any construction should be given to the provision in question which could lead to such results. Our conclusion, as already substantially stated, is that congress only intended to preserve existing rights to known mines of gold, silver, cinnabar, or copper, and to known mining claims and possessions, against any assertion of title to them by virtue of the conveyances received under the town-site act, and not to leave the titles of purchasers on the town-sites to be disturbed by future discoveries." Davis v. Wiebold, 11 Sup. Ct. Rep. 628, (filed April 6, 1891.)

It is claimed by appellants that Judge Myres had no authority to convey the land to plaintiff, because the constitution of 1879 abolished the county court and the office of county judge; that the superior judge could not lawfully convey the property to plaintiff without express legislation authorizing him to do so. We do not think this contention is sound. Under the constitution and laws of this state, the superior courts are the successors of the county courts which existed prior to 1879. Sections 5, 6, art. 6, Const.; St. 1880, pp. 2, 23. The judges of the superior courts are clothed with all the powers formerly exercised by the county judges, and as the trust created by the patent to Fitch was an official trust, and in no sense a personal one, Judge Myres became the successor of the county judge, and as such was authorized to convey the lot. Supervisors v. Railroad Co., 24 Wis. 126; Whittlesey v. Hoppenyan, (Wis.) 39 N. W. Rep. 355.

There is no evidence of any valid mining claim or possession at the time of the grant to Dodsworth, and, as it was not known to be mineral land, it was not "public mineral land" when the defendant Belle Hill located thereon. Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. Rep. 95. The court did not err in excluding Exhibits A and B. They were clearly incompetent and immaterial evidence. Although the appellants' specifications of insufficiency of the evidence to support the findings are not set forth with particularity or in proper form, we have disregarded the objection made by respondent, and considered all of the points made by appellants. The judgment and order are affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; SHARPSTEIN, J.; HARRISON, J.; GAROUTTE, J.; MCFARLAND, J.

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89 Cal. 110

MAYRHOFER v. BOARD OF EDUCATION *et al.*

(No. 13,675.)

(*Supreme Court of California.* May 18, 1891.)

MECHANICS' LIENS—SCHOOL BUILDINGS.

Const. Cal. art. 20, § 15, gives material-men a lien upon the "property" to which they have furnished material, and Code Civil Proc. § 1183, grants them a lien upon "any building" to which they have furnished material; but Const. art. 11, § 18, prohibits school-districts from incurring indebtedness exceeding the annual revenue provided therefor, unless provision shall be previously made for the payment thereof by taxation. *Held*, that a public school-house is not subject to the mechanic's lien laws.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

John M. Lucas, for appellant. *J. P. Goodwin, Wellborn, Parker & Stevens*, and *Watson & Hicks*, for respondents.

TEMPLE, C. This action was brought to foreclose a lien for materials furnished to a subcontractor for the building of a public school-house. Final judgment was entered upon demurrer to the complaint, and plaintiff appeals from the judgment. Whether the laws of this state give to mechanics and material-men the right to have a lien upon such buildings is the only question necessary to consider upon this appeal. Section 15, art. 20, of the constitution, provides: "Mechanics, material-men, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such liens." Section 1183, Code Civil Proc., enacts that mechanics and material-men shall have a lien for labor or material used in the construction of any building or other structure. The following sections prescribe the procedure and the effects of certain acts. The claim is made that public buildings are included both in the word "property" used in the constitution, and in the phrase "any building" used in the Code, and therefore it must necessarily follow that mechanics and material-men are by these provisions given a right to a lien upon such buildings. But this ignores the rule of statutory construction, that the state is not bound by general words in a statute which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform is functions, or establish a right of action against it. Says Mr. Justice STORY in U. S. v. Hoar, 2 Mason, 314: "In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary, force to the government itself. It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the government or affect its rights, unless that construction be clear and indisputable upon the text of the act." To the same effect are the following cases: Swearingen v. U. S., 11 Gill. & J. 373; Com. v. Baldwin, 1 Watt, 54; Bank v. U. S. 19 Wall. 239; U. S. v. Davis, 3 McLean, 484; U. S. v. Williams, 5 McLean, 133; Com. v. Johnson, 6 Pa. St. 136; Josselyn v. Stone, 28 Miss. 753; People v. Herkimer, 4 Cow. 345; and a great many others. It is misleading to say that this construction is adopted on the ground of public policy. The import of the language is not limited, because it would be against public policy to give to the words their natural effect, but because, in view of familiar rules of construction, a different intent is manifested in the language used. The government was created and shaped by the constitution. It is not an end in itself, but a mere instrumentality for public service. Its powers and functions exist only for the people. One of its functions is to enact laws for the government of the inhabitants within its limits, thereby affording them protection and advancing their general welfare. The property it holds is simply to enable it to perform the service required of it. It is as much devoted to public use as are the streets and highways, though in a different way, and it is generally held by a different tenure. Instead of being the natural and obvious conclusion that a general law providing remedies for private individuals was intended to enable a creditor of the state to seize this property for the satisfaction of his debt, it would be a most unnatural inference. The constitution has itself provided, as the only means which the state has for the payment of its debts, the exercise of the sovereign power of taxation. And for each political subdivision the rule is the same. These revenues are divided into specific funds, and one furnishing labor or materials to the state knows to what he must look for payment. He becomes a creditor of a specific fund, and has no rights except with reference to such fund. The law conferring the right to a mechanic's lien implies a right of action to enforce it. One cannot sue the state, unless expressly authorized by statute, and this principle is embodied in our constitution. General statutes creating new remedies for individuals have never been held to authorize such suits. The former constitution of the state provided: "All property in the state shall be taxed in proportion to its value." There was no express limitation upon the meaning of the words used, and unquestionably in their natural import they included public property. It was held that such construction would be inconsistent with the purposes of taxation, (People v. Doe, 36 Cal. 220,) and it is strange that such a case ever arose. The inconsistency there was perhaps a little more obvious than here, but the principle is the same, and the claim here is really as inconsistent as there with the theory, plan, and policy of the government with reference to its revenues and its tenure of the property it holds for public service.

The public policy appealed to is laid down in the constitution itself. It is a constitutional policy. The section under consideration on its face purports to be a Code provision providing a remedy by individuals against individuals. The constitutional policy referred to but emphasizes the rule of construction which would have been sufficient of itself. And the position is firmly fixed beyond cavil by section 18, art. 11, which prohibits school-districts from incurring indebtedness exceeding the annual revenue provided for it, unless before the indebtedness is incurred provision shall be made for the payment of the debt by taxation. Could there be a plainer declaration that all indebtedness shall be paid from the revenue provided by law? Supposing, therefore, as we must, that the section in the constitution was framed in view of the well-known rule of construction, and in the same instrument in which are the other provisions alluded to, and that it omits to mention public buildings, it is manifest from the language itself that they are not included. It would follow that the judgment should be affirmed.

We concur: FITZGERALD, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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89 Cal. 135

ELTZROTH v. RYAN *et al.* (No. 13,723.)

(*Supreme Court of California.* May 19, 1891.)

PUBLIC LAND—PATENTS—QUIETING TITLE—EVIDENCE—RECORDS—EXCEPTIONS—PRACTICE.

1. Receipt by the patentee of a patent for land issued to him by the United States is not necessary to pass title.

2. Code Civil Proc. Cal. § 1919, provides that a public record of a private writing may be proved by a certified copy, and section 1951 provides that the certified copy of the record of a conveyance may be read in evidence with like effect as the original, on proof by affidavit or otherwise that the original is not in possession or under control of the party producing the copy. *Held*, that it is not necessary to prove the loss of an original patent before introducing a certified copy thereof in evidence.

3. If it were necessary for a patentee to prove the loss of the original patent before introducing a certified copy in evidence, his testimony that he never received the original, and did not know what had become of it, would be sufficient.

4. In an action to quiet title to land, where plaintiff proves his title, it is not incumbent on him to show that he has not parted with it, or that he is entitled to possession.

5. It is no defense to an action to quiet title to land that a patent under which plaintiff derived title was not recorded until after the action was commenced.

6. In such action, where defendant relies for his title on a constable's sale under execution on a judgment of a justice of the peace, he must show affirmatively that the justice had jurisdiction to render the judgment.

7. The supreme court cannot consider an exception on the ground of the insufficiency of the evidence, unless the particulars wherein it is insufficient are specified, as required by Code Civil Proc. Cal. § 648.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Code Civil Proc. Cal. § 1919, provides that "a public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record." Section 1951 provides that "every instrument conveying or affecting real property, acknowledged or proved, and certified as provided in the Civil Code, may, with the certificate of acknowledgment or proof, be read in evidence, in an action or proceeding, without further proof; and a certified copy of the record of such conveyance or instrument thus acknowledged or proved may also be read in evidence with like effect as the original, on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy." Section 648 provides that "when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient."

Welles Whitmore, (*David Stoddart*, of counsel,) for appellants. *Chas. G. Lamberson*, for respondent.

BELCHER, C. This is an action to quiet title to a quarter section of land in Tulare county. The complaint was filed March 13, 1888, and is in the usual form in such cases. Defendant Ryan did not appear. Defendant Wythe appeared, and by his answer denied all the averments of the complaint, and alleged that each of the defendants had a legal title and interest in the land and premises in question. At the trial the plaintiff was a witness, and testified that he purchased the quarter section in controversy from the United States, but that he never received the patent for it, and did not know what became of the original patent. He further testified, on cross-examination, that he lived in Tulare county during the year 1874, and then left, and did not return to the county until March, 1888. He then introduced in evidence the copy of a United States patent, dated April 15, 1875, conveying to him the said quarter section. Attached to the copy was a certificate of the acting commissioner of the general land-office at Washington, under seal, certifying "that the annexed copy of patent in favor of David Eltzroth, founded on Visalia, Cal., cash entry No. 2,212, is a true and literal exemplification from the record in this office." The copy was recorded in the recorder's office of Tulare county on June 27, 1888. The defendant objected to the copy of the patent being received in evidence, on the ground that the loss of the original had not been accounted for; that it appeared from the testimony that the plaintiff never received a patent for the land; and that it appeared upon its face to have been recorded in the county after the action was commenced. The court overruled the objection, and the defendant reserved an exception The plaintiff then rested his case, and the defendant moved for a nonsuit, on the ground that the plaintiff had failed to make out a case, in this: That his title, if any, appeared to have been acquired subsequent to the commencement of the action; that it appeared from the evidence that he had never received a patent for the land; and that it did not appear that he was ever entitled to the possession thereof. The motion was denied, and an exception taken. To make out his case the defendant attempted to show that he had acquired title to the quarter section by and through a constable's sale thereof to his grantors, under an execution issued on a judgment rendered against the plaintiff by a justice of the peace on the 21st day of October, 1875. To this end he offered in evidence the constable's certificate of sale and deed, in proper form, and conveyances from the grantees named therein to himself. He then proved that the plaintiff named in the judgment commenced an action against the plaintiff herein in the justice's court in 1875, and obtained a judgment therein for $76 and costs, and that the record of the action was destroyed by fire, in the year 1886. The justice of the peace, in whose court the action was commenced, testifies: "I remember that there was a judgment rendered in that action in favor of the plaintiff and against the defendant. I know that there was an execution issued on that judgment against the property of the defendant, but I cannot describe the land sold." The plaintiff objected to the certificate of sale and deeds being received in evidence, upon the ground that they were irrelevant, immaterial, and incompetent, for the reason that no foundation had been laid for their introduction. The court sustained the objection, and the defendant duly excepted to the ruling. The case was thereupon submitted for decision, and the court made its findings, and gave judgment for the plaintiff. In due time the defendant moved for a new trial upon a bill of exceptions. The motion was denied, and he then appealed from the judgment and order.

The rulings complained of were clearly right. It was not necessary that the plaintiff should have received and accepted the patent in order to vest in him title to the land granted. It is settled law that title by patent from the United States is title by record, and the delivery of the instrument to the patentee is not, as in a conveyance by a private person, essential to pass the title. U. S. v. Schurz, 102 U. S. 378; Donner v. Palmer, 31 Cal. 514; Chipley v. Farris, 45 Cal. 539; Miller v. Ellis, 51 Cal. 73; Cruz v. Martinez, 53 Cal. 239. It was not necessary that the plaintiff prove the loss of the original patent before he could introduce the copy in evidence. Sections 1919, 1951, Code Civil Proc. But, if such proof had been necessary, we think the plaintiff's testimony that he never received the patent, and did not know what had become of it, quite sufficient. And it was not necessary that the plaintiff prove that he had not parted with his title, or that he was entitled to the possession of the land. A *status* once established is presumed by the law to remain until the contrary appears. Kidder v. Stevens, 60 Cal. 414. The objection that the copy was not recorded until after the action was commenced was frivolous. It was entirely immaterial, for the purposes of the case, whether the copy had been recorded or not.

As to the defense. A justice's court is an inferior court, and its jurisdiction must be shown affirmatively by a party relying upon, or claiming any right under, its judgments. Jolley v. Foltz, 34 Cal. 321; Kane v. Desmond, 63 Cal. 464. Here there was no proof that the defendant in the justice's court case relied upon was ever served with summons, or voluntarily appeared therein. It must be presumed, therefore, that the justice had no jurisdiction to render the judgment which he testified was rendered in his court, and that the same was void. This being so, the purchasers at the constable's sale acquired no interest in the property bid in by them. The appellant contends that the findings of the court were not justified by the evidence, and that the judgment should therefore be reversed. But the bill of exceptions brought up in the record contains no specifications of particulars in which the evidence is alleged to be insufficient to justify the findings, and this point cannot therefore be considered. Section 648, Code Civil Proc. It follows that the judgment and order appealed from should be affirmed, and we so advise.

We concur: Vanclief, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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89 Cal. 141

People *ex rel.* Pixley *et al.* v. Pond *et al.* (No. 14,194.)

(*Supreme Court of California.* May 19, 1891.)

Mandamus to Board of Election Commissioners.

Under the repeated decisions of the supreme court of California, a writ of mandate will not issue to compel the registrar and board of election commissioners of the city and county of San Francisco to count the votes cast in certain precincts for candidates for the offices of supervisor and police commissioner, to declare the result, and to issue certificates of election accordingly.

In bank. Application for *mandamus*.

N. S. Wirt, for petitioners. *Davis Louderback*, for respondents.

PATERSON, J. This is an application for a writ of mandate to compel the respondents, the registrar and board of election commissioners, to count the votes in certain precincts of the city and county of San Francisco alleged to have been cast for candidates to fill the office of supervisor for the first board of supervisors, and also those cast for candidates for the office of police commissioner. The first 12 petitioners named herein were candidates for the office of supervisor, and the last 3 named were candidates for the office of police commissioner. It is alleged that every one of the petitioners received about 1,500 votes, and was elected to the office for which he was a candidate, there being no opposing candidate; and petitioners ask that the respondents be required, after counting the votes, to declare the result, and to issue certificates of election accordingly. The questions argued by counsel for petitioners are not new. They may not have been presented so forcibly or with as great perspicuity before, but they have been determined adversely to the contentions of the petitioners after careful consideration of the constitutional and statutory provisions germane to the subject, and we feel constrained to adhere to the construction heretofore adopted. The contention of petitioners who claim to have been elected as members of the first board of supervisors has been settled adversely to them by the decisions in Desmond v. Dunn, 55 Cal. 248, 249, and People v. Board, 3 Pac. Rep. 412; and the claim of the others, by the decisions in Staude v. Board, 61 Cal. 313; Heinlen v. Sullivan, 64 Cal. 378, 1 Pac. Rep. 158; and People v. Hammond, 66 Cal. 655, 6 Pac. Rep. 741. The effect which a decision overruling those cases would have upon municipal proceedings for over 10 years past is so apparent that it is unnecessary for us to point out the reason why we should adhere to the decisions referred to, at least so far as the board of supervisors is concerned, even though we should believe that they were based upon an erroneous construction of the provisions involved; and, although the rule applies with less force to the case of the police commissioners, no good reason has been shown why the decisions heretofore rendered should be departed from. If the principle is wrong, or the system works unsatisfactorily, the remedy remains with the people. Writ denied.

We concur: BEATTY, C. J.; HARRISON, J.; DE HAVEN, J.; GAROUTTE, J.; McFARLAND, J.

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89 Cal. 134

JUDGE *v.* OHM. (No. 14,418.)

(*Supreme Court of California.* May 19, 1891.)

APPEAL—FAILURE TO FILE TRANSCRIPT.

An appeal will be dismissed if the transcript is not filed within the time prescribed by rule of court.

In bank. Motion to dismiss appeal.

Jos. M. Kinley, for appellant. *W. C. Belcher*, for respondent.

PER CURIAM. It appears by the certificate of the county clerk of the city and county of San Francisco that appellant filed her notice of appeal upon the 5th day of January, 1891, and her undertaking on appeal upon the 10th day of the same month. That the bill of exceptions was settled upon the 2d day of January, 1891, and was filed the day following. A motion to dismiss the appeal was made April 15, 1891, upon the ground that no transcript had been filed within the time prescribed by the rules of this court. Although the time to file the transcript in the cause had long since gone by at the hearing of this motion, still no transcript was on file at that time, and no cause shown for such failure to file the same.

Let the appeal be dismissed.

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89 Cal. 156

WILLIS *v.* McMAHAN *et al.* (No. 13,170.)

(*Supreme Court of California.* May 20, 1891.)

INNKEEPERS—REFUSAL OF ENTERTAINMENT—EVIDENCE—INSTRUCTIONS.

1. In an action against an innkeeper for refusal to entertain plaintiff, an invalid, thereby preventing him from receiving the benefit of the water of a mineral spring appurtenant to the hotel, from which it is alleged that he had derived much benefit theretofore, it is not error to allow plaintiff to testify that deprivation of the water had injured his health.

2. Where there is no evidence that defendants refused to allow plaintiff the use of the water, it is not error to refuse defendants' request to instruct that they were not bound to furnish such water.

Commissioners' decision. Department 1. Appeal from superior court, Lake county; R. J. HUDSON, Judge.

Marshall Arnold, for appellants. *R. W. Crump*, for respondent.

TEMPLE, C. Appeal from judgment and order denying defendants' motion for a new trial. Action for damages for refusal to entertain plaintiff at defendants' hotel, thereby preventing him from receiving the benefit of Bartlett Springs water. It appears that defendants were proprietors of Bartlett Springs, in Lake county, and of a hotel at the springs, for the accommodation of guests, who resorted there in great numbers for the water, which was the principal inducement for guests to visit the hotel. The plaintiff was an invalid, and had on several occasions been entertained at the hotel and benefited by the water. On the 9th day of June, 1888, he again requested entertainment as a guest. There was room for his accommodation. He was a fit and proper person, and had ample means of payment. The manager, one of the proprietors, being present, refused him entertainment, saying: "I'll teach you how to get up a petition to have me removed." It is claimed here that the court erred in allowing plaintiff to testify that preventing him from using the water had a very injurious effect upon his health. Under the circumstances, however, this amounted to no more than the previous statement that the water had benefited him; that he was an invalid, and had visited the springs hoping to be benefited again. The jury could not have been misled, for it could have had no other meaning. The complaint avers, and the evidence shows, that the water was the principal inducement to visitors of the hotel, and was the sole inducement to plaintiff. Necessarily, to be deprived of it would be an injury in his estimation. Error is also claimed in the refusal to give defendants' fourth instruction, to the effect that defendants were not bound to furnish water of the spring. There was no evidence that they refused to allow plaintiff the use of it. His injury was in being refused entertainment at the hotel, and, in consequence, the use of the water. We think the judgment and order should be affirmed.

We concur: BELCHER, C.C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

89 Cal. 154

PACIFIC PAV. CO. v. BOLTON *et al.* (No. 14,162.)

(*Supreme Court of California.* May 20, 1891.)

APPEAL—UNDERTAKING—SUFFICIENCY.

Where defendants have filed an undertaking on appeal from the judgment against them and one for stay of execution, in neither of which is made any reference to an appeal from an order denying their motion for new trial, they cannot perfect the latter appeal by filing an undertaking in the supreme court, and claiming the benefit of Code Civil Proc. Cal. § 954, for that section refers to defective undertakings, while in this appeal from the denial of a new trial there is no undertaking at all.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

J. M. Wood, for appellants. *Otto Tum Suden*, for respondent.

GAROUTTE, J. This is a motion to dismiss an appeal from an order denying a new trial. It is based upon the ground that the appeal was not perfected within the time required by law, inasmuch as appellants filed no undertaking on appeal from the order denying the motion for a new trial. It appears that appellants filed an undertaking on appeal from the judgment in the sum of $300, coupled with an undertaking in the sum of $500, for the purpose of staying the execution, conditional upon the affirmance of the judgment. No reference whatever is found in the undertaking as to any appeal from the order denying defendants' motion for a new trial. At the time this motion was heard appellants had filed a sufficient undertaking in this court, approved by the chief justice, claiming the benefits to be derived from section 954 of the Code of Civil Procedure, and claiming that the original undertaking was simply insufficient. Their contention in this regard cannot be sustained, and their action in filing the undertaking in this court is of no avail. The filing of a new undertaking in this court in accordance with the foregoing section of the Code is limited to cases of defective undertakings, and in this case there is nothing whatever upon which to found a valid undertaking upon an appeal from the order denying the new trial. The undertaking filed in the lower court does not refer to any appeal from the order denying the motion for a new trial, and upon its face there is an entire absence of anything to indicate that such was its purpose and intent. The foregoing facts of this case are the same as are found in Schurtz v. Romer, 81 Cal. 244, 22 Pac. Rep. 657, and the court in dismissing that appeal said: "For these reasons the bond approved and filed in this court was ineffectual for any purpose, and the appeal must be dismissed;" and to the same effect is Berniaud v. Beecher, 74 Cal. 618, 16 Pac. Rep. 510. Appellants' counsel relies upon section 965 of the Code of Civil Procedure, which provides that executors who have given official bonds may rely upon such bonds in appeals from orders and judgments of the superior court in matters pertaining to the estate, etc. It is sufficient to say that there is nothing in the record to show that the defendant executors ever gave any official bond, and this is not an appeal from an order made in the "proceedings had upon the estate." While the notice of the motion to dismiss the appeal is technically defective, it is plainly apparent that the error is clerical, and it should not invalidate the notice. Let the appeal from the order be dismissed.

We concur: HARRISON, J.; PATERSON, J.

89 Cal. 158

PEOPLE v. WALLACE. (No. 20,683.)

(*Supreme Court of California.* May 20, 1891.)

HOMICIDE—EVIDENCE—WAIVER OF OBJECTION—INSTRUCTIONS.

1. On indictment of an employe in a low theater, resorted to by immoral women, for murder, the admission of evidence that defendant had solicited a woman inmate to live with him is prejudicial error.

2. The inmates of such resort having been called as witnesses, the jury are the sole judges of their credibility, and it is error for the court to instruct that, since the law licenses such resorts, it is submitted whether it is justifiable to charge the inmates with want of veracity, unaccompanied by other proof.

3. On indictment for murder, a witness cannot testify that when the shot was fired, killing deceased, a third person, shown to have shortly before conversed with defendant, exclaimed that he would bet defendant killed deceased; nor can he testify to the fact that a remark was made without giving its substance,—the evidence being mere hearsay.

4. The fact that defendant's attorney, after repeatedly objecting to the admission of such evidence, persistently sought to be brought out by the state notwithstanding the court ruled it incompetent, consents to the witness' saying what the remark was in reply to inquiry from the jury, is not a waiver of defendant's objection. The evidence being incompetent and prejudicial, the court should not have admitted it, even with consent of counsel, and, having done so, should have stricken it out. PATERSON, J., dissenting.

5. Error in the court's refusal to strike out such evidence is not cured by a subsequent instruction that defendant is not bound by anything said, not in his hearing or presence, by the person who made the remark, such instruction not being a plain and unequivocal direction to disregard the evidence.

6. The court cannot, on appeal, disregard evidence erroneously admitted, and look into the unobjectionable evidence to determine whether it is sufficient to sustain the verdict.

In bank. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

Robert Ferral and *Samuel Shortridge*, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

DE HAVEN, J. The defendant was convicted of the crime of murder in the first degree, for the killling of one Albert H. Rice, and adjudged to suffer the penalty of death. From this judgment, and an order refusing him a new trial, this appeal is taken. The homicide was committed at a place known as the "Elite Theater," in San Francisco. The deceased was the proprietor of this resort, and the defendant was employed there for the purpose of keeping order and suppressing disturbances. This so-called "theater" is spoken of by one of the witnesses as a "cellar," and was denominated by counsel for the appellant, during the trial, as a "dive, "and its character is sufficiently disclosed by the testimony, which shows that the theater is below the street, and that it is a part of the duty of the "actresses" there employed to serve drinks, attend the "boxes," and solicit patronage for the bar. Upon the trial Lulu Vernon, an "actress" in this "theater," was a witness for the people, and was permitted to testify that defendant knocked at her bedroom door on the day of the shooting, and that she did not admit him. The attorney for the people then asked her: "Since you have been working at the Elite Theater, has this man Wallace asked you to be his girl?" The question was objected to by appellant, whereupon the attorney for the people made this statement: "If your honor please, this defendant has had his counsel ask this woman if she has been leading a decent and virtuous life, and I want to show what endeavors this defendant has made to induce her to live with him." The objection of the defendant was overruled, and the witness answered: "Yes; he asked me to be his girl." She further said she told him "No," that she "didn't wish any fellow." The admission of this testimony was erroneous. It was not relevant to any issue involved in the case, and was clearly calculated to present the appellant before the jury as a low and degraded character. It may be that there are those who look with some indifference upon the moral delinquencies of men in their social relations with the other sex, if such conduct is not too flagrant and notorious. But, even if this should be assumed as the fact, it would not follow that this evidence was not prejudicial, as its object—its declared purpose and effect—was to show that appellant had proposed to "live" with this woman in a state of shameless immorality. One of the attorneys for the people concedes this in his brief. He says: "The whole testimony at full length amounts to one single verbal request by him that she should take up with him the relations which are common to people of their class and surroundings, and which make no greater figure in our estimation of such people than would marriage among people of a different social plane, and whose lives are ordered more in accordance with conventionalities." The occupation of this witness, all of the surroundings and character of the so-called "theater" in which she was employed, were fully disclosed by the evidence, and the proposition to "live" with her, and she to become his "girl," "looked to a relation which need not be characterized here, but which the jurors, as men of ordinary observation, must be presumed to have fully understood. But one inference could be drawn from this testimony, and that most prejudicial to the appellant, in the minds of men of ordinary decency and of average morality. The evidence, having only this tendency, and being wholly irrelevant, should not have appeared in the case. People v. Fair, 43 Cal. 137; People v. Dye, 75 Cal. 112, 16 Pac. Rep. 537; People v. Tiley, (Cal.) 24 Pac. Rep. 290.

2. One Moore was called as a witness for the people, in rebuttal, and referring to the time of the homicide, and a restaurant near the Elite Theater, this question was asked him: "Between five minutes to eight and five minutes past eight, and while you were in the restaurant after you had left Wallace and had a conversation with him, in which he mentioned Rice's name to you, did you not hear a pistol shot, and exclaim immediately, 'Wallace has killed Rice?'" The witness answered, "No." This question called for irrelevant and incompetent testimony, but, as it was answered in the negative, of itself did no harm; but afterwards one Guthrie, the keeper of the restaurant in which the remark was alleged to have been made, was placed upon the witness stand by the prosecution and asked: "After the firing of the shots, did this man Moore say to you that Wallace had killed Rice?" The court sustained an objection to this upon the ground that the matter was hearsay, and inadmissible under any circumstances. This ruling was clearly right. The incompetency of the evidence called for by the question is glaring, but, notwithstanding this, and the ruling of the court asserting its inadmissibility, the question was immediately repeated by the attorney conducting the prosecution, and the defendant was again compelled to appeal to the court. The court finally ruled, notwithstanding the objection of defendant, that the witness might answer directly whether Moore did or did not make any remark at the time and place referred to, indicating that he heard the shots which killed Rice, but must not repeat the language used, to which defendant duly excepted. In this ruling the court erred, as it was immaterial whether Moore heard the shots or not, and the answer of the witness that Moore did say something, taken in connection with the direct question as to the language used, which was not allowed, could hardly fail to suggest to the jury the nature of the remark made, and was little less damaging to the defendant than if such rejected question had been answered in the affirmative. At this point different

jurors began to more particularly question the witness about the circumstances, and finally one juror said: "We have not heard yet what the language was that this Moore used at the time." Whereupon the attorney for the people, instead of answering that such testimony was not under the rulings of the court proper to be laid before the jury, said: "That is what we would like to have, and we do not object to letting it go in." Objection was made by the attorney for appellant, and the court once more ruled the testimony inadmissible. In the face of these objections, and in contempt of the repeated rulings of the court, the counsel conducting the prosecution again announced: "I would like to have the juror's question answered as to what Moore said." Thereupon counsel for appellant withdrew his objection, and the witness answered: "* * * He said, 'No; I will bet you it was Wallace shot Rice, the proprietor;' and I said to him, 'No; it was two of the women that were shot.' He says, 'The reason that I think it was him was this: that I was with him this afternoon, and that he had sent a messenger boy for his pistol, and said he would shoot him.'" That this testimony was merely hearsay, and therefore incompetent, is plain, and that it bore directly upon a most vital point in the case, namely, whether the killing of Rice had been contemplated by appellant, and was the result of a fixed purpose after deliberate premeditation, is also apparent. The rule which forbids the introduction of hearsay evidence is one which is so generally understood, and closely adhered to, that it is seldom that the admission of such evidence is assigned as error in an appellate court. But in the case of People v. Jacobs, 49 Cal. 384, the trial court admitted evidence similar to that which we are now considering, and it was there held that when a witness is called by a party, and does not testify as expected, nor give testimony against him, the party calling him is not permitted to prove that the witness had made at some other time the statement to which he had refused to testify, for to do so would enable the party to get the naked declarations of the witness before the jury as independent evidence, as was done in the present case. Here the alleged declarations of the witness Moore, not made under oath, or in the presence of appellant, were given to the jury as evidence in the case, to prove that the killing of Rice was the result of a preconceived design upon the part of appellant. The character of this testimony cannot be disguised by calling it an impeachment of the witness Moore. Viewed in every light, and reduced to its last analysis, it was hearsay; simply one witness testifying that he heard another person say that the defendant had told him that he intended to kill the deceased.

After the reception of this testimony the appellant moved that it be stricken out. The motion was denied, the court giving as a reason for its action that the evidence was admitted without objection. It has undoubtedly been held in many cases that it is a sufficient answer to such a motion that the evidence was received without objection. The rule is one of practice, and is applied in order to save the time of the court, which otherwise would be uselessly consumed in listening to testimony, and then striking it out; and also to prevent a party from obtaining an advantage by deliberately consenting that a witness may give evidence upon a certain point with the expectation or belief that it may be favorable to him, and then having it excluded when the evidence is not satisfactory. Under its operation, when without objection secondary evidence has been received where primary should have been produced, or evidence of confessions, or dying declarations, or of experts, without proof of the preliminary facts required by law, or when competent evidence of an irrelevant or immaterial fact has been allowed by consent, the trial court may properly deny a motion to strike out such evidence thus admitted. In such cases it is held that a party has no legal right to complain, if the court, in the exercise of its discretion, retains the evidence. The motion to strike out is addressed to the sound legal discretion of the trial court, and when the objection to the evidence is not merely technical, as in the instance above given, but is substantial, and it also appears to the court that the justice of the particular case before it requires such action, the subsequent motion to strike out should be allowed. Indeed, a court may properly refuse to receive, even with the consent of the parties, evidence which in law is not recognized as fit and appropriate. In Monfort v. Rowland, 38 N. J. Eq. 185, the court declares: "The court is not bound to accept anything but legal evidence, and should seldom, if ever, allow its judgment to be controlled by anything else. The parties are at liberty to make such agreements respecting the evidence as they may see fit, but the court is not bound by them. The court may recognize them if it thinks proper to do so, but it should in no case sanction them if they are against the policy of the law, or dangerous to the safe administration of the law." In the case of Parker v. Smith, 4 Cal. 105, it was held that the court might of its own motion strike out and instruct the jury to disregard the illegal testimony of a witness, although given without objection from the opposing party. The court there say: "On the trial of this cause one of the witnesses deposed to a state of facts which upon his cross-examination proved to be hearsay evidence, and wholly inadmissible; whereupon the court ordered the testimony of the witness to be stricken out, and instructed the jury to disregard it. The appellant assigns this as error—*First*, because the testimony was not objected to *in limine* by the respondent; and, *second*, because the court of its own motion ruled it out. * * * The right of the court to interfere is also undoubted. The testimony was clearly improper. The duty of the court was not confined to passing upon such portions of the testimony as may be excepted to, but extends to the preservation of the rights of litigants, and a proper disposition of the matters in controversy." If this is the right and duty of the court in a civil case, with much greater reason can it be said that in a trial for murder, in which the life of a defendant is involved, the court ought not to refuse to strike out testimony which is inherently illegal and incompetent, and which, under well-settled rules of law, cannot be received as legal proof of any fact. We think the court should have excluded this incompetent evidence upon defendant's motion. The court ought to have done so, not only because of the nature of the evidence, but because the defendant had more than once objected to its introduction, when the counsel conducting the case for the people was endeavoring by repeated questions to get it before the jury, in open defiance of the rulings of the court, and the objection to it was only yielded in deference to what seemed to be the wish of a juror to hear the evidence. But the court ought not to have permitted the defendant to be placed in this position, and should have enforced its previous rulings on its own motion. But, whether it did this or not, the testimony should have been excluded upon the subsequent motion of the defendant.

3. The court afterwards, in its charge to the jury, gave this instruction: "Some evidence has been admitted of a statement made by one Moore, at the restaurant of a Mr. Guthrie, immediately after the shooting; but in this connection I say to you that the defendant at the bar is not bound by anything Moore may have said not in his presence and hearing." This was not equivalent to excluding this evidence from the consideration of the jury. It was not a plain and unequivocal direction to them to wholly disregard it as illegal, and not proper to be considered at all, and therefore cannot be regarded as obviating the error in the previous ruling of the court.

4. The court erred in charging the jury: "In this connection I think it proper to say the law allows and licenses this class of theaters. It allows and licenses the sale of liquor therein. While this state of things exists it is submitted whether, by the mere keeping of such a place, it is justifiable to charge its inmates with want of veracity, unless accompanied with other proof." In this instruction the court very clearly intimates that in its opinion the witnesses referred to had been unjustly assailed, and that any argument against their credibility, based upon the fact that they were inmates of this "theater," was not justifiable. But whether such an argument was justifiable—that is, whether it ought to influence the judgment of the jury in passing upon the credibility of these witnesses—was a question solely for the consideration of the jury, and the instruction quoted was an invasion of their province, and erroneous. Com. v. Barry, 9 Allen, 276; People v. Fong Ching, 78 Cal. 169, 20 Pac. Rep. 396. Jurors must be left to determine for themselves whether an attack upon the credibility or truthfulness of a witness is sustained by the facts before them, and whether an argument addressed to them for the purpose of convincing their judgment upon the point is one which ought in fairness and justice to have been urged; and, no matter how flimsy, unreasonable, or unjust such attack may appear to him, the judge is not allowed in his charge to oppose the weight of his opinion against the argument of counsel as to the credibility of the witnesses, but must leave the whole matter to be disposed of by the good sense of the jury, which will generally be found adequate for that purpose. In this case the record discloses that the witnesses referred to in this instruction gave material evidence against the defendant, and the giving of this instruction cannot be overlooked, as an immaterial error, which could not possibly have affected the verdict of the jury. There are other assignments of error, but we do not deem it necessary to pass upon them. We are not authorized to disregard the errors above pointed out, and look into the unobjectionable evidence in the case for the purpose of determining its sufficiency to justify the verdict. To weigh the evidence, and determine whether it establishes the guilt or innocence of the defendant, is the exclusive province of a jury; and the defendant is entitled to have this issue submitted to the jury upon legal and competent evidence alone, and upon proper instructions from the court. We cannot speculate or know what the verdict of the jury would have been if the errors referred to in this opinion had not appeared in the case, but are compelled to render judgment upon the questions of law presented by the exceptions of the defendant. Judgment and order reversed.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.

PATERSON, J., (*concurring*.) I think the defendant waived his right to complain of the ruling of the court with respect to the statement made by Moore at the restaurant, immediately after the shooting, by withdrawing his objection to the questions asked; but, if this were not so, the error was cured by the court in its instruction to the jury that the defendant was not bound by anything Moore may have said not in his presence and hearing. For the reasons stated in paragraph 4 of the opinion, however, and on account of other errors not noticed in the opinion, I think the defendant was prejudiced by the rulings of the court, and that he is entitled to a new trial. The written statement of Charles F. Smith contained evidence of conversations other than the conversation inquired into in his examination in chief,—statements which were clearly hearsay. The testimony of Asche, as to what the deceased stated before he met the defendant prior to the homicide, may not have had any important bearing on the case in the minds of the jury, but it was, nevertheless, erroneously admitted. The instruction of the court that "the killing must take place while the person killed is in the very act of making such unlawful and violent attack, and under such circumstances that the person assailed cannot resort to other legal means to save and protect himself, except retreating or running, which he is not bound to do," omits the element of appearances on which the party assailed is entitled to act, provided for by section 197, subd. 2, Pen. Code. People v. Flanagan, 60 Cal. 2. The same is true of the instruction of the court that, to justify a person for killing another upon the ground of self-defense, the killing must be done under a well-founded belief that it was absolutely necessary for such person to kill the deceased to save himself from great bodily harm. People v. Anderson, 44 Cal. 68.

(3 Cal. Unrep. 406)

PEOPLE v. BRUGGY. (No. 20,706.)[1]

(*Supreme Court of California.* May 22, 1891.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

1. An instruction that if defendant killed deceased in resisting an attempt on the part of deceased to "murder" defendant, or an attempt to do defendant great bodily harm, then the killing was justifiable, is not fatally erroneous, as it does not tend to lead the jury to understand that an attempt to kill defendant not constituting murder would not justify the killing by defendant.

2. An instruction that if defendant drew his pistol with a deliberate intent to kill deceased, and that deceased saw the pistol, and, believing himself in danger of defendant, ran away, and that defendant, with intent to willfully and deliberately kill deceased, followed for the purpose of overtaking or meeting and killing him, and did meet him, unarmed, and showing no disposition to kill defendant, and defendant then and there, without believing himself in danger of losing his own life, fired, and killed deceased, then the evidence showed no self-defense, cannot be objected to on the gronud that it omits the hypothesis of defendant's being in danger, or believing himself in danger, of receiving great bodily harm. PATERSON, J., dissenting.

In bank. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge.

J. C. Sims, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of murder in the first degree, and is under sentence of death. He appeals from the judgment rendered against him, and from an order refusing a new trial. He makes the point that the evidence is insufficient to sustain the verdict. The jury had before them persons who witnessed the homicide, and all its attendant circumstances. There was certainly some evidence which tended to show the guilt of the defendant as charged; and, that being so, we are not warranted in saying that the jury gave it improper weight, and should not have returned the verdict which they did.

It is further claimed that the instruction of the court was erroneous, which was in this language: "If the jury believe from the evidence in this case that the defendant, Bruggy, killed the deceased by shooting him, and that the shooting was done by Bruggy in resenting an attack on the part of the deceased to murder him, Bruggy, or an attempt on the part of the deceased to do great bodily harm to him, Bruggy, then in such case I instruct you the killing by Bruggy was justifiable, and you should find the defendant not guilty. The rule in such a case is this: What would a reasonable person—a person with ordinary caution, judgment, and observation—in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from his situation and his surroundings? If such reasonable person, so placed, would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril, and in acting on such appearances." The defendant contends that this instruction should not have confined his right to kill the deceased to a state of facts where the deceased was endeavoring to murder Bruggy, or to do him some great bodily harm, but that it should have stated further that an attempt to kill Bruggy by the deceased, either with or without malice aforethought, would have warranted the defendant in taking the life of the deceased, and that the word "murder" was misleading in the connection in which it was used. It must be borne in mind that this instruction was to the effect that, if the whole evidence showed a certain condition of affairs, the defendant was to be acquitted. If it had stated that Bruggy was not to be acquitted unless murder or some great bodily harm was then about to be accomplished by the deceased, then it is plain that the instruction would be misleading. But it is not manifest that as reasonable men the jury could have understood the instruction to mean what the defendant claims. Such a construction by them would not be harmonious in any degree with the language used by the court, and, although to be strictly accurate, the words, suggested, or some others appropriate to convey the idea, would have made the instruction clearer, the omission to do so did not, in our opinion, have or tend to have a misleading effect. The test in such a matter as this is not that a given instruction is erroneous, merely, but, if the court can see that it did not mislead the jury, the judgment will not be disturbed. Hayne, New Trials & App. § 122.

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[1] Rehearing granted, post, 965.

We do not perceive that the instructions of the court with reference to what constitutes murder in the first and second degrees were either misleading or erroneous. If appellant desired any further instructions on that subject he should have asked for them. People v. Franklin, 70 Cal. 642, 11 Pac. Rep. 797; People v. Northey, 77 Cal. 618, 19 Pac. Rep. 865, and 20 Pac. Rep. 129.

Another ground on which the appellant urges that the judgment and order should be reversed is that the jury were erroneously instructed and misled by the court in the following instruction: "If you believe from the evidence that the defendant, while upon the sidewalk, drew his pistol with a deliberate intent to kill and murder Dick Louison, and that Dick Louison saw the pistol, and, believing himself in danger of the defendant, ran away, and through the alley, and into the saloon, to avoid the defendant; and you further believe from the evidence that the defendant, with intent to willfully and deliberately kill and murder Louison, entered and passed through the saloon with the pistol in his hand, for the purpose of overtaking or meeting him and killing him; and you further believe from the evidence that he did meet the deceased coming into the saloon though one of the back doors of the saloon, unarmed, and showing no disposition to kill and murder the defendant, and that the defendant then and there, without believing himself in danger of losing his own life at the hands of Dick Louison, fired the fatal shot, and killed said Louison,—then I instruct you the evidence shows no self-defense." The objection to this instruction is that it is confined to a reasonable ground for belief by appellant that he was in danger of "losing his own life," and does not include the other proposition, that he was in danger, or believed himself in danger, of receiving great bodily injury. If the instruction had been intended as an abstract statement of the general doctrine of self-defense there might have been some force in the objection, although even in such case, if the court should give another instruction containing the element of fear of great bodily injury, (as was done in the case at bar,) it is difficult to see how error could be successfully assigned. But such was not the case with respect to the instruction in question. It was based upon a hypothesis (founded on the evidence) which excluded the notion of self-defense entirely. If a defendant pursues the deceased (who runs away) with a drawn pistol, intending to kill and murder the deceased, and does not make any endeavor to decline any further struggle, the fact that at the moment of the fatal act the deceased makes some effort to defend himself which may put the defendant in danger of either death or bodily injury, does not constitute self-defense. The instruction would not have been erroneous if it had not contained any allusion at all to the defendant's belief of danger to his own life. There was nothing in it of which defendant at least could complain. The law of self-defense was very correctly given to the jury in the general charge of the court, which was as favorable to defendant as he could reasonably expect; and we see no error that would warrant a reversal of the judgment.

The evidence discloses that the killing of the deceased was to some extent the result of a drunken brawl; and it would seem that a verdict by the jury of imprisonment for life would have satisfied the law, but that is not a question to be here considered. The law gives the power of fixing the punishment in such cases to the jury, and the only appeal from their decision as to that matter is to the executive. The judgment and order denying a new trial are affirmed.

PATERSON, J., *(dissenting.)* I think the instruction referred to in the opinion was erroneous. It ignores the fact that the defendant may have declined any further struggle immediately prior to the firing of the shot. Although he was the assailant, if he in good faith "endeavored to decline any further struggle before the homicide was committed, the homicide was justifiable." Pen. Code, § 197, subd. 3. Whether he did so decline further combat was a question of fact for the jury to determine on the evidence. It cannot be said that there was no evidence tending to show such a declination. The parties met right at the back door of the saloon, and the deceased immediately grabbed the defendant by the arms, and pushed him back several feet to the billiard table, and was pushing him over against it when the fatal shot was fired. What occurred beyond what has been stated, or what, if anything, was said by either party after they met at the rear door of the saloon, and before the shot was fired, does not appear in the evidence. If the defendant did decline further struggle, he was justified in shooting the deceased if he believed that he was in danger of receiving great bodily injury. This element was also omitted from the instruction.

The court instructed the jury that "to reduce a felonious homicide from the grade of murder to that of manslaughter, upon the ground of sudden quarrel, or heat of passion, the provocation must be of such a character as would be naturally calculated to excite and arouse the passions; and it must appear that the party acted under the smart of his sudden passion and resentment." Here the element of malice is entirely wanting in the charge, yet without malice there can be no murder. The instruction is erroneous because it in effect tells the jury that, although the defendant acted under a heat of passion, it could not be manslaughter unless the provocation was of such a character as would naturally excite and arouse the passions of an average man. The question is not whether some other person would probably have been excited and thrown into a passion by similar circumstances, but whether the defendant acted "upon a sudden quarrel or heat of passion." Pen. Code, § 192. What will excite and anger one man might simply amuse another. The court gave this instruction: "Upon the law of self-defense, I instruct you as follows: To justify the killing of another in self-defense it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline further trouble before the fatal shot was fired. If the jury believe from the evidence that the defendant, George Bruggy, at the time he fired the fatal shot which killed the deceased, Dick Louison, (if he did fire such shot and kill him,) believed, and had good reason to believe, that his life was in imminent danger at the hands of said Dick Louison, then I charge you that the defendant was justifiable in firing said shot, and you should acquit him." This instruction is loaded down with errors of a glaringly prejudicial character. The first part of the instruction has been condemned here several times. People v. Flahave, 58 Cal. 250; People v. Gonzales, 71 Cal. 577, 12 Pac. Rep. 783; People v. Dye, 75 Cal. 113, 16 Pac. Rep. 537. The last part of the instruction in effect tells the jury—and no doubt they so understood it—that unless the defendant believed, and had good reason to believe, that his life was in imminent danger, he was not justifiable in firing the shot, thus ignoring the question of appearances, and fear of great bodily injury. People v. Flanagan, 60 Cal. 4; Pen. Code, § 197. If these instructions were erroneous, (and I think it must be conceded that they were,) they were not cured by other instructions on the same point, although the latter may have been correct. People v. Anderson, 44 Cal. 65. The court in another instruction used this language: "If the murder was deliberate and premeditated, it was murder of the first degree; otherwise it was murder of the second degree." In calling the attention of the jury to the fact that the defendant had been a witness in his own behalf, the court said: "It is proper for the jury to consider whether this position and interest [the defendant's] may not affect his credibility, or color his testimony." The peculiar terms employed here seem to indicate an intimation by the learned judge that the defendant's interest in the case had evidently caused him to "color his testimony." The defendant requested the court to give an instruction on the question of reasonable doubt, which has been several times approved here. It was refused on the ground that it had already been given in the charge of the court, and it is true that the substance of the instruction was given by the court in its own charge, but it was given in such an attenuated form that I think the defendant may justly complain, although standing alone, perhaps, it could not be held to be prejudicial. It is true some of the instructions I have referred to have not been criticised by counsel for the appellant in his brief, but they were all excepted to in the court below, and I think, considering the importance of the case, it is the duty of our court to notice them, whether defendant's counsel refers to them or not. The learned judge of the court below doubtless would have corrected the instructions if his attention had been called to the matters omitted therefrom, but I am unable to see how it can be claimed that other instructions given on the same subject cured the errors in those referred to.

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89 Cal. 184

STATLER v. BROEDEL. (No. 13,296.)

(Supreme Court of California. May 21, 1891.)

Commissioners' decision. Department 1.

Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

J. H. Campbell, for appellant. *J. S. Gage*, for respondent.

BELCHER, C. This is an action to recover the sum of $300, the agreed price of 160 acres of land alleged to have been sold and conveyed by the plaintiff to the defendant. The defendant, by his answer, denies that the plaintiff ever sold or conveyed to him the premises mentioned in the complaint; denies that he agreed to pay the plaintiff for said premises the sum of $300 or any sum whatever; admits that negotiations for the sale or exchange of said premises for a horse and buggy of defendant's were at one time pending between the parties, but avers that no agreement for such sale or exchange, or any sale or exchange, of said premises was ever made between them. The court below found "that the defendant bought of the plaintiff 160 acres of land, * * * for which he agreed to pay the plaintiff therefor three hundred dollars; that the plaintiff made, executed, and delivered to the defendant a good and sufficient deed conveying the title thereto to the defendant; that the defendant has failed, neglected, and refused to pay the plaintiff the purchase price of said lands, or any part thereof; that there is now due and owing the plaintiff, J. S. Statler, from the defendant, Michael Broedel, three hundred dollars, the purchase price of said lands." Judgment was accordingly entered that the plaintiff recover from the defendant the sum of $300 and costs of suit. From this judgment the defendant appeals on a statement of the case. The only points made for a reversal are that the findings and judgment were not justified by the evidence. No good end would be subserved by setting forth the evidence here. It was partly written and partly oral. We have carefully read and considered all that is presented in the statement, and are of the opinion that it must be held sufficient to justify the findings. We advise, therefore, that the judgment be affirmed.

We concur: TEMPLE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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89 Cal. 144

PEOPLE v. FICK. (No. 20,745.)

(*Supreme Court of California.* May 19, 1891.)

KIDNAPPING—EVIDENCE—JUDGMENT.

1. On indictment for kidnapping, where it is shown that defendant, a constable, had a warrant authorizing him to arrest prosecutrix and bring her before a justice of the peace, and that he did not take her before the justice, but left her at a certain house, evidence is admissible that this was a house of ill fame, such evidence tending to show a motive for his failure to take her before the justice.

2. Evidence that at the same time another constable arrested the husband of prosecutrix on a charge of which he was innocent, and confined him in jail for two days, is immaterial, and its admission is harmless error.

3. It is a question for the jury whether "Choy Fong," the name of the prosecutrix, as alleged in the indictment, is *idem sonans* with "Toy Fong," which the evidence shows to be her true name.

4. Though the indictment alleges that defendant forcibly took the prosecutrix "for the purpose and with the intent to feloniously employ her for the unlawful use" of certain named persons, the intent is surplusage, and need not be proved.

5. It is no defense that the warrant under which defendant acted was regular on its face, since his arresting prosecutrix, his taking her into another county, and his leaving her at the house instead of taking her before the justice, as directed by his warrant, constitute a continuous act, which was not within his authority under the warrant.

6. A direction in the judgment that, in addition to being imprisoned, defendant shall pay the district attorney a certain fee, though it is unauthorized, is separable, and may be stricken out without remanding the case.

In bank. Appeal from superior court, San Joaquin county; J. H. BUDD, Judge.
John M. Fulweiler and *Ben. D. Tabor*, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

DE HAVEN, J. The defendant, H. L. Fick, was indicted by a grand jury of San Joaquin county for the crime of kidnapping. Upon his trial the jury found him guilty as charged. His motion for a new trial was denied, and judgment given that he be imprisoned in the state-prison for eight years, and that he pay the district attorney a fee of $25. From this judgment and the order denying his motion for a new trial, the defendant appeals.

It was shown upon the trial that the defendant was at the date of the alleged commission of the offense charged a constable of township No. 3, Placer county, and that there was delivered to him on March 22, 1890, a warrant in due form, issued by a justice of the peace, within said county, commanding him to arrest one Toy Fong, and to bring her forthwith before said justice at his office in said county, or, in case of his absence or inability to act, before the nearest and most accessible magistrate of the county. The defendant, armed with this process, proceeded to the county of San Joaquin, and on March 24, 1890, arrested a Chinawoman, whose name is given in the evidence as Toy Fong. This woman he took to the county of Placer, but did not at any time take her before the justice issuing the warrant, or any magistrate, but instead left her at the house of one China Molly, the person on whose complaint the warrant was issued. The appellant assigns as error various rulings of the court in the admission of testimony, and in giving and refusing instructions.

1. The court did not err in admitting evidence that the general reputation of the house in which China Molly lived was of ill fame. It was to this house that the defendant took the woman he was charged with kidnapping, and where he left her. This appearing, it was not improper to show that this house was of ill fame, and it was competent to prove the fact by evidence of general reputation. That appellant left the woman at a house of such a character, and did not thereafter take her before a magistrate, were matters proper for the jury to consider in passing upon his intent in making the arrest, and bringing her into the county of Placer. The evidence tended in some degree to furnish an explanation or motive for the act of appellant in failing to comply with the mandate of the warrant held by him.

2. In going to San Joaquin county the appellant was accompanied from Sacramento city by a constable of that city

named Swift; and at the same time the woman was arrested Swift, who seems to have had a warrant therefor, legal upon its face, arrested her husband, Go Sam. Testimony was admitted, appellant objecting thereto, showing that Go Sam was taken to Sacramento city, kept in jail two nights, and then released on bail. The prosecution was further permitted to show by Go Sam that he was in fact innocent of the alleged crime for which he was arrested. If it should be conceded that by a strict application of the rule which requires evidence to be confined to the points in issue this testimony should have been excluded, still we cannot see how its admission prejudiced the case of appellant. So far as we can see from the record, this evidence had no tendency to show that appellant was guilty of the crime with which he was charged, and it must have been disregarded by the jury as immaterial. A mere technical error in the admission of immaterial evidence, which is of such a character that it is apparent it could have no tendency to excite a prejudice against a defendant on trial, is not cause for the reversal of a judgment.

3. The appellant was charged with kidnapping one Choy Fong. Upon the trial it appeared that the name of the woman actually taken is Toy Fong. The appellant requested the court to charge the jury "that testimony proving or tending to prove that one Toy Fong was * * * taken from said county of San Joaquin by the defendant into the county of Placer will not sustain a conviction under said indictment for so taking Choy Fong." The court refused to so charge. The question whether the name "Toy Fong" is *idem sonans* with "Choy Fong," and so both relate to the same person, was in this case one of fact for the jury, and not a question of law for the court to determine. In the case of Com. v. Donavan, 13 Allen 571, the defendant was charged with larceny from one John Mealy. At the trial this person was called, and testified that his name was spelled "Malay" or "Maley," but never "Mealy," and that he was called "Maley," but never "Mealy." The trial court declined to instruct the jury "that if they should find his name to be Maley or Malay, and not Mealy, then they should acquit the defendant," but left it to the jury to determine whether the name proved was *idem sonans* with that given in the indictment, and this ruling was approved on appeal to the supreme court, that court saying: "The question whether one name is *idem sonans* with another is not a question of spelling, but of pronunciation, depending less upon the rule than upon the usage, which, when it arises in evidence in the general issue, is for the jury, and not for the court, and was rightly submitted to the jury in this case." This rule applies with peculiar force here, where the question relates to the pronunciation of Chinese proper names. The court cannot say as a matter of law that the names mentioned in the instruction asked for, as usually spoken by that people, do not have the same sound. The instructions given, in the absence of a request from the defendant for more specific directions as to the right and duty of the jury to determine the particular question, were sufficiently definite, and we must presume that the jury passed upon the question, as it was their province to do, and found from the evidence that these names, "Choy Fong," and "Toy Fong," are pronounced alike.

4. The indictment charges that the woman Choy Fong was forcibly taken from San Joaquin county "for the purpose and with the intent to willfully and feloniously employ her, said Choy Fong, for the use unlawfully of the said Mow Lin Gut and Ah Young (*alias* China Molly.)" The court gave the following instruction to the jury: "If you believe from the evidence beyond a reasonable doubt that the defendant, H. L. Fick, did, on or about the 24th day of March, 1890, and before the finding of said indictment, willfully, unlawfully, feloniously, and forcibly take the woman named in the indictment, Choy Fong, against her free will or consent, from the county of San Joaquin in this state, and carry her into the county of Placer in this state, then you will say in your verdict: 'We, the jury, find the defendant, H. L. Fick, guilty.'" In giving this instruction the court committed no error. The words above quoted from the indictment as to the purpose and intent of defendant are surplusage. Under section 207 of the Penal Code "every person who forcibly steals, takes, or arrests any person in this state and carries him into another * * * county" is guilty of kidnapping. The language just quoted necessarily implies that the arrest and conveying to another county must be without the consent of the person injured, and without any lawful authority therefor; but the particular purpose intended to be accomplished by such unlawful act is immaterial. The crime consists of a false imprisonment, aggravated by a removal to another county, and these acts are sufficiently alleged when the indictment is in the language of the statute defining the offense. The allegation as to the purpose of defendant being surplusage, it was not necessary for the prosecution to prove such purpose, or for the jury to find it to exist, and the instruction just quoted was correct.

5. Appellant claims that in taking the woman from San Joaquin to Placer county he committed no crime, because he was acting under a warrant regular on its face, and that, such action being lawful, it did not become a crime by reason of his subsequent failure to take her before a magistrate in the latter county; and that not only did the court err in its instruction upon this point, but that the verdict is against the evidence. The error of this contention is in its assumption that in what appellant did he was acting in obedience to the warrant in his possession, and in its denial of the right to look at the entire transaction, for the purpose not only of determining whether the appellant did pursue the authority with which he was clothed, but also whether any departure from such authority was willful, and with the intention of disregarding the personal rights of the woman taken by him. It is a maxim of the law (and its

correctness is shown by human experience) that acts indicate the intention, and in conformity with this the law in some cases judges of a man's previous intentions by his subsequent actions. Broom, Leg. Max. p. 271. In this case the arrest of the woman, and her conveyance into Placer county, and there placing her in the house of China Molly, constitute one continuous act, and for the purpose of determining the intention of defendant when he made the arrest, or at any other time while he had the woman in custody, it is proper to look at the entire transaction as one act, from its beginning to its consummation. Thus viewing it, it is not unreasonable to believe that appellant when he made the arrest intended to do with his prisoner just what the evidence shows that he did do, and that he had no other purpose; in other words, that her arrest was simply a means to the end he had in view; that he never intended to take her before a magistrate, but did intend to place her in the charge of China Molly. Such an act was unlawful, and, as the warrant under which appellant claims that he acted never authorized such a proceeding, the warrant cannot of itself afford any justification for the act now under consideration. If an officer desires the protection which the law always gives to one who acts under its authority, he must keep within the limits of its commands. If he arrests under a warrant he must follow its directions in dealing with his prisoner. The rule is that "one who arrests the person of another by legal process, or other equivalent authority conferred upon him by law, can only justify himself by a strict compliance with the requirements of such process or authority. If he fails to execute or return the process as thereby required, or to do what the law required him to do in making the arrest, his whole justification fails." Phillips v. Fadden, 125 Mass. 198. In Brock v. Stimson, 108 Mass. 521, referring to the principle which holds an officer to be a trespasser *ab initio* for an abuse in the execution of process, it is said: "The same rule holds good in the case of an officer who, after arresting a person on criminal process, omits to perform the duty required by the law of taking him before a court." The case here is unlike that of Ex parte Sternes, 82 Cal. 245, 23 Pac. Rep. 38. In that case it appeared that the officer acted under a lawful warrant, and did precisely what he was thereby commanded to do; and it was held that he had committed no crime in so doing. The instructions given by the court below upon the point we are now considering were full and complete, and the one given by the court of its own motion seems to have been prepared by the learned judge with unusual care, and states with precision the law applicable to the evidence before the jury. By this the jury were instructed that, if the appellant arrested the woman in good faith, under a warrant, intending to take her before a magistrate in Placer county in obedience to its commands, they should find him not guilty, even though they might find that, after reaching that county, he unlawfully placed her in an insecure place, and thereby allowed her to escape; but if they were satisfied beyond a reasonable doubt that he did not make the arrest in good faith, and that he carried her into Placer county without any intention of taking her before the magistrate issuing the warrant, or other magistrate, and did not in fact take her before any magistrate, then they must find him guilty. The jury were also instructed that an officer is required to arrest any person named in a warrant which is delivered to him for that purpose, and that it must be presumed that his official duty was faithfully performed, unless the presumption was overcome by the evidence for the prosecution. Thus the question of the defendant's good faith in what he did was fairly submitted to the jury; and his conviction was not made to depend upon the mere fact that he had not followed the authority given him by law, and the evidence was amply sufficient to justify the verdict of the jury.

6. The attorney general concedes that he has found no law authorizing that portion of the judgment directing the appellant to pay a fee of $25 to the district attorney. This portion of the judgment may be separated from the other, and we can correct it here without remanding the case. Ordered that the judgment appealed from be, and the same is hereby, modified by striking therefrom the words: "And that he pay the district attorney a fee of twenty-five dollars;" and, being so modified, the judgment and order are affirmed.

We concur: BEATTY, C. J.; PATERSON, J.; MCFARLAND, J.; GAROUTTE, J.; SHARPSTEIN, J.; HARRISON, J.

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89 Cal. 228

PEOPLE v. DUNN, (four cases.) (No. 13,852.)

(*Supreme Court of California.* May 26, 1891.)

LIQUOR LICENSES—VALIDITY OF ORDINANCE.

In an action to recover unpaid liquor license taxes under an ordinance passed by a board of supervisors, Monday, October 1, 1883, it appeared that prior thereto, on August 6, 1883, the board, pursuant to County Government Act Cal. March 14, 1883, § 22, requiring the supervisors to provide for the holding of regular meetings, and which act repealed Pol. Code, § 4045, March 13, 1883, requiring the supervisors, on the first Monday of October, to fix rates of county licenses, passed an ordinance for the holding of regular meetings on the first Monday in February, May, August, and November, to continue in session until the business was disposed of. The ordinance was passed at a special meeting of the board held for the fixing of county taxes only. *Held*, that the ordinance passed October 1st is void.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. MYERS, Judge.

G. H. Colby and *J. E. Prewett*, for appellant. *F. P. Tuttle*, Dist. Atty., for the People.

VANCLIEF, C. This is a consolidation of four actions to recover from the defendant license taxes by virtue of an ordinance (No. 3) passed by the board of supervisors of Placer county on Monday, the 1st day of October, 1883, providing that persons selling spirituous liquors, etc., in said county, must procure from the tax collector a license, authorizing them to carry on that business, for which they must pay to the tax collector a tax of $24 per quarter and a fee of $1; and further providing that the tax collector may authorize suit, in the name of the people, to be brought against any person who has carried on such business without license, for the recovery of such tax, with $15 damages. The trial was by the court without a jury, and judgment was rendered in favor of plaintiff "for the sum of one hundred and sixty dollars, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of one hundred and nine dollars." Defendant moved for a new trial on a bill of exceptions. A new trial was denied, and defendant appeals from the judgment, and from the order denying a new trial.

The appellant's principal point is that the ordinance passed by the board of supervisors on Monday, October 1, 1883, was void, because the meeting on that day was not a regular meeting of the board, nor a special meeting called for that purpose. Section 4045 of the Political Code, a new section, passed on March 13, 1883, provided, (subdivision 3:) "The board of supervisors of each county must, on the first Monday of October of each year, fix the rates of county licenses, "(adding a proviso not material to the present purposes.) In San Luis Obispo Co. v. Hendricks, 71 Cal. 243, 11 Pac. Rep. 682, it was decided that this provision was repealed by section 22 of the county government act, passed March 14, 1883, which provides: "The board of supervisors must by ordinance provide for the holding of regular meetings of the board at their respective county-seats." And as a consequence of such repeal it was further held that after the board of supervisors has provided for holding regular meetings, as required by section 22 above quoted, it has no authority to fix the rate of county licenses at any other than at one of the regular meetings thus provided for, or at a special meeting called for that purpose according to section 23 of the county government act. It appears that prior to October 1, 1383, to-wit, on August 6, 1883, the board of supervisors of Placer county, by ordinance, provided that the regular meetings of that board should thereafter "be held at the office of the county clerk at Auburn, on the first Monday in February, May, August, and November of each year, and continue in session until the business before it is disposed of." And it further appears that the meeting at which the ordinance on which this action is brought was passed convened on October 1, 1883, and was not a continuance of any former meeting, nor a meeting specially called for the purpose of fixing the rate of county licenses. It was a special meeting held for the purpose of fixing the rate of county taxes in obedience to section 3714 of the Political Code, at which no other business could be done except on the conditions prescribed by section 23 of the county government act. It follows from these facts, and the decision in the case of San Luis Obispo Co. v. Hendricks, supra, and cases therein cited, that the board of supervisors of Placer county had no authority to enact the ordinance fixing county licenses on the 1st day of October, 1883, and consequently that the ordinance is void. I think the judgment and order should be reversed, and the cause remanded.

We concur: FITZGERALD, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded.

89 Cal. 170

RICHARDS *et al.* v. TRAVELERS' INS. Co.

(No. 13,960.)

(*Supreme Court of California.* May 21, 1891.)

ACTION ON ACCIDENT POLICY—PLEADING.

1. Where, in an action on an accident policy, the complaint alleges that deceased sustained bodily injuries effected through external, violent, and accidental means, such a state of facts being provided against by the policy, an objection that the complaint does not state the particular circumstances under which the insured met his death is not maintainable under a general demurrer.

2. The policy provided that the money shall be paid within 90 days after proof that the insured received injuries which alone occasioned his death within 90 days from the happening thereof. The complaint alleged that "more than 90 days had elapsed prior to the commencement of this suit after sufficient proof that the insured at a time within the continuance of the said policy had sustained bodily injuries through external, violent, and accidental means, within the intent and meaning of said policy; that such injuries alone had occasioned death within ninety days from the happening of such injuries," and that deceased and plaintiff "have duly complied with all the terms and conditions of said policy and renewal by them or either of them, to be kept or performed." *Held*, it sufficiently alleged the notice and proof of death required by the policy.

3. Where the insured died from the effects of a blow struck by a person after an attempt to blackmail, such death is the result of accidental means within the general terms of a policy providing against injuries or death caused through "external, violent, and accidental means."

4. Where, in an action on an accident policy providing that the insurance shall not extend to any cause of death unless the claimant shall establish by positive proof that the death was not the result of design, either on the part of the insured or of any other person, it appearing that the insured died from the effects of a blow struck by another person, it is not error to charge that if the death of insured was caused by a blow dealt him, that would not prevent recovery if the person inflicting the blow did not mean to kill the insured.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

T. M. Osmont, for appellant. *Cross & Simmonds*, for respondents.

MCFARLAND, J. This is an action upon an accident insurance policy. By the terms of the policy the insured, Philip Richards, was to have a sum of money paid him weekly in case of injury to him by accident, and his estate was to be paid

$5,000 in case of his death from such injury. During the life of the policy said Richards was killed. The jury returned a verdict in favor of plaintiffs, executors of said Richards, deceased, for $5,000; and defendant appeals from the judgment and from an order denying a new trial.

1. We think that the complaint is sufficient. There was no formal demurrer, but defendant objected to a jury being impaneled and to the introduction of any evidence upon the ground that "the complaint does not state facts sufficient to constitute a cause of action." The first objection is that the complaint does not state the particular circumstances under which the death of the insured occurred,—that is, whether it was caused by lightning, drowning, railroad collision, etc. But the complaint avers that at a named date the deceased "sustained bodily injuries, effected through external, violent, and accidental means; and that on, to-wit, the 27th day of May, 1887, the said Philip Richards died at Nevada City, Nevada county, California; and that the said death was occasioned by said injuries alone." This language, which avers a state of facts expressly provided against by the covenants of the policy, is sufficient as against an attack which is no more specific than a general demurrer. The other objection to the complaint is that it does not aver notice and proofs of death, as required by the policy. But it is averred that "said Philip Richards and said plaintiffs have duly complied with all the terms and conditions of said policy and renewal by them, or either of them, to be kept or performed," and this was generally a sufficient pleading of conditions precedent. Code Civil Proc. § 457; Blasingame v. Insurance Co., 75 Cal. 633, 17 Pac. Rep. 925. It has been held in some cases that where money covered by an insurance policy is not to be paid until a certain time after the loss, or after notice and proofs of the same, there should be a special averment that such time had elapsed. In the case at bar there was a provision in the policy that the money should be paid "within ninety days" after proof that the insured received injuries which alone "occasioned his death within ninety days from the happening thereof;" and with respect to this matter it is alleged in the complaint that "more than 90 days had elapsed prior to the commencement of this suit after sufficient proof that the insured, at a time within the continuance of the said policy, had sustained bodily injuries, effected through external, violent, and accidental means, within the intent and meaning of said policy; that such injuries alone had occasioned death within ninety days from the happening of such injuries." This averment, together with the general averment above noticed, makes the complaint entirely sufficient as against a general demurrer.

2. Upon the merits appellant contends that the verdict was not justified by the evidence, and that the court erred in its instructions to the jury. The deceased lived at Nevada City, and was brought by one H. J. Dassonville to the drug-store and office of a physician in that city about 9 o'clock on the evening of April 22, 1887. He was suffering from a severe wound on the head and over the left eye, from the effect of which he died on the 27th of the next month, May, 1887. There was evidence tending to show that the wound was caused by a fall from an elevated sidewalk down onto Spring street, in which there were rocks and piles of old iron; but appellant contends that the evidence shows the wound to have been inflicted by said Dassonville, who, after a failure to blackmail the deceased, suddenly struck him a blow with some instrument or thing capable of producing the wound. The general terms of the policy provide against injuries or death caused through "external, violent, and accidental means." The means by which the death of the deceased was caused were certainly "external and violent;" and, while there was not much evidence to show that it was caused by a blow from Dassonville, still in that case the jury had the right, under the evidence, to find it "accidental," within the general covenants of the policy. It is impossible to give a precise definition of the word "accidental." As every effect has a cause, there is one sense in which nothing is accidental. Accident policies are of recent origin; and there have been only a few judicial decisions with respect to them; but the authorities to be found on the subject seem to be to the point that "accident" must be given its popular meaning,—that is, a casualty, something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured. The fullest discussion of the subject is to be found in the opinion of the United States circuit court for the district of Michigan in the case of Ripley v. Railway Co. In that case the insured had been attacked by highwaymen and killed, and it was contended that, as the highwaymen intended violence, there was no accident. The learned judge, (WITHEY, J.,) in delivering the opinion of the court, says: "Perhaps, in a strict sense, any event which is brought about by design of any person is not an accident, because that which has accomplished the intention and design, and is expected, is a foreseen and foreknown result, and therefore not strictly accident. Yet I am persuaded this contract should not be interpreted so as thus to limit its meaning, for the event took place unexpectedly, and without design on Ripley's part. It was to him a casualty, and in the more popular and common acceptation 'accident,' if not in its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event. * * * I think in construing a policy of insurance against accident, issued to all sorts of people, a majority of whom do not, as the company well knew, nicely weigh the meaning of words and terms used in it, courts are called upon to interpret the contract as a large class, not versed in lexicology, are sure to regard its terms and scope. That which occurs to them unexpectedly is by them called 'accident.' The company fix the terms of the con-

tract, and are to be held, in the absence of plain, unequivocal exceptions and provisions, to intend what, in popular acceptation, the insured party is likely to understand by its terms." 2 Bigelow, Ins. Cas. 738. In that case judgment went for defendant upon another point, and was affirmed by the United States supreme court, where the meaning of "accident" was not discussed, (16 Wall. 336;) but the language of Judge WITHEY seems to us to express correct views of the question. It is quoted approvingly in other authorities. Bliss, Life Ins. § 438; 7 Amer. Law Rev., 587; 1 Amer. & Eng. Enc. Law, p. 87, § 3, and notes; Insurance, etc., Co. v. Martin, 32 Md. 315. We are of opinion, therefore, that, if it could be considered that, in the case at bar, the death of the deceased was caused by a blow from Dassonville, still it was caused by "accidental means" within the general terms of the policy. The policy, however, contains a special condition as follows: "This insurance shall not be held to extend to disappearances, or to any cause of death, or personal injury, unless the claimant under the policy shall establish by direct and positive proof that the said death or personal injury was caused by external violence and accidental means, and was not the result of design either on the part of the insured or of any other person." Respondents contend that this clause is a mere attempt to change the rules of evidence, and therefore entirely void,—that it is not a provision about anything except evidence. We do not think it necessary to examine this contention. Taking the provision as valid, it merely states as a condition, so far as it applies to the circumstances of this case, that the death shall not be the result of the design of any person; that is, that it must not be caused by the act of one whose design was to cause death by the act. The point was presented by the fifth instruction given by the court as follows: "If the death of Philip Richards was caused by a blow dealt him by H. J. Dassonville, or some other person, that would not prevent plaintiffs from recovering in this action, if you believe from the evidence that when Dassonville or such other person inflicted such blow he did not mean to kill said Philip Richards." We are of opinion that this instruction is not erroneous. There were circumstances in evidence tending to show that if Dassonville did give the blow which resulted afterwards in the death of deceased, he did not intend such result, and it would not be a correct construction of the clause of the policy under review to say that it includes every case where a blow not intended to kill unfortunately and undesignedly produces death, and particularly when we consider the rules of construction which apply to the makers of instruments.

The other instructions of the court seem to be unobjectionable, and to present the law of the case very fully. Those given at the request of the defendant presented that side of the case very favorably. Instructions No. 1 and No. 5, asked by defendant, were properly refused. Whatever was correct in them was given elsewhere. The judgment and order appealed from are affirmed.

We concur: GAROUTTE, J.; DE HAVEN, J.; HARRISON, J.; PATERSON, J.

(89 Cal. 186)

LANGAN v. LANGAN *et al.* (No. 13,610.)

(*Supreme Court of California.* May 25, 1891.)

ACTION ON NOTE—PAROL EVIDENCE OF CONSIDERATION—INCONSISTENT FINDINGS.

. Where in an action on a note it appeared that said note was given in consideration of the balance due upon a prior note, such prior note being collateral to and described in a written agreement on the part of plaintiff to sell defendant certain property therein, and compliance therewith to be deemed full consideration for the note therein set out, oral evidence is inadmissible to show that certain land-warrants, not specified in said agreement, formed part of the consideration of the note in suit.

2. Where there was a conflict in the findings of the court below,—three findings that the consideration of the note was the sale of property described in the written agreement, and two findings that the consideration included certain land-warrants not referred to in said agreement,—a judgment based thereon is a decision against law, for which a new trial may be had.

MCFARLAND, J., dissenting.

In bank. Appeal from superior court, Merced county; C. H. MARKS, Judge.

F. H. Gould, for appellant. *J. K. Law*, for respondents.

DE HAVEN, J. Action for the balance alleged to be due upon a promissory note executed by defendants to plaintiff on April 25, 1885, for the sum of $2,000. The answer of the defendants alleges that in December, 1884, the defendant Thomas F. Langan purchased from plaintiff an undivided one-fourth interest of all the copartnership property belonging to a firm of which plaintiff was a member for the sum of $3,000, and in payment thereof then executed to plaintiff his promissory note for said sum. That he afterwards paid $1,000 thereon, and then took up said note, and he and the other defendant, his wife, gave to plaintiff the note mentioned in the complaint, for the balance due on account of said purchase,—that is, as we construe the answer for the balance due upon the promissory note executed in December, 1884. The answer, then, in a separate defense, alleges that a part of the copartnership property purchased by defendant consisted of two land-warrants, and that said warrants were a part of the consideration for which the note referred to in the complaint was given, that plaintiff agreed to locate them upon lands, and convey said lands so located thereunder to defendant T. F. Langan; that plaintiff has located the same, and refuses to make a conveyance of the land so located to defendant, and by reason thereof defendant has been damaged in amount equal to the value of said land. There was another partial defense interposed, but this was found against the defendants, and needs no consideration. The court below found the allegations of defendants' answer in relation to the land-warrants to be true, and judgment was rendered in favor of defendants for their costs. The plaintiff appeals from this judgment, and also from an order denying his motion for a new trial.

1. It is apparent from the answer of defendants, and the court so finds, as we read findings Nos. 4, 5, and 6, that the note mentioned in the complaint was given in consideration of the balance due upon the note for $3,000, executed in December, 1884. It therefore became a material question upon the trial to determine what was the consideration for this original note. Upon the trial it appeared that this note of December, 1884, had a contract attached to it, written on the same sheet of paper, and was executed in duplicate, each of the parties retaining a copy. This note and agreement are in the following words:

"Merced Co., December 3, 1884. Sixty days after date, I promise to pay J. A. Langan the sum of three thousand ($3,000) dollars, gold coin of the United States, for value received. THOS. F. LANGAN."

"It is further agreed that if at the end of sixty days T. F. Langan gives collateral security to J. A. Langan, and pays one per cent. per month for the payment of two thousand dollars by a mortgage upon the homestead of Honora Langan and Hesekiah M. Martin tracts of land, and otherwise secures the payment of the same, then J. A. Langan agrees to take said security and grant further time, not to exceed two years from the date hereof, upon two thousand dollars of said note; and thereupon J. A. Langan agrees to give a bill of sale to T. F. Langan for one thousand sheep, the property of J. A. Langan, which are now in the possession of T. F. Langan, and a deed to all his (J. A. Langan's) rights in the homestead of Honora Langan, and one-fourth interest in the Hesekiah M. Martin tract of land, and the half interest in two express wagons, and all the improvements on said ranch, the title of said sheep and ranch to remain as they are at present until the performance of said agreement, to-wit, the payment of the foregoing note according to the tenor thereof, or the security of the payment as herein provided by mortgage, etc. This agreement has nothing to do with any former agreements made by said parties, but such other agreements are to be settled according to the tenor of themselves, namely, the three hundred dollars for rent of sheep, and the one thousand dollars balance due on sheep sold by J. A. Langan to T. F. Langan last year. J. A. LANGAN. THOS. F. LANGAN. Witness: W. J. STOCKTON."

This writing is to be construed as an agreement on the part of the plaintiff, J. A. Langan, to sell to the defendant T. F. Langan the property therein mentioned, for the price and upon the terms therein stated; and this agreement to sell said mentioned property and compliance with it is to be deemed full consideration for the note therein set out, precisely as if the agreement had so recited in words; and therefore the court erred in admitting oral evidence to show that the land-warrants referred to in the evidence were a part of the consideration of this note. This ruling of the court is not sustained by the rule which permits parol evidence of a consideration different from that named in the contract or deed, or the existence of a separate oral agreement, constituting a condition precedent to the taking effect of a written contract obligation. The effect of the oral evidence here was to add to and vary the terms of the written agreement by proving a contract to sell other and different property from that described in the agreement. The opinion of the court in Hubbard v. Marshall, 50 Wis. 327, 6 N. W. Rep. 497, is in point here: "The rule which allows the maker of a promissory note to show in an action upon it a failure or partial failure of consideration, is not sufficiently broad to cover this case. Here we have written instruments, which set out particularly the consideration of the notes in suit, to-wit, the assignment of notes and mortgages, and of a contract to convey lands and to sell timber upon other lands. The right to prove a failure of consideration would admit evidence of the failure of any consideration expressed in the writings, as that the title to any of the property thus sold or assigned had failed, but does not go to the extent of allowing proof of an additional consideration not expressed in the writings, and a failure thereof. To hold otherwise would be to destroy the rule which prohibits parol evidence to contradict or vary written instruments. The instrument signed by plaintiff and accepted by the defendant, and the notes signed by the latter and delivered to the former, constitute an agreement in writing. The terms of the agreement are clearly expressed, and the writings contain no clause from which it may be inferred that the parties did not intend to incorporate in them the contract just as it was made, and the whole of it."

2. In the bill of exceptions the plaintiff specifies that the decision of the court was against law, because certain findings are contradictory; and this is one of the grounds upon which a new trial was asked. The motion should have been granted for this reason: Findings 7 and 11, which are necessary to support the judgment in favor of defendants, are in conflict with findings 4, 5, and 6, as we construe them; those first named being to the effect that the consideration of the note referred to in the complaint is as stated in the answer of defendants, while findings 4, 5, and 6 are that its consideration is the balance due upon the note of December 3, 1884, and that the consideration of that note was the sale of the property described in the written agreement above set out. In this condition of the findings it cannot be said that they determine the issues of fact arising in the case, and a judgment based upon such findings is a decision against law, for which a new trial may be had. Knight v. Roche, 56 Cal. 15.

3. The appeal from the judgment in this case was taken more than one year after the date of its entry. The parties entered into a stipulation, thus extending the time for appealing from the judgment, and the respondent has not asked that the appeal be dismissed. The court, however, is not bound by this stipulation. The appeal

from the judgment is dismissed. Order denying plaintiff's motion for a new trial reversed.

We concur: Beatty, C. J.; Garoutte, J.; Harrison, J.

Paterson, J. I concur in the order dismissing the appeal from the judgment. I also concur in the order reversing the order denying the motion for a new trial, on the ground that the findings are uncertain and conflicting.

McFarland, J. I dissent. I see no contradiction in the findings, and no error committed in the trial of action. I think the order should be affirmed.

(89 Cal. 223)

People v. Arras. (No. 20,675.)

(*Supreme Court of California.* May 26, 1891.)

Larceny—Information—Variance.

1. An information for larceny charged that defendant, "on or about the 17th day of November, 1889, did * * * steal * * * a certain bank-check, * * * which said check was then and there of the value of $95.50, and was the property of said P." *Held*, that this sufficiently alleges that the check was the property of P. at the time the offense was committed.[1]

2. Though the information alleges that the check was drawn "in favor of one P.," and the evidence shows that it was drawn in favor of "A. G. P. or bearer," the variance is immaterial.

De Haven, J., dissenting.

In bank. Appeal from superior court, Yolo county; C. H. Garoutte, Judge.

Hurst & Hurst and *Charles W. Thomas*, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

Per Curiam. The defendant was convicted of grand larceny, and appeals from the judgment, and from the order denying his motion for a new trial. He relies upon two propositions to reverse the case: (1) That the demurrer to the information should have been sustained. (2) That there is a fatal variance between the information and the proof. The information charges the defendant with grand larceny in stealing a certain "bank check" drawn by one D. N. Hershey on the Bank of Yolo, in Woodland, Cal., "in favor of one Pennington, for the sum of ninety-five dollars and fifty cents, and which check was then and there of the value of $95.50, and was the property of said Pennington." The objections to the sufficiency of the information are extremely technical, and are, in our opinion, without merit. It is claimed, for instance, that the information does not allege that at the time the offense was committed the check was the property of the complaining witness, Pennington. The language of the information is that "on or about the 17th day of November, 1889, Calvin Arras did willfully, unlawfully, and feloniously steal, take, and carry away certain personal property, to-wit, a certain bank-check, * * * which said check was then and there of the value of $95.50, and was the property of said Pennington." It would be overrefinement, not justified by the law or the language used, to hold the information defective in this respect. The variance relied upon by appellant consists in this: As appears by the information, the check was drawn in favor of "one Pennington;" the check when introduced in evidence disclosed the fact that it was drawn in favor of A. G. Pennington or bearer. If this be a variance, is it a material variance? A material variance between the proof and the information arises when an acquittal of the defendant under the information would be no bar to a further prosecution for the same offense. People v. Hughes, 41 Cal. 234. In this case the check described in the information and the check introduced in evidence have so many earmarks in common as to establish the identity of the two instruments as being one and the same beyond all doubt, and indicate conclusively that the misdescription could not have misled the defendant to his prejudice, and that a conviction or acquittal of the offense charged in this information would forever bar any further prosecution for the larceny of the check. This court has held that information charging the larceny of "fifty sheep," "one cow," "four cattle," "one horse," "a gold watch," etc., were sufficient as to the description of the property stolen, when taken in connection with an allegation of ownership. Surely, then, no greatly detailed description of the bank-check was necessary to be used in the information, especially when section 967 of the Penal Code provides: "In an indictment or information for the larceny of money, bank-notes, certificates of stock, or valuable securities, it is sufficient to allege the larceny to be of money, bank-notes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof." If a defendant cannot object to being tried under an information measured by the foregoing section, how can this defendant complain that in this information he has been misled by a misdescription of the check, and that a fatal variance exists? In the case of People v. Edwards, 59 Cal. 360, the defendant was charged with the crime of burglary in entering a building known as the "store of one S. Loupe," etc. The evidence disclosed that the store belonged to S. Loupe, L. Loupe, and A. Haas, who were partners doing business there, but was known as "Loupe's Store." This court said: "It is true that the additional fact was elicited that other persons were interested with the party named in the information as owner of the store which had been broken into and entered; but, if that fact had been recited in the information, it would not have identified the offense with any greater certainty, or enabled the defendants to understand more clearly the offense with which they were charged. It only showed that there was a partially erroneous description or allegation of ownership of the store in which they had committed the offense. But the discrepancy did not in any respect affect the validity of the information, nor could it in any way have misled or prejudiced the defendants in their defense; it affected none of their substantial rights. The variance was therefore immaterial." This information describes the check correctly in so many respects that a defect in description in the one respect urged could not have misled the defendant in his defense, and certainly rendered the variance immaterial. Judgment and order affirmed.

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[1] In an indictment for cutting timber from the land of another, the name of the owner is sufficiently charged by giving his surname and initials only. State v. Prince, (La.) 8 South. Rep. 591. An indictment for a trespass in wrongfully cutting down timber on lands, "the estate of Madison Young, deceased, * * * and the heirs of said estate," sufficiently describes the owners. State v. Paul, (Iowa,) 47 N. W. Rep. 773. But an indictment charging the breaking and entering the "store of the Perry Mason Shoe Company," but not alleging that the company was a corporation, or, if it was a partnership, giving the names of the partners, is bad. Edmonds v. State, (Ala.) 6 South. Rep. 54.

I dissent: DE HAVEN, J

(90 Cal. 590)

REED *et al.* v. NORTON *et al.* (No. 13,843.)

(*Supreme Court of California.* Jan. 31, 1891.)

MECHANIC'S LIEN—NOTICE OF CLAIM.

1. Where, in an action to enforce certain liens of mechanics and others, plaintiffs' notice of lien stated that the labor and materials furnished were to be paid for at what they were reasonably worth, and the testimony showed that part of the materials were furnished upon a contract price, and the balance upon a basis of a *quantum meruit*, a finding that such notice was "in due form, as required by law," is error, under Code Civil Proc. Cal. § 1187, which requires the person to file his claim, stating the terms and conditions of his contract.

2. Under Code Civil Proc. Cal. § 1187, which requires a person to file a notice containing the name of the owner of the structure for which materials were furnished, and also the name of the person by whom he was employed, or to whom he furnished materials, a notice of lien stating that the materials were furnished to H., and that claimants were employed by both H. and N. to furnish the same, is a compliance therewith; it appearing that plaintiffs made the contract with N., the owner of the building, to furnish the materials, and that H., the contractor, gave sundry orders for payment, drawn on N., which he paid.

3. Where plaintiffs' notice of lien alleged that the price agreed upon was "the usual price, and what said materials were reasonably worth at their place of business," and that the goods were to be paid for on delivery, it sufficiently complies with the above section, requiring the notice to state the terms of the contract expressly agreed on, to entitle plaintiffs to recover on a *quantum meruit;* it appearing that the goods were furnished the architects of the defendant owner of the building, and that they were reasonably worth the amount sought to be recovered.

4. The notice of lien alleging that H., the contractor, purchased the goods both as contractor and as the agent of the owner of the building, an allegation in the complaint that he purchased only as agent is an immaterial variance.

5. A variance between the record and the evidence, as to the value of the materials furnished, and the way in which they were purchased and furnished, is immaterial.

6. An allegation in the complaint to enforce a mechanic's lien that "said firm sold and delivered N. certain hardware and building material, to be used in the erection and construction of said building, and affixed and attached thereto," warrants the finding that the materials were used in the building.

7. Plaintiff's notice of lien set out that his agreement with defendant N. was "that he was to be paid for said labor done and furnished at what it was reasonably worth, to be paid for when the work ceased." On the trial plaintiff testified: "My contract was to furnish all the material and do all the painting for $250." *Held*, that the variance between the actual contract and the statement in the notice is fatal.

8. Where M., whose contract for furnishing materials exceeded $1,000, failed to allege in his complaint that his contract was in writing, or filed for record, such omission does not contravene Code Civil Proc. Cal. § 1183, which provides for the filing of a contract between the contractor and owner where the amount exceeds $1,000, it appearing that he was a subcontractor and material-man.

9. Where the memorandum of contract was filed at 10:30 o'clock A. M., and it appeared that the work was commenced no earlier than 8 or 8:30 A. M. of the same day, the evidence thereof being doubtful, and such work being of a trivial nature, a finding that the work commenced before said filing will not be sustained.

10. The contract providing that the owner should pay, upon the written order of the contractor, the material-men when the materials were used in the building, and also pay the mechanics and laborers at the end of every week for work performed, such payments are specific enough as to time and amounts to comply with Code Civil Proc. Cal. § 1184, which requires the contract price to be made payable in installments at specified times after commencement of the work, or completion of specified portions, or of the whole work.

11. An objection to the failure to file, in the recorder's office, the plans and specifications of the building, is not well taken, where the contract was made after Code Civil Proc. Cal. § 1183, was amended in 1887, and such amendment does not require the filing thereof.

12. The contract provided for the payment of $5,500 for all work and material, three-fourths payable in installments as the work progressed, the other fourth 35 days after completion, with an obligation to pay for materials when used, and work as it was rendered weekly. *Held*, that such contract was a substantial statement of "the amounts of all partial payments, together with the times when such payments shall be due and payable," required under Code Civil Proc. Cal. § 1183.

13. It appearing that defendant owner of the building against which liens were filed, had not retained for 35 days after the completion of the work, and paid over to those entitled thereto, 25 per cent. of the contract price, as provided in his contract, he is responsible to that extent.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Graves, Turner & Graves and *William Shipsey*, for appellants. *J M. Wilcoxon*, for respondents.

FOOTE, C. Eight actions were brought against the defendants here—the owner of a building, Thomas Norton, and his contractor, Thomas Helm—to enforce the liens of certain mechanics and material-men. Before trial they were all consolidated. The contractor, Helm, made default. Norton, the property owner, answered, denying all the allegations of the complaints, except as to his ownership of the property on which the liens were sought to be enforced. Judgment passed for the plaintiffs, it being stipulated that there should be priority in favor of one claim over another, and that all claims should be satisfied *pro rata* if the money arising from the sale of the property should be insufficient to pay all in full. From that judgment and an order denying a new trial the defendant Norton appeals.

One reason urged for a reversal of the judgment and order is that the finding as to the notice of lien filed by the plaintiffs Smith & Waite, that it was "in due form as required by law," is not sustained by the evidence. It is said in support of this contention that the notice of lien required to be filed under section 1187 of the Code of Civil Procedure, in order to preserve the lien, sets out that the materials to be furnished and labor to be performed were to be paid for on the basis of what they were reasonably worth, and that the proof shows that they were furnished at an agreed contract price, and that, therefore, the evidence disproves the contract set out in the notice, and, as the notice was fatally defective in this respect, no lien attached that could be enforced. The notice does state the contract as contended for by the defendant. The evidence as to the matter is that given by F. L. Smith, one of the lien claimants, as follows: "We contracted with defendant Helm to furnish this material. There was no special contract, except as to the price of the material. We gave him a list of what we would furnish a certain amount of material for. We furnished Helm with a list of the materials and prices, and most of the materials were furnished by us according to that list. Question. Did your firm agree to furnish all the material furnished in your line for $658? Answer. No, sir, we did not,—most emphatically. The list we furnished to Mr. Helm for that amount of material was taken from a portion of the plans from figures that Mr. Laird made on his plans that it would require so much,—so many feet of each kind of material,—and we gave him figures on that, and furnished it to him at the figures we gave him; but we didn't give him the figures for the whole amount of material and all other things; but, of course, we charged in the same proportion, as near as we could. The materials were reasonably worth the amount charged." From this it appears that a certain portion of the materials were furnished upon a special contract as to price, and that the balance were furnished on the basis of a *quantum meruit*. Inasmuch as this shows the finding to be wrong in stating that the notice of lien complied with section 1187, Code Civil Proc., giving the terms of the contract under which the materials were furnished, at least so far as a part of them are concerned, the contention of the defendants seems to be sound. Neither is the finding supported by the evidence that the materials furnished or work done by these plaintiffs were upon the agreement of the defendant Helm, with the knowledge of Norton, to pay for them all at what they were reasonably worth.

With reference to the claim of Schwartz, Beebe & Co., it is objected that the evidence shows that their notice of claim of lien was not in legal form as shown by their evidence, and therefore the finding that it is in due form is unsupported by evidence, as well as the finding that the contract was to furnish materials, etc., for what they were reasonably worth. It is further asserted that the claim of lien is at variance with the contract proved, in that the former states that the materials were furnished to Helm, and that claimants were employed by both Helm and Norton to furnish the same, while the evidence of one of the plaintiffs is: "I made a contract about this lumber with defendant Norton about June 20th. The contract was made in this way: I met defendant Norton, and we talked over the prices of lumber and the discount for cash, and that was the only time I ever had any conversation with him about it; and he said he was going to build a house, and wanted to know what the price of lumber would be. I had no conversation with defendant Helm about it. I never transacted any business with him about it. Wm. Evans came after the lumber. He brought the bill there. I gave no particular time for payment. It was to be a discount for cash. The amount charged in the notice of lien is the reasonable value of the lumber furnished: such as we sell it for in the market in our lumber-yard. About August 2d, I went to defendant Norton for payment. He said I must get an order from defendant Helm. I got an order for $1,100, and Norton paid it. I then talked with Norton about the balance of the bill. He said he and I would deal about that bill. I said I had nothing to do with Helm, and had said nothing to him about it, and he said he and I would arrange about the payment of that bill, and pay the bill up in full, and the percentage be fixed afterwards. Since we filed the lien he said he thought I had better take what I could legally get. When I was furnishing the material I heard that Helm had the contract." From this it seems that Norton did make a contract with the plaintiffs to furnish the material, that it went into the building that Helm, the contractor, was erecting for Norton, and for which he got it from the material-men, and that Helm gave orders to pay for it drawn on Norton, which were paid. Thus it would seem that practically the materials were furnished to Helm; that Norton originally contracted for them; and Helm, by giving an order for the payment, admitted his liability to pay for them. How any injury could result to Norton from this kind of a variance we do not perceive, and therefore the statement of claim, so far as it mentions the name of the person by whom the plaintiff was employed, or to whom he furnished the materials, was substantially the same as shown in evidence. As to the terms and conditions of the contract, we think there is no substantial variance between the statement in the notice of claim of lien and the evidence.

As to the Reed, Smith & Co. claim, it is said by appellant that the contract as set out in the claim of lien is different from what the proof shows it to be, and as a consequence the findings as to the nature of the contract, and that it was in due form, are unsupported by the evidence. In the notice the contract as to price is that it was "the usual price, and what said materials were reasonably worth at their place of business,"—that is, at the place of business of the plaintiffs. In that connection his counsel argues as follows: "In the notice of lien it is alleged that the price agreed upon was 'the usual price, and what said materials were reasonably worth at their place of business.' There is not a word in the testimony to support the allegation that there was such an agreement. The testimony is simply silent upon this point. Nor is there any testimony as to what the materials were reasonably worth at the place of business of Reed, Smith & Co. The Code of Civil Procedure, § 1187, requires the notice of lien to state the terms, time given, and conditions of the contract. This means the terms, time, and condition expressly agreed upon. Jewell v. McKay, (Cal.) 23 Pac. Rep. 139. If no terms, time, or conditions were agreed upon, the notice need state none. Jewell v. McKay, supra. But, when the notice states that terms, time, or conditions were agreed upon, then the proof must come up to the statement. The notice of lien states that it was agreed that payment should be at the time of delivery; no testimony that there was such an agreement." The statement in the claim appears to be nothing more than that the materials were bought and furnished on the basis that they were to be paid for on delivery at what they were reasonably worth. This would be, in effect, giving the plaintiffs a right to recover on a *quantum meruit.* And while it may have been unnecessary to set out such a contract in the notice of claim of lien under the decision just cited, we do not think that such decision announces the principle that where such a course is pursued the party shall not be held to have filed a notice of claim based upon a *quantum meruit.* The evidence being that such materials as were asked to be furnished were furnished and delivered upon the order of Helm and Norton and Laird, the architects for Norton, that they were used in the building of Norton and that they were reasonably worth $939.90, and no part of that sum has been paid, we can see no force in the defendants' contention on the point.

It is further argued in reference to this claim that there is a variance of a fatal nature between the notice of claim and the complaint; that the notice treats the contract between the contractor and the owner as valid; that it does not allege that the contract or a memorandum thereof was not filed, and in this respect it differs from all the other notices of lien; that the complaint treats the contract as void for want of filing; that in the notice of lien it is alleged that Helm, the contractor, purchased the materials both as contractor and agent of Norton; that in the complaint it is alleged that he purchased as agent only. The point made seems to have been decided adversely to the contention made here, in Lumber Co. v. Gottschalk, 81 Cal. 641-646, 22 Pac. Rep. 860.

We perceive no merit in the points made of the same tenor as to the C. H. Reed & Co. claim, looking at the record and the evidence, particularly as to the value of the materials furnished, and the way in which they were purchased and furnished.

As to the L. H. Simmons case, it is said that the complaint does not state a cause of action; that it does not state that the materials were used in the building. There was no special demurrer filed to this complaint, and the court found that the materials were used in the building, and the complaint set out that "said firm sold and delivered to said Norton certain hardware and building material to be used in the erection and construction of said building, and affixed and attached thereto." If this hardware and building materials were affixed and attached to the building, they must be said to have been used in the erection and construction of it. Under the circumstances, we think the complaint was sufficient. There is nothing in the cases cited by the appellants to sustain their contention. California Powder-Works v. Blue Tent, etc., Mines, (Cal.) 22 Pac. Rep. 391; Silvester v. Mine Co., Id. 217. There is no substantial variance between the notice of lien and the evidence as to the contract in this case.

It is contended, further, that the J. M. Huyck complaint does not state a cause of action, in that it omits to state that the building was completed. There is nothing in the point, as it is fairly inferable from the language of the complaint at folio 94 that the building was completed when the notice of lien was filed.

As to the point made of the variance between the actual contract made with Knight and the statement of the same in the notice of lien, it appears that it is well taken. The notice sets out: "That the agreement between him and said Norton was that he was to be paid for said labor done and material furnished at what it was reasonably worth, to be paid for when the work ceased." The evidence is, on the part of Knight, that he had an express contract with Norton to do painting for $250; that he did a portion of it, and stopped because Norton refused to pay him. He says: "My contract was to furnish all the material and do all the painting for $250." The other points made, that there is a variance between the notice and the contract proved, as to the name of his employer, and that the complaint does not show that the building was completed when the notice of lien was filed, are without force.

The point seems to be made upon the Mitchell complaint that it is not alleged therein that the contract for furnishing the materials, etc., was in writing or filed for record, and that as it was over $1,000 it was void. Mitchell was a mere subcontractor and material-man, and there is nothing in section 1183, Code Civil Proc., requiring a contract of the kind he had to be in writing or recorded; and, even if the contract between Norton and Helm had been void, there was no necessity for Mitchell to have had any written contract or to have recorded it.

The defendants argue that the findings are conflicting as to the completion of the building at the time the notices of lien claims were filed, and that the evidence shows that they were prematurely filed. We do not think either point well taken The contractor had ceased to work upon the building for 30 days on December 10, 1889, before the lien claims were filed, and this is held to entitle such claimants as are here involved to file their notices of lien as they did. Lumber Co. v. Olmstead, 85 Cal. 84, 24 Pac. Rep. 648.

But we do not think that the finding of the court that the work was commenced before the contract, or a memorandum thereof, was filed in the recorder's office of the proper county, is sustained by the evidence. The memorandum was filed on the 25th of June, at 10:30 o'clock A. M. While even admitting the plaintiff's view of the testimony to be correct, which is doubtful, that any work at all was commenced before this filing, it was of the most trivial nature, and was not commenced until, at the earliest, 8 or 8:30 A. M. of the same day. It should be held, under the evidence, that the filing of the memorandum was before the work was actually commenced.

The objection urged that the contract as made is defective, in that the time specified for payments thereunder is not in accordance with section 1184 of the Code of Civil Procedure, which reads thus: "No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work; but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work: provided, that at least 25 per cent. of the whole contract price shall be made payable at least thirty five days after the final completion of the contract. * * * In case such contracts * * * do not conform substantially to the provisions of this section, the labor done and the materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." The contract provided: "For all the material, and for the construction of said building, as herein provided, said Norton agrees to pay said Helm the aforesaid sum of $5,500, as follows: (1) Upon the written order of said Helm, he [Norton] will pay the material-man for materials furnished as soon as the same is actually worked into the building, and whether the same be furnished directly to said Helm or to his subcontractors. (2) Upon the written order of said Helm he [Norton] will pay the mechanics and laborers upon said building at the end of every week for work actually done, and whether such laborers and mechanics be hired directly by said Helm or by his subcontractors. (3) When all the material and labor is paid for, as aforesaid, then said Norton will pay said Helm the balance of said contract price: (4) provided, that said Norton may retain 25 per cent. ($1,375) of said contract price until thirty-five days shall have expired after final completion of said contract." We think these payments, to be made through Norton to the material-men when their material was used in the building, and to the mechanics and laborers weekly, were specific enough as to time and amounts to comply substantially with the statute.

In their opening brief the respondents claim that, in order for the memorandum to be valid, there must have been filed in the recorder's office the plans and specifications for the building. But this contract was made after the amendment of 1887 to section 1183, Code Civil Proc., and in that amendment it is not specified that any plans or specifications shall be filed, nor is it necessary to a proper memorandum that they should be.

In their reply brief they press this point no further, but claim that the memorandum filed is insufficient because it does not specify the time mentioned in the contract for making payments, and is not a memorandum of the contract as to payments. The memorandum, among other things, contains this: "Said Helm to be paid $5,500 for all work, labor, and material; three-fourths thereof payable in installments as work progressed. (Said Norton to pay the material-men, laborers, and mechanics upon the written order of said Helm; laborers and mechanics to be paid weekly during the progress of the work, until said three-fourths is exhausted.) The other one-fourth payable in thirty-five days after the final completion of the contract." We do not see but what this is a substantial statement of "the amounts of all partial payments, together with the times when such payments shall be due and payable," as set out in the contract, and required to be in the memorandum, under section 1183, Code Civil Proc. The point is also made that certain of the verifications to some of the claims of lien are insufficient. But we see no merit in it; it is only required that the verification should state that the claim is true, without setting out the particulars which the law requires to be contained in the body of the claim. Arata v. Mine Co., 65 Cal. 342, 4 Pac. Rep. 195.

This disposes of all the material questions argued on the appeal, and it appears that the defendant Norton did not retain for 35 days after the final completion of the work and contract, and pay it over to those entitled thereto, 25 per cent. of the contract price of $5,500, and that he is responsible to that extent, but no further, to those who make good their claim to it; but the judgments rendered are for more than that amount. For the reasons heretofore stated we advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

(89 Cal. 215)

BARRY v. GOAD *et al.* (No. 12,984.)

(*Supreme Court of California.* May 26, 1891.)

BOARDS OF EDUCATION — INSPECTING TEACHERS— INJUNCTION.

1. The board of education of the city and county of San Francisco, under the authority given it by Act Cal. April 1, 1872, to employ teachers, and fix, allow, and order paid their salaries, cannot appoint and employ "inspecting teachers" to perform duties imposed by the act on the board itself, and on the superintendent, consisting of visiting the schools, ascertaining their condition by oral examinations, observing the methods of the teachers, and giving them advice and instructions in the methods of teaching.

2. A tax-payer may maintain an action to enjoin the board from drawing drafts on the school fund in favor of such inspecting teachers, without showing that he will sustain any special injury different from that of the public at large.

In bank. Appeal from superior court of city and county of San Francisco; N. HAMILTON, Judge.

Otto Tum Suden and *Horace W. Philbrook*, for appellant. *Jos. Rothschild*, for respondents.

HARRISON, J. The plaintiff, a resident and tax-payer of the city and county of San Francisco, brought this action for the purpose of restraining the board of education of said city and county from drawing any draft upon the school fund in favor of the defendants, Kennedy and Fowler, in compensation for services rendered and to be rendered under an appointment from said board, upon the ground that such appointment was unauthorized by law. In their answer to the complaint the defendants set forth the order under which they allege that the said Kennedy and Fowler were employed, in which is specified in detail the duties required of them. Upon the trial of the cause the court made the following findings of fact: "(1) That the allegations in plaintiff's complaint are not sufficient in law to entitle plaintiff to any relief or any judgment; (2) that all the affirmative allegations in defendants' answer are true;" and thereupon rendered judgment in favor of the defendants. The board of education of the city and county of San Francisco is a creature of the legislature, and has only such powers as have been conferred upon it. It has no authority to divert the moneys of the school fund to any purposes other than such as have been expressly authorized by law. By Act April 1, 1872, (St. 1872, p. 846,) defining the powers and duties of the board, it is declared: "Section 1. The board of education of the city and county of San Francisco shall have power: * * * *Third,* to employ and dismiss teachers, janitors, and school census marshals, and to fix, alter, allow, and order paid their salaries or compensation." The board is also authorized "to employ and pay such mechanics and laborers as may be necessary to carry into effect the powers and duties of the board;" and "to employ and pay counsel" for the purpose of prosecuting and defending actions relating to the property of the school department. St. 1864, p. 162. Section 15 of the act of April 27, 1863, (St. 1863, p. 605,) declares that the school fund of the city and county of San Francisco "shall be kept separate and distinct from all other moneys, and shall only be used for school purposes under the provisions of this act;" and section 16 of the same act declares: "The said school fund shall be used and applied by said board of education for the following purposes, to-wit: *First,* for the payment of the salaries or wages of teachers, janitors, school census marshals, and other persons who may be employed by said board." The "other persons" herein referred to are "mechanics and laborers," and the "counsel" authorized by section 2 of the same act, as amended in 1864. St. 1864, p. 162. Aside from these provisions, we have not been cited to any statute which authorizes the board to employ any person in any capacity other than those above mentioned, or to direct payment out of the school fund for any services other than such as may be rendered under the above-named employments. It is alleged by the defendants in their answer herein that on or about the 20th day of March, 1883, the board of education of the city and county of San Francisco adopted a resolution to appoint and employ, and did appoint and employ, the defendant Laura T. Fowler inspecting teacher; and in said resolution it was provided that the special duty of such inspecting teacher should be to "visit schools, and ascertain by frequent oral examinations the condition of the classes; to observe carefully the methods of teaching and discipline pursued by the teachers; to give advice and assistance to teachers and principals when necessary, and in their presence and before their classes exemplify the best method of teaching; that the inspecting teacher shall be subject to the direction of the superintendent and deputy superintendent of public schools for the accomplishment of a careful, efficient, and thorough inspection of the schools, under such further direction or instructions as may from time to time be given by the committee of classification and credential and qualification of teachers, subject to the approval of the board, at a salary of $175 a month;" and that this was the only order under which the defendant Fowler was employed by said board; that on or about the 5th of January, 1887, it appointed and employed the defendant Kennedy as head inspecting teacher of the public schools of said city and county, at a compensation of $200 per month; and that said defendants Kennedy and Fowler have ever since been engaged in the performance of their duties under said employment. This averment by the defendants of the resolution or order under which the defendants Kennedy and Fowler are employed by the board of education is substantially the same as that alleged in the complaint, and is treated in the briefs upon both sides as expressing the duties required of said defendants under their employment by the board.

It is contended by the respondents that under its power to employ "teachers" for the public schools, the board had authority to employ Kennedy and Fowler as "inspecting teachers" to perform the duties provided by the resolution under which they were appointed; and that these duties are peculiarly such as appertain to the functions of a teacher. On the other hand, it is claimed by the appellant that the duties required of these "inspecting teachers" are precisely such as the statute has imposed upon the superintendent of schools and the board of education itself, and that the board cannot, by merely giving its appointees the title of "inspecting teachers," transfer to them the duties which the statute has imposed upon itself or upon the superintendent. Section 3 of the act of April 1, 1872, (St. 1872, p. 848,) declares that "it shall be the duty of the superintendent of common schools of the city and county of San Francisco—*First*, to visit and examine every school under the board of education as often as once in every six months; to inquire into all matters relating to the government, course of instruction, books, studies, discipline, and conduct of such schools; * * * and to counsel with and advise the teachers in relation to their duties, the proper studies, discipline, and conduct of the pupils, the course of instruction to be pursued, and the books of elementary instruction to be used; * * * and to make a monthly report to the board of education, stating which schools have been visited by him, and adding such comments in respect to the matters here specified as he may deem advisable;" and by the first section of said act the board of education is authorized "to establish and regulate the grade of schools, and determine the course of studies, and the mode of instruction to be used in said schools." It is apparent, upon a comparison of the provisions of these statutes with the resolution defining the duties of inspecting teachers under which the defendants Kennedy and Fowler were employed, that the special duties which these inspecting teachers are to perform are such, and such only, as the statute has prescribed as a portion of the duties of the superintendent and of the board of education. Aside from the normal schools, which it is the duty of the board to provide "for the instruction of those who desire to become teachers," the only "teachers" which it has the power to employ are those whose duties are to instruct the children (between the ages of six and twenty-one) for whose benefit the public schools are maintained. The duties, however, which under the resolution authorizing their appointment are required of the inspecting teachers, in no respect pertain to instruction, but are simply those which would pertain to a superintendent or inspector of the several schools to which their attention is directed. The action of the board cannot be upheld upon the ground that its appointees are termed "inspecting teachers," if, in fact, their duties are those of "inspectors" rather than of "teachers." The character of the appointees must be determined from the functions which they are to discharge, and not from the name by which they are called. As is conceded by counsel for respondents in his brief, "it is by the resolution appointing them, and defining their duties, their *status* must be determined." If the duties which they are to perform are those of a superintendent, it is immaterial whether they are styled "superintendent" or "inspector" or "inspecting teacher." It needs no argument to show that the board cannot transfer to its own appointees the duties that the statute has devolved upon another officer, or appropriate any portion of the school fund to a payment for services that the legislature has declared shall be rendered by the board itself without compensation, or be performed by the superintendent as a part of the duties for which he was elected. The statute allows to the superintendent only one deputy, and his compensation cannot be paid out of the school fund. Pol. Code, § 1549. If the board can appoint persons under the name of "inspecting teachers" to perform the duties which appertain to the office of the superintendent, or of his deputy, and cause their compensation to be paid out of the school fund, it would thus indirectly do that which is forbidden by statute.

We fully recognize the force of the argument on behalf of the respondents, that great advantage would accrue to the public schools from the services of competent persons appointed to discharge the duties specified in this resolution of appointment, and we readily concede that the board in making the appointment was prompted solely by its desire to increase the efficiency of the school department. It is also easily perceived that the services of capable persons in the discharge of the duties required under this resolution would be of great aid to the board in remedying any defects that might be found to exist in the conduct of the schools, and in increasing the efficiency of the teachers in giving instruction to their pupils. The board of education is, however, in the exercise of a public trust, limited by the act under which it was created, and with only such powers as the legislature has seen fit to confer. If by experience it has found that these limitations are too great, or that the powers conferred are insufficient to enable it to properly discharge its trust, the board is not at liberty to disregard the limitations, or to exercise powers not conferred upon it. The remedy for these defects must be sought from the legislature. The objection that the plaintiff cannot maintain this action, for the reason that he does not show that he will sustain any special injury different from that of the public at large, is untenable. Winn v. Shaw, (Cal.) 25 Pac. Rep. 968. The judgment of the superior court is reversed, and that court is directed to enter judgment for the plaintiff in accordance with the prayer of his complaint.

We concur: BEATTY, C. J.; DE HAVEN, J.; PATERSON, J.; GAROUTTE, J.; SHARPSTEIN, J.

In re MOORE'S ESTATE. (No. 14,275.)

(*Supreme Court of California.* May 6, 1891.)

Department 1. Appeal from superior court, Sacramento county. W. C. VAN FLEET, Judge.

Johnson, Johnson & Johnson, for appellant. *Catlin & Blanchard*, for respondent.

PER CURIAM. Upon the authority of Estate of Bauquier, No. 14,080, (see opinion filed on denying petition for rehearing, ante, 532,) the motion to dismiss the appeal in this cause is denied.

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89 Cal. 70

BURGEL *et al.* v. PRISSER. (No. 13,645.)

(*Supreme Court of California.* May 14, 1891.)

EJECTMENT—TENANCY IN COMMON—JUDGMENT.

Where, in ejectment, it appeared that the land had been the community property of the plaintiffs' father and mother; that the father died, and plaintiffs inherited one-half of the land, and their mother the other half; that the mother subsequently married the defendant, and afterwards died, whereupon plaintiffs inherited from her two-thirds of her half, and the defendant the other third,—a judgment that plaintiffs recover an undivided five-sixths of the land, instead of merely that plaintiffs were tenants in common of an undivided five-sixths of the land with the defendant, and should be let into possession thereof as such, is error, as being against evidence.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Albert A. Johnson, for appellant. *Add. C. Hinckson*, for respondents.

MCFARLAND, J. This is an action of ejectment, the complaint being in the usual form. Defendant, in his answer, denies that plaintiffs were either the owners or entitled to the possession of the demanded premises. The court found that the plaintiffs were the owners and entitled to the possession of the undivided five-sixths of the tract of land described in the complaint, as tenants in common with defendant, who is found to be the owner and entitled to the possession of one undivided sixth; and judgment was rendered that plaintiffs recover such undivided five-sixths. Defendant moved for a new trial, the motion was denied, and from the order denying the motion defendant appeals. There is a short statement on the motion for a new trial which summarily states that there was evidence which "proved" certain facts. (There is some contention by respondents that this statement is not sufficiently authenticated; but, as the record shows that the statement was settled and allowed by the presiding judge, we must take it to be genuine, and sufficiently certified.) Among other facts shown by this statement to have been "proved" are these: The land in contest was owned by Charles H. Burgel, the father of plaintiffs, and was the community property of said Charles and his wife, Mary, who was the mother of plaintiffs. Charles, the father, died in 1884, and the land went, by operation of law, one-half to the widow, and the other half to the plaintiffs. In February, 1886, the defendant, Prisser, married the mother, Mary, and was her husband until February, 1887, when she died. The defendant was appointed her administrator in March, 1887, and was such administrator at the time of the commencement of this action, and at the time of the judgment; the administration not yet having been closed. The proof of these facts was admissible under the denials in the answer. Under these facts, plaintiffs are the owners and entitled to the possession of the undivided one-half of the land which descended to them from their father. They are also heirs to the undivided two-thirds of their mother's half, to which they will be entitled on final distribution, if no part thereof be necessary to pay debts, etc.; but, pending administration, the defendant, as administrator of their mother, is entitled to possession of the undivided half which came from the mother. If the judgment had merely determined that plaintiffs were tenants in common, and should be let into possession with defendant, there could have been no objection to it. It has been decided, however, that in an action like the one at bar, on account of mesne profits and other matters that may arise, "it is proper for the court before which the ejectment suit is tried to ascertain and settle the respective interests of the parties." Freem. Co.-Ten.; Mahoney v. Middleton, 41 Cal. 54. The finding, therefore, that plaintiffs "are entitled to the possession of an undivided five-sixths interest in the tract of land described in their complaint," is against the evidence; and for this reason the order denying a new trial must be reversed. The order appealed from is reversed, and the cause remanded for a new trial.

We concur: DE HAVEN, J.; GAROUTTE, J.; HARRISON, J.; PATERSON, J.

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89 Cal. 69

PAIGE *et al.* v. ROEDING *et al.* (No. 14,262.)

(*Supreme Court of California.* May 14, 1891.)

APPEAL—DEFECTIVE RECORD—DISMISSAL.

Code Civil Proc. Cal. § 950, provides that on appeal from a final judgment the court must be furnished with a copy of the judgment roll; and Id. § 954, provides that, "if the appellant fails to furnish the requisite papers, the appeal may be dismissed." *Held* that, where the whole judgment roll is not "requisite" to the full determination of the appeal, it will not be dismissed because of the omission of an unessential part.

In bank. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Pillsbury & Blanding, for appellants. *Rosenbaum & Scheeline*, for respondents.

McFarland, J. This cause is before us on a motion of respondents to dismiss the appeal upon the ground that the transcript filed by appellants does not contain a copy of the judgment roll. Section 950 of the Code of Civil Procedure directs that on an appeal from a final judgment the court must be furnished with a copy of the judgment roll; and section 954 provides that, "if the appellant fails to furnish the requisite papers, the appeal may be dismissed." This power to dismiss might, perhaps, be properly exercised in extreme cases; but it frequently happens that the whole of a judgment roll is not "requisite" to the full determination of an appeal. And it would be unjust to dismiss an appeal merely because some part of the roll had been—inadvertently, perhaps—omitted from the transcript. If the omission be deemed material by respondents, they can easily remedy the supposed defect by suggestion of a diminution of the record. In the case at bar the asserted defects in the copy of the judgment roll—which do not very clearly appear from the certificate of the clerk—are not important enough to authorize a dismissal of the appeal. The motion to dismiss the appeal is denied.

We concur: Harrison, J.; Paterson, J.; Garoutte, J.; De Haven, J.

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89 Cal. 63

Oneto v. Restano. (No. 13,798.)

(*Supreme Court of California.* May 13, 1891.)

Lease—Delivery—Water-Rights—Estoppel.

1. The fact that a lease has always been in the possession of the lessor is not conclusive evidence that there has been no delivery, since the lessor has as much interest in it as the lessee, and as much occasion for its possession, and the fact that the tenant has entered under it is sufficient to sustain a presumption that it has been duly delivered.

2. Where of two parties in possession of certain water-rights it appeared that one had been the original appropriator, and that, after his ditch and flume had fallen into decay, he arranged with the grantor of the other that they should together repair and renew the ditch and flume, appropriating a quantity of new water from a different spring, and share the total flow equally, the subsequent acceptance by the grantee of the other party of a lease from the original appropriator will be held, in the absence of any other showing, to be a compromise of the respective rights, and the lessee, after enjoying the fruits of the compromise during the term of the lease, cannot afterwards repudiate it, and claim to have held the water adversely to the lessor.

Commissioners' decision. In bank. Appeal from superior court, Tuolumne county; J. F. Rooney, Judge.

F. W. Street and *A. L. Hart*, for appellant. *F. D. & G. W. Nicol*, for respondent.

Temple, C. This is the second appeal in this case. The former appeal, like this, was taken by the plaintiff from a judgment in favor of defendant, and from an order denying his motion for a new trial. The judgment was reversed on the ground that the court failed to find that the use of the water by the defendant and his grantors had been adverse. 78 Cal. 374, 20 Pac. Rep. 743. After the case had been remitted to the trial court the defendant was allowed to amend his answer so as to aver that for more than five years last past he has been using the water adversely to plaintiff and his grantors. There is no other claim in the answer of title on the ground that the use was adverse, unless such defense is involved in the simple allegation of ownership. In fact, the theory of the defense seems to be that Bache, plaintiff's grantor, was the owner of a spring from which he had conducted water to his premises in the city of Sonora; that by agreement with the Antoninis, through whom defendant derives his title, Bache and the Antoninis some years afterwards constructed a new ditch and flume, and took in other waters: that it was understood that the Antoninis and Bache should then share the water equally. The new water taken in was, defendant claims, just about equal to that which had previously been carried by the Bache ditch from the spring which belonged to him. So that by the arrangement with the Antoninis, Bache was able to secure a new ditch and flume in place of one which had become dilapidated and unserviceable, and still practically retain all the water he had before. And the court finds that it was agreed, when they arranged to rebuild, that the water of said spring (the new water to be taken in) to be thereafter appropriated, together with the Bache spring, should belong to them in common, and to share equally in the use of the water each alternate day for irrigating their respective gardens, and for culinary, domestic, and other useful purposes. It is also found as a fact that they did open up another spring, constructed the ditch and flume as agreed, and caused the waters of both springs to flow into it; and it is found that from that time—1867—Bache and the Antoninis and their respective grantors have used the water on alternate days for irrigating their respective gardens, and for culinary and other useful purposes, continuously, peaceably, and uninterruptedly; that the new spring had not previously been owned, claimed, or appropriated by any person. This state of things continued until May 1, 1877,—some 10 years,—when Lorenzo Antonini, who had become sole owner, sold to David Sanguinnetti. At that time Bache and Sanguinnetti made and executed an agreement in writing, whereby Bache, in consideration of one dollar, did rent, lease, and demise to Sanguinnetti, for the term of 10 years, one-half of the water flowing in his ditch every alternate day. Sanguinnetti agreed to keep the ditch in repair on his premises, and to pay one-half the expense of repairing the ditch and flume above his premises, and of a new flume if it should be necessary; and, should the flume and ditch be flooded, both agreed to repair the same at their joint expense. The parties continued to use the water after the lease as before, taking the whole of it each alternate day, and accordingly on the former appeal it was held this lease was for one-half of the water, to be measured by using every other day. In short, the lease covered the very water-right in controversy.

Sanguinnetti was a witness at the trial, and testified that he could not read or write, that he never had or heard of a lease, and that he always claimed the use of the water in his own right, and had so informed Mr. Bache. The court finds, however, the due execution of the lease, but also that it was retained by Bache, and never had been in the possession of Sanguinnetti. The finding that the agreement was executed must be held to include delivery, for otherwise there is no finding upon this important point, and the word has been held to include all that is necessary to make an instrument complete and operative. There is evidence which tends to show that the parties believed they had executed the instrument, and that Sanguinnetti so understood it. In regard to a lease, the mere fact that the instrument has always been in the possession of the lessor is not conclusive evidence that it has not been delivered so as to become operative. An ordinary deed is usually of value only to the grantee. The maker has no further interest in it. But an indenture of lease is a very different thing. It continues to be of fully as much interest to the landlord as to the tenant, and he has fully as much occasion for its possession. Such agreements are usually executed in duplicate. But where it is retained by either party with consent of the other it must be considered as delivered, if both understand that it has been executed, and is in operation. Where the tenant enters under it, there can usually be very little question about it. The due execution of the lease being found, the question arises as to its effect. It will be seen from the above statements that, according to the findings of the court, at the time of the execution of the lease the parties were equally entitled to the use of the water, although some question might be made as to whether their interest was joint. So long as the water of the two springs was carried in the common flume they were equally entitled to use the water; and so the parties had been continuously using it for more than 10 years, and were so using it at the time the lease was made. Sanguinnetti, then, was in possession at the time of the demise. The evidence upon which the court bases its finding is conflicting, confused, and contradictory. A. Antonini, upon whose testimony both parties chiefly rely, seems uncertain as to the ownership of the property. The facts apparently shown by the evidence do not seem very conclusive upon that point, although, after a careful study of the transcript, we are satisfied there is evidence sufficient to justify every material finding. Still, as there was much room for grave doubts upon the subject of ownership, it is altogether probable that the lease was executed after a claim made by Bache and a consideration of the matter by Sanguinnetti. In fact, it was most likely a compromise of threatened litigation. Bache conceded the free use of the water for 10 years in consideration of the acknowledgment of his title by Sanguinnetti. If it were a new question, we should say he could not now, having enjoyed the fruits of this compromise, go back upon it. But the rule is too thoroughly established to be open to question in this state. Tewksbury v. Macgraff, 33 Cal. 237; Franklin v. Merida, 35 Cal. 558; Holloway v. Galliac, 47 Cal. 474; Peralta v. Ginochio, Id. 460; Insurance Co. v. Stroup, 63 Cal. 150; Davis v. McGrew, 82 Cal. 138, 23 Pac. Rep. 41. The lease had expired by its terms before this litigation was commenced, and, under the rule established by the above decisions, it constituted no estoppel as against the defendant. Under the circumstances it becomes unnecessary to pass upon the questions raised in regard to the verbal sale, and the claim that the defendant held the property adversely for five years since such alleged sale. It follows that the judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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89 Cal. 89

GESSNER v. PALMATER. (No. 13,468.)

(*Supreme Court of California.* May 16, 1891.)

VENDOR'S LIEN—ASSIGNMENT—ATTACHMENT.

Where the owner of land contracts to convey it upon the payment of a certain price, for which he accepts notes, but the title is not to pass until the notes are paid, the land is, by express contract, held in pledge for such payment, and the notes and contract are in the nature of a mortgage, and the lien will pass to the assignee of such a note, who, under Code Civil Proc. Cal. § 538, requiring a plaintiff in attachment to state that his claim is without security, cannot maintain action by attachment therefor. MCFARLAND, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Winslow P. Hyatt, for appellant. *Del Valle & Munday*, for respondent.

PATERSON, J. This is an appeal from an order denying a motion to dissolve an attachment. The motion was made on the ground that the note upon which the action was brought was given to Webster, plaintiff's assignor, in part payment for certain land purchased from him by defendant; that Webster had a vendor's lien as security for the payment of the note; that the lien passed to plaintiff by the assignment of the note, and, being thus secured, an attachment was improper. The affidavit filed in support of the motion states that the defendant purchased certain land from Webster under a contract which provided for payment of the purchase price by installments, and that at the time and place of making said contract for the sale and purchase of said lot of land, and as part of the said contract, the defendant executed and delivered to Webster the promissory note sued on, and that Webster still holds, against the defendant, the contract giving him the right to purchase. There is, perhaps, no subject of equity jurisprudence discussed in the books upon which there is a greater diversity of opinion than exists in relation to the origin, nature, and effect of a vendor's lien, against whom and in whose favor it avails, and how it may be discharged or waived. Hammond v. Peyton, 34 Minn. 531, 27 N. W Rep. 72. The various definitions given and principles applied to it by the courts, are hopelessly irreconcilable; and, if we take the expressions found in decisions and text-books, without observing the distinction between the lien implied by law in favor of a vendor who has parted with the legal title and taken no security for the purchase money, and the security which the vendor has while he holds the legal title under an unexecuted contract for the conveyance of lands upon payment of the purchase money, there will appear to be great confusion and inconsistency. The former, the implied lien, is properly known as a "vendor's lien." It is the creature of courts of equity, founded upon the equitable presumption that where the vendor has parted with his title and taken no security for the payment of the purchase money, the parties intended that the property itself should remain as a pledge for the payment of the purchase price of the land. The lien thus created by implication is not a specific, absolute charge upon the property; it is personal to the vendor, and does not pass by a transfer of his claim for the purchase money. The fee is in the purchaser, and he may defeat the lien by a conveyance to a *bona fide* purchaser for value. Sparks v. Hess, 15 Cal. 186; Baum v. Grigsby, 21 Cal. 172; Lehndorf v. Cope, 122 Ill. 333, 13 N. E. Rep. 505. The latter is improperly designated as a vendor's lien. Where the vendor holds the legal title under an unexecuted contract for the conveyance of the land upon payment of the purchase money, the transaction shows upon its face that he holds it as security. The vendee cannot prejudice that title, or in any way divest it, except by performance of the act for which the vendor holds it. The vendor's security is something stronger than a mortgage, because the legal title is retained as security. Stevens v. Chadwick, 10 Kan. 413. It has been called an "imperfect" or "equitable" mortgage, which is a more appropriate term than "vendor's lien." Moore v. Lackey, 53 Miss. 85. In many of the best-considered cases, including Sparks v. Hess, supra, it is treated as if it had the similitude of a mortgage, subject to foreclosure in the same way a mortgage is foreclosed. There is no necessity for any lien by implication. Where the title is not to pass until the vendee pays the purchase price, the land is by express contract held in pledge for such payment, and the notes and contract may be considered as an instrument in the nature of a mortgage. It is a lien by contract, is an incident to the debt, and the assignee of notes given for the purchase money, like the assignee of a note secured by mortgage, is entitled to the benefit of the security. Avery v. Clark, (Cal.) 25 Pac. Rep. 919, (filed February 6, 1891;) Wright v. Troutman, 81 Ill. 374; Adams v. Cowherd, 30 Mo. 460; Lowery v. Peterson, 75 Ala. 109; Bradley v. Curtis, 79 Ky. 327; McClintic v. Wise, 25 Grat. 448; Lagow v. Badollet, 1 Blackf. 419; Dingley v. Bank, 57 Cal. 471. There are a few decisions to the contrary, some of which inveigh against the rule, and, emanating, as they do, from highly respectable authority, are entitled to careful consideration; but they bear evidence of a departure from sound legal rules, and will be found generally to have been influenced by decisions in cases where the legal title had passed to the vendee, thus overlooking the distinction we have attempted to point out, and which is paramount always in determining questions of this kind. The authorities preponderate very decidedly in favor of the view we have expressed. 2 Jones, Liens, § 1119, note.

The provisions of our Civil Code, §§ 3046, 3047, apply to the vendor's lien proper, and not to the security held by a vendor under an unexecuted contract for the sale of land. There has been, and still exists, a great conflict of decision among the American courts, not only as to the nature of the security of the implied lien, but as to whether it could be assigned, and what act of the vendor would amount to a waiver of the lien. Perry, Trusts, (4th Ed.) § 328, note 4. The notes of the code commissioners, and cases cited by them under the sections above referred to, show that it was intended to settle this conflict by express enactment. Ann. Civil Code, §§ 3045, 3046, notes; Avery v. Clark, supra.

We are not called upon in this case to say whether the purchaser of a negotiable note for value, without notice of the security held by a vendor of real estate under an unexecuted contract, would have the right to a writ of attachment. The affidavit, on motion to discharge the writ herein, stated that plaintiff "purchased the note sued upon in this action with full knowledge that the same was given as collateral to and identical with the debt secured by said contract and the lien on said real estate." The note having been secured originally by the vendor's lien, and plaintiff having taken it with notice of that fact, it was his duty to state in his affidavit for the writ "that such security has without any act of the plaintiff, or the person to whom the security was given, become valueless." Such is the requirement of the statute. Section 538, Code Civil Proc. The affidavit upon which the attachment was issued states that the payment of the sum claimed "has not been secured by any mortgage or lien upon real or personal property." The affidavit filed by defendant in support of his motion to discharge the writ states facts showing that the note was originally secured. No counter-affidavit was filed by plaintiff. The attachment was improperly issued, and therefore the motion should have been granted. The order is reversed, with directions to discharge the attachment.

We concur: BEATTY, C. J.; DE HAVEN, J.; GAROUTTE, J.; HARRISON, J.

MCFARLAND, J. I dissent, and adhere to the views expressed in the former opinion. 24 Pac. Rep. 608. I cannot subscribe to the doctrine that the owner in fee of land, who simply agrees to convey it upon the payment to him of certain money evidenced by a promissory note, is in the same position as one who conveys the land and takes back a mortgage; or that if, in the former case, he merely assigns the promissory note, the assignee of the note has a lien on the land. If the latter can enforce such a lien, he must be able to release it. But how could he release it? It could be released only by conveying the land to the vendee, but how could he convey that which he hath not? If, after the assignment of the note, the vendor should convey the land to the vendee, what then would be the condition of the supposed lien of the assignee of the note? The whole doctrine must rest on the untenable proposition that the assignment of a negotiable promissory note is a conveyance in fee of land.

I know that some of the recent text-writers speak of such a case as bearing "a strong similitude to that of mortgagee and mortgagor," and say that, although it "is often spoken of in the cases as a vendor's lien," yet, in their opinion, such language is "a misuse of terms;" and that, although "it has been said, in English and American decisions, that the vendor's lien may arise before conveyance as well as after," yet that this saying "confounds legal notions which are essentially different." But, in my opinion, those "English and American decisions" correctly state the law, and tend to prevent confusion. In this state Sparks v. Hess, 15 Cal. 194, is the leading case on the subject. In that case the court say: "This is not a suit to enforce a vendor's lien after conveyance executed, but to enforce such lien when the contract of sale remains unexecuted;" and that, while the position of the vendor is "in some respects" like that of a mortgagee, it is in other respects different. "The vendor is at liberty to ask either a decree directing performance, and in case of refusal a sale of the premises, or a decree barring the right of the vendee to claim a conveyance under the contract." Throughout the whole case the right of the plaintiff is treated as and called a "vendor's lien;" and there is no doctrine better established than that a vendor's lien is not assignable. In the case at bar there was no conveyance of the legal title from the owner of the land (Webster) to the assignee of the note; and, in my opinion, the mere assignment of the note carried no title to the land, and no vendor's lien, or any lien at all. But, in my opinion, a vendor's right is too shadowy to be a lien, within the meaning of the attachment law.

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89 Cal. 73

BELCHER v. FARREN *et al.* (No. 13,752.)

(*Supreme Court of California.* May 14, 1891.)

NATURALIZATION—EVIDENCE.

A widow, born in Ireland, whose parents never came to this country, and who was herself never naturalized, in order to prove her citizenship by marriage to a naturalized citizen, must produce record evidence of her husband's naturalization.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Garber, Boalt & Bishop, for appellant, Belcher. *W. B. Wallace*, for respondent.

TEMPLE, C. This is a contest over the right to purchase swamp and overflowed lands from the state. There are three applicants. Farren's application was filed before the segregation, and under the recent decision of Buchanan v. Nagle, (Cal.) ante, 512, the judgment denying his right to purchase must be affirmed. Belcher's application was made after the survey and segregation, but he is not an actual settler, and the court finds that the land is suitable for cultivation, and on the authority of Fulton v. Brannan, ante, 506, (Cal. No. 13,603,) the judgment must be affirmed as to him, unless it appears that there was error at the trial such as will necessitate a reversal. We find no such error. The facts, we think, show, independently of the opinion evidence complained of, that the land is suitable for cultivation. The land is level, free from serious obstruction to plowing; the soil a rich, sandy loam. It is near Lake Tulare, but has been dry for some years; and there is evidence that the lake is steadily receding year by year. If in such a soil crops sometimes or often fail through drought, it cannot be said, in this state, that the land is therefore unsuitable for cultivation. The defendant Ford is found to be an actual settler on the east half of the section. Her residence seems from the evidence to be somewhat ideal. The purchaser is required to be an actual settler. He must show something more than that he has eaten and slept on the place, besides having a cabin there, and that he has made some fanciful attempts at planting trees and cultivation. The section means real settlers on the land, and not occasional visitors. It does not contemplate casual acts, done not in good faith to make a home, but simply to secure cheap land; although, if a home is actually established, motives cannot be further questioned. At the trial it appeared that defendant Ford was a widow, born in Ireland. Her parents never came to this country, and she was never naturalized. After she came to the United States she married, as she says, a naturalized citizen. If she did so, under the law of congress she became a citizen. She had no record evidence, however, to prove the naturalization of her husband. Objection was made to the parol proof, and counsel asked to have her application stricken out. We are constrained to hold under the decisions that the evidence was incompetent. Miller v. Prentice, 82 Cal. 104, 23 Pac. Rep. 8; Bode v. Trimmer, 82 Cal. 513, 23 Pac. Rep. 187; Prentice v. Miller, 82 Cal. 575, 23 Pac. Rep. 189. In the last case it is said: "And, like any other judicial record, must be proved by the record itself, or a properly exemplified copy thereof, or by proof of its loss or destruction. Charles

Green's Sons v. Salas, 31 Fed. Rep. 107. There are, however, certain limitations to this rule, for after proper proof of the naturalization of the parents of alien children, who were under 21 years of age and residents of the United States at the time their parents were naturalized, parol evidence may be received to prove the minority and residence of the children in order to show that they are citizens, (Rev. St. U. S. § 2172;) and proof of naturalization may also be by the parol evidence of the party, in the form of an affidavit, in proceedings concerning mining claims, by virtue of section 2321 of the Revised Statutes of the United States; but the appellant does not come within either of these limitations." This quotation is made because it intimates that in case of the children they must also prove the naturalization of their parents by the record,—a case parallel to the present. The other facts which it is said they may prove by parol constitute no exception to the rule, which is simply that an ordinary naturalization is effected by a judgment, and it must be proven as other judgments are. So the cases cited by the respondent, if they are properly called "naturalizations," are not by judgment, and the practice in such cases throws no light upon the point involved here. We think the judgment, so far as it adjudges that plaintiff and defendant Farren are not entitled to purchase the land in question, should be affirmed, as also the motion denying defendant Farren new trial; and that as to defendant Ford the judgment should be reversed, and a new trial ordered.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment as to plaintiff and defendant Farren, and the order denying defendant Farren's motion for a new trial, are affirmed, and the judgment as to defendant Ford is reversed, and a new trial ordered.

HARNEY v. FARREN *et al.* (No. 12,853.)

(*Supreme Court of California.* May 19, 1891.)

In bank. Appeal from superior court, Tulare county; WM. W. CROSS, Judge.

Garber, Boalt & Bishop and *Freeman & Bates*, for appellants. *W. B. Wallace*, for respondent.

PER CURIAM. Upon the authority of the recent cases of Buchanan v. Nagle, ante, 512, (No. 13,705;) Fulton v. Brannan, ante, 506, (No. 13,603;) and Belcher v. Farren, ante, 791, (No. 13,752;) the judgment and order denying a new trial in this action are affirmed.

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87 Cal. 557

HARVEY v. HADLEY *et al.* (No. 13,961.)

(*Supreme Court of California.* Jan. 30, 1891.)

TRIAL—FINDING BY THE COURT.

In an action by the vendee of land against the vendor for damages caused by misrepresentations in selling it the court found that the value of the land without any prospect of a college or street-car line being built as represented was at the time of the sale $3,000; that, if the contract for building the street-car line had been let as represented, the market value of the land would have been $6,000; that with a good prospect that both the college and street-car line would be built the land would have been worth $8,000, which was the sum the vendee paid for it; that as it was with the prospect of the building of the college then existing the value was $5,000. *Held*, that a judgment for $3,000, based on the third and fourth branches of the finding, was not inconsistent with the finding as a whole, and would be sustained.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Wells, Guthrie & Lee and *J. A. Donnell*, for appellants. *C. W. Pendleton* and *Anderson, Fitzgerald & Anderson*, for respondent.

VANCLIEF, C. On July 8, 1887, the plaintiff and defendants entered into an agreement in writing, whereby the plaintiff agreed to sell to defendants a certain tract of land, situate in the town-site or projected town of Whittier, in the county of Los Angeles, for the sum of $8,000, $3,000 of which had been paid before the commencement of this action. For the residue ($5,000) the defendants made their promissory note of even date with the contract, payable on or before June 7, 1888, with interest at 10 per cent. per annum, to be compounded semi-annually. This action was brought to recover the amount due on the note, and to foreclose the vendor's lien upon the land. The defense is that the defendants were induced to purchase the land by false and fraudulent representations of the plaintiff to the damage of the defendants. The court found that plaintiff made the representations charged, and that the greater portion of them were false and fraudulent, to the damage of defendants in the sum of $3,000, and deducted this sum from the note, and rendered judgment for the plaintiff for the residue and interest, amounting to $2,595. The defendants appeal from the judgment on the judgment roll, and contend that the finding of only $3,000 damages is inconsistent with the twelfth finding, by which, they say, it appears that the damages were $5,000. This is the only point made, and to dispose of it in favor of the respondent I think it is only necessary to read the twelfth finding in connection with the eighth and thirteenth findings. The twelfth finding is as follows: "That the value of said land, without any prospect of a college or street-car line being built as represented by the plaintiff, and without any contract being let for the same or either of them, was at the time of the purchase the sum of $3,000; that, if the contract for the building of said street-car line along Hadley street to the south-west corner of said land to Painter avenue had been let, as represented by plaintiff, said land would have been at the time of the purchase of the market value of $6,000; that, if said plaintiff had in good faith intended to build said college, and the Quakers had agreed or determined to build said college, and the contract for building said street-car line had been let at the time of making said contract, as represented by plaintiff, said land would then have been of the market value of $8,000; and that said land as it was, and with the prospect of the building of said college then existing, was of the market value of $5,000." The court here finds what would have been the value of the land at the time of purchase under four different conditions of facts: (1) In case all the representations of the plaintiff had been entirely false; (2) in case the representation as to the contract for building the street-car line alone had been true; (3) in case all the representations made by plaintiff had been true; and (4) the value of the land "as it was, with the prospect of the building of the college then existing," as appears in the eighth finding, wherein it is found: "There were general rumors afloat, and a prospect that said college would be built as stated by plaintiff." The value of the property in the first two supposed cases is immaterial, even according to the rule of damages claimed by counsel for appellant, viz.: "The measure of damage is the difference between the actual value of the property at the time of purchase and its value if the property had been what it was represented or warranted to be." In order to estimate the damages by this rule only the third and fourth branches of the twelfth finding are necessary. The third finds that if the property had been what it was represented to be, its value would have been $8,000. The fourth finds that the actual value of the property as it was at the time of purchase (one part of plaintiff's representations then being true) was $5,000. Thereupon the court estimated defendants' damages to be $3,000, the difference between these two valuations. Counsel for appellants are mistaken in assuming that the court found the representations of plaintiff to have been entirely false. The court found that a part of plaintiff's representations as to the college was true, and considered this in estimating the actual value of the property at the time of the purchase, but excluded it from the estimate, (1,) whereby the value was found to be $3,000. I think the judgment accords with the findings of fact, and that it should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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87 Cal. 545

ROSENBERG v. DURFREE *et al.* (No. 13,-842.)

(*Supreme Court of California.* Jan. 30, 1891.)

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. In an action for personal injuries it appeared that plaintiff, a child of eight years, was invited by one of the defendants, in the presence of the other, to ride on a narrow pole drawn by a horse to propel machinery, which in its circuit passed near to portions of the machinery then in motion; that she lost her hat, and told defendant in charge of the sweep to stop the horse and let her get it; that he told her to pick it up next round; that she tried to do so, lost her balance, and threw out her arm to regain it, when her hand was caught in the cog-wheel, and crushed. *Held*, that a verdict for plaintiff was supported by the evidence.

2. An instruction that a child of such tender years and immature judgment as to be incapable of comprehending the danger to which it is exposed, and of exercising the necessary precaution in guarding against it, cannot be charged with negligence in exposing itself to threatened danger, and that in determining this proposition the jury must consider the age, sex, and all the conditions surrounding plaintiff at the time of the injury, is not erroneous as misleading, or as instructing the jury that the machinery was dangerous.

3. It was not error to charge that if the jury should find that the sweep was a dangerous place for plaintiff to ride, and that defendants, having reason to know that it was dangerous, permitted her to ride upon it in dangerous proximity to the machinery, and that because of her tender years and immature judgment she was incapable of comprehending and guarding against the danger, and under such circumstances was injured, it would be evidence of negligence.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Chapman & Hendrick, for appellants. *Galbreth & Morrison*, for respondent.

FOOTE, C. This action is to recover damages caused to the plaintiff, a child eight years of age, alleged to have resulted from the carelessness of the defendants in negligently inducing and permitting her "to sit upon a sweep or narrow pole drawn by a horse to propel the machinery for pumping water, then being propelled by and under the control and for the use and benefit of defendants." It is alleged further in the complaint that the "sweep in its circuit passed above and near to cog-wheels and other portions of said machinery then in motion, thereby exposing plaintiff to the danger of being crushed and mangled therein if she accidentally fell or in any manner was dislodged from the sweep, and was precipitated upon the machinery; that the defendants well knew of the danger to which the child of tender years was thus exposed, yet they knowingly, carelessly, and negligently suffered her to remain alone on said sweep with no person to guard her, exposed to the danger aforesaid; and that by reason thereof plaintiff fell or was precipitated upon said machinery then in motion, and her left hand was caught, mangled, and lacerated therein, causing the loss of three fingers therefrom, thereby maiming and crippling the plaintiff permanently." The defendants demurred to the complaint. The demurrer was overruled, an answer filed, and upon the trial a jury returned a verdict for the plaintiff, and assessed her damages at $1,750 and costs. Judgment was rendered upon the verdict, from which this appeal is taken, and an order denying defendants' motion for a new trial. There is no dispute but that the child was injured, and suffered the loss of her fingers while on the sweep and falling upon the machinery. The defendants' counsel states that the child was seated upon the lever or sweep, and while riding around upon it she lost her balance, and, endeavoring to recover herself, threw her left hand into the cog-wheel, "and, unfortunately, just at that moment it was passing under the smaller wheel, when it was caught, and three of her fingers crushed, so that they had to be removed." The defendant Charles Durfree, the son of the other defendant, was in charge of the machinery at the time of the injury. This the father knew, and also that the child was riding around upon the sweep.

A part of the testimony of the child is that: "I was sitting on the sweep. I was going around, and lost my balance, and my hand got in the wheel. I was at the cow *corral* before I went on the sweep." "Question. How far away was that from the sweep? Answer. About half an acre; not as much as that. Charley [meaning young Durfree] called me, and said, 'Come and take a ride.' First I didn't hear him, and said, 'What?' Then he said it again, 'Come and ride, Hannah;' and I went over to the sweep, and I saw Mr. Durfree, [meaning the father, the other defendant,] and he had a shovel in his hand. He was standing there watching me go over. When I was getting on the sweep he said, 'Hannah, look out; there might be some danger to your hands and your arms;' and I said, 'Oh, no; there won't.' He was in the corn when he said that, and then I went on, and had gone round several times, and I made the horse go when I was on there, and then I lost my balance. First I dropped my hat, and then I said, 'Charley, stop the horse; I want to get my hat.' And he said, 'Pick it up the next time round.' I tried to pick it up, and I lost my balance, and my hand caught in the wheel of the cog. I first got on the sweep near the horse, and Charley said, 'Move up towards the big wheel and machinery.' The way I happened to lose my hat was the wind blew it off. When I came round, and went to pick up my hat, Charley made some motion, and the horse jerked, and that is the way I lost my balance. The horse's name is Doc. My hand got caught in the wheel. I didn't fall off the sweep, and Charley took me off, and carried me to the house. Some of the fingers were cut, and the ends of the fingers dropped. Charley took me to the house. He didn't say anything that I remember. Mamma hollered, and said, 'Charley, you have crippled my little girl for life.'" The child is the daughter of a domestic servant of the defendants.

It is claimed by the defendants that the evidence is utterly insufficient to prove that the machinery is at all dangerous; that there is no proof that the defendants were guilty of any negligence. In this connection it is further said that the evidence of the child is contradictory, since upon a former trial she testified as to a material matter differently from what she did on this trial; and that, therefore, her testimony is to be disregarded, and that of the defendants, in contradiction of it, received, in which event it is contended the verdict is unsupported by evidence. We do not perceive any conflict in the child's evidence, as contended for. Her testimony on the last trial was somewhat fuller than upon the first, but there was no contradiction by one of anything in the other, and nothing to show any unreliability on her part; in fact, she was in many respects sustained by the evidence of the defendants. It does appear from the evidence that the child was a favorite, both with the father and son, defendants, and that the want of care which they exercised in permitting a young child like this little girl to get upon the sweep and ride around upon it, involving a risk of her getting injured, was the result more than anything else of a desire to have the child's society by the son, and of a disposition by both father and son to be indulgent to her; but these motives, commendable as they may be in the abstract, cannot excuse them from exercising such care as the law requires to prevent the little girl from placing herself in danger, and getting maimed for life. We do not, therefore, think the verdict unsupported by evidence.

It is further claimed that the instructions asked for and granted were erroneous. One of them is: "The court instructs you that a child of such tender years and immature judgment as to be incapable of knowing, comprehending, and measuring the danger to which it is exposed, and of exercising the necessary precaution in guarding against it, cannot be charged with negligence in exposing itself to the threatened danger. In determining this proposition in connection with this case, you must consider the age, sex, and all the conditions surrounding the plaintiff at the date of the injury, as disclosed to you by the evidence." We do not understand this instruction to say to the jury, as defendants contend that the court instructed the jury, that the machinery by which the plaintiff received her injury was dangerous; for, whether the danger to the child existed or not, they were told it was "as the evidence disclosed it;" that is, existed or not, as the evidence disclosed. There was nothing misleading in telling the jury that they were to consider all the conditions surrounding the plaintiff, including her age and sex, in determining from the evidence as to the danger she may have been exposed to, and her appreciation of it, as bearing upon the question of contributory negligence.

An objection is also made to an instruction that the jury are instructed that if the plaintiff was in peril under certain circumstances it would be evidence of negligence; thus, as is claimed, telling the jury that the injury while riding on the sweep was of itself evidence of negligence. The instruction is: "If you shall find from the evidence that at the date of the alleged injury the sweep referred to, in its relation to the machinery, was a dangerous place for the plaintiff to ride, and shall find that while the defendants were using said machinery, and the defendants had reason to know the same was dangerous, and they knowingly permitted the plaintiff to sit upon and ride said sweep, in dangerous proximity to said machinery, her parents or other guardians not being present; and you shall further find that, because of the tender years and immature judgment of the plaintiff, she was incapable of comprehending and guarding against the danger to which she was thereby exposed; and you shall further find that, while she was riding under the conditions and circumstances stated, plaintiff's hand was caught and injured in and by said machinery,—that it would be evidence of negligence." As we understand the instruction, it informs the jury that, if a certain state of facts exists, culminating in plaintiff's injury, such state of facts is evidence of negligence. We do not see that the clause objected to, in view of all the other portions of the instruction, and others given, would tend to mislead the jury as complained of.

Objection is also made to this instruction: "And, finding the facts as above stated, you should further find from the evidence that defendants were father and son, and that the son, while working the machinery for the father, invited, requested, induced, or permitted the plaintiff to ride on said sweep, and that the father knew of her so riding, or had reason to know it was dangerous, and could have removed her, or caused her to be removed, therefrom, or could have stopped said machinery, or caused the same to be stopped, and did neither, but, on the contrary, both he and the son suffered her to remain, such facts would show negligence on the part of the defendants." It is said that in this instruction it is not clearly stated how the jury were to determine as to the father's responsibility; that the jury might have been impressed with the idea that the father was responsible for the son as his servant inviting the plaintiff to ride. But we do not so understand the instruction. The first part of it is with reference to the state of facts under which it appeared in evidence that the son invited, permitted, and induced the plaintiff to ride under circumstances of danger to her. The second, that the father, aware of the danger into which she had been placed by the conduct of the son, had yet permitted her to remain there thus exposed, when he could have prevented her. The jury were correctly told that if the state of facts with reference to each, somewhat different, existed, they were both responsible. But we do not understand that they are told that either is responsible for the negligence of the other. We perceive no prejudicial error, and advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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87 Cal. 134

McMENOMY v. BAUD. (No. 12,759.)

(*Supreme Court of California.* Dec. 15, 1890.)

NUISANCE—LAWFUL OCCUPATION—INJUNCTION.

A brass foundry and machinery incident thereto are not, *prima facie*, nuisances, and in an action by an adjoining proprietor for damages and injunction, where the evidence shows that the smoke-stack and steam escape-pipe are too low; that the boiler and engine are not properly set; that the fuel is not such as should be used; that the dipping of brass castings in diluted acids was practiced upon the sidewalk,—the resulting annoyances are such as can be remedied, and an injunction restraining defendant from operating the factory at all is error, and must be modified. WORKS, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

John Darcy, (*Otto Tum Suden*, of counsel,) for appellant. *Clunie & Young*, for respondent.

PER CURIAM. The plaintiff and defendant are coterminous owners of lots of 27½ feet front on Fulton street, in San Francisco, and running back 120 feet to Ash avenue. Each, with his family, resided on his lot, there being an open space of only five to six inches between their houses. The defendant operated a small brass foundry on the first or ground floor of his house, with machinery incidental thereto, propelled by a small steam-engine having a cylinder of six inches diameter, and seven inches stroke. The principal machinery consisted of turning lathes for turning and polishing brass. The objects of this suit are to enjoin the operating and use of the foundry and machinery, on the ground that they are a nuisance to plaintiff, and to recover $2,000 damages. The allegations of the complaint in regard to the nuisance are as follows: "(3) That defendant has erected and maintained on his said premises, and used and operated for the two years last past, in the same place, and in close proximity to the above-described premises of plaintiff, a steam-engine and boiler and lathe, and the machinery of a brass foundry, and still maintains, uses, and operates the same, and threatens to continue to do the same; that he has operated and used, and operates and uses, and threatens to operate and use, the same in such a manner as to disturb and annoy this plaintiff, and this plaintiff's family, and to endanger the safety and health of this plaintiff, and this plaintiff's family, and to offend the senses of this plaintiff and his family. (4) That the presence and proximity of said machinery, and its operation and use by defendant, has greatly injured and damaged plaintiff, in this: That the defendant has used said machinery and operated the same for the last two years continuously, night and day, and on Sundays and at all times, and still so uses and threatens to and will so use it, unless restrained by this court; that said machinery constantly produces intolerable noise, which deprives plaintiff and his family of all rest and enjoyment, and has produced such effect for two years last past, and has rendered the life of this plaintiff and that of his family miserable; that by the jarring thereof said building of plaintiff has been shaken and unsettled, and the walls and plaster thereof broken and cracked; that defendant has employed and still employs, and threatenes to employ, unskilled employes in and about said machinery, and thereby has endangered, and will endanger, the safety of this plaintiff, and this plaintiff's family, and thereby keeps them in peril of their lives, and will so keep them; that thereby the value of this plaintiff's said property has been and is become greatly impaired in value, and this plaintiff is and will be unable to rent the same, and will be compelled to abandon the same, unless defendant be restrained from operating the same machinery." The answer denies that the operating of the foundry and machinery is, or ever was, a nuisance, and denies all averments tending to prove the nuisance.

As to the alleged nuisance and damage, the court found the following facts: "That during all said times he, said defendant, used, operated, and maintained the same said foundry and machinery, engine and boiler, in such a manner as to disturb and annoy the plaintiff and his family, and to endanger the safety and health, and to offend the senses, of the plaintiff and his family. *Fourth.* That the presence and proximity of said machinery, and its operation and use by defendant, as aforesaid, greatly injured and damaged plaintiff and his property. That the defendant, during all of said two years next before the commencement of this action, used and operated said engine, boiler, and machinery at unusual and unseasonable hours, night and day, and on Sundays, and that such use and operations caused intolerable noise, produced offensive fumes, smells, smoke, and soot, which extended to and within the said premises of plaintiff; that, by the jarring caused by the operation of said machinery and engines, the said building of plaintiff was continuously shaken and unsettled, the walls and plastering therein broken and cracked, and said house rendered unsafe as a dwelling, and thereby greatly endangered the lives and safety of the plaintiff and his family; that, on account of all thereof, the said property of plaintiff has been greatly impaired and depreciated in value, and the life and existence of plaintiff and his family rendered uncomfortable and miserable, and their health impaired. *Fifth.* That by reason of the premises, plaintiff has been damaged in the sum of two thousand dollars. *Sixth.* That the maintenance of said foundry, and the use and operation of said engine, boiler, and machinery, is, and during all of said times has been, a nuisance on said premises of defendant, and to said plaintiff and his family, upon plaintiff's said premises. *Seventh.* That the said location of said foundry is in a residence portion of the said city of San Francisco, and is in an unsuitable place for the location of such works." As a condition of denying defendant's motion for new trial, the damages were reduced to $1,200. The judgment perpetually enjoins the defendant "from erecting, maintaining, having, keeping, or operating on said premises of defendant described in the pleadings and records herein, said brass foundry and machine-shop, boiler and engine, or any foundry or machine-shop, boiler or engine, causing noises, smoke, or other effluvium injurious to health, offensive to the senses, or an obstruction to the free use of plaintiff's property described herein." And further orders and decrees that a permanent injunction issue to defendant and his servants and employes, "requiring him and them and each of them to perpetually refrain from having, maintaining, operating, or continuing the use of said brass foundry and machine-shop, boiler and engine, or either thereof, on the said premises of defendant, and requiring him and them, and each of them, to perpetually refrain from having, erecting, maintaining, or operating any brass foundry, or foundry or machine-shop, boiler or engine, thereon, causing noises, smoke, or other effluvium injurious to health, offensive to the senses, or an obstruction to the free use of plaintiff's property described herein, and that said nuisance now maintained on said premises of defendant be abated." The defendant has appealed from the judgment and from an order denying his motion for a new trial, and his counsel here contend that the evidence is insufficient to justify the findings, and that the findings do not support the judgment.

1. As to the effect of the running of the foundry and machinery, upon the plaintiff and his family and his property, the evidence is extremely conflicting. On the part of the plaintiff it tends to prove that the defendant operated the foundry and machinery in such a manner as to offend the senses of the plaintiff and his family, and to interfere with the comfortable enjoyment of their residence. To this extent the findings are justified by the evidence, notwithstanding the conflict, and entitle the plaintiff to an adequate remedy by injunction. But so far as the findings exceed this, I think they are not justified by the evidence. The evidence does not justify the findings that the noise was "intolerable," that said building of plaintiff was "continuously" shaken and unsettled, that said house was rendered "unsafe" as a dwelling, that the lives of the plaintiff and his family were "endangered" or rendered "miserable," or that their health was "impaired." The points to which the evidence was directed were annoyances (1) by smoke and soot, (2) by noise and jarring of machinery, (3) by noisome smells, and (4) by obstruction of sidewalk. There is no finding, and no evidence to justify a finding, that either of these causes of annoyance and injury to plaintiff was necessarily incident to the proper operation of the foundry or machinery complained of. Indeed, the evidence tends to prove that the injurious effects may be remedied without enjoining the running of the foundry or machinery, and that it was only the improper and negligent manner of running them that caused the injurious effects upon the plaintiff and his property. It is said that the smoke-stack and the steam escape-pipe are too low, that the boiler and engine are not properly set, and that the fuel is not such as should be used. There is no pretense that the "dipping" of brass castings in diluted acids, upon the sidewalk, was necessary, or that such dipping might not be done at some other place from which the fumes would not reach plaintiff's house, nor that the improper obstruction of the sidewalk was necessary to the proper operation of the foundry or machinery. A brass foundry, and machinery incident thereto, are not *prima facie* nuisances; and a plaintiff who complains of them must allege and prove that they are such by reason of their peculiar location or the improper or negligent manner in which they are conducted. Therefore, where the injurious effects complained of may be prevented without abating or enjoining the works

or the operations thereof entirely, only the causes of the specific injurious effects proved should be enjoined. If, for example, the cause be the production and escape of smoke and soot in such a way as that they penetrate plaintiff's premises to his injury, the remedy by injunction should be restricted to this specific injury, and leave the defendant at liberty to operate his works, if he can, and elects to do so, in such a manner as to remove the cause and prevent the injury. Tuebner v. Railroad Co., 66 Cal. 171, 4 Pac. Rep. 1162; Sullivan v. Royer, 72 Cal. 248, 13 Pac. Rep. 655; Cooley, Torts, (2d Ed.) p. 714 et seq.; Wood, Nuis. §§ 144, 151, 556, 559, 565; Carson v. Railroad Co., 35 Cal. 332; Brown v. Kentfield, 50 Cal. 129. The first part of the injunction in this case restrains the defendant from operating the foundry or machinery complained of, in any manner or at all; and the second part restrains him from operating "any foundry or machine shop, boiler or engine, causing noises, smoke, or other effluvium injurious to health, offensive to the senses, or an obstruction to the free use of plaintiff's property described herein." Even this last part is too general. It is not confined to such noises, smoke, and effluvium as shall be injurious to the health or offensive to the senses of the plaintiff, or to the occupants of his property. That the injunction should be modified is apparent, but, on account of the exaggerated findings of fact not justified by the evidence, the extent of the modification cannot be determined here. The judgment and order are therefore reversed, and the cause remanded for a new trial.

WORKS, J., dissents.

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87 Cal. 140

CRALL v. BOARD OF DIRECTORS OF POSO IRRIGATION DIST. (No. 14,038.)

(*Supreme Court of California.* Dec. 15, 1890.)

IRRIGATION BONDS—CONFIRMATION—PROCEEDINGS IN REM.

1. St. Cal. 1887, p. 29, known as the "Wright Act," authorized the organization of irrigation districts, with boards of directors, who, after determining the necessary amounts to be raised, should submit the question of the issue of bonds therefor to the qualified voters at a special election. St. 1889, p. 212, supplemental to the Wright act, provided for confirmation of proceedings for the issue and sale of bonds issued thereunder by a special proceeding in the superior court on petition of the board of directors after notice given and published in a prescribed manner. *Held*, that an order of confirmation entered in such proceedings is conclusive, as to a proper compliance with all the provisions of the Wright act, on a land-owner of the district who did not appear at the confirmation proceedings, but who seeks to enjoin the sale of the bonds.

2. The confirmation proceeding being a proceeding *in rem*, the land-owner is bound thereby if there has been due publication of notice in accordance with the terms of the statute, notwithstanding there has been no personal service upon him.

Commissioners' decision. In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

L. J. Maddux, for appellant. *Wright & Hazen* and *A. L. Rhodes*, for respondent.

BELCHER, C. C. An irrigation district, known as the "Poso Irrigation District," was organized by the board of supervisors of Kern county under the act passed by the legislature of this state, and commonly called the "Wright Act." St. 1887, p. 29. A board of directors for the district was elected, and the members qualified and entered upon the discharge of their duties. In performance of the duties prescribed by the act, the board estimated and determined that the amount of $500,000 was necessary to be raised for the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of the act. Thereupon the board called a special election, to be held on a day named, at which was submitted to the qualified electors of the district the question whether or not the bonds of the district should be issued in the amount so determined. Notice of the election was given and published in the manner and for the time prescribed by the act, and the election was held pursuant to the call. When the returns of the election were canvassed, it was found and determined that a majority of the votes cast were in favor of the issuance of the bonds, and thereupon the board ordered that bonds of the district to the amount of $500,000 be immediately prepared and issued in the manner and form provided by the act. Subsequently the board made another order that the bonds to the amount of $200,000 be offered for sale. All of the foregoing proceedings were apparently regular, and in compliance with the provisions of the Wright act. After the entry of the order for the sale of the bonds, the board of directors, under the act supplemental to the Wright act, "and to provide for the examination, approval, and confirmation of proceedings for the issue and sale of bonds issued under the provisions of said act," (St. 1889, p. 212,) commenced a special proceeding in the superior court of Kern county for the purpose of having all the proceedings for the organization of the district and the issue of the bonds judicially examined, approved, and confirmed. A petition for confirmation, in due form, was filed, and thereupon the court fixed a day for the hearing of the petition, and ordered notice to be given and published for the time and in the manner prescribed by the act; and in pursuance of this order notice in proper form was duly given and published. At the time appointed the matter was heard upon oral and documentary evidence, and thereafter the court filed its findings of fact and conclusions of law, and entered its judgment, approving and confirming all of the proceedings for the organization of the district and for the issue of bonds; and it "further ordered, adjudged, and decreed that the said Poso irrigation district, ever since its organization as aforesaid, has been, and now is, a duly and legally organized irrigation district, and that it possesses full power and authority to issue and sell, from time to time, the bonds of said district, to the amount of five hundred thousand dollars." The plaintiff herein did not appear in the confirmation proceedings, but after the entry of the judgment of confirmation he commenced this action to obtain a decree enjoining the sale of the bonds.

For the purpose of showing that the plaintiff is a proper party to bring the action, the complaint alleges that he is the owner of lands within the district, and that they will be subject to assessment to raise money to pay the bonds if they should be sold. It then, after stating facts sufficient to show that there was, in form, a regular organization of the district, and an apparent compliance with the provisions of the statute for the issue of bonds, proceeds to allege that the board of directors has no power to issue or sell the bonds, because—*First*, the petition which was presented to the board of supervisors for the organization of the district was not in truth signed by 50 freeholders, nor by a majority of the freeholders, then or at any time owning land within the proposed district, and that not more than 30 of the persons whose names purport to have been signed to the petition ever were freeholders within the district; *second*, the notice of the time and place when and where the election for the organization of the district would be held was not in fact published for the full period prescribed by law; *third*, the lands of plaintiff were not susceptible of irrigation by the same system of works applicable to the other land of the district, and they would not be benefited by irrigation thereby; *fourth*, the notice of the special election upon the question whether bonds should be issued was not published or posted for the full period prescribed by law; *fifth*, the board of directors wrongfully and unlawfully estimated and determined that it was necessary to raise $500,000 for the purposes of the district, when in fact it was necessary to raise only $200,000 for those purposes. The answer of the defendant sets up the judgment of confirmation in bar of the action, and is, in effect, that the matters of irregularity and illegality stated in the complaint were conclusively determined by that judgment. To the answer the plaintiff filed a general demurrer, and thereupon, the vital question in the case being whether the plaintiff was estopped by the judgment of confirmation, the parties stipulated that final judgment should be rendered in accordance with the decision upon the demurrer. The court overruled the demurrer, and rendered judgment for the defendant. From that judgment the plaintiff appeals.

There can no longer be any question that the Wright act is constitutional, and that irrigation districts organized under its provisions, like reclamation districts, are public corporations. Irrigation Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379; Irrigation Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825. The districts are authorized to construct irrigation works, and to that end to issue bonds bearing interest at the rate of 6 per cent. per annum, the interest payable semi-annually, and the principal in installments extending over 20 years. These bonds are, from time to time, to be offered for sale, and to be sold to the highest responsible bidder, provided that not less than 90 per cent. of their face value shall be accepted; and they are to be paid, interest and principal, by revenue derived from an annual assessment upon the real property of the district. It is a matter of every-day observation that bonds bearing such a rate of interest, and about whose validity and payment at maturity there is no question, can be readily sold for considerable more than their face value, while bonds which are liable to be assailed and questioned years after their issue, by any one who is required to contribute to their payment, are reluctantly taken at any price. It was doubtless for the purpose of settling all these matters in advance, and thereby making the bonds of irrigation districts more readily salable, and at better prices than they would otherwise command, that the legislature passed the confirmation act, providing that the districts might, before offering any of their bonds for sale, have all questions affecting their validity judicially and finally determined. The confirmation proceeding is denominated in the act a special proceeding, and it is clearly in the nature of a proceeding *in rem*, the object being to determine the *status* of the district, and its power to issue valid bonds. The fifth section of the act is as follows: "Upon the hearing of such special proceeding the court shall have power and jurisdiction to examine and determine the legality and validity of and approve and confirm each and all of the proceedings for the organization of said district under the provisions of the said act [Wright act] from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale, and the sale thereof." St. 1889, p. 212. That the legislature had power to pass an act to accomplish the purposes intended by this act cannot be questioned. Nor is it pretended that the appellant did not have notice of the confirmation proceedings, or that he was in any way or for any reason prevented from appearing therein, and raising all the objections which he now seeks to raise. The contention is simply that no process issued in those proceedings was served on him personally, and hence that he was not obliged to appear, and his rights are not barred by the judgment, but he is at liberty now to make "any attack upon the proceedings for the issue of bonds, including the proceedings for the organization of the district, that he could have made had there been no judgment of confirmation." To hold otherwise, it is claimed, would have the effect of depriving him of his property without due process of law.

It will be observed that the question is not whether the valuation of the land for the purposes of assessment can be made and definitely fixed without further notice to the land-owner, nor whether the assessment can be collected without further notice, but it is simply whether the notice by publication and posting was sufficient to give the court jurisdiction to determine that the proceedings taken for the organization and on behalf of the district were such as will enable the district to create a valid debt to be paid by the levy of assessments in the manner provided by the Wright act. In our opinion the contention of appellant cannot be sustained. It was not necessary, we think, that personal service be made upon all or any of the land-owners of the district in order to give the court jurisdiction and power to render a judgment, valid and binding as against them and all the world, upon all the questions involved in the case; and this view seems to be well supported by the authorities. In Pennoyer v. Neff, 95 U. S. 727,—a case largely relied on by appellant,—the supreme court of the United States held that, where the entire object of the action is to determine the personal rights and obligations of the defendants,—that is, where the suit is merely *in personam*,—constructive service by publication upon a non-resident of the state is insufficient for any purpose, and at the same time declared that "such service may answer in all actions which are substantially proceedings *in rem*." In this state constructive notice, given in such way as is provided by statute, of proceedings for the probate of wills, and of all proceedings in the administration of estates of decedents, has always been regarded as sufficient. In State v. McGlynn, 20 Cal. 233, it was held that the probating of a will was a proceeding *in rem*, and that the decree admitting a will to probate was conclusive not only upon the parties who were before the court, but upon all other persons. In its opinion the court quotes the following language, used by the supreme court of Vermont in Woodruff v. Taylor, 20 Vt. 65: "The probate of a will I conceive to be a familiar instance of a proceeding *in rem* in this state. The proceeding is in form and substance upon the will itself. No process is issued against any one; but all persons interested in determining the state or condition of the instrument are constructively notified, by a newspaper publication, to appear and contest the probate; and the judgment is not that this or that person shall pay a sum of money or do any particular act, but that the instrument is or is not the will of the testator. It determines the *status* of the subject-matter of the proceeding. The judgment is upon the thing itself; and, when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument as to all the world (at least so far as the property of the testator within this state is concerned) just what the judgment declares it to be." See, also, In re Warfield's Will, 22 Cal. 51; Rogers v. King, Id. 72; Halleck v. Moss, Id. 266; Irwin v. Scriber, 18 Cal. 500. So in an action brought against the land and all owners and claimants, known and unknown, to recover a street assessment, it has been held that constructive service of process may be sufficient to authorize the court to render a judgment which is conclusive and binding upon all the world until reversed on appeal or set aside by some direct proceeding brought for that purpose. Mayo v. Ah Loy, 32 Cal. 477; People v. Doe G. 1,034, 36 Cal. 220; Eitel v. Foote, 39 Cal. 439. So, too, in insolvency proceedings it has been held that notice by publication is sufficient to give the court jurisdiction over the subject-matter and the parties. Bennett v. His Creditors, 22 Cal. 38; Friedlander v. Loucks, 34 Cal. 18; Arnold v. Kahn, 67 Cal. 472, 8 Pac. Rep. 36. Many other analogous cases might be cited, but we think the above sufficient.

The decision in Mulligan v. Smith, 59 Cal. 206, cited by appellant, is not in conflict with what has been said. That case was ejectment to recover possession of a lot of land, which had been sold to pay an assessment under the Montgomery-Avenue act. The act required that a petition, signed by a majority of the owners in frontage of the property to be charged with the costs of the improvement, be presented to the mayor; that a board of public works be then organized, and that it make a report showing the benefits and damages resulting from the improvement to each piece of property within the district to be assessed; and that the report be presented to the county court for approval and confirmation. This court, on page 231, said: "In no part of the statute does it appear that any provisions were made for any notice to be given to property owners of the proceeding authorized to be taken before the mayor, or of the proceedings by the board of public works, or in the county court, against the property declared to be benefited by the opening of the avenue. No personal notice was in fact given to the defendant of the presentation of the petition or of any of the acts of the board. Neither the mayor nor the board was required to give notice until the board had completed the report of its work. Then the statute required it to publish a notice for twenty days in two daily newspapers printed and published in the city and county of San Francisco, that the report would be open for the inspection of all parties interested, at the office of the board, every day, during ordinary business hours, for thirty days." And again, on page 232: "Nowhere in the statute is the petition made part of the report or of the *data* or documents used in making it. Nor is it anywhere required that the board or the mayor shall return it to the court or file it there or elsewhere. The court had, therefore, no jurisdiction of the petition,—no power to adjudge upon its execution,—and it could not assume jurisdiction of it, or by its judgment decide upon its sufficiency and validity so as to conclude the defendant; and in adjudicating upon the report itself the court acquired no jurisdiction of the person or property of the defendant, so as to determine his rights. Both, it is true, were within the territorial limits of the jurisdiction of the court, but no actual or substituted process of law had been served upon one or the other." It was accordingly held that the court below rightly admitted evidence to show that the petition was not signed by the owners of a majority in frontage of the lands assessable for the opening of the avenue. On the other hand, our attention is called to Lent v. Tillson, 72 Cal. 404, 14

Pac. Rep. 71, in which was involved the validity of the proceedings taken for the widening of Dupont street in the city and county of San Francisco, under the provisions of an act passed for that purpose. It was held, in an able and elaborate opinion by Mr. Justice Temple, that notice by publication, as required by the act, was sufficient to constitute due process of law, by which all persons whose rights were affected by the proceedings had before the county court were brought into court, and was sufficient from that time on to charge them with notice of everything done, and to uphold the final order of the court. We conclude that the court below had jurisdiction in the confirmation proceedings of the subject-matter and the parties, and that its judgment is conclusive and binding upon the defendant and all the world until reversed on appeal, or set aside by some direct proceeding instituted for that purpose. We therefore advise that the judgment be affirmed.

We concur: Vanclief C.; Hayne, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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86 Cal. 449

Stanley v. McElrath. (No. 12,187.)

(*Supreme Court of California.* Dec. 16, 1890.)

Modifying judgment in 25 Pac. Rep. 16.

Per Curiam. The judgment heretofore ordered and entered in this case is set aside, and the following substituted: The judgment of the superior court as to the difference between 7 and 10 per cent. is reversed, and the cause is remanded, with directions to the superior court to modify the judgment by computing interest on the principal sum of $6,136.50 at 7 per cent. per annum from March 28, 1883, up to the date said judgment was entered. As so modified, the judgment will stand affirmed, the appellant to be allowed the costs of this appeal.

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89 Cal. 211

Dedmon *et al.* v. Moffitt *et al.* (No. 13,823.)

(*Supreme Court of California.* May 26, 1891.)

Verdict—Failure to Make Findings.

Where, in an action to restrain the diversion of water claimed by plaintiffs by prior appropriation, one of the defendants is enjoined, and it is found that the others had a right to divert the water in the mode and to the extent they were diverting it, plaintiffs cannot complain of a failure to find that said defendants were threatening a further diversion, in the absence of evidence affecting the correctness of the former finding.

In bank. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Goodwin & Goodwin, for appellants. *John Gale*, for respondents.

Per Curiam. The plaintiffs, claiming to have acquired by prior appropriation the waters of Adams creek and its tributaries, in Sierra county, commenced this action against the defendants to recover damages for a diversion of said water, and to restrain them from further diverting the same. The case was tried by the court, and judgment rendered in favor of the plaintiffs against the defendant Goble, and in favor of the other defendants. The findings are very elaborate and carefully prepared, and appear to give a history of the appropriation of the waters in question by the several parties to the action and their predecessors in interest for a period of 20 years. The plaintiffs moved for a new trial upon a statement of the case, upon the ground of the insufficiency of the evidence to justify the findings, and that the same are against law; and assign as a particular error that the evidence was insufficient to justify the eighteenth finding of fact. It is a sufficient answer to this assignment of error that the finding itself is not upon a material issue in the case, and that the judgment does not depend upon this finding. Irrespective of this, however, the evidence of Horton and Moffitt, found in the statement, tends to support the finding, and, in the absence of direct evidence to the contrary, was sufficient to justify the court therein.

Appellants ask a reversal of the judgment for the reason that the court has failed to make findings upon certain material issues in the case. A judgment will not, however, be reversed merely for the failure of the court below to make findings upon any issue presented in the case, unless it shall be made to appear to this court that there was evidence presented to that court upon such issue sufficient to authorize it to make a finding thereon. It must also appear that the issue upon which the evidence was given was of such a nature that the finding which the appellant claims should have been made would have the effect to countervail other findings in the record to such an extent that the judgment thereon would be invalid. Himmelman v. Henry, 84 Cal. 104, 23 Pac. Rep. 1098; Winslow v. Gohransen, (Cal.) ante, 504. It appears from the evidence set out in the statement that the south ditch of the plaintiffs was deprived of water during a portion of the irrigating season of 1887, and that the plaintiffs were not able to irrigate as much of their land during that season as they had been accustomed to irrigate in previous seasons. The court found that whatever diversion of the water was made by the defendants, other than the defendant Goble, was rightfully made by them. It also found that during the greater portion of the period covered by the complaint the defendant Goble diverted through his north-west ditch a quantity of water from the creek greater in amount than would have been sufficient to fill all of the plaintiffs' ditches; and, as such diversion was in violation of the plaintiffs' right, the court enjoined Goble from further diversion of water through his north-west ditch. Inasmuch as whatever diversion was made by the defendants, other than Goble, was rightfully made, and as Goble was enjoined from diverting water through his north-west ditch, the plaintiffs obtained all the relief to which they were entitled. When the court had found that the defendants, other than Goble, had the right, as against the plaintiffs, to divert the water in the mode and to the extent in which they were diverting it, the plaintiffs were not entitled to a finding that they threatened any further diversion, as it would not invade their rights. So, too, the extent to which the plaintiffs had appropriated the waters of the creek, or the precise time at which they had completed their ditch, or the amount of water which flowed in it at any particular date, was immaterial, so long as any act of the defendants in reference to such water was not an invasion of their rights. If the plaintiffs do not claim that the findings of the court respecting the relative rights of the parties to divert the waters of the creek were erroneous, it was unnecessary for it to find the time at which the defendants made any specific amount of diversion, or the extent to which the plaintiffs could fill their ditches. As the plaintiffs have not set forth in the statement any evidence affecting the correctness of the above findings, any further findings upon issues, which would not impair the sufficiency of these findings to support the judgment, would be immaterial, and the failure to make such findings does not justify a reversal of the judgment.

It is also urged that certain findings made by the court are inconsistent, and that for this reason the judgment should be reversed. We have carefully examined the findings, and are unable to see that there is any inconsistency in them upon any material point, or which would justify a reversal of the judgment. The case appears to have been fully tried by the court below, and the findings appear to have been carefully prepared, and to show the several rights of the respective parties to the waters in question, and to fully sustain the judgment of the court. The judgment and the order denying the motion for a new trial are affirmed.

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89 Cal. 196

BROWN *v.* CLARK *et al.* (No. 13,456.)

(*Supreme Court of California.* May 26, 1891.)

ADVERSE POSSESSION—PAYMENT OF TAXES.

1. Code Civil Proc. Cal. § 325, provides that adverse possession is not established unless the land has been occupied and claimed continuously for five years, and the occupants, their predecessors and grantors, have paid the taxes which have been levied on such land. April, 1878, A. entered on land of plaintiff's, fenced it, and occupied it until May, 1884, when he erected a building, and put a tenant in possession, who has since occupied the property. The taxes assessed upon the lot in 1883 were paid by plaintiff. In 1884 the land was assessed to B., mortgagee of A., who paid the taxes that were thereafter assessed for that and three succeeding years. The assessment of 1888 was paid by A. Plaintiff sued in ejectment in 1889. *Held*, that there had been actual and continuous occupation of the premises and a payment of taxes for five years under adverse claim of right, authorizing a decree quieting A.'s title to the property.

2. Where land is assessed to the mortgagee, and he pays the taxes, it becomes a payment on account of the mortgagor, and is as if made by him, under Const. Cal. art. 13, § 4, providing that the mortgage security shall be assessed as an interest in land to the mortgagee, and either party can pay the tax thereon.

Commissioners' decision. Department 1.

Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

J. C. Bates, for appellant. *Otto Tum Suden*, for respondents.

FOOTE, C. Brown brought an action of ejectment against the defendant Clark and his tenant for the possession of a lot of ground in the city and county of San Francisco. The defendants denied that they had ousted the plaintiff from any portion of the lot described in the complaint except 12½ feet in width by 30 feet in length thereof; and as to this portion they set up by way of cross-complaint the right and title to the same in Clark by virtue of the provisions of section 325 of the Code of Civil Procedure, and prayed that his title thereto might be quieted. Upon the issue tendered by the cross-complaint, and the answer thereto, the court below sustained the contention of the defendants, and held that they were entitled to a judgment for costs, and that the defendant Clark was entitled to a decree quieting his title to the 12½ by 30 feet of the lot, which he claimed in his cross-complaint to be the owner of by adverse possession under claim of right, etc. From the judgment thereupon rendered, and an order refusing a new trial, the plaintiff appeals. The grounds upon which he claims that the court below erred in its findings for the defendants are: That, although the evidence shows that for five years before the action was brought the defendant Clark, or his tenant, was actually and continuously in possession of the land involved here, under a claim of title exclusive of any other right, and had protected the land by a substantial inclosure, and improved the same by building a house thereon, and occupying it by himself or tenant, yet that the evidence did not show that Clark had paid all the taxes levied and assessed upon the land, so as to establish adverse possession, such as is meant by the proviso to section 325 of the Code of Civil Procedure, which reads thus: "Provided, however, that in no case shall adverse possession be considered established under the provision of any section or sections of this Code unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land." If the statute is to be given the construction that the taxes to be paid by the claimant of title, such as is Clark, are taxes which are assessed and levied during the time of his continuous occupation and claim under adverse right, then the defendant is entitled to the relief he obtained if it is also to be held that the payment of taxes by his mortgagee is a payment by him. The action was brought on the 25th of March, 1889. On the 1st of April, 1878, the plaintiff, Brown, was the owner of the land. On that day the defendant Clark entered upon and occupied it, under an adverse claim of right, and under such claim and occupation at once inclosed it with a substantial fence. Ever since that date until

May 4, 1884, he maintained his actual occupation and possession of it, keeping the same protected by a substantial inclosure. At the date last mentioned he improved the lot by erecting a building on it, and since then his tenant, Quang Teong, has been in the exclusive possession and occupation of the building and lot. The taxes were paid by the plaintiff, Brown, on the 29th of December, 1883, which had been levied and assessed on the lot on the first Monday of March, 1883. The lot was assessed some time in 1884 to the mortgagee of Clark, and this mortgagee paid all the taxes as they became due which had been assessed against it on the first Monday in March of the years 1884, 1885, 1886, 1887, and the defendant Clark paid all the taxes assessed against the lot on the first Monday of March, 1888, and was in possession up to the day this action was brought, and still is. The plaintiff contends that, as he paid the taxes that were assessed on the first Monday of March, 1883, this was a payment of all taxes due up to and including June 30, 1884, that being the end of the fiscal year, (Const. art. 20, § 5,) and that, therefore, the defendant cannot claim to have the statute run in his favor until the 1st of July, 1884, which would not be five years prior to the 25th of March, 1889, when this action was commenced. But these taxes, while they had been levied and assessed before March 25, 1884, did not remain an assessment levied and unpaid on that day, but became a lien from the first Monday of March, 1883, by virtue of the levy and assessment thereof. Pol. Code, § 3718. The duty laid upon the occupant, as it seems to us, is to pay all taxes which have been levied and assessed against the land during his term of continuous occupancy and adverse claim of right for five years. If he does this he can maintain his possession as against the person who would otherwise be the owner of the land. The plaintiff paid all the taxes which had been levied and assessed on the land, and which remained a burden upon it up to the 29th of December, 1883. When Clark, or his mortgagee, under contract to do so for the mortgagor, paid all the taxes levied and assessed after that, during the five years of Clark's continuous occupation and adverse claim, he satisfied the conditions of the statute as to payment of taxes.

This view of the matter is greatly strengthened when we come to consider that the actual continuous possession under claim of right, exclusive of any other right for five years, was sufficient to establish adverse possession as against the owner of a paper title by one not relying upon a written instrument, judgment, or decree, where land claimed and occupied was protected by substantial inclosure, or was cultivated or improved, under sections 324 and 325 of the Code of Civil Procedure, until April 1, 1878, when the proviso was added, making, as we think, as an addition to the necessary element of occupation and continuous claim, exclusive of all others, another element that all taxes should be paid which "have been" levied or assessed on the land; the proviso intending that the one element should accord with the other as to time, and this cannot be done except on the idea we have advanced, viz., that the taxes to be paid are all those assessed or levied during the possession, adverse claim, and occupancy. As to continuous occupation under adverse claim of right, it is obvious, under the statute, that it must have existed for five years before the date of bringing the action. That would carry the date of commencement of such necessary possession and occupancy to the 24th of March, 1884. There is nothing in the statute which computes these five years upon the basis of fiscal years. There is nothing therein which states directly for how many years taxes shall be paid. But it says, the taxes to be paid are those which have been assessed on the land. It would seem reasonable, therefore, to say that the object of the proviso was to make the person claiming by occupancy have annexed to this conditional privilege the further condition that he must pay all the taxes which become a burden on the land by levy and assessment during his occupancy under adverse claim of right. It would appear to follow that if Clark had an actual and continuous occupation under adverse claim of right for five years prior to the 25th of March, 1889,—the day this suit was brought,—he satisfied the first condition of the proviso in question, and a reasonable construction of the language thereof must be that if he satisfied this first condition he satisfied the next condition, if he paid all the taxes assessed and levied during that occupation; for, if this be not so, then the rule by which he occupied as to length of time must become different from that which the statute declares to be sufficient as to occupancy, and, in the absence of direct statutory direction, such an inference should not be indulged. Under the constitution of this state, art. 13, § 4, the mortgage security is assessed as an interest in the land to the mortgagee, and either party can pay the tax thereon; but if paid by the mortgagor it is *pro tanto* a payment of his mortgage debt. Thus, when the mortgage is executed it is in view of this provision of the constitution, and a relation springs up between the parties by virtue of which this tax is to be paid by the mortgagee primarily, but really for the mortgagor; and the tax when thus paid by the mortgagee for the mortgagor by virtue of such relation to do so is a payment for and on account of the mortgagor, and is as if made by him. Therefore, when the mortgagee paid the taxes assessed, there being none other, the mortgagor paid all the taxes assessed and levied on the land. For these reasons we are of opinion the judgment and order should be affirmed.

We concur: FITZGERALD, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

87 Cal. 561

SAN DIEGO FLUME CO. v. CHASE. (No. 13,888.)

(*Supreme Court of California.* Feb. 25, 1891.)

In bank. On rehearing. For former report, see 25 Pac. Rep. 756.

PER CURIAM. A rehearing of this cause is denied, but so much of the opinion and decision heretofore filed as limits the respondent to the use of two 1½-inch standard pipes is set aside. The contract does not limit respondent to any particular number of standard pipes in conducting his irrigation.

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89 Cal. 332

WM. WOLFF & CO. v. CANADIAN PAC. RY. CO. (No. 13,242.)

(*Supreme Court of California.* May 30, 1891.)

JUDGMENT BY DEFAULT—APPLICATION TO SET ASIDE—CONDITIONS.

1. On July 19th defendant filed an application to set aside a judgment by default entered against him on July 16th. The hearing was postponed by consent, and on November 23d the motion was stricken from the calendar in the absence of both parties, but on defendant's motion it was restored on January 8th following. On January 12th defendant, discovering that the application was defective, filed a new application, with affidavits and a proposed answer, making the record of the first application part of the moving papers. *Held*, that the second application was substantially an amendment of the first, and was filed within a reasonable time, within the meaning of Code Civil Proc. Cal. § 473, requiring such an application to be made within a reasonable time, but in no case exceeding six months after the judgment was taken.

2. Such provision does not require the application to be heard within the time limited.

3. The dismissal by the court without prejudice, on defendant's motion, of his application to set aside a judgment by default because of a defect in the application, is not a refusal, in whole or in part, to grant the application, within the meaning of Code Civil Proc. Cal. § 182, providing that if an application to a judge for an order is refused, in whole or in part, no subsequent application for the same order shall be made, etc.

4. Where the court makes an order opening a judgment by default on condition that defendant pay plaintiff a certain attorney's fee, the refusal of plaintiff to accept the same, on the ground that his right of appeal from the order may be affected, does not warrant the court's vacating that part of the order requiring payment of the fee.

5. Where an order opening a judgment by default requires defendant to pay plaintiff a certain attorney's fee, a tender thereof to plaintiff's attorney is sufficient to preserve defendant's rights under the order until its validity is determined, but does not constitute payment unless it is kept good.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Code Civil Proc. Cal. § 473, provides that the court may relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, provided that application therefor be made within a reasonable time, but in no case exceeding six months after the judgment was taken. Section 182 provides that "if an application for an order, made to a judge of a court in which an action or proceeding is pending, is refused, in whole or in part, or is granted conditionally, no subsequent application for the same order shall be made to any court commissioner, or any other judge except of a higher court; but nothing in this section applies to motions refused for informality in the papers or proceedings necessary to obtain the order, or to motions refused with liberty to renew the same."

O'Brien, Morrison & Daingerfield, for appellant. *Edward S. Salomon* and *Lindley & Eickhoff*, for respondent.

Vancliff, C. The appellant is a California corporation, and, as such, on June 30, 1888, brought an action in the superior court of the city and county of San Francisco against the respondent, a foreign corporation, to recover damages for an alleged failure safely to carry and deliver certain goods, the property of appellant, from New York to San Francisco. The summons was served upon Moses M. Stern, who is described in the affidavit of service as the business agent of the defendant. Judgment by default was rendered July 16, 1888. On the following day the defendant's attorney obtained an order staying execution pending a motion to set aside the default. On July 19, 1888, the attorney for defendant gave notice of appearance in the action, and also of a motion to set aside the default and judgment on the grounds of mistake and inadvertence; and upon the following day the papers served upon the plaintiff were filed. The hearing of the motion was postponed from time to time, by consent of both parties; and on November 23, 1888, the motion was stricken from the motion calendar by the court in the absence of both parties, and, on motion of defendant, was restored to the calendar on January 8, 1889. On January 12, 1889, the defendant, discovering that the first application was defective, filed a new application upon additional affidavits, accompanied by a proposed answer to the complaint. This application purported to be a present application to the court "to vacate and set aside the judgment heretofore entered in said action against defendant, to relieve said defendant from the default judgment and other proceedings taken against defendant in said action after the institution thereof, and for such other and further relief as may be proper, upon the ground that such proceedings, said default, and such judgment were made in said action because of the mistake, inadvertence, surprise, and excusable neglect of said defendant; upon the further ground that such judgment was improvidently rendered; and upon the further ground that said defendant has a good and substantial defense to said action on its merits, and that the granting of said application would be in furtherance of justice." It also contained a notice, by the attorneys for defendant, "that we shall move to have the application aforesaid heard, and said relief applied for granted, at the court-room of said court and department, in the new city hall, in said city and county, on Friday, the 18th day of January, 1889, at 10 o'clock A. M., or as soon thereafter as counsel can be heard. Said motion will be based upon all the papers and proceedings on file or of record in the above-entitled action, and upon the affidavits and the proposed answer of defendant herewith served and filed." Both the original and amended applications were brought to a hearing on January 25, 1889, when plaintiff filed counter-affidavits contradicting some of the facts stated in the affidavits for defendant, and stating additional facts tending to show that the last application might have been made at an earlier date. The defendant then moved to dismiss without prejudice the first application, of which notice had been given on July 19th; and this motion was granted, against the objection of the plaintiff. The court thereupon proceeded to hear the second or amended application, and on January 25, 1889, made an order setting aside the default and judgment on the conditions that the defendant pay to the plaintiff $16.50 costs, and $75 for counsel fees, within 10 days, and further ordering that the proposed answer, filed with the application, stand as the answer of the defendant. On January 29, 1889, the $75 for counsel fees was tendered to plaintiff's attorneys, who refused to receive the money, and at the same time gave, as the reason for refusing, that the right of plaintiff to appeal from the order setting aside the default and judgment might be prejudiced by accepting it. Upon an affidavit showing this tender and refusal, the court, on February 4, 1889, issued an order to plaintiff to show cause why the order of January 25th should not be modified by vacating so much thereof as directs the payment of $75 counsel fees, which order was served February 5, 1889, but the affidavit upon which the order was made was not served with the order. The hearing upon the order to show cause was regularly continued, and finally set for March 8, 1889, when, there being no appearance for the plaintiff, the court modified the order of January 25th by vacating so much thereof as required the payment of $75 attorney's fees. The plaintiff has appealed from both orders, and contends that, inasmuch as the first application was abandoned and dismissed, the second application must stand and be considered as if no earlier application had been made; and that it was not made within a reasonable time, because no motion was made in open court until after the expiration of six months from the date of the judgment; and that the modifying order was erroneous, for the reason that the moving affidavit was not served with the order to show cause, and that the money should have been tendered to plaintiff, and not to plaintiff's attorneys.

1. A view of the whole proceedings as disclosed by the record will show that the second application was substantially an amendment of the first by the addition of affidavits and a proposed answer, and, for the purpose of determining the question of diligence, must be so regarded. The second application expressly refers to and makes "all the papers and proceedings on file or of record" a part of the moving papers. The plaintiff consented to the delay of the hearing of the application as first made. There is nothing to show that the defect in the moving papers as first filed was discovered by the defendant any considerable time prior to the date of the amended application. The discovery was presumably made on the 8th of January, 1889, when the first application was restored to the calendar. The question as to what is "a reasonable time," short of the extreme limit of six months allowed by section 473 of the Code of Civil Procedure, within which applica-

tion may be made for relief "from a judgment, order, or other proceeding," etc., must depend upon the circumstances of the particular case, all of which should be considered by the court. Where a delay has been assented to by the other party, or does not appear to have been injurious to his rights, the six-months limitation prescribed by the Code should be considered as the only limit of reasonable time. In the matter of opening defaults, much is confided to the discretion of the trial court. Dougherty v. Bank, 68 Cal. 275, 9 Pac. Rep. 112; Chamberlin v. County of Del Norte, 77 Cal. 151, 19 Pac. Rep. 271. And where the circumstances are such as to lead the court to hesitate, it is better to resolve the doubt in favor of the application, so as to secure a trial and judgment upon the merits. Watson v. Railroad Co., 41 Cal. 17; Cameron v. Carroll, 67 Cal. 500, 8 Pac. Rep. 45; Lodtman v. Schluter, 71 Cal. 94, 16 Pac. Rep. 540. The application having been made within six months after the judgment, and within a reasonable time, the jurisdiction of the court to hear and determine it could not be lost by the expiration of the six months before the hearing. The limitation prescribed by section 473 of the Code of Civil Procedure is a limitation of the time within which the application must be made, and not upon the time within which it must be heard or determined. Conklin v. Johnson, 34 Iowa, 266. The dismissal of the first application without prejudice, at the request of defendant's counsel, was not, under the circumstances, a refusal by the court, in whole or in part, to grant the application, in the sense of section 182 of the Code of Civil Procedure.

2. But I think the court erred in vacating that portion of its former order requiring the payment of $75 to plaintiff as a condition of opening the default. Having, in the proper exercise of its discretion, imposed this condition, it should not have been revoked on the showing made, which was that plaintiff's attorneys declined to accept the money for the mere reason that they feared that such acceptance might prejudice the right of plaintiff to appeal from the order opening the default. Under the circumstances, the court might, perhaps, have required the defendant to deposit the money in court to abide the event of the proposed appeal; for plaintiff's attorneys may well have doubted as to the effect of their acceptance of the tender upon their right to appeal. Cogswell v. Colley, 22 Wis. 399; Radway v. Graham, 4 Abb. Pr. 468; Lupton v. Jewett, 19 Abb. Pr. 320. The tender to plaintiff's attorneys, however, was a sufficient performance of the condition to preserve the rights of the defendant under the order opening the default until the question of its validity should be determined. But, in order to constitute the tender a payment, it must be kept good; and the plaintiff is entitled to receive the amount tendered upon the affirmance of the order setting aside the default judgment. I think the order of January 25, 1889, setting aside the judgment by default upon the conditions therein stated, should be affirmed; and that the order of March 8, 1889, vacating so much of the order of January 25th as requires the payment of $75 for counsel fees, should be reversed.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order of January 25, 1889, setting aside the judgment by default upon the conditions therein stated, is affirmed; and the order of March 8, 1889, vacating so much of the order of January 25th as requires the payment of $75 for counsel fees, is reversed.

89 Cal. 28[illegible]

DAVIES v. OCEANIC S. S. Co. (No. 13,933.)

(*Supreme Court of California.* May 28, 1891.)

NEGLIGENCE—PLEADING—EVIDENCE.

1. A complaint alleging that defendant negligently left open a hatchway on its vessel, and that plaintiff's intestate was struck and thrown down said hatchway by the negligence of defendant's employe in loading the vessel, states a cause of action.

2. The admission of evidence that said employe would get intoxicated when he came off a trip, though not relevant, as it appeared that at the time he was not intoxicated, is not ground for reversal, as it could not have influenced the verdict.

3. No one except said employe saw deceased at the time of the accident, and he did not do so until deceased was struck by the barrel, which the employe was swinging from the rail to the hatchway, but it appeared that, a short time before, deceased was caulking near the hatchway. *Held*, that the question of negligence on the part of the employe and deceased was one for the jury.

Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Milton Andros, for appellant. *Geo. Lezinsky*, for respondent.

DE HAVEN, J. This is an action by the plaintiff, as administratrix, to recover damages for the death of H. B. Davies. The complaint alleges that said death was caused by the negligence of defendant, its servants and employes. Plaintiff recovered judgment for the sum of $7,000.

1. It is claimed by the appellant that the complaint does not state a cause of action, in that it does not show that the defendant failed in the discharge of any duty it owed to the deceased. It is urged that the negligence with which appellant is charged is the leaving unprotected an open hatchway on its vessel, through which the deceased fell and was killed, and we have been referred to the cases of Dwyer v. Steam-Ship Co., 17 Blatchf. 474,[1] and The Germania, 9 Ben. 356, which hold that so doing is not negligence for which an action will lie. These cases are not in point. It is true the complaint alleges that the hatchway through which deceased fell was negligently left unprotected, but this is only part of an averment, the gist of which is that deceased was lawfully employed on the vessel, and "by and through the carelessness and negligence of said defendant and its servants and employes in and about the said loading, and without any negligence or fault

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[1] 4 Fed. Rep. 493.

of said H. B. Davies, said H. B. Davies was struck by a barrel of lime, which said defendant, its servants and employes, were engaged in loading into a hatchway near said H. B. Davies, and was precipitated down said hatchway in the said vessel." This, with the other averments, states a cause of action. The defendant did owe to deceased, lawfully on its vessel, the duty of not negligently throwing him down the hatchway.

2. The testimony of the witness Classen, to the effect that the witness Hulgerson would get intoxicated when he "came off a trip," though not relevant to any issue in the case, could not have prejudiced the case of the defendant. It was clear from Classen's evidence that Hulgerson was not intoxicated at the time of the accident, and the admission of the evidence complained of could not have influenced the verdict, and is therefore not a cause for reversing the judgment.

3. The plaintiff offered no evidence tending to show that the witness Luce had made before the trial the statement embodied in the question asked him, and which the witness denied; and therefore the rule laid down in People v. Jacobs, 49 Cal. 384, has no application.

4. It is also urged that the evidence is insufficient to sustain the verdict. No person saw the deceased at the time of the accident except the witness Hulgerson, and he does not seem to have done so until deceased was struck by the barrel of lime. He says: "I did not see him before the barrel struck. He must have come from aft." And this witness further stated that when he first saw him deceased was between him and the hatchway. But there was evidence tending to show that within a very short time before the accident the deceased was engaged in caulking near the hatchway, and it was for the jury to determine his position at the time, from all the circumstances appearing before them; and so it was for them to determine, from conflicting evidence, whether, in the mode in which the lime was being hoisted, the witness Hulgerson could manage and control the barrels while in transit from the railing to the hatchway. Assuming, however, that he could do so, as claimed by appellant, it was still a proper question for the jury whether, in view of all the facts surrounding him, he was not negligent in attempting to convey the barrel to the hatchway without looking to see if it would in its passage strike the deceased. The same may also be said of appellant's contention that deceased was guilty of contributory negligence. It makes no difference whether deceased was knocked into the hatchway while he was engaged in caulking, or whether he was struck while attempting to pass between the railing and hatchway, it would still be a question for the jury to determine whether at the time of the accident the deceased was exercising the degree of caution required of him by his situation. It is certainly a pure question of fact whether the deceased, while engaged in caulking near the hatchway, would have been in any danger, with the exercise of reasonable care upon the part of the person handling the barrel from the railing to the hatchway; and if he would not, with such care, have been in danger, he was not guilty of any contributory negligence in working there. Conroy v. Iron-Works, 62 Mo. 35. And so also it cannot be said as a matter of law that the deceased, in the way the jury may have believed he attempted to pass between the railing and hatchway, would have been in any danger if at that time the person in charge of the barrel on the railing had exercised reasonable care, and looked to see whether he could safely proceed with the loading. The deceased was not guilty of negligence simply because he did not anticipate negligence on the part of the man at the railing in charge of the loading, unless he was in some way chargeable with notice that such person was indifferent or careless. He was only bound to exercise such care as a prudent man in his situation would ordinarily exercise for the protection of his life; and whether he did or not was a question, the decision of which was for the sound and impartial judgment of the jury. There are cases where the state of the evidence is such that the court can declare, as matter of law, that there was no negligence on the part of defendant, or that a plaintiff has been guilty of contributory negligence, but this is not one of them. When the evidence is conflicting, or when reasonable men might differ as to the inferences which ought to be drawn from the undisputed evidence, the question of negligence or contributory negligence is not one of law, but of fact. 1 Shear. & R. Neg. § 54; Belton v. Baxter, 58 N. Y. 411; Hart v. Bridge Co., 80 N. Y. 622; Railroad Co. v. Moore, 24 N. J. Law, 832. While the evidence does not make a very strong case for the plaintiff, we cannot say that the verdict is without evidence to support it. The questions relating to defendant's negligence and plaintiff's contributory negligence were fairly submitted to the jury by instructions to which no exception is taken, and, as there is evidence upon which it can rest, the verdict is conclusive here. Judgment and order affirmed.

We concur: McFarland, J.; Sharpstein, J.

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89 Cal. 264

Foster v. Maginnis. (No. 13,009.)

(*Supreme Court of California.* May 28, 1891.)

Specific Performance—Vendor and Vendee.

In a suit for specific performance of a parol contract to convey land, followed by part performance, the evidence must show that the acts of part performance were done by complainant, and with defendant's consent, and that they were done in pursuance of the contract, and with a design of carrying it into execution.

Department 1. Appeal from superior court, Lake county; R. J. Hudson, Judge.

Clitus Barbour, for appellant. *R. W Crump*, (*James Wheeler*, of counsel,) for respondent.

Garoutte, J. This is an action for the specific performance of a parol contract to convey land. Among other facts, the court found: "Defendant verbally sold the land described in the complaint to plaintiff for two hundred dollars, which sum plaintiff then and there paid to defendant. That then and there defendant agreed to execute and deliver to plaintiff a deed thereto, and plaintiff immediately took possession of said land, with the knowledge and consent of defendant, and made valuable improvements thereon." After a careful examination of the evidence in this case we are satisfied that it does not support the foregoing findings. In the case of Blum v. Robertson, 24 Cal. 142, this court said: "It is a rule well settled that a party who claims a right to a conveyance of land under a parol or verbal contract upon the ground of part performance must make out by clear and satisfactory proof the existence of the contract alleged by him; and it is not enough that the acts of part performance proved are evidence of some agreement, but they must be unequivocal and satisfactory evidence of the particular agreement charged in the complaint." The terms of the contract in this case, under any aspect of the evidence, are vague and indefinite in the extreme. The plaintiff himself says that the defendant was to deed him all the land south of the road and fence, and there appears to be some of the tract claimed between the road and fence. It appears this particular tract of land was bought by defendant of Mrs. Reeves, and paid for at the time other tracts were purchased; and whatever promises defendant made to plaintiff as to deeding him this land were made without any consideration whatever, and partook of the nature of a gift without delivery. But, whatever the contract may have been, there is no evidence to support the finding that "defendant sold said land to plaintiff for two hundred dollars, and which sum plaintiff then and there paid to defendant." And again, there is no evidence to support the finding that "the plaintiff immediately took possession of said land with the knowledge and consent of defendant, and made valuable improvements thereon." The fact that he moved some personal property upon the land in the nature of fence-posts and loose lumber, is not a compliance with the rules of courts of equity requiring permanent and valuable improvements; and, according to the testimony of plaintiff himself, the defendant never consented to his possession, or authorized it in any way. Indeed, there is no evidence showing that he had any knowledge of it. Equitable fraud is the basis of this character of action; that is, fraud as a necessary consequence in setting up the statute as a defense, and the vendor thus securing for himself the benefits of the acts of part performance. It follows from this principle that the acts of part performance must be done by the party seeking to enforce the contract; and must be done in pursuance of the contract, and with a design of carrying the same into execution; and must be done with the consent and knowledge of the other party. While there may be some trust relation existing between these parties as to this land, the evidence fails to disclose sufficient facts upon which to base a decree for specific performance. Let the judgment and order be reversed, and the cause be remanded for a new trial.

We concur: PATERSON, J.; HARRISON, J.

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89 Cal. 321

SIDDALL v. CLARK. (No. 13,141.)

(*Supreme Court of California.* May 29, 1891.)

EXECUTORS AND ADMINISTRATORS—POWERS TO COMPROMISE.

In California an agreement by an executor or administrator to receive in full satisfaction of a judgment in favor of the estate an amount less than that due thereon is void, and hence the debtor's note executed and delivered to him pursuant to such agreement is without consideration.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

D. Wm. Douthitt, (*Marcus Rosenthal*, of counsel,) for appellant. *Ben Morgan*, for respondent.

BELCHER, C. This is an action on a promissory note. The defendant pleaded want of consideration for its execution. The court gave judgment for the defendant, and the plaintiff appeals. The facts are these: In 1879, the defendant, for a valuable consideration, executed to W. W. Traylor two promissory notes for sums aggregating $2,950, and bearing interest at the rate of 1 per cent. per month. In January, 1883, Traylor died intestate, and in February following Mrs. Elizabeth D. Traylor was duly appointed administratrix of his estate. She qualified, and entered upon the discharge of her duties as administratrix, and in April, 1883, the said notes were inventoried and appraised as of no value. In July, 1883, no part of the notes having been paid, Mrs. Traylor commenced an action to recover the amount due thereon, and on September 18, 1883, judgment by default was entered in her favor, as administratrix, against defendant for the sum of $4,372.50. On February 2, 1885, the defendant executed the note now in suit, which reads as follows: "$750.00. San Francisco, Feb. 2, 1885. On demand, for value received I promise to pay to Mrs. E. D. Traylor seven hundred and fifty ($750) dollars, with interest at the rate of six per cent. per annum payable monthly. This note is given by me in payment of all claims against me by the estate of W. W. Traylor. Not transferable. GEO. G. CLARK." When this note was taken, nothing had been paid on the judgment, and it was intended to have the note, by way of compromise, take the place of all existing indebtedness of the defendant to the estate. The attempted compromise was, however, never authorized or approved by the court having jurisdiction of the estate or a judge thereof, and the administratrix never satisfied of record the judgment or any part of it, but the same was in full force when this action was commenced, and remained so until it became barred by the statute of limitations. In July, 1885, defendant paid $50 on his indebtedness to the estate, and in August of that year the whole estate was distributed to Elizabeth D. Traylor in her own right and as assignee of other heirs. In October, 1885, Mrs. Traylor died testate, and, after administration of her estate, the note in suit, with other property, was distributed to the plaintiff, who commenced this action June 2, 1888. Conceding that executors and administrators have the legal right to compromise and discharge debts due the estates which they represent, without the approbation of the court or a judge thereof, when it appears to them to be just and for the best interest of the estates, (Moulton v. Holmes, 57 Cal. 337,) still it has been held in this state that a payment of a part of the amount due upon a money judgment, under an agreement that it shall operate as satisfaction in full, will not discharge the judgment, and that an agreement to discharge a judgment for a sum less than the amount for which it was rendered is void, (Deland v. Hiett, 27 Cal. 611.) It will be observed that the note in suit was not given, or intended to operate, as a mere part payment of the judgment against the defendant, but it was to take the place of and be a substitute for the whole judgment. This being so, the agreement on the part of the administratrix to accept it for that purpose was clearly null and void under the rule above stated. But a void promise on one side cannot constitute a consideration for a valid promise on the other side. The rule on this subject is thus stated in Story, Cont. § 447: "Mutual promises are concurrent considerations, and will support each other unless one or the other be void; in which case, there being no consideration on the one side, no contract can arise." See, also, 1 Whart. Cont. § 498. It follows, in our opinion, that the note was executed without any sufficient consideration therefor, and that the court below properly so held. The point is made that the want of consideration was not sufficiently pleaded in the answer, but we think it was. We advise that the judgment be affirmed.

We concur: Temple, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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89 Cal. 327

Harrison v. McCormick *et al.* (No. 13,039.)

(*Supreme Court of California.* May 29, 1891.)

Sale—Contract—Parol Evidence—Fraud.

1. Where the contract for the sale of coal is in writing, and mentions the quality of coal sold by name, but nothing therein indicates that a sample was used or referred to, parol evidence is not admissible to show a sale by sample.

2. In an action for the purchase money, where there is nothing to show that the coal was not of the quality mentioned in the contract, but judgment goes for defendant, the admission of such parol evidence is reversible error.

3. Such evidence is not admissible as showing that a fraud was practiced on defendant, where there is no allegation in the answer that the contract was induced by false representations.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Craig & Meredith, for appellant. *H. C. Firebaugh*, for respondents.

De Haven, J. The defendants had judgment in the court below; and from such judgment, and an order denying him a new trial, the plaintiff appeals. The action is for a balance alleged to be due plaintiff on account of the sale of 50 tons of coal, sold under the name of "Montana Lump Lehigh Hand-Picked Coal." The answer sets up, among other defenses, that the coal was sold by sample, and not by name, and that the coal delivered did not correspond with the sample. The plaintiff proved that an agreement for the sale of the coal was reduced to writing, and executed in duplicate, and that the one retained by him was lost. He then proved the contents of this written agreement by a witness who refreshed his memory from a letter-press copy of the written portion of said agreement, and a blank memorandum of contract similar to that upon which the agreement was written. The contract, as thus proven, is as follows: "San Francisco, January 12, 1882. Messrs. McCormick & Lewis ordered from J. W. Harrison fifty tons Montana Lode Lump Lehigh Hand-Picked Coal, early lading in New York. Ship to be named, original cost, etc. To be paid on receipt of bills of lading, etc., and the freight to be paid on receipt of coal here, at $13.50 per ton per 2,240 pounds, gold coin, payable as above, delivered from ship's side when landed. Any shortage in excess of 2 per cent. to be paid by the seller." The record does not disclose any conflict in the evidence as to the fact that there was a written agreement, or that its written terms were as above set forth. The defendants, however, were permitted to show by parol evidence that the contract was for coal of the same kind and quality as the defendants had previously bought from plaintiff, and which they were then using in their foundry, and that the coal delivered was not of the kind or quality thus referred to as a sample; and the question presented by this appeal is whether this parol evidence was properly admitted.

1. We do not see how the admission of this evidence can be sustained. Its effect was to show that coal was sold by sample, and thereby to import into the contract a warranty that the coal sold was to be equal to the sample. When the contract is in writing, and nothing in the written contract indicates that a sample was used or referred to, parol evidence canot be allowed to show a sale by sample. Tied. Sales, § 188; Wiener v. Whipple, 53 Wis. 298, 10 N. W. Rep. 433; Thompson v. Libby, 34 Minn. 374, 26 N. W. Rep. 1. In Wiener v. Whipple, supra, the written contract was as follows: "Bought of Cass Whipple about 300 bushels of barley, at 65 cents per 50 pounds, to be delivered by the 15th of September next. Paid on same, $25." And it was held not competent to add to the terms of this agree-

ment by parol evidence that the sale was made by sample. In Thompson v. Libby, supra, it is distinctly held that in a sale of personal property a warranty of its quality, if made at all, forms a part of the contract of sale, and is not a collateral contract; and therefore proof of such warranty cannot be added to the written agreement by parol evidence. It is claimed that the agreement proven by plaintiff was a mere informal memorandum, incomplete upon its face, and not intended to contain all the terms of the contract, and that for this reason the oral evidence was proper. We do not so regard the writing under consideration. It contains within itself all that is necessary to constitute a contract; and this being so, in the absence of any averment in the answer of defendants that there was an omission or mistake made in reducing it to writing, it is not competent to show by oral evidence that it does not state all of the terms of the agreement. The question whether a writing is upon its face a complete expression of the agreement of the parties is one of law for the court, and the rule which governs the court in its determination has been well stated as follows: "If it imports on its face to be a complete expression of the whole agreement, —that is, contains such language as imports a complete legal obligation,—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed." Thompson v. Libby, 34 Minn. 377, 26 N. W. Rep. 2. See, also, Naumberg v. Young, 44 N. J. Law, 339. In 1 Greenl. Ev. § 275, it is said: "When parties have deliberately put their engagement in writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing." Tested by this consideration, it is clear that the agreement here is to be deemed complete, as it imports a clear legal obligation, and without any uncertainty as to what the parties thereto undertook to perform. It states an agreement for the sale and delivery of 50 tons of coal of a particular name; and it contains, either expressly or by implication, everything necessary to make the mutual obligations of the parties, arising out of a contract of sale, complete. This is therefore to be deemed a written contract; and other terms and conditions which might have been introduced into it by the parties, but were not, cannot be added by parol. The abbreviation, "etc.," found in the sentences: "Ship to be named, original cost, etc. To be paid on receipt of bills of lading, etc.,"—does not render the writing incomplete as a contract of sale, nor justify the conclusion that it was not intended by the parties as a memorial of all the terms of their contract. In the connection used, the abbreviation used is meaningless, and in no manner affects the legal construction of the agreement, and is therefore to be disregarded as surplusage.

2. The respondents further insist that this evidence was proper because it tended to show that a fraud was practiced upon them in the making of the contract. This would be so if such a defense had been made in the answer. The answer denies the execution of the contract alleged in the complaint, and avers that the contract of sale was by sample; but it contains no averment that defendants were induced to enter into the contract alleged in the complaint by any fraudulent representation, as that the coal described in such contract by name was the same kind and quality of coal previously bought by defendants from plaintiff; and without such averments, or an allegation of mistake in reducing the contract to writing, this evidence was irrelevant and immaterial.

3. The court does not find as a fact that the coal delivered to respondents was not merchantable. It is true, one part of the finding is to the effect that it "was filled with slate and dirt and foreign matter;" but this is said in connection with the statement that it was not as good as the sample by which the court finds it was sold. In another portion of its findings the court declares that it was not as good as the sample referred to, "but it was of the kind, variety, and class known as 'Montana Lump Lehigh Hand-Picked Coal.'" If it was, then the respondents got what was called for by the written contract, unless it was not equal in quality to coal of that brand. There is no finding that it was not. In this state of the findings, we cannot hold that the admission of the oral evidence as to the sale by sample was immaterial, as it would have been if the court had found that the coal delivered was not merchantable, nor equal in quality to that called for by the contract alleged in the complaint, and that plaintiff had been paid its full value. Judgment and order reversed.

We concur: McFarland, J.; Sharpstein, J.

(3 Cal. Unrep. 412)

Flynn v. Dougherty. (No. 13,032.)[1]

(*Supreme Court of California.* May 30, 1891.)

Contract—Conditions—Breach.

Where in an action for a breach of contract it appeared that defendant verbally accepted plaintiff's written offer to furnish stone for a building defendant had undertaken to build, and that plaintiff was required, as one of the conditions, to execute a bond for the performance of the work and to commence the work as soon as possible, the failure of plaintiff to furnish or tender the bond within eight or nine days precludes his right to recover prospective profits, when nothing has been done under the bid.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; F. E. Spencer, Judge.

Jarboe, Harrison & Goodfellow, for appellant. *Charles F. Wilcox*, for respondent.

Vancliff, C. This is an appeal from a judgment of nonsuit, and from an order denying plaintiff's motion for a new trial. The complaint alleges, in substance, that in July, 1886, the plaintiff contracted with the defendant to cut, furnish, and deliver to the defendant the stone required for the construction of the state asylum about to be erected in the county of Santa Clara, for the sum of $6,883; that plaintiff was at all times ready and willing to perform the contract on his part, but that the defendant refused to accept the stone, and gave plaintiff notice of such refusal, and prevented plaintiff from performing the contract, and wholly repudiated it, to the damage of plaintiff in the sum of $2,000. The answer specifically denied each allegation of the complaint. Upon the trial, the plaintiff testified that on the 9th day of July, 1886, he presented to the defendant a bid or offer in writing, of which the following is a copy: "San Jose, July 9, 1886. The undersigned propose to cut, furnish, and deliver the stone-work of the asylum to be built at Agnew station, according to the plans and specification of Mr. Jacob Lenzen & Son, architects, for the sum of six thousand eight hundred and eighty-three ($6,883.00) dollars. THOMAS FLYNN." Plaintiff admitted that there was no contract or memorandum in writing between him and the defendant for the stone-work mentioned in the complaint; and further testified that the defendant was himself bidding for the construction of the state asylum at Agnew station, and a few days thereafter informed plaintiff that the contract for its construction had been awarded to him, (defendant,) and that plaintiff's bid for the stone-work was accepted, telling him at the same time that a bond would be required of him, (plaintiff,) and that he should make arrangements to commence work as soon as possible, so as not to delay the construction of the asylum; that on July 20th plaintiff came to San Jose, and after meeting with the defendant was informed by him that the contract for the stone-work had been given to another person; that he was at all times ready to carry out and perform the contract on his part, and for that purpose had brought his foreman to San Jose, and instructed other workmen to follow; that the cost of the work would not have exceeded $4,500, and that if he had completed the contract he would have realized therefrom a profit of over $2,000; that he had quite a lot of stone on hand already quarried that could have been used, which it would have cost between $500 and $600 to quarry, and which he had previously quarried while he was getting out other work, the most of which is still on hand, that if the stone had been cut according to his bid and the specifications, and had not been used in the construction of the asylum, it would not have been available for other purposes or salable in the general market, but that none of the stone was so cut, and none of it was delivered, nor was any money paid therefor by defendant. Another witness testified to a conversation with the defendant in which he told the witness that Flynn had got the contract for cutting, furnishing, and delivering the stone for the asylum. No other evidence was given or offered in the case, and defendant moved for a nonsuit on the ground that the alleged contract was for the sale of goods and chattels, and as there was no note or memorandum thereof in writing signed by defendant, nor any acceptance or receipt of the goods or any part thereof, nor any payment of any part of the purchase money, as required by the fourth division of section 1624 of the Civil Code, the contract was invalid, and on the further ground that the plaintiff failed to prove that he had sustained any damage. The court sustained the motion, and plaintiff excepted. I am inclined to the opinion that the alleged contract was not within the statute of frauds, but it is unnecessary to decide that question, since, according to plaintiff's own testimony, the acceptance of his offer by the defendant was only conditional, the condition being that plaintiff must give a bond for the performance of the work. There is no evidence tending to prove that plaintiff ever gave or offered to give the bond, without which even the proposed verbal contract was incomplete. It appears that the negotiation was opened by the uninvited offer of plaintiff to do the stone-work according to certain specifications for a certain price. At the same time that defendant said he accepted the offer he also said that plaintiff should give a bond, and commence the work as soon as possible. About eight or nine days thereafter, without having given or offered to give the bond, the plaintiff returned to San Jose, when he was told that the work had been let to another party; but even then he did not offer to give the bond, nor does he testify that he then offered to commence the work, but only that "he was at all times ready to carry out and perform the contract on his part," by which he may have intended to be understood that he offered to commence the work. But his offer to commence the work, if he did so offer, before he tendered the bond, was nugatory. He claimed no other damage than being deprived of prospective profits, but, as he signally failed to prove a contract, he is not entitled to even nominal damages. I think the judgment and order should be affirmed.

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[1] Reversed in banc. See 27 Pac. 1080, 91 Cal. 669.

We concur: FOOTE, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

In re KNOX. (No. 14.002.)

(*Supreme Court of California.* June 3. 1891.)

BEATTY, C. J. Counsel for the petitioner in the above-entitled matter having consented that the procedings against the respondent be dismissed, it is sc ordered

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(89 Cal. 385)

DEWAR *v.* RUIZ, (GARDNER, Intervenor.)
(No. 13,721.)

(*Supreme Court of California.* June 1, 1891.)

SWAMP LANDS—RIGHT TO PURCHASE — EVIDENCE.

1. An application to purchase swamp and overflowed land, made before segregation of the land, is void, and it is proper to refuse to admit

it in evidence in an action to determine the rights of the parties thereto to purchase.

2. In such action it is competent to show that the land in question, though granted to the state as swamp land, has been so far changed by natural causes as to have become suitable for cultivation.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

N. O. Bradley and *W. B. Wallace*, (*Wells, Guthrie & Lee*, of counsel,) for appellant. *Lamberson & Taylor* and *T. M. McNamara*, for respondent.

MCFARLAND, J. This action was brought by respondent against Ruiz, defendant, to determine the rights between said parties to purchase certain swamp and overflowed land. Gardner intervened as successor in interest to Ruiz. Judgment went in the lower court in favor of respondent, and against the defendant and intervenor, and the latter appeals.

1. There was no error committed in refusing to admit in evidence the application of defendant, Ruiz, to purchase, and subsequent papers dependent upon it, because, waiving all other objections, it appeared, and is not contradicted, the said application was made before segregation of the land, and was therefore void. Since the briefs in the case at bar were filed, this court has, in Buchanan v. Nagle, 26 Pac. Rep. 512, in Wren v. Mangan, Id. 100, and in later cases, approved the doctrine stated in Garfield v. Wilson, 74 Cal. 175, 15 Pac. Rep. 620, that the Code makes no provision for an application to purchase prior to segregation.

2. There was no error in allowing respondent to show that the land in contest, although granted to the state as swamp and overflowed land, and purchasable as such, had been so far changed in its character by natural causes as to have become "suitable for cultivation." Fulton v. Brannan, (Cal.) 26 Pac. Rep. 506.

3. The evidence warranted the findings, and the latter clearly show that the defendant was entitled to purchase.

We see no material error committed at the trial of the cause. The judgment and order denying a new trial are affirmed.

We concur: DE HAVEN, J.; HARRISON, J.; GAROUTTE, J.; PATERSON, J.

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89 Cal. 276

HORN v. HAMILTON. (No. 13,342.)

(*Supreme Court of California.* May 28, 1891.)

ATTORNEY AND CLIENT—NEGLIGENCE—FAILURE TO COLLECT CLAIMS—TRIAL.

A complaint against an attorney alleged that he had received the full amount of a note left with him by plaintiff for collection, that he had surrendered the note to the maker, and refused to pay over the amount received. The answer denied receiving any money, and alleged that defendant, being a creditor of such maker, had, with the consent of plaintiff, taken an assignment of a contract held by such maker to secure both claims. Upon the trial plaintiff testified that he gave the note to defendant to collect or obtain security, that he pointed out property for the satisfaction of the note, and that the maker offered to give a second mortgage on his property, having a sufficient margin, as defendant knew, and that he understood the contract was assigned to defendant as security. Defendant was allowed to prove that the assignment of the contract was all he could get, and the court charged that, unless the jury found defendant had failed to collect or get good security when he could have so done, and thereby the debt was lost, they should find for the defendant. A verdict was rendered for plaintiff. *Held*, that the case having been tried and submitted, without objection, on the theory of negligence in collecting the note, defendant received the benefit of a defense that the note could not have been collected, and as that was more favorable than he was entitled to under the issue in the complaint, he cannot complain of the verdict.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; JAMES E. MURPHEY, Judge.

L. F. Cooper and *Sawyer & Burnett*, for appellant. *Lucas & Miller*, for respondent.

TEMPLE, C. Appeal from judgment and order denying defendant's motion for a new trial. Action to recover money alleged to have been collected on a note by defendant as plaintiff's attorney. It is charged that the defendant received from the debtor payment and satisfaction in full, both principal and interest, and thereupon canceled and surrendered the note to the maker; that defendant has failed and refused to pay to plaintiff the amount recovered, or any part thereof, "and now refuses to pay the same, or any part thereof, and now wrongfully withholds the same from plaintiff." The defendant admits receiving the note, but denies receiving it as plaintiff's attorney, and avers that plaintiff and defendant were both creditors of one White, and consulted in regard to the prospect of collecting their debts, and that defendant, with the full consent of plaintiff, finally agreed with White to surrender all the notes held by himself and plaintiff to White in consideration of the assignment to them of White's interest in a certain contract, to which White was a party; that the contract was assigned to defendant with plaintiff's knowledge and consent, in pursuance of this agreement, defendant agreeing to hold it for himself and plaintiff in proportion to the amount of their respective claims. He denies that he has collected any money whatever upon the note, and avers an offer to assign to plaintiff the contract transferred to him by White, and his readiness still to so assign it. He also avers that at the time of the transfer White had no other property except a dairy farm, which was mortgaged for more than it was worth, and some personal property, which was then under attachment. That plaintiff and defendant, then, consulting as creditors of White and not as attorney and client, agreed to take the assignment in payment of their indebtedness, and, in pursuance of this understanding, plaintiff delivered the note in question to defendant, and not otherwise. The action was tried by a jury, who returned a verdict for plaintiff. The plaintiff testified, in effect, that he gave the note to defendant, as an attorney, to collect or obtain security; that he pointed out to defendant sufficient property from which the money might have been made, and that White offered to secure the debt by a second mortgage on his ranch, and that there was ample margin for that purpose, as defendant knew; that he understood that the contract was assigned as security, and not in payment, and afterwards discovered that his note had been surrendered and canceled. The evidence is abundantly sufficient to sustain a verdict against the defendant, if it can be held to be consistent with the allegations of the complaint. The complaint is for money had and received, on the theory that, as defendant had surrendered the note to be canceled as paid, he may be charged as for a collection. On the trial both parties, as well as the court, appear to have tried the case as though the issue were whether defendant had failed to collect through negligence. That the defendant so regarded the issue is conclusively established by the instructions he asked for, as well as by the evidence he offered. That the court so understood it, is shown by the instructions given of its own motion. If the plaintiff recovered, the amount would be the same in either form of action. The main difference would be that, in an action for damages, the defendant would have had the benefit of a defense that the debt could not have been collected. As a matter of fact, he had the benefit of such defense. The instruction of the court was to the effect that the jury should find for the defendant, unless they found that he had failed to collect or to get good security, when he could have collected or obtained security, and thereby plaintiff had lost his debt. This instruction was more favorable to defendant than he was entitled to have. If, having no authority to accept in payment anything but money, he took, in his own name, property in full payment, and discharged the debt, the client was at liberty to regard it as a collection. Here he was allowed to prove that it was all he could get, or that the debt could not have been collected. The trial was not in accordance with the issue tendered in the complaint, but there was no objection made at the trial, and the case was in all respects tried as though the pleadings covered the matters actually in contest. The defendant has evidently sustained no injury. The objections to the sufficiency of the complaint cannot be made after verdict; undoubtedly it is good enough to support the judgment. We think the judgment should be affirmed.

We concur: Belcher, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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89 Cal. 427

Smith v. Belshaw *et al.* (No. 13,021.)

(*Supreme Court of California.* June 6, 1891.)

Master and Servant—Where Relation Exists—Defective Mine.

In an action for negligence in suffering the roof of a drift in a coal mine to remain without support, whereby it fell upon and injured a miner, it appeared that several months prior to the accident, defendant, being the owner, turned over the possession and management of the mine to one D., who from that time employed and paid the workmen and operated the mine for his own benefit. *Held*, that there was no relation between the parties whereby a liability could arise, and the fact that the miners were paid at defendant's store, and that some of them thought they were working for defendant, was immaterial.

Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by John Smith, a minor, by his guardian *ad litem*, James Smith, against Mortimer W. Belshaw, Charles Belshaw, and James Dickenson, doing business under the firm name and style of Belshaw & Co.

Fred B. Lake, (*J. E. Foulds*, of counsel,) for appellants. *Leander Quint*, for respondent.

Garoutte, J. This is an action to recover damages from defendants on account of their negligence in suffering the roof of a drift in a coal mine to remain without support, by reason whereof a portion of said roof fell upon plaintiff, who was a laborer in the mine, and injured him. A verdict for damages was rendered against M. W. Belshaw and Dickenson, and a judgment in favor of defendant Charles Belshaw. This appeal is prosecuted by M. W. Belshaw from the judgment and order denying his motion for a new trial. Under the law, as applied to the facts of this case, it plainly appears that no liability rests against the appellant Belshaw. While we will not disturb the verdict of a jury where the evidence is conflicting upon substantial matters, yet in all cases the verdict must have some meritorious support from the evidence, or be set aside and disregarded. In this case the evidence is undisputed that at the time of the accident, and for some months prior thereto, the mine was in the exclusive possession and control of defendant Dickenson, under a contract with Belshaw, who was the owner thereof. That under such contract Dickenson employed and paid the workmen; had entire charge of and authority over the mine, and received a fixed rate per ton from Belshaw, for the coal taken therefrom, when the same was delivered to him. The principle of law is so well settled that, where one carries on an independent employment in pursuance of a contract, by which he has entire control of the work, and the manner of its performance, his employer is not liable for any negligence of which he may be guilty in the course of his employment, that the citation of authorities is unnecessary labor. Indeed, respondent's counsel concedes the law, but insists that the evidence is sufficient to sustain the verdict. As already stated, we are unable to find it in the record. The fact that the miners were paid their wages at defendant Belshaw's store, where they had been paid prior to the contract with Dickenson, and the further fact that some of the miners thought they were working for Belshaw, are circumstances too slight to defeat the express and uncontradicted testimony as to the terms of the contract, and the labor performed under it. What the miners thought as to who was their employer is entirely immaterial. There is no question of estoppel involved in the case, and appellant, in order to escape liability for the negligence of Dickenson, was not bound to give any notice to the miners that he had given up the control of the mine. This is not an action on contract, based upon ostensible agency, but is an action in tort, and must rest upon the actual facts and the actual relations existing between the parties. Samuelson v. Mining Co., 49 Mich. 164, 13 N. W. Rep. 499; Rourke v. Colliery Co., 2 C. P. Div. 206. In Gulzoni v. Tyler, 64 Cal. 336, this court said: "If the defendants were the owners of the boat, but had not the possession, control, or management of it themselves, or by their agents or employes, they cannot be held responsible for the negligence or mismanagement of whosoever had the exclusive control, possession, and management of it." In Johnson v. Owen, 33 Iowa, 515, it is said: "A bare belief of plaintiff, though founded on a reasonable cause, that Nash was defendant's servant, which in no way had influenced his action, which was not intended to be created, and which was not the natural result of his acts, could not make him liable as the employer of Nash. It would be a very dangerous rule to hold that inferences and opinions concerning men's actions, although founded upon reasonable cause, would render them liable for the acts of others." It is further contended by respondent that the appellant was liable as owner of the mine. (1) That the accident occurred in an old drift that was used simply for the purposes of egress and ingress to that portion of the mine from which the coal was being extracted, and therefore it remained under the control of Belshaw. (2) That the mine was in an unsafe condition at the time appellant turned the possession of it over to Dickenson. Neither of these positions can be successfully maintained. The entire mine, as disclosed by the evidence, was turned over to Dickenson; and he had the same control, possession and management of the old drifts, used for the purposes of ingress and egress, as he had over the portions where the miners were actually engaged in extracting the coal. And there is no testimony in the case indicating that this drift was in an unsafe condition at the time Dickenson assumed control. He had been in possession some months when the rock, which finally caused the injury, was noticed to be dangerous. The case in 49 Mich. 164, 13 N. W. Rep. 499, heretofore cited, is quite similar to the one at bar in many respects, and we quote: "That the mine at no time was a place of absolute safety is conceded, but the danger was not peculiar to this mine, and by itself raised no presumption of negligence. The question is whether the defendant, at the time of delivering possession to the contractors, had neglected any precaution which ought to have been taken to guard against danger. * * * The negligence, if any, must, on this showing, have consisted in the failure to inspect the roof frequently, and to bar down any rock that seemed likely to detach itself and fall, or to erect timbers to prevent the fall. Some personal fault must be involved, or neglect of duty, before there can be a personal liability." It follows from the foregoing views that the judgment and order must be reversed as to defendant M. W. Belshaw, and cause remanded for a new trial.

It is so ordered.

We concur: PATERSON, J.; HARRISON, J

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89 Cal. 23

CITY AND COUNTY OF SAN FRANCISCO v. PACIFIC BANK. (No. 14,146.)

(*Supreme Court of California.* May 29, 1891.)

REHEARING—POINTS NOT BEFORE PRESENTED.

A petition for a rehearing, filed by counsel whose names are not on the record, and based upon grounds not presented in the original argument, will not be considered. Affirming 26 Pac. Rep. 615.

On rehearing.

PER CURIAM. A petition for rehearing has been filed in this cause by counsel other than those whose names appear in the record, or who participated in the oral argument. In their petition they do not question the correctness of the opinion filed upon the decision of the cause, but ask for a reversal of the judgment upon grounds entirely different from those which were presented at the oral argument, or in the briefs then submitted. Petitions for rehearing are permitted by the rules of the court for the purpose of correcting any error which the court may have made in its opinion, or of enabling counsel to direct the attention of the court to matters presented at the argument which may have been overlooked in the decision. When counsel have once argued and submitted a cause for the decision of the court, it must be assumed that they have presented all the reasons upon which they rely for an affirmance or a reversal of the judgment. The court will not consider a petition for a rehearing that attempts to discuss the case upon grounds which were not presented in the original argument, or discussed in its opinion. Kellogg v. Cochran, 87 Cal. 192, 25 Pac. Rep. 677. Rehearing denied.

(89 Cal. 446)

Gerlach v. Turner. (No. 13,222.)

(*Supreme Court of California.* June 10, 1891.)

Presumption of Marriage—Physicians—Employment by Husband to Attend Wife.

1. In an action against a husband for medical treatment of his wife, it appeared that the parties had been formally married and cohabited until they learned that a divorce from a former wife was invalid, whereupon they discontinued cohabitation, but still acknowledged each other as husband and wife. The evidence as to the invalidity of the divorce, and that the first wife was living, was elicited by defendant on cross-examination, and was hearsay. *Held* not sufficient to rebut the presumption of marriage, although no objection to the evidence was made.

2. A physician called by a man to attend a woman, supposed to be his wife, can recover for his services from the person summoning him, although the parties are not in fact legally married.

3. One who calls a physician to attend a person whom he represents to be his wife is estopped to deny that fact in an action for services rendered on the faith of such representation.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

A. P. Needles, for appellant. *A. N. Drown*, for respondent.

Beatty, C. J. This is an action to recover $850 for medical services alleged to have been rendered at the special instance and request of the defendant in attending his wife, or reputed wife, Mary J. Turner, during her last illness. In a former action against the administrator of Mary J. Turner for the value of the same services, the plaintiff was defeated by proof of her marriage to this defendant, and of an employment by him; from which it followed that he, and not her estate, was liable for the demand. Gerlach v. Terry, 75 Cal. 290, 17 Pac. Rep. 207. Thereupon this action was commenced in which the plaintiff has been nonsuited upon the ground that Mary J. Turner was not the wife of defendant, although so reputed, and that plaintiff's services were rendered at her request, and solely upon the faith of her promise to pay for them out of her separate estate. In other words, the plaintiff has lost his suit this time because, in the opinion of the superior court, he did not prove a marriage or an employment by the reputed husband, while he lost it before because such marriage and employment was proved. Certainly this is a hard case, but it is one that is legally possible. The defendant, not having been a party to the first suit, is not estopped by the decision therein made that he was the husband of Mary J. Turner, and contracted with the plaintiff; and if in this suit the contrary appears the plaintiff cannot claim to recover merely because in the former action the representative of Mary J. Turner succeeded in evading her just obligation by the false pretense that the defendant, as her husband, was the party bound for the debt. It will be necessary, therefore, in order to determine whether nonsuit was properly granted, to confine our attention exclusively to the evidence produced by the plaintiff on the trial of this action.

Before considering the evidence, however, we will notice briefly a preliminary objection of counsel for the respondent, who contends, as we understand him, that the appellant has not specified the ruling of the court granting the motion for a nonsuit as an error of law, and consequently that it cannot be reviewed. Schroeder v. Schmidt, 74 Cal. 460, 16 Pac. Rep. 243. But in this contention counsel is evidently mistaken, for, in fact, the statement of the case not only shows that plaintiff duly and in time excepted to the order granting a nonsuit, but also distinctly specifies the ruling as an error of law, in both of which particulars it totally differs from the record in Schroeder v. Schmidt. The question is therefore properly presented whether upon the evidence a nonsuit should have been granted.

The evidence shows that in 1872 a clergyman, in pursuance of a regular license, performed the ceremony of marriage between defendant and Mary J. Mason, afterwards and until her death known as Mary J. Turner. But there was some testimony—hearsay and incompetent, as it appears to us, but admitted without objection—that at the date of this supposed marriage defendant had a wife living from whom he erroneously supposed himself to have been divorced; and it was upon the assumption of the truth and sufficiency of this testimony that the judge of the superior court held that he had never been the husband of Mary J. Mason. But it appears that for about eight years after the marriage ceremony they both believed themselves to be husband and wife, and so conducted themselves towards each other, and before the world. At the end of that time the defendant testifies that he discovered that no decree divorcing him from his former wife had been entered; that he communicated this discovery to Mary J. Turner; that they took advice of counsel, and, finding they were really not husband and wife, they ceased to live together in that relation, and he gave her the sum of $6,000 for her support. It appears, however, that, although they may have put an end to their conjugal relations as between themselves, they still continued, for the purpose of avoiding scandal and publicity, to hold themselves out to the world as husband and wife. They lived on his ranch in Sonoma county, where, he says, he paid her to act as his housekeeper, but she retained and was known by the name of Mrs. Turner; and when in November, 1882, she was attacked by the fatal illness which occasioned the employment of the plaintiff, the defendant came with her to San Francisco, took her to the house of Mrs. Beanston, her daughter by a former marriage, and himself called the plaintiff to see her. The plaintiff wrote down the name and address of the house where he was directed to call, writing Vincent by mistake for Beanston, and, without waiting to inquire by whom he was to be paid for his services, commenced and continued his attendance. For a whole month—from November 3d to December 3d—he noted his daily visits in his account-book under the name of Vincent; after that, under the name of Mrs. Turner. He says that he did not at any time feel any concern about his bill. His patient was in the house of a daughter, and constantly attended by the defendant, who demeaned himself as her husband, and spoke of her to the plaintiff and to the nurse and others as his wife. He supposed he would be paid, of course, and never thought of inquiring by whom. He says it would have made no difference who came for him or sent for him he would have rendered his services just the same. He seems, indeed, during his long attendance, and it is much to his credit, to have been intent only upon the relief of his patient, and wholly oblivious to the collection of his fees. During the latter part of Mrs. Turner's illness—from three to six weeks before her death—the plaintiff was informed of the peculiar relation between her and the defendant, and was at the same time informed that she had plenty of means of her own to pay him for his services. This information seems to have been volunteered by both the defendant and by Mrs. Turner, and not to have been elicited by any inquiries from the plaintiff, who continued his attendance as before. After Mrs. Turner's death the defendant claimed a portion of her property as heir, and actually applied for letters of administration on her estate, describing himself in his sworn petition, as her surviving husband. He abandoned his application, however, when he found himself opposed by her son, Mr. Terry, who received the appointment as administrator. The plaintiff having been convinced, apparently, that Mrs. Turner's estate was liable to him for his services, presented his claim to her administrator, and upon its rejection sued Terry, with the result above stated, *i. e.*, that he was defeated, on the ground that her husband, this defendant, owed the debt, and that her promise to pay it was invalid.

Upon this state of facts, we think, the superior court erred in granting a nonsuit, for two reasons: *First.* There was abundant evidence of a marriage between the defendant and Mrs. Turner, and nothing to rebut the conclusion that they were, in fact, husband and wife, except hearsay evidence that he had a former wife living at the date of their marriage. And this hearsay evidence was not put in by the plaintiff, but was called out on cross-examination, and allowed in the absence of any objection by the plaintiff, who might properly have objected that it was not cross-examination, but a part of the defendants own case. *Second.* Even if it had been clearly proven by competent evidence that defendant was not the husband of Mrs. Turner, he is still liable, if he employed the plaintiff to attend her; and the evidence shows that he did. A man may employ a physician to attend a total stranger, and *a fortiori* one whom he chooses to have known as his wife. And, besides, the defendant's conduct—at least, up to the time when Mrs. Turner, towards

the last of her sickness, promised plaintiff that she would pay him—was such as to amount to an explicit representation that he was her husband, and, after the plaintiff has rendered services on the faith of such representation, defendant is estopped to assert its falsity. We are not unmindful of the claim that plaintiff's own testimony shows that he did not rely on the defendant. But we do not think his testimony shows any such thing. He expected confidently to be paid, and he simply did not consider the legal aspects of his contract. He was entitled to rely on the defendant, and must be presumed to have done so. He may not have a right to invoke this principle of estoppel as to the value of services rendered after he was informed that defendant was not Mrs. Turner's husband, but, even as to these services, the defendant is liable if he originally employed the plaintiff, and did not plainly and unequivocally put an end to that employment at the time he informed him of his true relation to the woman he called his wife. The judgment and order appealed from are reversed.

We concur: HARRISON, J.; GAROUTTE, J.

(89 Cal. 203)

RANKIN v. AMAZON INS. Co. (No. 12.807.)

(*Supreme Court of California.* May 26, 1891.)

FIRE INSURANCE—REPRESENTATIONS.

1. In an action on a fire insurance policy running to O. & Co., (owners,) loss payable to R. & Co., (plaintiffs,) it appeared that, at the time of making application for insurance, plaintiffs promised to furnish a survey and diagram, without which the company refused to take the risk. A rider to the policy provided: "Reference is hereby made to a survey and diagram on file in the office of M. & Son, [insurance brokers acting on behalf of plaintiffs,] which is made a part of this policy, and a warranty on the part of the assured." The policy also provided: "For further particulars, reference is hereby made to an application and survey, No. ——, furnished by, and a warranty on the part of, the assured, which is hereby made a part of this policy." *Held*, that the admission in evidence of the survey and diagram, consisting of questions and answers, could not be objected to on the ground that the insurance was effected before it was furnished to the company; as, if it was thereby deprived of its force as a warranty, it still had effect as a representation of facts made as an inducement for the issuance of the policy, the falsity of any material part of which would warrant the rescission of the insurance.

2. The survey having been furnished in accordance with plaintiffs' agreement, they could not object to it on the ground that the parties furnishing it had no authority from the owners of the property.

3. The provision of the policy that   understood and agreed that, during such time as the above mill is idle, a watchman shall be employed by the insured, to be in and about the premises day and night," being free from ambiguity with respect to the time the premises were to be watched, it was error to submit the question to the jury whether plaintiffs had complied with the condition; it appearing that while the mill was idle for two months but one watchman was hired, and he was not instructed to watch the mill at night, and, as a matter of fact, slept every night in a building several hundred feet from the mill.

4. If it was material whether the watchman was on duty at the time of the fire, the burden of proving it was on plaintiffs, defendant having shown that the mill was idle.

In bank. Appeal from superior court, city and county of San Francisco; J. W. ARMSTRONG, Judge.

Haggin, Van Ness & Dibble, for appellant. *Doyle, Galpin & Zeigler*, (*Philip A. Galpin*, of counsel,) for respondent.

PATERSON, J. This is an action on a fire insurance policy to recover the sum of $548.24. The policy contained the following clause: "Reference is hereby made to a survey and diagram on file in the office of J. C. Mitchell & Son, which is made a part of this policy, and a warranty on the part of the assured." The application for the policy was made on November 21st, but was not countersigned or delivered until November 24, 1884. Mitchell & Son, who were insurance brokers, acted on behalf of plaintiffs in procuring the policy, and they promised at the time the application was made to furnish the survey and diagram. The company refused to take the risk unless the brokers would agree to furnish such a survey. A survey and diagram was made by the owners of the property, and a copy thereof dated December 4, 1884, was presented to the agents of the defendant, but at what precise time it was presented does not appear. On December 3, 1884, the policy was taken to the office of the defendant and the written portion thereof was changed, increasing the amount of the insurance, and another rider, which was duly authenticated and attached, was substituted, which contained the same reference, quoted above. The survey and diagram consisted of many questions and answers. It was written on the blank form of another insurance company, and was signed, "Owens River M. G. & S. Co., by Hoyt & Son, applicants." The policy ran to the Owens River Iron & Smelting Company, (owners,) "loss, if any, payable to Rankin, Brayton & Co." When this document was offered in evidence, plaintiffs objected to it on the grounds that the insurance had been effected prior to the time the survey was presented to the company, and that Hoyt & Son had no authority to act on behalf of the mining and smelting company. The objection was sustained. The defendant excepted. The ruling was erroneous. The loss was not payable to the owners of the mine, but to their creditors, Rankin, Brayton & Co., and the question as to the authority of Hoyt & Son is immaterial. Plaintiffs promised to furnish the survey, and it was furnished in accordance with their agreement, and became a part of the contract. The admissibility of the evidence does not depend solely upon the reference contained in the rider. The policy itself provides: "For further particulars reference is hereby made to an application and survey, No. ——, furnished by and a warranty on the part of the assured, which is hereby made a part of this policy." The delay of the plaintiffs in furnishing the survey should not be held to entirely destroy its efficacy as a part of the contract. The fact that the survey was not furnished until after the policy was delivered may have deprived it of any force or effect as **arranty**, under section 2605 of the Civil

Code; but conceding this to be true, it does not destroy its effect as a representation of facts made as an inducement for the issuance of the policy, and as such it is evidence which the jury should consider on the issue as to rescission. If any of the material representations were false, the defendant's tender of the premium and notice that the policy was canceled before the commencement of the suit operated to rescind the contract. Sections 2580, 2583, Civil Code.

The policy, as first printed and written, contained this clause: "It is understood and agreed that, during such time as the above mill is idle, a watchman shall be employed by the insured to be in and upon the premises day and night." At the request of the plaintiff, this provision was changed by inserting the word "about" in lieu of the word "upon." The object of the change doubtless was to avoid any controversy, in case of loss, as to whether it was necessary that the watchman should be actually upon the premises on which the insured buildings stood. The change, however, did not accomplish the full purpose intended, for the watchman slept a distance of 300 or 400 feet from the mill; and the word "about," as used, is so uncertain in signification that it cannot be determined therefrom exactly what territory was intended to be covered by it. But, however uncertain the promissory warranty may be as to the premises upon which the watchman was required to be, there is no ambiguity in the language with respect to the time he was required to watch the premises. Where the language of a policy may be understood in more senses than one, it is to be construed most strongly against the insurer, because he frames it, and is supposed to make it as potent as possible in his own favor; but, where there is no imperfection or ambiguity in the language, it must be construed, like any other contract, according to the intention of the parties.

The court instructed the jury that, "if the assured employed a watchman to be in and about the premises day and night while the mill was idle, then the plaintiff is entitled to recover," and submitted to them for determination the question whether plaintiffs had performed the conditions of the contract. Cases are cited by respondent in support of the action of the court which hold that under certain watchman clauses it is proper to receive evidence of usage, and to submit to the jury the question whether the insured employed a watchman to look after the property in the manner in which men of ordinary care in similar departments of business manage their own affairs of like kind. But they all go off upon the proposition that the terms of the warranty are not explicit as to the time and manner of keeping a watch. Thus in the Massachusetts case (Crocker v. Insurance Co., 8 Cush. 79,) the language of the clause was, "a watchman kept on the premises;" and in the Illinois case (Insurance Co. v. Shipman, 77 Ill. 189,) "a watchman to be on the premises constantly during the time until September 1, 1872." In the latter case plaintiff had employed a day watchman and a night watchman, and the only question considered was whether it was necessary for the watchman to be actually on the premises on which the insured buildings were situated. In the case before us the terms of the warranty are explicit as to the time of keeping a watch, and, on the undisputed evidence, we think the court ought to have held that the plaintiffs had not complied therewith. The mill was idle for two months prior to the destruction thereof by fire, and the evidence shows that plaintiffs did not employ a watchman "to be in and about the premises day and night." A watchman was employed, but he was not instructed to watch the premises at night, and, as a matter of fact, slept every night in a building distant 300 or 400 feet from the mill. Mr. Minear, the superintendent, testified that McMurray, the watchman, was not instructed to watch the premises during the night; that his instructions were not special, "either at day or night." In the nature of things, it could not be expected that one man could watch the buildings day and night, (only one watchman was employed,) but, if it be assumed that he could, no one was employed to do so. There is no ambiguity in the phrase "day and night." "We do not need a dictionary, nor a law-book, nor the testimony of an expert, to tell us that a man who is employed to watch in the day-time, and who is permitted to sleep at night, is not a watchman at night." Brooks v. Insurance Co., 11 Mo. App. 349; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 39. It is not a case of mere negligence. If a loss is occasioned by the mere fault or negligence of the watchman, unaffected by fraud or design on the part of the insured, it is within the protection of the policy; but, to entitle the insured to recover, it must appear that he has in good faith employed a watchman to perform the duties required by the terms of the warranty. Trojan Min. Co. v. Fireman's Ins. Co., 67 Cal. 27, 7 Pac. Rep. 4; Wenzel v. Insurance Co., 67 Cal. 438, 7 Pac. Rep. 817; Cowan v. Insurance Co., 78 Cal. 181, 20 Pac. Rep. 408; Waters v. Insurance Co., 11 Pet. 219. It does not appear whether the watchman was actually on duty at the time the fire occurred. If the fact be considered as material, it is sufficient to say that, defendant having shown the mill was idle, the burden of proving a compliance with the warranty rested upon the plaintiffs. Cowan v. Insurance Co., supra; Wood, Ins. (2d Ed.) p. 1136. The judgment and order are reversed, and the cause is remanded for a new trial.

We concur: GAROUTTE, J.; HARRISON, J.; DE HAVEN, J.; MCFARLAND, J.

BEATTY, C. J. I concur in the judgment, and in the conclusion that the evidence does not show that a watchman was employed as stipulated.

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89 Cal. 286

BULL v. BRAY *et al.* (No. 12,695.)

(*Supreme Court of California.* May 28, 1891.)

FRAUDULENT CONVEYANCES—INTENT—FINDINGS.

Civil Code Cal. § 3439, provides that "every transfer of property * * * made * * * with intent to delay or defraud any creditor * * * is void." Section 3442 provides that in all cases arising under this section "the question of fraudulent intent is one of fact and not of law," and that no transfer shall be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. *Held* that, in an action to set aside a conveyance, although a court has found that it was made without consideration by an insolvent debtor, and that his creditor was thereby defrauded, a failure to also find a fraudulent "intent" is fatal.

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Alpheus Bull against Watson A. Bray, Julia A. Bray, Emma B. Cohen, and Alfred H. Cohen to set aside certain conveyances as fraudulent. After trial by the court and judgment for plaintiff, a new trial was granted. Plaintiff appeals.

Wm. H. Sharp and *J. F. Wendell*, for appellant. *Chickering & Thomas*, (*J. P. Phelan* and *Garber & Bishop*, of counsel,) for respondents.

Garoutte, J. This is an appeal from an order granting defendants a new trial. The action was brought by plaintiff, a judgment creditor, to set aside two certain deeds of gift made by defendant Watson A. Bray, the judgment debtor, to Julia A. Bray, his wife, May 20, 1880, and August 3, 1881, respectively, of lands in Contra Costa county, as being void against prior creditors. Plaintiff's debt had been reduced to judgment; execution was issued thereon, and returned wholly unsatisfied. In the lower court, plaintiff had judgment, as prayed for, declaring said deeds null and void as against his judgment, and that he be entitled to enforce his execution against the property in said deeds described. Defendants moved for a new trial, and their motion was granted upon the ground that the findings as filed omitted to find upon the issue of intent raised by the pleadings in the case; that is to say, there is no finding on the issue made by the pleadings, whether the conveyances from Bray to his wife, referred to in the pleadings, were made or accepted with intent to hinder, delay, or defraud the plaintiff or other creditors of said Bray. The question presented by this appeal is, therefore, whether, in view of the facts found by the court, it was necessary to make a further finding as to the fraudulent intent; for, if the facts found by the court necessarily establish the fraudulent intent, that satisfies the law. If probative facts only are found, yet, if the ultimate fact flows as a necessary conclusion therefrom, the findings are sufficient. Osborne v. Clark, 60 Cal. 623; Biddel v. Brizzolara, 56 Cal. 381; People v. Hagar, 52 Cal. 189; Coveny v. Hale, 49 Cal. 555. The only findings of the court necessary to consider in the investigation of this most important question are as follows: (1) That said deeds were entirely voluntary, and there was no valuable consideration whatever for the making and delivery of the same, and said deeds were deeds of gift. (2) That at the times of the making of said deeds the defendant Watson A. Bray was insolvent, and has ever since remained insolvent. (3) That defendant Bray, at the time he made and delivered said deeds, was not fully aware, and did not know his actual financial condition, and his inability to pay and discharge in full his then outstanding debts and liabilities. (4) That by the making and delivery of said deeds Watson A. Bray did hinder, delay, and defraud this plaintiff in the collection of his debt.

This action rests upon section 3439 of the Civil Code: "Every transfer of property * * * made * * * with intent to delay or defraud any creditor * * * is void." "Every transfer of personal property * * * is conclusively presumed if made by a person having * * * the possession or control, * * * and not accompanied by an immediate delivery * * * to be fraudulent and therefore void against those who are his creditors, while he remains in possession." Civil Code, § 3440. Then, to exclude all possibility of misconception arising out of the conflicting decisions of other states as to whether the question of intent is a matter of law or of fact, section 3442 provides that in all cases arising under section 3439 "the question of fraudulent intent is one of fact, and not of law." It further provides that no transfer shall be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. It also expressly excepts transfers of personal property arising under section 3440, for that section makes the question one of law by providing that transfers made in a certain way shall create a conclusive presumption of fraud. The general contention of appellants in this case is fairly illustrated by the doctrine laid down by Bump, in his work on Fraudulent Conveyances, (3d Ed. 271, 272:) "If the act necessarily delays, hinders, or defrauds his creditors, then the law presumes that it is done with fraudulent intent. The intent is to be assumed from the act. The circumstances of the act, or rather the act itself, is conclusive evidence of fraud, for no man is permitted to say that he does not intend the necessary consequences of his own voluntary act. The law will not speculate about what is actually passing in the donor's mind, for the act need not be immoral or corrupt. The law does not concern itself about the private or secret motives which may influence the debtor. * * * He may make a conveyance with the most upright intentions, really believing that he has a right to do so, and that it is his right and duty to do it, and yet, if the transfer is voluntary, and hinders, delays, or defrauds his creditors, it is fraudulent. * * * The presumption in such a case is conclusive, and against it all other evidence is unavailing. The debtor may have some other purpose in view, but the intent to defraud is a part and parcel of his act. It is upon these principles that the law relating to voluntary conveyances rests. In the construction of the statute, they are deemed within its operation, when they necessarily tend to defeat the just rights of creditors, even though they are made *bona fide* and with the intention of conferring a gratuitous benefit upon some meritorious object. The law stamps a man's generosity with the name of fraud when it prevents him from acting fairly towards his creditors, and presumes fraud if he disables himself from paying his debts. In such case the presumption of fraud arises and may exist without the imputation of moral turpitude. The principle is, that persons must be just before they are generous, and that debts must be paid before gifts can be made." This doctrine, ever since the celebrated case of Reade v. Livingston, 3 Johns. Ch. 500, decided by Chancellor KENT, has been recognized and accepted by many judges in many states of the Union.

Respondents insist that "the question of intent is a question of fact, and that the intent or purpose of the grantor in making the transfer in all cases is a question for the jury, and that it is material to the issue to determine whether the act done is a *bona fide* transaction, or whether it is a trick or contrivance to defeat creditors." "That the question of solvency or insolvency of the grantor at the time of the making of the deeds is a matter of evidence to be given its due weight in determining the ultimate fact as to the fraudulent intent of the grantor; that a rich man may make a fraudulent deed as well as one who is insolvent; and that while a voluntary conveyance by an insolvent may be *prima facie* fraudulent, it cannot be conclusively fraudulent, for that would make the question of intent a question of law, and thus be in violation of that provision of the Code which says it shall be a question of fact." These views, to a great extent, are supported by the exhaustive case of Seward v. Jackson, 8 Cow. 450, and by other authority, both English and American. The cases in this country passing either directly or indirectly upon the questions involved in this litigation are practically numberless, and, as we have already seen, are greatly at variance. But, as has been said by Bigelow on Fraud, (Preface, iv. and v., Ed. 1877:) "The law here to be applied is statutory law, and, as to the statutory law concerning fraud on creditors and purchasers, each state of the Union, with few exceptions, has a Code of its own, interpreted by independent tribunals, and enforced by distinct and diverse penalties and procedure. With deference to the views of others who have attempted to present a harmonious view of the statutes of the different states, the author is satisfied that such efforts are both unsatisfactory and dangerous. The decisions of the courts of New York concerning the interpretation of an ambiguous statute of that state,—that is, concerning the intention of the legislature of that state in the passage of the act,—cannot be safe authority in another state, even upon a question of the meaning of a statute framed in the very same words. The legislature of New York meant one thing by the language used, and the legislature of another state may have meant something else, and so the courts of each state may have declared, and rightly. To say, therefore, that the decisions are in conflict is incorrect, and to attempt to deduce the true rule of law as applicable to both states is vicious." Without attempting to deduce the true rule from the many authorities of many states, we will discuss this case by the authority of our statutes and Codes, and in the light of the decisions of our own judicial tribunals.

Having found the fact that the conveyances were voluntary conveyances, that the defendant Watson A. Bray was insolvent at the time he made the conveyances, and that these conveyances delayed and defrauded the plaintiff in the collection of his debt, was it still necessary for the court to find the further fact that the intent of the grantor in making the conveyances was to delay and defraud creditors, and was the court justified in granting a new trial by reason of its failure to make such finding? Appellant contends that the absence of a finding of intent is immaterial, because the conveyance being voluntary, the grantor being insolvent, and the conveyance having defrauded the creditor, the intent to delay and defraud follows as an absolute and conclusive presumption, and the intent, being the ultimte fact, necessarily results from such probative facts. In order to support this contention the ultimate fact must follow necessarily—that is, as a matter of law—from the other facts. In Coveny v. Hale, 49 Cal. 556, the court said: "Of course, it is only when the conclusion follows as a matter of law that such a finding will be held sufficient." "The only inferences which we can draw from the findings," said the court in De Celis v. Porter, 65 Cal. 10, 2 Pac. Rep. 257, and 3 Pac. Rep. 120, "are inferences of law. We are not allowed to draw inferences of fact from the facts found. If this court would infer a fact from other facts, it would be usurping the province of the trial court, which alone can find the facts in issue. This is the rule with regard to special verdicts, and we are of opinion that the same rule applies to findings of fact." To the same effect are the cases of Chandler v. Bank, 65 Cal. 499, 4 Pac. Rep. 502; Salisbury v. Shirley, 66 Cal. 228, 5 Pac. Rep. 104; Hibberd v. Smith, 67 Cal. 556, 4 Pac. Rep. 473, and 8 Pac. Rep. 46. It may be conceded that it would have been perfectly proper for the trial court to have drawn an inference of fact as to the fraudulent intent of the grantor from the other facts found; that this court might be justified in setting aside a finding to the contrary as not being supported by the evidence, (Judson v. Lyford, 84 Cal. 505, 24 Pac. Rep. 286;) but that does not dispense with the necessity of an actual and express finding as to the ultimate fact, as a fact, by the lower court, nor authorize this court to exercise what would be original jurisdiction by supplying a finding upon this most vital and essential matter. As section 3442 of the Civil Code declares that the question of fraudulent intent is "one of fact and not of law," it is not entirely plain that this court can under any state of facts, however plain they might be, hold that the ultimate fact might flow from the probative facts as a matter of law. But, assuming that the ultimate fact of "intent to defraud" may flow as "matter of law" from the probative facts, yet to obviate a finding of this ultimate fact the facts found must necessarily and conclusively indicate that the grantor was possessed of the intent to defraud at the time the conveyances were made. If the facts found do not absolutely exclude all possibility of the absence of fraudulent intent in the mind of the grantor, then the want of the finding of such intent cannot be dispensed with in this court. Thus, in the case of Emmal v. Webb, 36 Cal. 204, the court, in considering whether it could infer a fact from other facts, said: "To warrant us in so doing, the fact to be inferred must follow inevitably from the facts found, or, in other words, the non-existence of the fact to be inferred must, upon every conceivable theory of which the case will admit, be inconsistent with the existence of the facts which are found." And to the same effect are Coveny v. Hale, 49 Cal. 556; Younger v. Pagles, 60 Cal. 520; Walker v. Buffandeau, 63 Cal. 312; Coglan v. Beard, 35 Cal. 63, 2 Pac. Rep. 737; Water Co. v. Richardson, 72 Cal. 601, 14 Pac. Rep. 379. We then proceed to consider whether there is any possible state of facts consistent with the findings of the court heretofore quoted, and also consistent with the absence of fraudulent intent in the mind of the grantor at the time of the making of the deeds sought to be set aside in this action. The finding of the court "that the defendant Bray by the making of these deeds did hinder, delay, and defraud the plaintiff in the collection of his debt" throws no special light upon the solution of the question as to the actual intent of the grantor; while important as evidence of the intent, by reason of the presumption that every man intends the usual and ordinary consequences of his voluntary acts, yet our statute requires that a conveyance shall not only delay and defraud creditors, but that it was made with the intent to delay and defraud, and the statute appears to recognize the intent as the prevailing and controlling element in measuring the *bona fides* of the transaction. Bray did actually defraud Bull in the making of the deeds, by depriving him of property which would otherwise have been applied to the satisfaction of the execution; but it does not necessarily and conclusively follow therefrom that the intent was present in his mind to defraud, or that in making the transfer he may not have been actuated by the most honest motives.

Appellant insists that the existence of the facts, to-wit, "that the grantor was insolvent at the time of the transfer, and that the conveyances were deeds of gift, render the inference of fraudulent intent absolute and conclusive, and a conveyance under such circumstances, therefore, would be void under any and all conceivable states of facts; and this is the important and determinative question in this case." Very many of the authorities from other states relied upon by appellant to support this contention rest in whole or in part upon the presumptions "that every man intends the usual and natural consequences of his voluntary act," and that "every man is presumed to know the condition of his own business;" and, applying those presumptions, it is said that the natural consequence of an insolvent giving away his property is to defraud his creditor, and that, therefore, the insolvent must have intended to defraud; and, again, "a man is presumed to know the condition of his own business affairs, and therefore if, as a matter of fact, he is insolvent, he must know of such insolvency." Best, in his work on Evidence, section 307, speaking of the changes which this subject of presumptions has undergone in our legal history, says: "Certain presumptions which in earlier times were deemed absolute and irrebuttable have, by the opinion of later judges, acting on more enlarged experience, either been ranged among *præsumptiones juris tantum*, or considered as presumptions of fact, to be made at the discretion of the jury. On the whole, modern courts of justice are slow to recognize presumptions as irrebuttable, and are disposed rather to restrict than to extend their number. To conclude a party by an arbitrary rule from adducing evidence in his favor is an act which can only be justified by the clearest expediency and soundest policy, and some presumptions of this class ought never to have found their way into it." According to the provisions of the Code of Civil Procedure, (sections 1961–1963,) the foregoing presumptions are disputable presumptions, and may be controverted by other evidence; and, indeed, the presumption that every man knows the condition of his own business affairs has no standing in this case, for the trial court has found as a matter of fact that "the defendant Bray did not know that he was insolvent." And, not knowing his insolvency, how can it be presumed from the existence of his insolvency that he intended to defraud? For no man can be presumed to intend a consequence which he does not know, of which he is ignorant, and which, therefore, he cannot contemplate. It may be conceded that one who acts recklessly and regardless of consequences is not to be exonerated. The fraud in this case rests upon the insolvency of the grantor; for, while there is no allegation, proof, or finding as to the value of the property conveyed, still, if he was solvent, a gift of this character, in the absence of an actual fraudulent intent, would be upheld. If defendant Bray did not know that he was insolvent, then he did not know that this property was required to pay his debts, and the finding of the court that he was ignorant of his insolvency is absolutely inconsistent with the presumption that he intended the consequences of an act, which consequences depended upon insolvency. Appellant's counsel insist that a voluntary conveyance by an insolvent is void under all circumstances, and that the intent to defraud is conclusively presumed. If that be so, it must be by reason of some presumption of law; but, if it be said that fraud can be conclusively presumed in any case, except as provided by section 3440, Civil Code, then fraud is again made a question of law, and this would amount to an abrogation of section 3442, Id., which provides that "fraudulent intent is a question of fact," and would be creating a class of conclusive presumptions not recognized or justified by either section

3440, Id., or section 1962, Code Civil Proc.

As has been remarked at the inception of this opinion, the great number of cases from the courts of other states, cited by appellant's counsel to support this contention, will not be reviewed. Some of them directly sustain such position; others merely affirm the decisions of *nisi prius* courts, that a gift by an insolvent is sufficient evidence to justify the setting aside of a conveyance by a creditor; others hold the insolvent guilty of a fraudulent intent as a matter of law; and many others are based upon the two presumptions heretofore referred to, and holding that such presumptions were conclusive presumptions, and that therefore the fraudulent intent necessarily resulted therefrom; and this was the reasoning adopted by this court in the case of Swartz v. Hazlett, 8 Cal. 118. The court held in that case that "every man must be held to know the law and the facts regarding his own business." In other words, if the debtor is insolvent, he is conclusively presumed to know that fact; and, the necessary consequences of a transfer of his property being to delay and defraud his creditors, the fraudulent intent follows in all cases. The important distinction between that case and the one at bar is that in this case the lower court not only recognized the presumption that "every man is presumed to know the condition of his own affairs," as being rebuttable, but absolutely rebutted it by finding as a fact that "the defendant Bray did not know the condition of his own affairs, and did not know that he was insolvent." In 1 Whart. Cont. § 377, subd. 4, is used this language: "As a condition of fraudulent intention, insolvency known to the grantor must be shown. A party who believes himself to have the pecuniary ability to make a gift can make such gift without the risk of its being subsequently impeached, supposing his belief is not negligently adopted." In the case of Swartz v. Hazlett, supra, this court really held that a transfer of property by a grantor who knew of his insolvency was conclusively fraudulent; and, while we are not inclined to even adopt that view of the law under our statutes, yet, from the reasoning of the court in that case, if there had been a finding as to the grantor's ignorance of his insolvency, it does not appear that the case could have been reversed, and judgment ordered for the plaintiff. As we have already seen, (Emmal v. Webb, supra,) if, upon any conceivable theory, the inference of fraudulent intent would be inconsistent with the fact of insolvency, then this court cannot find the intent as matter of law. Now, it appears from the record in this case, in addition to the findings already discussed, that the liabilities and assets of the defendant Bray approximated three-quarters of a million dollars, respectively; that he continued in business for years after these deeds were made, and before he made an assignment for the benefit of his creditors; and, in addition to these facts, we will suppose that he honestly believed at all times that he had ample property remaining to pay his debts after this property was transferred, and that the property transferred was of merely nominal value. A state of facts could be imagined even much more favorable to the grantor, Bray, than the foregoing, and which would be perfectly reconcilable with the fact of actual insolvency, and the absence of fraudulent intent at the time of the making of the conveyances; and, conceding the trial court would be justified in drawing the inference of fraudulent intent from such a state of facts, this court would not and could not say that such intent would flow therefrom as a matter of law. It is difficult to see how trivial gifts, made with fair, honest intentions, can be adjudged to have been made with a fraudulent intent, when intent is declared to be a matter of fact in all cases.

In the case of Carpentier v. Mendenhall, 28 Cal. 484, it was held that a finding of a demand by one tenant in common to be let into possession, and a refusal by his co-tenant, was not a finding of ouster. The court said: "The law will not presume from either the one or the other, nor from both combined, that there was an intent to oust. That intent must be established as a fact by the finding of the jury. Conversion is one of the points to be established in actions of trover, but it is settled that demand and refusal is not conversion, but only evidence of it, for the consideration of the jury. In the absence of all explanation, the court would be justified in directing or advising the jury to infer a conversion or an ouster, in a case like the one at bar, from the fact of demand and refusal, but the inference is to be made by the jury and not by the court." There appears to be no reason why the legal principles declared by this court in the criminal case of People v. Mize, 80 Cal. 44, 22 Pac. Rep. 80, are not applicable here. The defendant was charged with an assault with intent to commit murder. It is a statutory offense, and the intent is the essential ingredient. The trial court gave the following instruction. "The jury are instructed that the natural and probable consequence of every act deliberately done by a person of sound mind is presumed to have been intended by the author of said act; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendants, or either of them, did shoot at said Henry Coffey, as charged in the information, and that the natural and ordinary consequences of said shooting would be the death of said Henry Coffey, then the presumption of law is that the defendant so shooting did shoot at said Coffey with intent to kill him." This court said: "It is doubtless true that a man is presumed to have intended the immediate and natural consequences of his act, but, when an act becomes criminal only when it has been performed with a particular intent, that intent must be alleged and proved. It is for the jury, under all the circumstances of the case, to say whether the intent required by the statute to constitute the offense existed in the mind of the defendant." This charge withdrew from the jury the consideration of the question whether the defendants intended to kill Coffey. The defendants claimed that they were acting in self-defense, and upon real and apparent danger. To tell the jury, therefore, if they believed that the defendants had shot at Coffey, and that the natural and ordinary consequences of the shooting would be the death of Coffey, the law would presume them guilty of an intent to kill, was erroneous, because it entirely disregards the question whether the defendants acted in good faith, and to defend themselves against real or apparent danger. So, in the case at bar, if a voluntary transfer by the defendant insolvent carries with it a conclusive fraudulent intent, the defendant would be precluded from showing his motives and good faith in making the conveyance, and the question of intent, which a jury may have been called to try, which in all cases is a question of fact, and which is the fact in the case, would be driven from the case by the court calling to its aid presumptions which, as we have already seen, are not only liable to attack, but are put to flight at the moment they come in contact with a substantial fact. The case of Hager v. Shindler, 29 Cal. 58, 59, holds that insolvency is but a circumstance from which fraud may be inferred or argued; evidence of fraud, but not by any means conclusive or irrebuttable evidence. In that case the court said: "In a case like the one at bar, insolvency is not a fact of jurisdictional consequence, nor is it *per se* a condition of relief. * * * A complaint framed for the purpose named, while stating that the deed was without consideration, should aid or help out the averment, not by averring insolvency, for that is but a circumstance, not by averring generally that the deed was fraudulent, for that is but a conclusion of law, but by averring the fact superadded by the statute, to-wit, that it was made with 'intent to hinder, delay, or defraud creditors.' The state of the grantor's worldly affairs may be used as evidence to elucidate the intent, if disputed; but as matter of pleading it is not necessary that insolvency should be averred in the complaint, and for the obvious reason that the fact does not enter as a term into the legal proposition. A rich man may make a fraudulent deed as well as one who is insolvent."

The Civil Code provides that the mere want of consideration does not of itself render a conveyance fraudulent as to creditors; and considering this section in connection with the presumptions recognized by the court in Swartz v. Hazlett, supra, the distinction between sales for an inadequate consideration and voluntary conveyances is entirely imperceptible, and the question in both cases at once becomes one of intent to be decided from all the evidence in the case. The difference in these two classes of conveyances is only in degree; for as the grantor must upon appellant's theory be presumed to know his condition, and to know that the consideration is inadequate, and that he is thereby depriving his creditors of the portion of the "fund" which is represented by the difference between an adequate and inadequate consideration, he must be presumed conclusively to intend to defraud them *pro tanto*, for the conveyance is voluntary to that extent. But McFadden v. Mitchell, 54 Cal. 629, holds that inadequacy of price and insolvency of the debtor are only circumstances more or less potential in the determination of fraud as a question of fact; and, referring to certain instructions given by the trial court, Justice McKee says: "By these instructions the court in effect took away from the jury the consideration of fraudulent intent as a question of fact, and as they are contrary to the plain rule established by the Code the cause is remanded for a new trial." Appellant's position in this case takes away from the jury the consideration of fraudulent intent as a question of fact. In Jamison v. King, 50 Cal. 136, the court, speaking through Justice McKinstry, said: "Doubtless the concurrence of insolvency on the part of the assignor, and inadequacy of price, would be a circumstance strongly tending to establish fraud; but inadequacy or failure of consideration is not of itself sufficient, even as against the creditors of an insolvent assignor, to authorize a court to find fraud as a conclusion of law. By our statute it is provided: 'The question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded upon a valuable consideration.' In the case before us the district court did not find fraud as a fact or as a conclusion of law, nor does the amended complaint allege it." In Miller v. Stewart, 24 Cal. 504, the court uses this language: "Whether the transactions in question were entered into by the Millers with intent to hinder, delay, or defraud their creditors is a question which the statute leaves to the determination of the jury upon such evidence as may be presented for their consideration. The intent is expressly declared to be a question of fact, and must therefore be for the jury, and not the court. In the instruction above quoted the court in effect takes the question from the consideration of the jury, and assumes the decision thereof." In Harris v. Burns, 50 Cal. 141, it appears, the trial court instructed the jury that certain facts, if proven, were conclusive as to the intent of the assignor to hinder, delay, and defraud his creditors. In the opinion of this court, Chief Justice Wallace says: "This instruction cannot be supported. The question of fraudulent intent is a question of fact; it is so declared by the statute. * * * The instruction, in effect, took away from the jury the decision of the question of fact, and established the fraudulent intent by mere legal conclusion from an isolated circumstance. This we held erroneous in Jamison v. King, Id. 132, at the present term." This decision is not based upon the theory that the facts referred to by the trial court in the instruction were in themselves too weak to justify a conclusive presumption of a fraudulent intent; but it decides that, the intent being a question of fact, such a presumption could not be indulged in under our statute.

If the legislature had intended a gift by an insolvent to constitute a constructive fraud or fraud in law, it was easy to have said so. Instead of that, they expressly legislated away all the reasons upon which the decisions so holding profess to stand. When the legislature did intend to preserve the doctrine of fraud in law, they did so in express language, by section 3440, Civil Code, and then provided that in all other cases the question of fraudulent intent is one of fact, and not of law. It is impossible to comprehend how any decision or series of decisions of other states can make the question of fraud in this state, and in this character of action, a question of law. No decision or series of decisions can repeal a statute. Let the order be affirmed.

We concur: DE HAVEN, J.; HARRISON, J.; MCFARLAND, J.; PATERSON, J.

BEATTY, C. J. I concur. It does not seem possible to avoid the conclusion that the law of California on the subject of voluntary conveyances by insolvent debtors is such as in the opinion of Justice GAROUTTE it is declared to be. But I cannot refrain from expressing the belief that it is most unfortunate that the court should be forced to that conclusion. When an insolvent debtor makes a gift of his property to a donee of his own selection, there can be but one result, so far as his creditors are concerned. They are necessarily deprived of what is rightfully theirs, and the law ought to pronounce such a transaction *ipso facto* fraudulent and void as to them. Our legislature, however, has deliberately chosen to make the rights of creditors in such case depend, not upon the proof of facts susceptible of demonstration, and from which the injury is a necessary result, but upon proof of the secret intent of the debtor; in other words, upon the whim of a jury. Such a law invites fraud, puts a premium upon perjury, and multiplies fruitless litigation. It ought to be changed, but the legislature alone has the power to change it. In the mean time the courts should give the utmost force and effect to so much of the law for the protection of creditors as remains. There should be no hesitation in stating, and in everywhere insisting upon, the proposition that a voluntary conveyance by an insolvent debtor is *prima facie* proof of a fraudulent intent, which throws upon the donee the necessity of rebutting the inference of fraud; and it ought not to be held or intimated that such inference will be rebutted by the mere fact that the debtor was at the date of the conveyance ignorant or uncertain as to his insolvency. It ought to be made clear, on the contrary, that he believed, and had good reason to believe, that his property remaining after the conveyance would be amply sufficient to enable him to meet and discharge his obligations as they matured.

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89 Cal. 351

THRELKEL v. SCOTT. (No. 13,817.)

(*Supreme Court of California.* May 30, 1891.)

FRAUDULENT CONVEYANCES — SETTING ASIDE BY GRANTOR'S ADMINISTRATOR.

In an action by an administrator under Code Civil Proc. Cal. § 1589, to recover property fraudulently conveyed by his intestate in his life-time, the fraudulent intent of the grantor must be alleged in the complaint, and it will not be inferred from the facts set out therein that the conveyance was voluntary, and that intestate was insolvent. BEATTY, C. J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. MYRES, Judge.

F. P. Tuttle, for appellant. *Hale & Craig*, for respondent.

FITZGERALD, C. Appeal from a judgment of the superior court of Placer county. This action was brought by plaintiff as the administrator of the estate of Robert N. Scott, the deceased husband of the defendant, to compel her to convey to him certain real property described in the complaint, and alleged therein to have been conveyed to her as a gift by her said husband on the day preceding his death, while fatally ill, and when he was indebted largely beyond his ability to pay. It is further alleged that the whole of the said property so conveyed should be restored to the estate, in order that the value and proceeds thereof may be applied in due course of administration to the payment of the debts and claims due and payable out of the funds of the said estate. The defendant demurred to the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the court below, and, upon defendant filing her answer, judgment was given for the plaintiff on the pleadings in the case, upon which judgment defendant prosecutes this appeal.

A question as to pleading, of much importance, is here raised by the demurrer in this case, which seems to have been overlooked by counsel, as no reference whatever is made to it in their briefs, and that is whether the fraudulent intent of the grantor when he executed the conveyance, and which must be proved before plaintiff will be entitled to recover, is a fact necessary to be alleged in the complaint. The power of the administrator to bring this action is derived solely from section 1589 of the Code of Civil Procedure, and in the exercise of it he is expressly limited by its provisions to actions for the recovery of property fraudulently conveyed by the decedent in his life-time. And the question here naturally suggests itself whether the fraudulent intent, which is expressly declared by our statute to be a question of fact, is one, the allegation of which is necessary to the sufficiency of the complaint. We think it is, for the very obvious reason that the allegation of fraudulent intent is indispensable for the purpose of showing the plaintiff's authority under the law to bring the action. Nor will such fraudulent intent, which is itself a question of fact, be inferred from the facts stated in the complaint, either for that or any other purpose, for the further reason that a voluntary conveyance by an insolvent debtor is not necessarily fraudulent and void as to creditors. Jamison v. King, 50 Cal. 136; McFadden v. Mitchell, 54 Cal. 628; Bull v. Bray, (No. 12,695,) 26 Pac. Rep. 873, (filed May 28, 1891.)

Hence it follows that the fraudulent intent is a fact necessary to be alleged in the complaint. As the complaint in this case contains no such allegation, we are of the opinion that the court erred in overruling the demurrer. We therefore advise that the judgment be reversed, with direction to the court below to sustain the demurrer.

We concur: Foote, C.; Vancliff, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, with direction to the court below to sustain the demurrer.

I dissent: Beatty, C. J.

(89 Cal. 354)

McLaughlin v. Menotti. (No. 12,475.)

(*Supreme Court of California.* May 30, 1891.)

Public Lands — Railroad Grants — Rights of Settlers.

1. Act Cong. July 1, 1862, provides "that there be and is hereby granted" to a certain railroad company certain sections to be afterwards located, depending on the route to be established, and that after the company has designated the general route of its road, and filed a map thereof with the secretary of the interior, he shall cause the lands to be withdrawn from pre-emption, private entry, and sale. *Held*, that the filing of such map, and the order of the secretary withdrawing the lands, precluded the subsequent inception of any rights in favor of any one else.

2. After such order of the secretary of the interior the land department had no authority to hold that the land was subject to selection by the state.

3. After the company had accepted the terms of the grant, and acted upon them, congress could not divest it of its rights in the lands.

4. To entitle a person to the exception in favor of a *bona fide* settler contained in a land-grant, (Act Cong. July 2, 1864,) it is not enough to show that he occupied and improved the land.

In bank. Appeal from superior court, city and county of San Francisco; James D. Thornton, Judge.

A. L. Rhodes, for appellant. *T. H. Lane & Hatch*, for respondent.

Paterson, J. This is an action of ejectment. The complaint is in the usual form, and the answer is a general denial. The plaintiff claims title under a patent from the United States to the Central Pacific Railroad Company issued April 3, 1872, and a deed from that company to plaintiff's testator dated April 3, 1873. The defendant claims under a patent from the state of California dated February 25, 1875.

The facts, which are not disputed, are in substance as follows: In 1858, when the land was unoccupied public land of the United States, Philip Hirleman settled on the land, and built thereon a dwelling-house, fences, and corrals, cultivated a portion of it, and remained in possession until he conveyed to one Jean Peter, March, 1866. The latter went into possession of the land, and held the same until it was conveyed by him to the defendant herein, March 29, 1867. On June 13, 1864, Hirleman applied to the locating agent of the state to locate the land in controversy under the provisions of the act of the legislature of April 27, 1863, entitled "An act to provide for the sale of certain lands belonging to the state," as a lieu school-land location. This application was in due form, and accompanied by the affidavit of loyalty, and was accepted on the 16th day of June, 1864. At some time prior to January 30, 1865, (the exact date is not found,) the Western Pacific Railroad Company filed a map in the office of the secretary of the interior, designating the general route, and a copy of this map was received at the land-office in San Francisco on the 30th day of January, accompanied by the proper order to the register and receiver, withdrawing the odd-numbered sections, including the lands in controversy, from pre-emption, private entry, and sale. The official map of the township was filed by the United States surveyor general in the local land-office on February 27, 1865. The assignment which the Central Pacific Railroad Company had made and executed in 1864 to the Western Pacific Railroad Company of its right to the land in controversy was affirmed by the act of congress of March 3, 1865. On February 28, 1865, the state's agent located, in lieu of a portion of the school lands of the state which had been lost, the land in controversy, at the request and for the use of Hirleman, by filing an application for the same in the name of the state in the United States land-office at San Francisco, and the location so made was filed in the state land-office on the 4th day of April, 1865, and was approved by the surveyor general of the state May 13, 1865. On June 24, 1865, Hirleman made payment to the treasurer of the 20 per cent. of the purchase money, and one year's interest on the balance, as required by law; and on the 31st day of August, 1865, a certificate of purchase for the land was issued to him by the state. The line of the Western Pacific Railroad Company was definitely located not earlier than the 1st day of September, 1866. On June 22, 1870, the two railroad companies referred to were consolidated under the name of the Central Pacific Railroad Company. On March 13, 1872, the defendant applied to the officers of the United States land department for a confirmation of the right of the state to the land under the provisions of the act of congress, entitled "An act to quiet land titles in California," approved July 23, 1866. The Western Pacific Railroad Company, and parties claiming under it, vere notified; and after proceedings had in the department, the commissioner of the general land-office, under the direction of the secretary of the interior, on May 15, 1874, listed over and certified to the state the land as confirmed to the state of California. A patent of the lands issued from the United States to the Central Pacific Railroad Company April 3, 1872, and n April 3, 1873, the company conveyed the land to the plaintiff. On December 31, 1874, full payment was made to the state by Hirleman, and on February 25, 1875, he received from the state a patent of the same.

The question is, upon these facts, which party has the better title? The defendant claims that the act of congress to quiet land titles in California, passed July 23, 1866, confirmed the state location, and granted the land in controversy to the state and her assigns, the state having prior to the passage of the act, and prior to the definite location of the line of the road, made a selection of the land, in lieu of school lands which had been lost, and disposed of the same to defendant, who purchased it in good faith; that the patent to the railroad company is void as to the land in controversy, because at the time the grant to the company took effect the land had been "otherwise disposed of by the United States," within the meaning of section 3 of the act of July 1, 1862. These contentions are the logical result of the defendant's erroneous views as to the operation and effect of the Pacific Railroad acts of July 1, 1862, and July, 1864. Although the amendatory act of 1864 enlarged the grant of 1862, it was done in such a way as to give the same operation and effect to the grant of the enlarged quantity as if it had been included in the provisions of the original act, and there is no longer any question as to the operation and effect of the act of 1862. Referring to a similar grant, the supreme court of the United States, in Railroad Co. v. U. S., 92 U. S. 741, said: "'There be and is hereby granted' are words of absolute donation, and import a grant *in præsenti*. * * * They vest a present title in the state of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach to it any particular tract." In Missouri, etc., Ry. Co. v. Kansas Pac. Ry. Co., 97 U. S. 491, Mr. Justice Field, delivering the opinion of the court, considered very carefully the purposes of the act of 1862, of the amendatory act of 1864, and the nature and effect of the grant, and said: "The act of July 1, 1862, passed to the company a present interest in the lands to be designated within the limits there specified. Its language is, 'that there be and is hereby granted' to it the odd sections mentioned, words which import a grant *in præsenti*, and not one *in futuro*, or the promise of a grant. * * * The grant was of sections to be afterwards located, and their location depended upon the route to be established. When that was settled the location became certain, and the title that was previously imperfect acquired precision and attached to the lands." Section 7 of the act of July 1, 1862, provides that the "said company shall designate the general route of said road as near as may be, and shall file a map of the same in the department of the interior, whereupon the secretary of the interior shall cause the lands * * * to be withdrawn from pre-emption, private entry, and sale." This map was filed in the office of the secretary of the interior prior to January 30, 1865, and on the day last named a copy thereof was filed in the United States land-office at San Francisco, with an order of the secretary withdrawing the lands from pre-emption, private entry, and sale. The purpose of this requirement and the effect of the withdrawal are to preclude the acquisition or initiation of any right other than that of the company in any of the odd-numbered sections of land until the line of the road has become definitely fixed, and when so definitely fixed the grant becomes specific by attaching itself to every odd-numbered section. If, therefore, Hirleman had no lawful claim at the time of the withdrawal,—which at the latest was January 30, 1865,—he never had any, for he could not acquire or initiate any thereafter. Buttz v. Railroad Co., 119 U. S. 55, 7 Sup. Ct. Rep. 100; Van Wyck v. Knevals, 106 U. S. 360, 1 Sup. Ct. Rep. 336. In those cases the court held, giving convincing reasons therefor, that the route is definitely fixed so that the grant attaches when a map, approved by the directors, designating the route of the proposed road, is filed with the secretary of the interior, and that no right could be initiated between the time it was so filed and the time when notice of the order was received at the local land-office.

Hirleman's application to the state locating agent was made and accepted in June, 1864. At that time the lands were unsurveyed, and the application and approval were therefore void. Collins v. Bartlett, 44 Cal. 380. It is true the application was on file when the agent made application to the United States land-officers to locate the land, February 28, 1865, one day after the official map of the township had been filed by the surveyor general; but this did not make the application or location valid. The lands had been withdrawn by the secretary, and thereafter no right of any kind could attach to the lands through any act of the state, or its agent. On January 30, 1865, if not before, the company's grant attached in such a manner that its indefeasible right to the land depended only upon the filing of the map of definite location, and the completion of the road. For the same reasons the decision of the officers of the land department in approving and listing the land to the state was void. The title had passed to the company before the listing. The definite location of the line of the road identified the odd-numbered sections within the limits of 25 miles on each side of the road, and the patent to the company took effect by relation as of the date of the passage of the act of July 1, 1862. Missouri, etc., Ry. Co. v. Kansas Pac. Ry. Co., supra. The application to the land department for confirmation under the act of July 23, 1866, was made on March 13, 1872. The land had passed out of the public domain several years prior to that time, and the grant thereof to the company could not be divested or in any manner limited by the action of the officers of the land department.

It is claimed by respondent that the question as to whether the land was subject to selection by the state was a question of fact within the jurisdiction of the land department, and that its decision cannot be attacked in this action. In Smelting Co. v. Kemp, 104 U. S. 641, the court held that if the lands had been previously disposed of, or if congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed. Its authority to act at all is denied, and shown never to have existed. Wright v. Roseberry, 121 U. S. 519, 7 Sup. Ct. Rep. 985; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. Rep. 1228. The act of August 3, 1854, provides that, if the lists embrace lands not granted to the state or territory, "said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby." 10 U. S. St. 346.

The confirmatory act of July 23, 1866, did not give to defendant's claim any additional assurance. There is nothing in that act indicating an intention on the part of congress to make its provisions applicable to any lands which had been withdrawn from sale; and, if there were, it would be a nullity so far as the lands granted and withdrawn from sale under the Pacific Railroad acts are concerned, for congress could not, after the company had accepted the terms of the acts of 1862 and 1864, and acted upon them, divest the company of its right in the lands.

Some of these questions have been considered recently in the United States circuit court, ninth circuit. In a thorough and elaborate opinion by Judge Sawyer, (Justice Field concurring,) the decisions of the national courts and the provisions of the several acts of congress bearing on the subject were carefully reviewed, and the conclusions reached which we have expressed above. U. S. v. Curtner, 38 Fed. Rep. 1.

Section 4 of the act of July 2, 1864, provides that "any land granted by this act, or the act to which this is amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral land, or the improvements of any *bona fide* settler, or any lands returned and denominated as mineral lands," etc. Defendant insists that if the lands were not "otherwise disposed of by the United States" (section 3, Act July 1, 1862,) through the selection made by the state, he acquired at least a "lawful claim" and became a "*bona fide* settler," within the meaning of those words, by the listing over to the state and by operation of the act of July 23, 1866, and therefore the patent to the company was issued without authority of law and is void. The language of the act shows that the "other lawful claim" referred to is a claim which has become in some way so connected with the paramount source of title as to be recognized as a claim by the laws of the United States. A pre-emption claim is a lawful claim because regularly initiated under the laws of the country; so are homestead and swamp-land claims; and the "other lawful claim" referred to must be of equal dignity and force. "Lawful claim" would include a Mexican grant, or the claim of the state to lands granted to it after selection of the lands and before patent; but one who has simply entered upon a parcel of public land, and improved it, without complying with the laws providing for the acquisition of the title, cannot be said to be possessed of a "lawful claim." Railroad Co. v. Tevis, 41 Cal. 494.

Was the defendant a "*bona fide* settler?" Counsel for appellant said at the argument that the act as enrolled reads, "or the improvements of a *bona fide* settler on any lands returned and denominated as mineral lands," etc., but assumed that the court would be bound to read it as printed in the volumes of the United States Statutes at Large, and that, if the defendant was a *bona fide* settler at the time the land was withdrawn from sale by the secretary of the interior, the judgment of the court below should be affirmed. We consider the case from this stand-point. No case was referred to, nor have we been able to find one, in which the words "*bona fide* settler" have been construed. We think, however, that they must refer to one who has done something more than merely occupy the land, and put a few improvements upon it; and that is all the court has found here. It cannot be said that every one who enters upon land, and builds a fence and a cabin or a house, is a *bona fide* settler. If congress had intended to exclude from the grant all lands upon which there were settlers having improvements, without regard to the question whether their entry and possession were lawful, it is not likely that it would have employed the term "*bona fide.*" Some effect must be attributed to those words. There certainly must be shown an intention in good faith to proceed diligently to comply with the laws, and acquire title. Appellant contends it must be shown that the settler entered upon the land for the purpose of acquiring title thereto from the government, and that he possessed the necessary qualifications to entitle him to connect his claim with the paramount source of title, and in support of his contention cites the case of U. S. v. Railroad Co.,[1] recently decided in an oral opinion by Judge Sawyer, in the United States circuit court. There appears to be sound reason in the contention, but the exigencies of the case before us do not require us to hold that it must always be shown that the settler was 21 years of age, or the head of a family, or had served the requisite time in the army or navy, and that he was a citizen of the United States, or had declared his intentions to become such. The question whether a settler is a *bona fide* settler is one of fact. In this case the ultimate fact is not found. Hirleman went upon the land and made improvements thereon in 1858, seven years prior to the time the land was reserved from sale, but for what purpose it is not found, except inferentially. Whether he was possessed of the qualifications necessary to enable him to initiate a valid claim is not found. It is true, it was in the power of congress to exempt from the grant to the companies lands occupied by aliens, and that the legislation of congress has been very liberal in enabling them to qualify themselves to acquire title to the public lands,—perhaps too liberal; but it has never been the policy of the government to encourage settlement without an intention on the part of the settler in good faith to proceed diligently in all the steps necessary to be taken in order to obtain the title. The facts that a settler has occupied and improved the land are merely evidentiary matters. Good intentions alone, added to settlement and improvements, will not establish the ultimate fact. A party who has entered upon public land to acquire the title from the government must show his good faith by diligently complying with the requirements of the law under which he expects to secure the title. Mott v. Hawthorn, 17 Cal. 58; Railroad Co. v. Tevis, supra. The evidence fails to show that the defendant has done so. The failure of the court to find the ultimate fact referred to left the question as to which party has the better title uncertain and unsettled, and entitled the plaintiff to a new trial. The appeal from the judgment was taken more than six years after the entry of the judgment. It is therefore dismissed. Langan v. Langan, (Cal.) 26 Pac. Rep. 764, (filed May 25, 1891.) The order appealed from is reversed.

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[1] Not reported.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.

DE HAVEN, J. I concur in the judgment. There is no finding in this case of the ultimate fact of ownership of the land in controversy, nor is it found as a fact that Hirleman, under whom the defendant claims, was a *bona fide* settler on the land in controversy on January 30, 1865, at which date there was filed in the United States land-office at San Francisco the order of the secretary of the interior, withdrawing from sale and location lands within 25 miles on either side of the general route of the Western Pacific Railroad Company, as shown upon its map of such general route, theretofore filed. If he was such settler, then the land in controversy did not pass to the railroad company; otherwise, it did. The court, therefore, should have found, in addition to the other evidentiary facts, either that he was or was not a *bona fide* settler, in so many words. A *bona fide* settler, within the meaning of section 4 of the act of congress of July 2, 1864, is one who has made an actual settlement upon public land, intending in good faith to acquire the title thereto from the United States. The words should be held to apply to any actual settler upon land affected by the act at the date of the order of withdrawal, provided for in section 7 of the act, and who had settled thereon and made improvements with the intention, in good faith, of taking at the proper time the necessary steps to acquire the title of the government in any of the modes allowed by the laws of the United States, and, as thus defined, are broad enough to include one who has made a settlement with the intention of procuring its location in part satisfaction of any grant made by the United States to the state, and then purchasing from the state. This reservation of land occupied by *bona fide* settlers is not a grant to such persons. They must show themselves entitled to enter it before they are permitted to acquire the title, but it is a withdrawal of such occupied land from the grant made to the railroad company.

I think, also, that as there was no evidence tending to show that Hirleman was not a citizen of the United States the court would have been justified in finding, from the facts before it, that he was possessed of the qualifications entitling him to purchase land from the state, and that upon January 30, 1865, he was a *bona fide* settler upon the land in controversy, within the meaning of the act of July 2, 1864.

We concur: BEATTY, C. J; SHARPSTEIN, J.

89 Cal. 373

CASHMAN v. ROOT *et al.* (No. 13,152.)

(*Supreme Court of California.* June 1, 1891.)

GAMBLING CONTRACTS—SPECULATION IN STOCKS—MARGINS—ACTION TO RECOVER MONEY LOST.

Const. Cal. art. 4, § 26, providing that "all contracts for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered," applies to a transaction wherein a broker purchases stock for a customer with his own money, charging only commissions and interest thereon, and retaining the stock as security until its sale, the customer putting up only a certain margin, and receiving the profit or paying the loss.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by William F. Cashman against George B. Root and one Hooker, to compel a conveyance of certain real estate. From a judgment for defendants plaintiff appeals.

P. Reddy and *W. H. Metson*, for appellant. *Pillsbury & Blanding*, *M. C. Baum*, and *Chas. J. Heggerty*, for respondents.

TEMPLE, C. This action is brought to compel a conveyance to plaintiff of certain real estate, which it is averred was conveyed by plaintiff to defendant Root on the 18th of June, 1884, in trust to secure the payment by plaintiff to defendant Hooker of any indebtedness which might exist within six months after the 14th of July, 1885. The complaint alleges that plaintiff was not, at the commencement of the suit, and for a long time prior had not been, indebted to Hooker in any amount whatever. Demand for a deed and refusal are also averred. The answers admit that the conveyance was made in trust, as charged in the complaint, but charge that plaintiff is still indebted to the defendant Hooker in the sum of $2,347. Defendant Hooker was a stock broker engaged in buying and selling mining stocks in San Francisco, on margin or otherwise, as required. Plaintiff had been a regular customer of Hooker for many years, and had lost heavily in stock speculations. Being, as Hooker testified, rather short of money, he conveyed the property sued for in trust to defendant Root, who was in Hooker's employ, to cover margins, and to enable plaintiff to continue his speculations in stock. Hooker states that he valued it at about $3,000, and to that extent plaintiff could buy on margin without actually putting up money. They continued to deal together until Hooker's business was closed by his insolvency in December, 1886, at which time Hooker held certain stocks for plaintiff, and, according to Hooker's books, plaintiff owed him $2,347. Plaintiff does not dispute the correctness of the account according to the course of dealing between the parties or their understanding at the time, but claims that the debt is illegal, and the contract to pay void, under section 26 of article 4 of the constitution of this state. It reads as follows: "All contracts for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." Plaintiff's dealings with Hooker were altogether on margin. When the estimated value of the land did not afford sufficient margin, it was put up in cash, and was kept good as the market fluctuated. Upon purchasing stock, the cost price was charged to plaintiff, less the amount of margin put up in cash. When sold, his account was credited with the amount realized. He was, of course, charged with the broker's commissions and the interest on the money advanced. The result, of course, was that plaintiff, aside from the commissions and interest, simply received or paid the differences between the buying and selling values. It was not contemplated that he should ever receive the stock, although he might, had he been able, have paid his debt and demanded the securities at any time. Stock ordered was always purchased by Hooker, paid for in full, and delivered to him, except when he had orders to sell the same stock for another customer, in which case the stock was simply transferred from one account to the other at market rates. The account was generally balanced monthly, when, as Hooker testified, plaintiff could tell whether he had lost or won in stocks. Hooker did not keep the stock of his customers separate, or preserve its identity, but always had under his control sufficient to satisfy the claims of his customers.

It is evident from these facts that the only purpose of these dealings was to enable plaintiff to speculate in the fluctuations of the market. If there were no break in the proceedings, it was indifferent to plaintiff whether any stock was bought or not, provided the entries were made in his account according to the market rates. It was quite a different matter, however, to Hooker. Had he not purchased, the transaction would have been a continuous wager between himself and his customer as to the future of the market. By purchasing he secured himself, and had no other interest than his commissions and the interest on his money. So, too, had there been a break anywhere in the deal, it might have been important to determine whether the stock was purchased by Hooker as agent and belonged to plaintiff, or was purchased for himself simply to make himself safe upon his contract to give plaintiff the advantage of the fluctuations of the market. The respondent contends that the relation of vendor and vendee did not exist between plaintiff and Hooker; that they neither bought nor sold stock to each other; that Hooker, as agent for plaintiff, purchased and paid for the stock, receiving immediate delivery for plaintiff, and thereafter held it subject to his order upon the payment of the price and commissions. The further contract, by which he held it as security for a loan, constituted the relation of pledgeor and pledgee, which is not prohibited by the constitution. This view was adopted by the learned judge of the trial court, and the findings are carefully drawn upon that theory. They find that the stock was purchased by Hooker as agent of and belonged to plaintiff, and that Hooker never sold stock to, or bought from, plaintiff. No part of the indebtedness, therefore, arose from the sale of stock on margin or otherwise.

This view of the relation between the broker and his customer in such a transaction is sustained by the weight of authorities, in this country and in England, but the decisions are by no means uniform. The first prominent case on the point is Markham v. Jaudon, 41 N. Y. 235. The question there was whether the stock in the hands of the broker was a pledge. In order to determine this question, an analysis is made of the contract relations, separating the powers and obligations of the parties. It was held that the broker undertook (1) to purchase for his customer; (2) to advance the money required beyond the margin; (3) to carry the stock, the margin being kept good, the customer to receive the gain or suffer the loss; (4) to retain the stock, or an equal amount of the same kind of stock; (5) to deliver to customer when required, upon payment; or (6) to sell when required, accounting for the proceeds. That the customer contracts: (1) To pay the stipulated margin; (2) to keep the margin good; and (3) to take the shares when required, and pay the amount due the broker. This statement of the rights and obligations of the parties has been generally followed in other cases, in which similar questions have arisen; and stockboards and brokers have adopted it as correctly stating the nature of the relation between broker and customer. It is evident, however, that the court in this analysis assumes the conclusion which it desired to reach. Its correctness has been questioned. In that case there were two strong dissenting opinions, in which the relation between the broker and his customer was regarded simply as a contract relation, by which the fact of agency was ignored or denied. Mr Justice GROVER says: "The contract contemplated that the title should at all times remain in the defendants (brokers.)" Mr. Justice WOODRUFF refers for his views of the relation to his opinion in Morgan v. Jaudon, 40 How. Pr. 366. He there states his opinion to be that "it does not contemplate, in the first instance, that the customer shall ever acquire the title to the stock. It is a pure speculation in the rise and fall of stocks, * * * and the broker is employed to provide the means, either from his own funds, * * * or by borrowing in his own name and on his own credit, by pledge of the very stock which he buys, the required amount; and the whole expectation and intention of the parties is satisfied, if, when directed to sell, he produces the required number of shares, and sells them for the very purpose for which the speculation is made, viz., to realize the profits or determine the loss which results to the party employing him for that purpose. It is entirely clear that in these transactions the party employed, though he belongs to a class commonly called 'brokers,' does not act as broker merely. In such business they are more than brokers; and all arguments imputing to them a mere agency, so far as they rest upon the facts that they are called 'brokers,' are unsound and fallacious." In Pennsylvania it has been held that the relation of principal and agent does not exist between the broker and his customer, but both are principals. Ruchizky v. De Haven, 97 Pa. St. 202; North v. Philips, 89 Pa. St. 250; Dickson v. Thomas, 97 Pa. St. 278; Gheen v. Johnson, 90 Pa. St. 38. In Ingraham v. Taylor, 58 Conn. 503, 20 Atl. Rep. 601, it was held that the broker, under such a contract, was not bound to purchase the stocks at all. It was enough if he could procure them when called for, at the market rate, when ordered. It is said: "By such contracts the plaintiff bought the right to demand at his option as to the time the delivery of shares at the price of the day of agreement. The defendants, in consideration of his payments upon margins, assumed the risk of an undertaking to deliver shares upon demand at that price." These citations are made to show that it is not universally admitted that the broker in such transactions purchases the stock as the agent of the customer. Looking at it from the point of view of the customer only, it is clear that by this device he has been able to purchase stock on margin. This phrase has come to have a peculiar or technical meaning among stock dealers, and it is applied to just these transactions between broker and customer.

It is a matter of public history that the constitutional provision was adopted just after a period of remarkable stock speculation, in which a large part of the community had been set wild with the apparent prospect of great gain, and the rapid fluctuations of stock afforded unusual inducement to stock gambling. By skillful manipulation of the markets, a few fortunate ones had been able to take advantage of the existing mania, and make large fortunes for themselves, at the cost of wide-spread financial ruin and distress. People of small means were enabled by brokers to speculate largely at that time, through these very purchases on margin. Of these matters this court will take judicial notice, and, doing so, cannot doubt that this inhibition was intended to strike down this practice. If it does not do this, it simply beats the air. Although an isolated case or two might occur, where a transaction directly between vendor and vendee is upon like terms, certainly we know there was no practice of that kind which could have been regarded as an evil of sufficient importance to be prohibited in the fundamental law. Such a prohibition is of little worth if it can be evaded by so simple a device. A party wishing to purchase on margins has but to interpose his broker, who is to carry the stock instead of the original owner. This would not diminish the evil. In fact, it is the very form of the evil mainly intended to be prohibited. It may be said that if the relation be not one of principal and agent, but simply a contract relation, by which the broker agrees to speculate in stocks, the customer indemnifying him against loss, and taking the profits, still there is no sale. It would be, it may be said, a contract to enable the customer to speculate in differences of market values. It is only sales on margin that are prohibited and made void. It is not easy to characterize by a name the relation between the broker and his customer. For all ordinary purposes, it may be admitted that the broker purchases as the agent of his customer, and then holds the stock as a pledge to secure a debt; but if by the transaction the customer is enabled to do that which is prohibited, to-wit, purchase stock on margin, it must be held to be within the prohibition; and, if Hooker did not himself sell to plaintiff, but was only the instrument through whom the illegal end was accomplished, he being privy to the design, the same result would follow. Irwin v. Williar, 110 U. S. 510, 4 Sup. Ct. Rep. 160. In the accomplishment of the unlawful purpose, he took the place of the vendor, and carried the stock as the vendor might have done; and the end was thus reached *per interpositam personam*. The end attained, and not the form of the transaction, must determine the question. It is claimed that it does not appear that the stock was the capital stock of a corporation or an association; but it is so found, and the respondent is in no position to complain of the finding. We think the court erred in holding, from the evidence, that plaintiff was indebted to Hooker or his assignee. We therefore recommend that the order and judgment be reversed, and a new trial ordered.

We concur. FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are reversed, and a new trial ordered.

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89 Cal. 304

McVERRY v. BOYD *et al.* (No. 12,916.)

(*Supreme Court of California.* May 28, 1891.)

STREET IMPROVEMENTS — ASSESSMENTS—VALIDITY —ENFORCEMENT OF LIEN.

1. Acts Cal. 1871-72, § 7, relating to the granting of contracts for street improvements by the board of supervisors of the city and county of San Francisco, provides that, if the contractor desires to have the time for completing his contract extended, he must make application to the board of supervisors, and "under the direction of

the board" the superintendent of streets may extend the time, and that on passage of the resolution by the board, the superintendent shall cause the same to be recorded. *Held*, that the duties of the superintendent are ministerial only the extension being granted by the board, and his failure to record the resolution of extension during the life of the contract does not render the extension invalid, if the resolution was passed in time.

2. After a contract for street improvement has been completed, a property owner cannot, in an action to enforce the lien of the assessment, question the sufficiency of a power of attorney under which the contract was entered into.

3. Where a statute gives the board of supervisors authority to order a street "graded or regraded," they may order the regrading though the property owners have already borne the expense of grading.

4. St. Cal. 1869–70, p. 482, and Civil Code Cal. § 498, requiring the owners of a railroad to improve a certain portion of the streets over which their track is laid, do not require that they shall be assessed with any portion of the expense of improving the street under a contract between the city and contractors.

5. Where a property owner contests the validity of an assessment for street improvements on the ground that the expense of improving a portion of the street occupied by a railroad should have been assessed against the railroad company, the burden is on him to show that such expense was included in the assessment against him.

In bank. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

W. W. Cope, for appellant. *J. M. Wood*, (*J. C. Bates*, of counsel,) for respondent.

Garoutte, J. This is an action to foreclose the lien of a street assessment upon a lot on Clay street, in the city of San Francisco. The appeal is by defendant Boyd from the judgment and order denying his motion for a new trial. Findings of fact were waived. April 3d was the day upon which the contract of plaintiff for the completion of the work expired, and upon that day the board of supervisors passed the following resolution: "Resolved, that the superintendent of public streets, highways, and squares, be and is hereby directed to grant the following extensions of time on street contracts, viz.: To property owners or assigns, 30 days for regrading Clay street from Jones to Leavenworth." The street superintendent did not, in pursuance of the foregoing resolution, issue a certificate of the 30-day extension until April 10th. The extension must be granted within the life of the contract in order to be valid. Raisch v. City and County of San Francisco, 80 Cal. 1, 22 Pac. Rep. 22; Beveridge v. Livingstone, 54 Cal. 54.

1. It is contended by the appellant that the extension to the contractor is granted by the street superintendent, and that the resolution of the board of supervisors is merely permissive or directory of such action, and that therefore in this case the contract was dead upon the 10th day of April, the date upon which the superintendent acted upon the resolution of the board. But upon a careful consideration of section 7 of the acts of 1871–72 it would seem that such contention is untenable. The law vests in the board of supervisors, acting judicially, the right to determine when additional time should be granted to the contractor; and whatever the statute requires the street superintendent to do under an order of the board directing an extension, he does as a ministerial act, and the statute is merely directory in that respect. Section 6 of the Act (St. 1871–72, p. 807,) provides that before the awarding of any contract by the board of supervisors the clerk shall cause to be posted a notice inviting sealed proposals, "which notice shall specify the time within which said work is to be performed," and also provides that prior to the publication of that notice the superintendent of streets shall furnish specifications "and the time within which the contract must be completed." These acts of the superintendent are not conclusive upon the board of supervisors in the matter of awarding the contract, but are merely advisory to it. The board is the legislative body, and the authority by which the contract is finally awarded. The time within which the work is to be completed is as much a part of the contract as is the manner of its performance. The superintendent, in entering into the contract, is but the ministerial officer of the board and can enter into only such contracts as have been authorized by it. After the contract has been awarded, he has no power to change the specifications, or the time within which the work shall be completed. If the contractor desires to have the time for its completion extended, he must make application to the board of supervisors, "and under the direction of the board of supervisors" the superintendent may extend the time originally fixed for the completion of the contract. After such "direction" the superintendent has no discretion in the matter, but may be compelled to carry out the "directions" of the board. The statute does not specify in terms the mode in which such extension shall be made; the only requirement being that, "on the passage of a resolution by the board of supervisors directing an extension of time to be granted to complete a contract," he shall "cause the same to be recorded in the office of the county recorder." This is the only act which the statute requires of the superintendent in the matter of extending the contract after he has been so "directed" by the board of supervisors. The statute, however, implies that the extension may be indorsed upon the original contract, but there is no direct requirement that such indorsement be made. Such indorsement, however, is not the extension of the contract, but merely an evidence of the fact that the contract has been previously extended by the board of supervisors, the only party having authority to grant the extension. In causing this resoluton of extension to be recorded in the office of the county recorder, as well as in making an indorsement thereof upon the contract itself, the superintendent is but giving expression to the act of the board of supervisors, and not in the exercise of any original authority conferred upon him. The statute does not say that the extension shall not be effectual until it is indorsed upon the contract, and the fact that such indorsement

was not made for several days "could not, as we concede, prejudice defendant's rights, and should not be permitted to prejudice the rights of plaintiff, who had no control of the matter." Himmelmann v. Reay, 38 Cal. 165. This construction of the statute is corroborated by a subsequent clause in section 7, which provides that the county recorder shall keep books of record in which "all extensions of time granted by the board of supervisors, as certified to by the superintendent, shall be recorded."

2. We do not think that the appellant can question in this action the sufficiency of the power of attorney from Jones to Jackson to enter into the contract with the superintendent of streets. After the board of supervisors have acquired jurisdiction to order the work done, and a contract has been awarded at a fixed price, unless the property owner himself desires to do the work, it is a matter of indifference to him by whom it is done, provided it is completed in accordance with the terms of the contract to the satisfaction of the superintendent. The burden upon his land is not affected in any respect by the fact that the work has been done under the contract with one person rather than with another. If there was any controversy between different property owners concerning their respective rights to enter into contract with the superintendent, or if the person to whom the contract had been awarded disputed the right of those claiming to be property owners to enter into the contract, the sufficiency of the power of attorney might be questioned; but after the contract has been completed, and the work accepted, the defendant in an action to enforce the lien of the assessment cannot make this objection as a defense. Miller v. Mayo, 26 Pac. Rep. 364, (No. 13,978, filed April 1, 1891.)

3. The objection by the appellant to the jurisdiction of the supervisors to order the work done, upon the ground that the street had been previously graded, is untenable. The statute in question (section 3)[1] gives to the board of supervisors the same authority for regrading as for grading a street. There is no limitation upon its powers in this respect. It is left to the discretion of the board to determine what work it will order done in any particular instance. Section 14 of the act does not in terms purport to give to the superintendent exclusive or any jurisdiction to order the regrading of a street; but is limited to the improvement of a street in front of individual lots. Whenever the condition of a street is such as, in the estimation of the board of supervisors, it is proper that the burden of regrading the same should be borne by the entire block, it has authority to order such improvement, even though a similar expense has previously been borne by the property owners.

4. Appellant urges that the assessment is void for the reason that no part of the expense was assessed against the railroad company whose track occupied a portion of the street. The statute referred to, (St. 1869-70, p. 482,) as well as the Civil Code, § 498, provides that the owners of the railroad shall improve a certain portion of the street over which their track is laid, but does not require that any portion of the expense incurred under a contract with the municipal authorities shall be assessed to it. Indeed, under the provision that the expenses shall be assessed "upon the lots and lands fronting" upon the work, such portion of the expense could not be assessed to the railroad company. There is nothing, however, upon the face of the assessment, from which it can be determined that any portion of the expense of regrading that portion of the street occupied by the railroad company was included therein. Being *prima facie* correct, it was incumbent upon the appellant to show wherein it was defective. The mere fact that a portion of the street was occupied by a railroad company whose duty it was to improve, or to bear the expense of improving, a part of the street, does not impair the *prima facie* correctness of the assessment. The apportionment of the expense of the work is given by the statute to the superintendent of streets; and the defendant, if dissatisfied with the assessment, should have appealed to the board of supervisors, as provided by section 12 of the act in question. Having failed to do so, he cannot now complain of any matters from which he could have obtained relief by applying at the proper time to the proper authorities. Hewes v. Reis, 40 Cal. 264; Himmelmann v. Hoadley, 44 Cal. 279; Dorland v. McGlynn, 47 Cal. 51; Boyle v. Hitchcock, 66 Cal. 129, 4 Pac. Rep. 1143; Blair v. Luning, 76 Cal. 135, 18 Pac. Rep. 153; Jennings v. Le Breton, 80 Cal. 11, 21 Pac. Rep. 1127. Let the judgment and order be affirmed.

We concur: HARRISON, J.; McFARLAND, J.; DE HAVEN, J.; SHARPSTEIN, J.

(89 Cal. 421)

Ex parte WILLIAMS. (No. 20,794.)

(*Supreme Court of California.* June 4, 1891.)

CRIMINAL LAW—SECOND CONVICTION—SENTENCE—HABEAS CORPUS.

1. Pen. Code Cal. § 461, declares that burglary in the second degree is punishable by imprisonment in the state-prison for not more than five years, and section 666 provides, among other things, that one twice convicted of felony may be punished by 10 years' imprisonment therein. *Held* that, where an indictment charged three former convictions, and these were admitted of record, a judgment reciting a conviction of burglary in the second, and affixing a sentence of 10 years, was valid, without reciting the former convictions.

2. In proceedings upon *habeas corpus*, the court will not determine that the document under which the petitioner is detained, and which is certified by the clerk to be a true and correct copy of the judgment "entered" on the minutes of the court, is to be disregarded on the production of another document, certified by the same officer to be a correct copy of the entry of judgment "filed" in the clerk's office.

Department 1. Application for *habeas corpus*.

Pen. Code Cal. § 461, provides that burglary in the second degree is punishable by imprisonment in the state-prison for not more than five years. Section 666 provides that a person, having been convicted of any offense punishable by imprisonment in the state-prison, committing a crime thereafter, if the subsequent offense is such that on a first conviction he would be punishable by imprisonment for a term exceeding five years, he is punishable by imprisonment for not less than 10 years, but, if the subsequent offense is such that on a first conviction he would be punishable by imprisonment for 5 years or less, then he shall be imprisoned not exceeding 10 years.

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[1] Section 3 authorizes the board, in terms, to order the streets, etc., "graded or regraded."

Carroll Cook and *J. E. Foulds*, for petitioner. *W. H. H. Hart*, Atty. Gen., for the People.

Harrison, J. Application for discharge on *habeas corpus*. In his return to the writ issued herein, the warden of the state-prison produces, as his authority for the detention of the petitioner, a certified copy of the judgment of conviction, as follows: "Commitment. In the superior court of the city and county of San Francisco, state of California. Department No. 11. Saturday, February 19, 1887. Present: Hon. D. J. Toohey, Judge. The People of the State of California vs. Gus Williams, convicted of burglary in the second degree. The district attorney, with the defendant and his counsel, Mr. O'Brien, came into court. The defendant was duly informed by the court of the information duly presented and filed on the 26th day of January, 1887, by the district attorney of the city and county of San Francisco, charging said defendant with the crime of burglary, and three prior convictions; of his arraignment and plea of 'not guilty as charged in said information;' of his trial and the verdict of the jury on the 16th day of February, 1887, 'Guilty of burglary in the second degree;' and defendant's motion for a new trial having been denied by the court, and said prior convictions having been admitted by defendant, the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which defendant replied he had none; and, no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment that whereas, the said Gus Williams having been duly convicted in this court of the crime of burglary in the second degree, it is therefore ordered, adjudged, and decreed that the said Gus Williams be punished by imprisonment in the state-prison of the state of California, at San Quentin, for the term of ten (10) years. The defendant was then remanded to the custody of the sheriff of the city and county, to be by him delivered into the custody of the proper officers of said state-prison at San Quentin. Office of the county clerk, city and county of San Francisco. I, William J. Ruddick, county clerk of the city and county of San Francisco, and *ex officio* clerk of said superior court thereof, do hereby certify the foregoing to be a true and correct copy of a judgment entered on the minutes of said court in and for the city and county of San Francisco, state of California, in the above-entitled cause, as appears of record in my office. Attest: My hand, and the seal of the said superior court, this 19th day of Feby., 1887. [Seal.] William J. Ruddick, Clerk. By Bert. McNulty, Deputy-Clerk." To countervail the effect of this, the petitioner presented the following document: "In the superior court of the city and county of San Francisco, state of California. Department No. 11. Saturday, February 19, 1887. Present: D. J. Toohey, Judge. The People of the State of California vs. Gus Williams, convicted of burglary, second degree. This being the day set for sentence, the defendant and counsel being present in court, the defendant was asked if he had any legal cause to show why judgment should not be pronounced against him, to which defendant replied that he had none. Thereupon the court renders its judgment that whereas, the said Gus Williams having been duly convicted of the crime of burglary, second degree, it is therefore ordered, adjudged, and decreed that the said Gus Williams be punished by imprisonment in the state-prison at San Quentin, for the term of ten (10) years. The defendant was then remanded to the custody of the sheriff of the city and county, to be by him delivered into the custody of the proper officers of said state-prison at San Quentin. 'I, Wm. J. Blattner, county clerk of the city and county of San Francisco, state of California, and *ex officio* clerk of the superior court in and for said city and county, hereby certify the foregoing to be a full, true, and correct copy of the original minute entry of judgment in the above-entitled cause, filed in my office on the 19th day of February, A. D. 1887. Attest: My hand and seal of said court this 27th day of January, A. D. 1891. [Seal.] Wm. J. Blattner, Clerk. By B. F. Jones, Deputy-Clerk."

It is claimed on behalf of the petitioner that the latter document must be taken as the judgment in the case, and, inasmuch as the maximum term of imprisonment for burglary in the second degree is fixed by the statute at five years, that, with proper deductions for good behavior, that term has expired, and he is entitled to his discharge. We cannot, however, in proceedings upon *habeas corpus*, determine that the document under which the petitioner is detained, and which is certified by the clerk to be a "true and correct copy of the judgment entered on the minutes of said court," is to be disregarded, or held of no effect, by the production of another document certified by the same officer to be a "full, true, and correct copy of the original minute entry of judgment, filed in the clerk's office." A stipulation by the attorney for the petitioner and the attorney general was filed herein at the hearing to the effect that the information upon which the petitioner was convicted, in addition to the charge of burglary, charged him with three prior convictions; and that upon being arraigned he pleaded not guilty to the crime charged, and admitted the prior convictions; that such plea and admission were entered in the minutes of the court; that the cause was thereupon set down for trial upon a subsequent day; and that the judgment roll made up by the clerk included copies of these entries in the minutes, as well as copies of the judgment and minute entry hereinbefore set out. It is thus seen that it appears upon the record of the case that the court did not exceed its jurisdiction in sentencing the prisoner to imprisonment in the state-prison for the term of 10 years. Ex parte Young Ah Gow, 73 Cal. 438, 15 Pac. Rep. 76.

It was not necessary that the entry of the judgment in the minutes should repeat the entries that had already been made in previous proceedings in the case. These had already become a part of the record, and would obtain no greater validity by being a second time recited in the minutes. "From the mere fact that these several papers are taken into and made a part of the record, it is clear that each one was intended merely to tell its own story, or, rather, to relate its particular branch of the whole history. Thus, the indictment states the jurisdictional facts, the nature of the offense, and the facts and circumstances so far as they are material. The other papers give the history of the trial, including the verdict; and the judgment, which constitutes the last chapter, merely finishes the account by stating of what offense defendant was finally convicted, and the penalty imposed by the court. The judgment need not, and it was not intended that it should, repeat anything contained in the papers which precede it, for, in view of the fact that they go into the record and make a part of it, such repetition would be idle and serve no useful purpose. The only material parts of a judgment are the statement of the offense for which the defendant has been convicted, omitting therefrom all that is contained in the previous papers, and therefore not necessary to be repeated, and the sentence of the court." In re Ring, 28 Cal. 253. It therefore appearing that the petitioner is detained in custody by virtue of process issued upon the "final judgment of a competent court of criminal jurisdiction," the provisions of section 1486 of the Penal Code require that he be remanded, and it is so ordered.

We concur: GAROUTTE, J.; PATERSON, J.

(89 Cal. 410)

RIVERSIDE WATER CO. v. GAGE. (No. 13,426.)

(*Supreme Court of California.* June 3, 1891.)

WATER-RIGHTS — IRRIGATION — PLEADING — FINDINGS.

1. An allegation in a complaint that plaintiff is owner of and entitled to all the water above defendant's dam in excess of 200 inches, and that by its construction, and a ditch diverting the flow, he has been deprived of over 450 inches of water, does not limit his claim to 450 inches, nor in any way qualify it.

2. A finding that plaintiff is the "owner" of all the water above defendant's dam in excess of a certain quantity is not in conflict with the rule that an appropriator of water does not become the owner until he has acquired its control by diverting it into conduits, when plaintiff is not seeking to recover the value of the water, but is seeking the determination of defendant's claim of a right to divert it.

3. Where the complaint alleged ownership and right of use in a certain portion of the waters of a river, an adverse and unfounded claim by defendant to, and a wrongful diversion of, a portion thereof, and the answer admits defendant's adverse claim, alleges that it is valid, and denies the wrongful diversion, a judgment that plaintiff has acquired a prescriptive right is not affected by a failure to find the facts as to prescription and the statute of limitation, since these issues are not raised by the pleadings.

4. An answer alleging that defendant was the owner of land through which the river flowed for a distance of about three miles, and that most of it was susceptible of, and would be benefited by, irrigation, is insufficient to raise any issue as to his right to take water by virtue of his riparian ownership, in the absence of an allegation that he was entitled as riparian owner to any definite amount of water, or what portion of the stream he could exhaust for irrigating, nor whether his land was located above or below the point of plaintiff's diversion.

In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Byron Waters, (*Kellogg & King*, of counsel,) for appellant. *Curtis & Otis*, (*R. E. Houghton*, of counsel,) for respondent.

BEATTY, C. J. The plaintiff, a California corporation organized for the purpose of appropriating, owning, selling, and distributing water for the irrigation of lands, and for domestic and other purposes, brings this suit to determine the adverse claim of the defendant to a portion of the waters of the Santa Ana river, and for an injunction restraining the defendant from diverting water in excess of his right. The findings and decree of the superior court were in favor of the plaintiff, and the defendant appeals from the judgment, claiming that the findings do not correspond with the allegations of the complaint, and that they are insufficient to support the decree. The substance of the decree is that the plaintiff is, as against the defendant, the owner and entitled to the use of all the water flowing in the Santa Ana river at the head of defendant's ditch during the irrigating season of each year, *i. e.*, the months of May, June, July, August, and September, except 289½ inches, which the defendant owns and is entitled to use, and the defendant is perpetually enjoined from diverting or obstructing the flow past his ditch of any water in excess of that quantity.

It is contended, in the first place, that this decree is erroneous because it goes entirely beyond the case made by the allegations of the complaint. But we think counsel for appellant misconstrues the complaint. It alleges very clearly and explicitly that the plaintiff at the commencement of the action was, and for more than 10 years prior thereto had been, the owner and entitled to the use of all the waters flowing in the Santa Ana river, at the point where defendant's dam was erected, in excess of 200 inches, measured under a 4-inch pressure; that defendant claimed some estate, title, or interest in said waters in excess of said 200 inches, which claim was wrongful and unfounded; and that he had wrongfully and without right placed obstructions in the river which prevented the water from flowing down to plaintiff as it was of right accustomed to flow, whereby plaintiff had been deprived of the use of upwards of 450 inches of water. This is not a claim, as appellant's counsel contends, that the plaintiff is owner and entitled to the use of 450 inches, and no more, of the water flowing in the Santa Ana river at the defendant's dam, but on the contrary is a claim of all the water flowing at that point except 200 inches, and that the defendant's claim to any water in excess of that quantity is wrongful and unfounded. The allegation that plaintiff has been deprived of the use and enjoyment of upwards of 450 inches of water by the acts of defendant in erecting the dam does not limit the plaintiff's claim to that quantity, or in any manner qualify the allegation that it owns all the water in excess of 200 inches. The issue tendered on this point was very clearly defined by the express admission of the defendant in his answer that he did claim all the water flowing in the Santa Ana river at the point of his dam, and his allegation that his claim was lawful and valid. The findings of the court were exactly responsive to this issue, and the decree follows the findings.

The second point made by appellant is a refinement upon the first, and consists of a criticism upon the allegation and finding that the plaintiff was the owner of a quantity of water at the defendant's dam. It is urged that an appropriator of water does not become the owner of the very body of the water as his personal property until he has acquired the control of it in conduits or reservoirs of his own. Citing Canal, etc., Co. v. Hoyt, 57 Cal. 46. The proposition, as stated, is undoubtedly correct; and if in this case, as in the case cited, the plaintiff's right of action depended upon its ownership of the *corpus* of the water at defendant's dam as its personal property, the objection to the findings would be material. But in this case the plaintiff is not seeking to recover the value of water which had become its personal property. It is seeking the determination of the adverse claim of defendant to the right to divert and use a portion of the stream; and the allegation and finding of ownership and right of use of all water flowing in the stream at defendant's dam in excess of a certain number of inches is only a mode, and a very apt and sufficient mode, of designating the quantity of water, to the unobstructed flow of which the plaintiff is entitled.

The remaining points urged by the appellant all relate to various specific findings of the court to the effect that plaintiff has acquired by prescription certain rights as against the defendant, and the defendant is barred by certain sections of the statute of limitations from the assertion of any rights he may have had as a riparian owner.

It is contended by the appellant that it is not enough to find that the plaintiff has acquired a prescriptive right to water as against the defendant, but that the facts must be found from which a prescriptive right arises; and it is further contended that, although the bar of the statute of limitations may be pleaded by a bald allegation that a claim or defense is barred by a particular section of the Code, a finding upon such issue is not sufficient unless it shows the existence of every fact necessary to bring the party pleading the statute within the provisions of the section relied on. All this may be so in a case where the fact of prescription or the bar of the statute is directly and necessarily in issue; but if a finding on these points is not necessary to support the decree, and is not made necessary by the pleadings, as we think is the case here, the insufficiency of the finding becomes immaterial. The complaint in this case alleges ownership and right of use in a certain portion of the waters of the Santa Ana river, an adverse and unfounded claim by defendant to, and a wrongful diversion of, a portion of such waters. The answer admits defendant's adverse claim, alleges that it is valid, and denies the wrongful diversion. The findings of the court are as broad and as specific on these points as the pleadings themselves, and contain everything necessary to support the judgment. If the findings as to prescription and the statute of limitations are not sufficient as findings on those points, they may be left out of consideration, and still the judgment is sustained by the findings that remain. Of course, if there was anything in the findings in question inconsistent with those which are required to support the judgment, they could not be left out of consideration, but they present no such inconsistency. They also support the judgment, so far as they go, and the only fault found with them is that they are not sufficiently specific. It may be contended, however, and no doubt that is the view of appellant's counsel, that the matters alleged by the defendant in his answer rendered full and specific findings on those points necessary. The answer of defendant sets up the facts, among others, that the Santa Ana river rises in the mountains, and flows through a narrow canon for about 30 miles to the point where it debouches into San Bernardino valley; that immediately below the point where it enters the valley, its waters were diverted by appropriators, not parties to this suit, as early as 1857, who have ever since continued so to divert and use such waters; that other appropriators made subsequent appropriations lower down on the stream by means of ditches, and for purposes sufficient to more than exhaust its entire flow; that the plaintiff's pretended claim is subsequent and subordinate to all these appropriations, and his point of diversion below them on the stream. To certain of these earlier rights by appropriation the defendant claims to have succeeded, and by reason thereof to have a right superior to that of the plaintiff. He plants himself, in other words, upon the ground of prior appropriation and prescriptive right. As to all these matters the findings of the court are full and specific. It is found that there were such earlier appropriations; that the defendant has succeeded to the rights of certain of the appropriators, and the water awarded to him by the decree is the quantity which it is found was appropriated by his grantors prior to the appropriation under which the plaintiff claims. There can be and there is no complaint that the findings are insufficient as to the rights of the defendant as an appropriator. But, in addition to the appropriations, upon which the defendant seems mainly to have relied, he did allege in his answer that he was the owner of a tract of land, containing about 2,600 acres, through and over which the Santa Ana river flowed for a distance of about 3 miles, and that most of the tract was susceptible of, and would be benefited by, irrigation. He did not, however, allege that he was entitled as a riparian owner to any definite quantity of water for the irrigation of his riparian lands, nor did he allege any facts showing or tending to show what proportion of the waters of the stream he could reasonably exhaust for that purpose. Nor is it alleged whether his land was above or below the point of plaintiff's diversion. In short, we think the answer insufficient to raise any issue as to the extent of defendant's right as a mere riparian proprietor to divert and exhaust any portion of the waters of the stream. The finding on this point is as full as and no fuller than the allegation, and does not conflict with the general finding in favor of plaintiff as to ownership of the water decreed to it. It was not necessary, therefore, to support the conclusions and judgment of the court, to find that the plaintiff had gained a prescriptive right, or that the defendant was barred of his riparian right; and, conceding these findings to be as insufficient as appellant contends they are, we think the other findings cover all the material issues, and fully support the judgment. Judgment affirmed.

We concur: MCFARLAND, J.; PATERSON, J.; GAROUTTE, J.; SHARPSTEIN, J.

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89 Cal. 387

BATES v. GREGORY *et al.* (No. 13,168.)

(*Supreme Court of California.* June 1, 1891.)

MUNICIPAL BONDS — CHANGE OF CORPORATION—LIMITATION OF ACTION.

1. By Act Cal. March 26, 1851, the city of Sacramento was incorporated, and provision made that it might sue and be sued under its corporate name of the "Mayor and Common Council of the City of Sacramento." Under provisions of acts of April 26, 1853, and April 10, 1854, it issued bonds payable July 1, 1874. By Act May 1, 1858, the city and county of Sacramento were united under the name of the "City and County of Sacramento," the act providing that the city and county was thereby made the successor of the mayor and common council, and the property and rights of the latter corporation transferred to and vested in the former. It was also provided that the city and council should not be subject to suit, or its property liable for debt. By Act April 25, 1863, the inhabitants within the limits of the city of Sacramento as defined in the act of March 26, 1851, were made a body politic under the name of the "City of Sacramento," and all property which on April 30, 1858, was vested in the "Mayor and Common Council," etc., and such as had since been acquired within the described city limits for municipal purposes, was transferred to the new corporation, and provision made that it might be sued on any bond or contract thereafter made. *Held*, that the holder of the bonds could not be deprived of the right to sue their maker, and that at no time since July 1, 1874, was he prevented by a statutory prohibition from bringing action thereon within Code Civil Proc. § 356, providing that when the commencement of an action is stayed by injunction or statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

2. The corporations created by the acts of 1858 and 1863 were respectively, in law, the successors of the corporation that issued the bonds, and liable to be sued thereon.

3. Although Act Cal. March 22, 1864, providing that the holders of all claims against the city of Sacramento which accrued prior to January 1, 1859, might present the same to the board of trustees, and it should issue bonds payable February 1, 1903, for all such claims as it might consider legal and just, does not limit the time within which an application for refunding should be made, still a failure to present them and demand new bonds in their place until after they had become barred by limitations would give the board the right to refuse to issue them.

In bank. Appeal from superior court Sacramento county; JOHN HUNT, Judge.

A. C. Freeman and *W. C. Belcher*, for appellant. *A. P. Catlin*, for respondents.

HARRISON, J. This was an application for a writ of mandate to compel the defendants, as trustees of the city of Sacramento, to issue to the petitioner new bonds of the city, in accordance with the provisions of the act of March 22, 1864, in exchange for unpaid bonds held by him that had been issued under the provisions of the acts of April 26, 1853, and April 10, 1854. The city of Sacramento was incorporated by the act of the legislature passed March 26, 1851, entitled "An act to incorporate the city of Sacramento." St. 1851, p. 391. The government of the city was vested in a mayor, recorder, and council, and by section 3 of the act it was declared that "the said mayor, recorder, and councilmen shall be a body politic and corporate by the name and style of the 'Mayor and Common Council of the City of Sacramento,' and by that name they and their successors shall be known in law, have perpetual succession, sue and be sued in all courts and in all actions whatsoever." By the act of April 26, 1853, (St. 1853 p. 117,) authority was given to the municipality to create loans upon the faith and credit of the city at the discretion of the city council. Under the provisions of this act the mayor and common council of the city of Sacramento issued a certain bond, dated the 6th day of May, 1854, for the sum of $544.45, payable on the 1st day of July, 1874, with 40 semi-annual coupons attached for $27.22 each. By another act, passed April 10, 1854 (St. 1854, p. 196,) the mayor and common council of the city of Sacramento were authorized to issue city bonds payable 20 years from the 1st day of July, 1854, and drawing interest at 10 per cent. per annum. Under the provisions of this act, two bonds for the sum of $1,000 each were issued by the mayor and common council of the city of Sacramento, dated respectively the 24th and 26th day of April, 1854, made payable on the 1st day of July, 1874, and to each there were attached 40 semi-annual coupons of $50 each. April 24, 1858, the legislature passed an act to take effect May 1, 1858, consolidating the city of Sacramento with the county of Sacramento, under the name and style of the "City and County of Sacramento." St. 1858, p. 267. Section 2 of this act declares that "the city and county of Sacramento is hereby made and constituted the successor of the corporation by this act dissolved, and heretofore known as the 'Mayor and Common Council of the City of Sacramento.' The lands, public and private buildings, property, rights of property, actions, rights of actions, moneys, revenues, income, and trusts now vested in or belonging or in any wise appertaining to the corporation known as the 'Mayor and Common Council of the City of Sacramento' are hereby transferred to and vested in, and are declared to appertain and belong to, the city and county of Sacramento, as hereinafter provided." It was also provided in said act that the city and county should not be sued in any action whatever, nor should any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in actions, and effects be subject to any attachment, levy, or sale, or any process whatever, either mesne or final. April 25, 1863, the legislature passed an act entitled "An act to incorporate the city of Sacramento," (St. 1863, p. 415,) by which the inhabitants of the territory embraced within the limits of the city of Sacramento, as defined in the act of March 26, 1851, were made a body politic under the name and style of the "City of Sacramento." By this act the lands, tenements, hereditaments, moneys, and property which on April 30, 1858, were vested in or held by the "Mayor and Common Council of the City of Sacramento," and such as had since that date been derived or acquired within the described city limits for municipal purposes or with municipal funds, were transferred to this new corporation. The government of the city was vested in a board of three trustees, and it was provided by the act that the body politic might sue and be sued and defend upon any bond, covenant, agreement, contract, matter, or thing whatever, provided such bond, agreement, contract, or thing that is the cause of action had been made or entered into after the passage of that act. On the 22d of March, 1864, the legislature passed "An act to provide for the liquidation of the indebtedness of the city of Sacramento which accrued prior to January 1, 1859." St. 1864, p. 217. By this act it was provided that the holders of all claims against the city of Sacramento which accrued prior to the 1st day of January, 1859, might present the same to the board of trustees, and that the said board should cause to be issued bonds, payable to bearer on the 1st day of February, 1903, for all such claims as they might upon examination consider legal and just. The plaintiff, having become the owner of the three bonds mentioned above, made a demand on the 17th of October, 1887, upon the board of trustees of the city of Sacramento that it issue to him bonds as contemplated by this last-named act for the amount of the principal of said bonds, and for all of the coupons thereon which matured on or before January 1, 1859. Upon the refusal of the board to issue him the bonds as demanded, he commenced this proceeding to compel the same. The court before which the cause was tried found that the petitioner's claim was barred by the statute of limitations, and rendered judgment in favor of the defendant, from which the plaintiff has appealed.

By the terms of the bonds, they matured on the 1st day of July, 1874, and consequently would be barred by limitation on the 1st day of July, 1878, unless, as claimed by appellant, the statute of limitations has no application. The appellant, however, contends that the statute of limitations is not applicable, for the reason that by the provisions of the act of 1858, incorporating the "City and County of Sacramento," and also of the act of 1863, incorporating the "City of Sacramento," hereinabove mentioned, he was prevented from bringing any action to enforce their collection, and invokes the provisions of section 356, Code Civil. Proc., which declares: "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." He also urges that inasmuch as the act of March 22, 1864, above mentioned, does not limit the time within which an application for refunding under its terms may be made, the statute of limitations has no application.

The provisions in the act of March 26, 1851, that the body politic then created might "sue and be sued in all courts and in all actions whatsoever," entered into and made a part of the contract of the municipality in the issuance of the bonds in question. The legislature could not thereafter, without impairing the obligation of this contract, pass any act which would deprive a holder of these bonds of the right to sue their maker. This principle is so familiar and so fully settled as hardly to require the citation of authorities. It was said by the supreme court of Massachusetts in Call v. Hagger, 8 Mass. 430: "If the legislature of any state were to undertake to make a law preventing the legal remedy upon a contract lawfully made, and binding on the party to it, there is no question that such legislature would by such act exceed its legitimate powers. Such an act must necessarily impair the obligation of the contract, within the meaning of the constitution, and the courts of law would be bound, therefore, to construe it as a void act of legislation, and as having no force or authority." In Von Hoffman v. City of Quincy, 4 Wall. 535, the supreme court of the United States, discussing this subject, says: "It is also settled that the laws which subsisted at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement." And in the same case the court further says: "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guarantied by the constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement.' The prohibition has no reference to the degree of impairment. The largest and the least are alike forbidden." See, also, Edwards v Kearzey, 96 U. S. 595; People v. Bond, 10 Cal. 563; Wolff v. New Orleans, 103 U. S. 358. If, then, it be admitted that it was the intention of the legislature, by the acts aforesaid, to prevent the institution of any action against the municipality upon the bonds in question, such act would have been unconstitutional, and beyond the power of the legislature to enact. The legislature has not in direct terms declared that no action shall be brought upon these bonds. It is only by an inference drawn from the fact that in the acts of 1858 and 1863 a limitation was imposed upon the bringing of actions against the corporations created by those acts that counsel claim such intention was manifested. It is not to be presumed that the legislature intended to do anything unconstitutional or beyond its power; and, if such limitation would have been unconstitutional, we must assume, in the absence of an express provision to that effect, that it was not intended. The fact that the corporation which was created by the act of April 24, 1858, was different in territory as well as in government did not of itself prevent an action from being brought against the maker of the bonds. Before the bonds had matured the legislature passed the act of April 25, 1863, by which the inhabitants of the same territory which was embraced in the original act of March 26, 1851, were reincorporated and vested with the same property and rights which the mayor and common council of the city of Sacramento had possessed prior to the taking effect of the act of April 24, 1858. By the act of April 24, 1858, the city and county of Sacramento was made and constituted the "successor" of the corporation theretofore known as the "Mayor and Common Council of the City of Sacramento," and by the act of April 25, 1863, all the property that the city and county of Sacramento had received from the mayor and common council of the city of Sacramento as the "successor" of that municipality was transferred to and vested in the new "City of Sacramento," which thus became the legal "successor" of the corporation which had issued the bonds.

The legislature cannot, by merely changing the name of a municipal corporation, or by abridging or enlarging its territory, so destroy its identity as to impair the rights of its creditors to the enforcement of their obligations against the original corporation. It has been held that where a public corporation has been absolutely dissolved without making any provision for its obligations, and where no successor is created, a creditor of such corporation has only the faith of the legislature upon which to rely for payment thereof. Barkley v. Commissioners, 93 U. S. 258. It is also an established principle that a corporation does not lose its identity, or become relieved from its liabilities, by any change in its charter, or by the substitution of a new charter in place of the old one, unless there is an express legislative declaration to that effect. This rule was applied in Broughton v. Pensacola, Id. 266. The city of Pensacola had issued certain bonds, and had thereafter, by virtue of certain statutes, ceased to exist under its original act of incorporation. The inhabitants of the territory within which the city had been organized subsequently established a municipal government under the provisions of the laws of that state, and the payment of these bonds was resisted upon the ground that the new corporation was not responsible for them. The court, however, held that the payment of the bonds could be enforced against the new corporation, saying: "The inhibition which preserves against the interference of a state the sacredness of contracts applies to the liabilities of municipal corporations created by its permission; and, although the repeal or modification of the charter of a corporation of that kind is not within the inhibition, yet it will not be admitted, where its legislation is susceptible of another construction, that the state has in this way sanctioned an evasion of or escape from liabilities, the creation of which it authorized. When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization." In Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. Rep. 398, the city of Mobile under its corporate name, the "Mayor, Aldermen, and Common Council of the City of Mobile," had issued certain bonds in 1859. In 1879 the legislature passed two acts, one entitled "An act to vacate and annul the charter, and dissolve the corporation of the city of Mobile, and to provide for the application of the assets thereof in discharge of the debts of said corporation," and another, entitled "An act to incorporate the port of Mobile, and to provide for the government thereof." The territory embraced in the port of Mobile was about one-half that which was formerly embraced in the city of Mobile, but included the larger portion of the inhabitants and taxable property of the former corporation. In an action brought against the port of Mobile to recover upon the bonds that had been issued by the former municipality, the court held that the port of Mobile was the legal successor of the city of Mobile, and liable for its debts, saying: "Where the legislature of a state has given a local community, living within designated boundaries, a municipal organization, and by a subsequent act or series of acts repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name, for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts; and, if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new." See, also, Amy v. Selma, 77 Ala. 103; Milner's Adm'r v. Pensacola, 2 Woods, 632; Hill v. City of Kahoka, 35 Fed. Rep. 32; Amy v. Watertown, 130 U. S. 320, 9 Sup. Ct. Rep. 537. We are of the opinion that the holder of the bonds in question has at no time since the 1st day of July, 1874, been prevented by a "statutory prohibition" from bringing an action to recover the amount of the bonds, and also that the corporations which were created by the acts of 1858 and 1863 were respectively in law the successor of the corporation that issued the bonds, and liable to be sued thereon.

It could not have been the intention of the legislature by the act of March 22, 1864, to extend the time for refunding the indebtedness of the city beyond the time within which an action upon that indebtedness could have been commenced. At the date of that act more than 10 years remained before the maturity of the bonds in question. The bonds held by the petitioner had no fund provided for their redemption, but were dependent solely upon the faith and credit of the city. The act of 1864 gave to the holder of these bonds the privilege of exchanging them for other bonds bearing a lower rate of interest, but secured in their payment by the fund provided therein for their redemption. An option was thus extended to the holder of such bonds to make the exchange, and this option could be exercised at any time during the life of the bonds. A failure on his part to present them to the board of trustees and demand the issuance of new bonds in their place until after they had become barred by the statute of limitations, would give to the board the right, if they chose to exercise it, of refusing to issue new bonds therefor upon this ground. A municipal corporation has the legal right to avail itself of the defense of the statutes of limitations as fully as any other debtor. It is a privilege personal to the debtor, and whenever in any legal proceeding it is invoked by the debtor the court is compelled to recognize it as a proper defense. This defense is pleaded in the present proceeding, and, as we have before shown, is sustained by the facts, and must, therefore, be held sufficient. The judgment and order appealed from are affirmed.

We concur: De Haven, J.; Sharpstein, J.; Garoutte, J.; Paterson, J.

McFarland, J. I concur in the judgment.

Beatty, C. J., being disqualified, took no part in the foregoing decision.

(89 Cal. 399)

Fisher v. Southern Pac. R. Co. (No. 14,136.)

(*Supreme Court of California.* June 2, 1891.)

Carriers—Mixed Trains—Injury to Passenger—Negligence — Medical Expert — Cross-Examination.

1. In an action against a railroad company for injuries received by a passenger on a mixed train through the alleged negligence of the trainmen in coupling the parts of the train, the court instructed, in the language of Civil Code Cal. § 2100, that "a railroad carrying passengers paying fare must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose," but omitted the concluding words of the section, "and must exercise to that end a reasonable degree of skill." *Held*, that the omission did not injure defendant, as the omitted part simply added to the requirement of diligence, skill in using it, and the instruction as given did not ignore or take from the jury the consideration of any evidence or argument rebutting the presumption of negligence created by plaintiff's evidence.

2. On the cross-examination of a medical expert the reading of statements from medical works, and asking the witness if he agrees with the authors, cannot be allowed where the statements are evidently intended as evidence to sustain the theory of the party cross-examining, and not to affect the competency of the witness or the value of his testimony.

Commissioners' decision. In bank. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

W. H. Dudley, for appellant. *D. M. Delmas*, for respondent.

Temple, C. Appeal from judgment and order denying defendant's motion for a new trial. Action for damages through alleged negligence of defendant, a common carrier of passengers for hire. On the 29th of August, 1889, defendant was operating a railroad between Oakdale, in the county of Stanislaus, and Stockton. On that day plaintiff purchased a ticket at the office in Oakdale, and immediately boarded the train for Stockton. The train was composed of one empty box-car, eight empty gravel-cars, two loaded box-cars, and a passenger-car. It was a regular train, principally for freight, but habitually carried passengers, and tickets were always sold at the ticket-office for this train. It is shown to have been so run for a period of four years before the injuries complained of. At this time there were some 14 passengers on the train. At a place called "Burnett's Station," where there was a gravel-pit, the train made a stop to exchange its eight empty gravel-cars for nine loaded gravel-cars. To accomplish this, the engine, the empty box-car, and the gravel-cars separated from the other cars, ran up the main track past the switch, leaving the two loaded box-cars and the passenger-car with brakes set, there being an up-grade at this place. After getting rid of the empty cars, the engine with the empty box-car was coupled to nine loaded gravel-cars, and they were let down the grade by gravitation alone, without steam, to the part of the train which had been left on the grade with brakes set. A conductor and two brakemen were in charge of the train, but the conductor and one brakeman had ridden the empty cars into the pit. The other brakeman turned the switch to put the train back upon the main track, and then jumped upon the engine or tender, so that there were no brakemen on either part of the two portions of the train to be coupled, no conductor to superintend, and no person between the two parts to be coupled. There was what was called a "left-hand" curve; and the conductor could not see either the end of his portion of the train, or the cars to be taken on. The fireman from the left-hand side could see and gave signals to the engineer. The cars had to be let down the grade some seven or eight hundred feet, and between the engine and the space were the nine gravel-cars and the empty box-car, about three hundred feet of the train. Upon receiving the signal "one car," meaning that there was the length of one car between the parts to be coupled, the engineer, as he testified, put all the brakes on, and left nothing undone. He had all necessary appliances in good order. There was, however, a violent jar at the coupling, which threw the plaintiff from his seat, diagonally across the car, some three or four feet, hitting a stove with his left side. He fell upon his back, and was partially unconscious for a time, receiving, as he claims, very serious injury. The defendant claims that this was not a passenger train, but a freight train, with a caboose car attached, that regular passenger cars were run upon the road for which plaintiff's ticket would have been good; that it is more difficult to manage freight-cars, and the exigencies of such a train expose it to some peculiar dangers, and render the same care impracticable; and that it should not be expected that there would be the same completeness in equipment as on purely passenger trains. These views are presented as objections to an instruction given at the instance of plaintiff, as follows. "The court instructs you that the law of this state is that a railroad company carrying passengers paying fare must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose." The language is taken from section 2100 Civil Code, omitting the concluding words of the section: "And must exercise to that end a reasonable degree of skill." It is claimed that these words constituted an important qualification of the rule, rendering it incumbent upon the defendant to provide, not every possible, or even the best possible, contrivance for the purpose, but only to exercise a reasonable skill to that end, and that the instruction ignored in part the theory of the defense: (1) That the jar resulted not from carelessness, but because the practical operation of this train in which plaintiff chose to ride demanded that it be managed and equipped not as a passenger but as a freight train; (2) the jar was only such as was to be expected upon a freight train; and (3) that the amount of care consistent with the operation of such a train was exercised.

I know of no principle by which the statute can be limited so as not to apply to all carriers of passengers for hire. If one insists on going by a train which does not habitually carry passengers, a different rule may prevail. Of course the different conditions attending the running of a freight train are proper matters to be taken into consideration in determining whether there has been negligence. It was proper for the jury to take into consideration the fact, if it were so, that in the coupling of loaded freight cars such violent jerks and jars are likely to occur, and might happen without negligence, and also that the practical operation of the train required that it be equipped as a freight rather than as a passenger train; but certainly the increased difficulty did not justify any remission of diligence and care. This train's regularly carrying freight and passengers rendered the company liable for the full degree of diligence enjoined by the statute. It cannot, I think, be held that the omitted clause requiring the exercise of a reasonable degree of skill in providing everything necessary for the safe carriage of passengers refers, as applied to the facts of this case, to the use of the freight train for the purpose of carrying passengers. If so, it would seem to prohibit the use of such train altogether, if it is conceded that it cannot be made as safe for that purpose as a passenger train. The qualification is not, as counsel seem to contend, that only reasonable diligence need be used, but to require, in addition to diligence, skill in providing what is necessary. Section 2101 of the Civil Code—the next section—enjoins the carrier to provide safe and fit vehicles, and declares he is not excused for default in this respect by any degree of care. Common sense teaches us that these sections must not receive a construction so absolute as to practically prohibit railroad passenger traffic, or such a useful and common convenience as a mixed or accommodation train; but to find any letting down of the standard of diligence, in the omitted clause is to impart a meaning diametrically opposed to its manifest intent, which, as stated, simply adds, to the requirement of diligence, skill in the use of it. The reasonable rule would, therefore, seem to be that those who travel on mixed trains assume the extra risk necessarily incident to such trains or the traffic; the carrier using such diligence and care as the Code requires on passenger trains, so far as such care is possible and reasonably consistent with the freight business. The injury was not claimed to have resulted from the failure to provide everything necessary. The sole issue as to negligence was in regard to the manner of coupling the two parts of the train at Burnett's Station, and the jury were, in substance, so instructed, at the instance of plaintiff. I cannot see, therefore, how the omitted clause could have helped the defendant, or that the instruction as given ignored or took from the jury the consideration of any evidence or argument rebutting the presumption of negligence created by plaintiff's evidence

On cross-examination of Woolsey, a witness called as an expert by defendant, plaintiff's counsel was allowed, against the objection of defendant, to read statements from medical works, and to ask the witness if he agreed with the authors. This is assigned as error. Plaintiff's counsel defends the ruling here on two grounds: (1) That the witness on his direct examination testified to certain medical opinions, and supported his statements by the assertion that they conformed to the authority of medical works, and he claims that the rule is that if the witness, either in direct or cross-examination, relies in any manner upon the authority of medical works, generally or specifically, it is proper cross-examination to confront him with the works upon which he relies, to show that his understanding of them is incorrect, or to contradict him; and, (2) that it is proper cross-examination to test the competency of the witness as an expert, or the value of his opinions.

A careful examination of the evidence has convinced me that the rulings complained of cannot be defended upon either of these grounds, though the legal proposition be admitted. As to the first, it is plain that some of the extracts read have no reference to any opinions of the witness, which he sought to sustain by a reference to medical writers, either generally or specifically, except in response to a direct question by plaintiff referring to such writers. As to the second ground, it is not so plain. The value of an effective cross-examination as a means of showing the incompetency of a witness or his lack of integrity and the true value of his testimony, can hardly be overrated; and this is true in a special sense as to expert testimony, where the party may choose from the body of a profession those whose opinions are most favorable. It is quite natural, and certainly common, for one called as an expert to enhance his authority by his power of self-assertion; and there is reason to fear that these opinions are not always as impartial and indifferent as a judicial utterance should be. While it is to be regretted, if, in the proper exercise of the right of cross-examination, it shall appear that certain medical writers of repute differ from the witness, and so a party will get the benefit of unsworn testimony, still this evil, unavoidable in the nature of things, is, in my opinion, not at all commensurate with that which would deprive a party in such a case of the best touchstone known to legal science, by which to estimate the value of testimony. And if, on general principles, such questions are legitimate on cross-examination, I do not see how a party can be deprived of his right because such evil consequences may follow. All the works on medical jurisprudence which I have examined seem to sustain this position; and some cases, although they are not uniform. Broadhead v. Wiltse, 35 Iowa, 429; Insurance Co. v. Ellis, 89 Ill. 516; Ripon v. Bittel, 30 Wis. 614; Pinney v. Cahill, 48 Mich. 584, 12 N. W. Rep. 862; State v. Wood, 53 N. H. 484. But, since consequences are likely to follow which admittedly should be avoided if possible, such examination should be strictly limited to this one purpose for which only it can be permitted. I think no fair-minded person can closely study this record without being convinced that the evidence was not put in with any such purpose. No doubt counsel offered it under the impression that it was justified as inconsistent with opinions which the witness had claimed were sustained by medical authorities. I have shown that the claim cannot be sustained on that ground. In fact, although the witness took issue with some statements read, they cannot fairly be said to contradict his evidence in any respect. They were evidently intended as evidence for the plaintiff to sustain his theory of the case, and not to affect the competency of the witness or the value of his testimony. As it seems to me a new trial must be granted for this error, it becomes unnecessary to review the other assignments. The judgment and order should be reversed, and a new trial granted.

We concur: FITZGERALD, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial granted; and the court is further of the opinion that the amount of the verdict was excessive.

DE HAVEN, J. I concur in the judgment. The court erred in permitting the attorney for the plaintiff, upon the cross-examination of the witness Dr. Woolsey, to read extracts from certain medical books, and then ask the witness whether he agreed with the same or not. Marshall v. Brown, 50 Mich. 148, 15 N. W. Rep. 55; City of Bloomington v. Shrock, 110 Ill. 22; Rog. Exp. Test. §§ 181, 182. It is not permissible on cross-examination to call the attention of such a witness to what is said on the subject to which he is testifying by standard works for the purpose of testing his general knowledge or competency as an expert. It has been held, however, that, when an expert asserts that his opinion agrees with a particular author, it is not improper to call his attention to what that particular author says for the purpose of contradicting him. But there was nothing in the evidence of Dr. Woolsey to justify reading to him, and in the presence of the jury, the extracts referred to, for any such purpose. I think, also, that as the evidence does not establish a case for punitive damages the sum awarded by the verdict is excessive.

89 Cal. 339

FOX *et al.* v. TAY *et al.* (No. 12,817.)

(*Supreme Court of California.* May 30, 1891.)

EXECUTORS—LIABILITY AS TRUSTEES—LIMITATIONS—PLEADING.

1. An executor who takes possession of assets belonging to the estate, and gives to his co-executors a note secured by mortgage for the amount, is a trustee of the fund, and the statute of limitations will not run in his favor until there is an express repudiation by him of the trust.

2. The fact that such executor was appointed in a foreign jurisdiction does not affect his relation to the estate as trustee; for though he could not by virtue of such appointment enforce the collection, in another jurisdiction, of the assets belonging to it, yet, where they come into his hands by voluntary payment, they are received in his capacity as trustee, and that relationship is not altered by his giving his own note and mortgage for the amount.

3. The co-executors appointed in a foreign jurisdiction, to whom the note and mortgage were given as trustees, can prosecute an action in that capacity to foreclose the mortgage without taking out ancillary letters of administration.

4. Under the provision of Code Civil Proc. Cal. § 462, that statements of new matter in the answer must be deemed controverted, matters in avoidance of the bar of limitations will be deemed to have been pleaded in reply to affirmative matters on the subject alleged in the answer.

Affirming 24 Pac. Rep. 855.

In bank. On rehearing.

PER CURIAM. After hearing in bank and further consideration of the case, we are satisfied with the conclusion reached in department 1, and with the opinion there delivered by Justice PATERSON. 24 Pac. Rep. 855. The matters upon which the plaintiffs rely to relieve them from the bar of the statute of limitations may be deemed to have been pleaded in answer to the affirmative matters alleged in the answers of the defendants. There being no replication, such affirmative matters are taken as controverted. Section 462, Code Civil Proc. The judgment and order are reversed, and the cause remanded for a new trial.

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89 Cal. 245

HAIGHT *et al.* v. VALLET *et al.*
(No. 13,038.)

(*Supreme Court of California.* May 27, 1891.)

EJECTMENT—CONFLICTING INSTRUCTIONS.

1. In ejectment, where the defense is that plaintiffs' ancestor conveyed the premises to defendants' grantor by a deed which plaintiffs claim was forged, it is error to instruct that a forged deed is void, and confers no rights, "except, if duly recorded, it is constructive notice of that fact."

2. In determining whether plaintiffs' ancestor executed the deed claimed to have been forged, the jury may properly consider the subsequent conduct of the ancestor, and whether he ever made any claim to the property, or its possession, paid taxes and assessments, or made any other assertion of ownership.

3. Instructions assigning several different dates from which the statute of limitations will begin to run against a party are conflicting and confusing, and constitute reversible error.

Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Taylor & Haight, for appellants. *Wilson & Wilson*, (*Cope, Boyd & Fifield*, of counsel,) for respondents.

SHARPSTEIN, J. This is an action of ejectment, and one of the defenses to the action is that the plaintiffs' ancestor conveyed the demanded premises to the grantor of the defendants. Another defense is that the action is barred by the statute of limitations. The verdict and judgment were in favor of the defendants, and the plaintiffs appeal from the judgment and order denying their motion for a new trial. The exceptions relied on here are to certain instructions given, and the refusal to give certain other instructions requested by plaintiffs to be given.

Plaintiff requested the court to instruct the jury that "a forged deed conveys no right, title, or interest; it is absolutely void, and as though never made." The court refused to give it as requested, but in lieu thereof gave the following: "A forged deed conveys no title, right, or interest; it is absolutely void, and as though never made, except, if duly recorded, it is constructive notice of that fact." The latter clause of this instruction is clearly erroneous, and is inconsistent with another part of the charge, in which the jury were instructed that "no legal effect can be produced upon the rights of the parties by recording a forged instrument."

Another instruction excepted to by plaintiffs reads as follows: "If you find from the evidence that the said Joseph M. Brown, the ancestor of plaintiffs, was not in possession of the property in question, or any part thereof, from and after the 18th day of December, 1860, or from any other period prior to the 4th day of March, 1861, to the time of his death, November, 2, 1864, and that during that time the defendants, or their grantors, or those under whom they claimed, were in the open, notorious, continuous, and exclusive possession of said property; and that defendants, and those under whom they claimed, continued such possession for the period of five years, and during all of said time were claiming to own the same adversely to all other persons, and exclusive of any other right,—then your verdict should be for the defendants, notwithstanding that the children of said Brown were minors at the time of his death."

Another instruction, which appellants claim to be in conflict with the one last above quoted, reads as follows: "The ancestor of the plaintiffs, that is, Joseph M. Brown had died on the 2d day of November, 1864, nearly two years prior to the 20th of August, 1866, so that I instruct you that the statute of limitations, with reference to the land in controversy, did not commence to run against him during his life-time. And inasmuch as the statute of limitations did not commence to run in his life-time, and did not commence to run against his children until the 20th day of August, 1866, and inasmuch as neither of the children had reached the age of majority five years prior to the commencement of this action, I instruct you, as a matter of law, that the defense of the defendants as against either of the children, and that whatever testimony has been given before you respecting the occupancy or possession of the land in controversy for the purpose of establishing an adverse possession, must be disregarded in your determination of the rights of the plaintiffs other than the representative of Josephine D. Brown, the widow of Joseph M. Brown." There is another instruction which is clearly inconsistent with the one first above quoted. It is as follows: "As I have before stated to you, the statute of limitations could not, in any event, have run with respect to the land in controversy until the 1st day of July, 1864." Thus the jury were instructed that the statute of limitations might have commenced running in 1860, if the plaintiffs' ancestor was not then in possession of the land; and that the statute of limitations could not have run with respect to the land in controversy until the 1st day of July, 1864; and that it did not commence to run against the children of Brown until the 20th day of April, 1866. That two of these instructions contradict a third is apparent. That, taken together, they are confusing, is also apparent. In Brown v. McAllister, 39 Cal. 573, the court said: "Where the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail, and it is equally impossible, after the verdict, to know that the jury was not influenced by that instruction, which was erroneous, as the one or the other must necessarily be, where the two are repugnant." That it is a sufficient ground for reversing a judgment has frequently been held. People v. Valencia, 43 Cal. 552; McCreery v. Everding, 44 Cal. 246; Chidester v. People's Ditch Co., 53 Cal. 57; Bank of Stockton v. Bliven, Id. 708; People v. Wong, 54 Cal. 154; Aguirre v. Alexander, 58 Cal. 26.

Another instruction excepted to was that, in determining the question as to whether Joseph M. Brown, the ancestor of plaintiffs, executed and acknowledged the deed which purported to have been executed to said Henry P. Hulbert, the jury had a right "to take into consideration the subsequent conduct of said Joseph M. Brown during his life-time, and whether he ever after the date of said deed set up any claim to the property, or made any claim upon the parties in possession of the same, for the delivery of possession to him, or paid the taxes or street assessments on the same, or did any other act asserting ownership over the property during his life-time, after the date of said deed." We think this instruction correct. The evidence upon which it was based is not set out in the transcript, but the statement in it is that defendants introduced evidence which tended to prove "that said deed purporting to have been executed by said Joseph M. Brown to said Hulbert was the genuine deed of said Brown." We think testimony of such conduct on the part of Brown, as the court in the instruction specifies, would have a tendency to prove the genuineness of the deed which purported to be executed by him, and therefore we cannot presume that such evidence had not been introduced. We cannot presume error, and in this instance none is shown. The exception to this instruction is overruled. The instruction given in regard to expert testimony is not, in our opinion, erroneous. The exception to that instruction is overruled. But for errors before pointed out the judgment and order denying the motion for a new trial must be reversed. Judgment and order reversed.

We concur: McFarland, J.; De Haven, J.

(89 Cal. 258)

Scott v. Jackson. (No. 12,912.)

(*Supreme Court of California.* May 27, 1891.)

Sale of Patents—Assignment—Evidence.

1. In an action for the price of letters patent which were sold to a rival manufacturer, and were to be assigned as soon as the patentee had effected certain settlements with other parties, but which were not assigned until nearly three years thereafter, it appeared that the patents were delivered to defendant, and held by him, and that plaintiff ceased to manufacture thereunder, and entered defendant's employ. *Held* sufficient to support a finding that the delay in making the formal assignment was acquiesced in by both parties.

2. Where the purchaser of patents takes and retains possession thereof, and derives the same benefit as if they had been formally assigned, and both parties act as if they had been assigned, the purchaser cannot complain that the formal assignments were tendered after one of the patents had expired.

In bank. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

M. A. Wheaton, for appellant. *Scrivner & Boone*, for respondent.

Paterson, J. This is an action to recover the sum of $1,500, the contract price of several United States letters patent sold by plaintiff's assignor, Watkins, to defendant under an agreement dated July 19, 1885. The contract of sale provided that Watkins should assign, deed, and deliver to defendant all of his patents for harvesting machinery for the sum of $1,500, one-half of which was made payable November 1, 1885, and the balance November 1, 1886. The contract provided that the assignment was to be made as soon as a settlement was made by Watkins with Rice. The court found that a settlement was made by Watkins with Rice in March, 1885; that at all times subsequent to January 19, 1885, Watkins was ready and willing to assign the patents to defendant, and that, in December, 1887,—prior to the commencement of this suit,—he tendered an assignment in writing to the defendant of all the letters patent except patent No. 97,646, which had expired on the 1st day of December, 1887. The contract was assigned by Watkins to the plaintiff herein January 20, 1886. Judgment was entered in the court below in favor of the plaintiff for the amount claimed. The defendant moved for a new trial, which motion was denied, and he thereupon appealed from the order and from the judgment.

It is claimed by appellant that Watkins could not put Jackson in default without an offer to perform; that readiness to perform is not the same as performance; that the tender of the assignment came too late, not having been made until two years and eight months after the settlement with Rice; that at that time it was impossible for Watkins to perform, because one of the patents had already expired, and defendant cannot be required to take less than all of the property Watkins agreed to sell. Of course Watkins could not put Jackson in default without an offer to perform in accordance with the terms of the contract, and, if there were nothing in the case to overcome the effect of the finding that Watkins did not tender an assignment of the letters patent until December, 1887, the defendant would be entitled to judgment; but the court found "that the delay in making the assignment of said patents was not caused by the neglect or refusal of said Watkins to make an assignment, but was acquiesced in by both parties to this contract;" and we cannot say that this finding is not supported by the evidence. It appears from the testimony that at the time the contract set forth in the complaint was entered into, the defendant was engaged in manufacturing and selling agricultural implements, and was the owner of letters patent for the manufacture of such implements. Watkins was also the owner of certain patents and improvements in agricultural implements, and was having his machines manufactured at the establishment of Rice, and was engaged in selling the same in competition with the defendant. Jackson claimed that Watkins was unlawfully infringing upon his patents, and litigation was threatened. The contract set forth in the complaint seems to have been entered into in compromise of the differences between the parties. Watkins agreed to sell to Jackson all of his letters patent for the sum of $1,500, make a settlement with Rice, and collect royalties for machines sold prior to January 1, 1885, and devote his entire time in the capacity of salesman and traveling expert for defendant, for which he was to receive the sum of $1,500 per year. Immediately after the execution of the contract, the patents were delivered by Watkins to Jackson. Watkins ceased to manufacture or sell any more of his machines, and remained in the employ of the defendant from January 19, 1885, until the early part of 1886, when he demanded a settlement under the contract. The defendant seems to have considered it important to avoid the competition caused by the manufacture and sale of Watkins' machines. There was evidence to show that such was the main consideration which induced the defendant to enter into the contract. It is true the defendant never used the patents, but the possession thereof was taken and held by him, and no doubt as thus held they were as valuable to him as they would have been if he had actually used them in the manufacture of machines. The rival patents were not only put out of the way, but defendant secured the services in his own business of Mr. Watkins, who is designated in the contract as "traveling expert in the field." The defendant purchased the Watkins machines from Rice, and paid the latter between $5,000 and $6,000 for them. Under the circumstances, the court below doubtless believed that the defendant had received all the benefit that he would have received if the letters had been actually assigned at the proper time, and that defendant was estopped by his conduct from claiming that the tender of the assignment came too late.

It is claimed by the appellant that the finding of the court does not amount to a finding of a consent to delay, or waiver of an earlier assignment, but we do not so understand it. The term "acquiesce," as used here by the court, means a consent inferred from silence,—a tacit encouragement. "Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by assertion of such adversary claim." Swain v. Seamens, 9 Wall. 254. "Acquiescence is where a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that under the circumstances of the case the other party may fairly infer that he has waived or abandoned his right." Rap. & L. Law Dict. By accepting and retaining possession of the patents, the defendant virtually deprived Watkins of the use thereof, and indicated that he was satisfied with what Watkins had done under the contract. Although Watkins continued in his employ for a long time after the contract was made, nothing was said about an assignment, both parties having apparently considered that none was necessary; and it would be a hardship now upon Watkins and his assignee if they should be deprived of the value of the property through what was evidently a mutual mistake in regard to that matter.

Appellant's contention that the tender of the assignment was not good because one of the patents was not included in the assignment tendered is unsound. The patent omitted from the assignment was dead, the statutory term of its existence having expired. It would have been a useless thing, therefore, to have included it in the assignment. If the delay in making the assignment was not through the neglect of Watkins, but by and with the consent of the defendant, as the court has found, the defendant cannot complain that the life of the patent had expired before the tender was made. Furthermore, no objection of this kind was made at the time Watkins tendered the assignment. Section 2076, Code Civil. Proc.

Judgment and order affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; HARRISON, J.; MCFARLAND, J.

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89 Cal. 433

HAUBERT v. MAUSSHARDT. (No. 13,030.)

(*Supreme Court of California.* June 8, 1891.)

CONTRACT OF SALE—MISTAKE—NOVATION.

Plaintiff sold defendant wine at a certain price, a written contract of sale being signed in duplicate. By mutual mistake, one copy recited a less price than that agreed, and this copy was assigned by defendant to a third party, to whom, by defendant's direction, the wine was delivered. *Held* that, in the absence of evidence showing a release of defendant and an acceptance of his assignee, there was no novation of parties, even though plaintiff may have known of the assignment, and received partial payments from the assignee.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. Wilson, Judge.

Taylor & Craig, for appellant. *W. C. Burnett* and *C. Bartlett*, for respondent.

Temple, C. Defendant appeals from the judgment and an order refusing him a new trial. On the 26th of February, 1886, plaintiff sold to defendant the wine in his cellar in Sonoma valley, for 28½ cents per gallon. After the parties had come to an agreement, defendant caused the contract to be written out by a friend, who prepared two copies, supposed to be duplicates. By mistake, however, in one copy the price was put at 20½ cents per gallon. Defendant took them to plaintiff, who read one of the contracts, which chanced to be the correct one, and, finding it satisfactory, both parties executed the two supposed duplicates; defendant assuring plaintiff that they were exactly alike. The incorrect copy was not read by either. It does not appear that plaintiff had anything to do with the preparation of the writing, or whether he even desired or expected a writing to be prepared, nor that he knew that defendant had not read and compared the two. One copy, which also happened to be the correct one, was left with plaintiff; the other defendant took, and immediately assigned to one Schmidt, who agreed to receive and pay for the wine, and give defendant one-half the profits on the transaction. The defendant was not employed by Schmidt to make the purchase, but he knew Schmidt desired the wine, and purchased with the expectation of making a transfer to him. Plaintiff knew that Mausshardt was purchasing with the expectation of transferring the contract to some one, though no name was mentioned by Mausshardt as a principal. It was, in fact, somewhat in the nature of those contracts which are sometimes called "options," only Mausshardt, though not expecting to complete the purchase himself, bound himself by an absolute contract. He expected to make something by selling the contract, and plaintiff must have known this, for there was something said about a commission, and plaintiff actually gave him $20 as compensation. The contract assigned to Schmidt was the one in which the price of the wine was stated at 20½ cents, and Schmidt denies knowing that the real price agreed upon was 28½ cents. The wine was all delivered to Schmidt in pursuance of defendant's express orders, and Schmidt paid plaintiff 20½ cents per gallon, and refused to pay more, on the ground that he had purchased at that price. The error was then discovered for the first time, and it seems plaintiff did not know until then that the contract had been assigned to Schmidt, although defendant claims that he did know of the assignment before he delivered any wine.

There are really but two points made on this appeal, although they are stated in different forms: *First*. The evidence shows a novation,—plaintiff accepted Schmidt as principal instead of defendant. There is no evidence which tends, even slightly, to show that plaintiff ever released defendant from his obligation, or accepted Schmidt in his place. If he knew of the assignment, and afterwards shipped the wine to the assignee, and received part payment from him, it would not show a novation. These acts are all consistent with his continuing to hold defendant, and, as that course would be more advantageous to plaintiff, it is to be presumed he did so. At any rate, the contract of novation must be proven as other contracts are. *Second*. Because Haubert signed the copy which was delivered to Schmidt he should suffer the loss resulting from the mistake. The evidence shows that plaintiff signed the copy on the assurance of Mausshardt that the two were exactly alike. Had this been true, there would have been no trouble. Plaintiff did not know, so far as appears, that defendant had not read and compared the two. He had a right to presume he had, and cannot be held responsible by defendant for reposing too much confidence in his assurances. There can be no doubt as to the responsibility of Mausshardt. Had there been a formal novation, under the circumstances, the contract of novation would have been invalid, as one made under a mutual mistake. We advise that the judgment be affirmed.

We concur: Fitzgerald, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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89 Cal. 310

Neuebaumer *et al.* v. Woodman. (No. 13,866.)

(*Supreme Court of California*. May 28, 1891.)

Mining—Location of Claim—Possession—Ejectment—Evidence.

J. attempted to locate a mining claim by posting notices on it, but failed to mark the location on the ground so that its boundaries could be readily traced as required by Rev. St. U. S. § 2324. He and his grantees held possession and worked the mine until ejected by defendant, who attempted to locate the claim by posting a notice at each end and recording a copy thereof, but who also failed to locate its boundaries on the ground. J.'s grantee worked on the claim after the attempted location by defendant. *Held*, that a finding that plaintiffs and their grantor never abandoned the claim and were in continuous possession, and that defendant was a mere trespasser, was sustained by the evidence.

Commissioners' decision. In bank. Appeal from superior court, Tuolumne county; J. F Rooney Judge.

E. A. Rogers and *F. D. & G. W. Nicol*, for appellant. *F. W. Street*, for respondents.

Foote, C. Henry Neuebaumer and F. W. Street sued in ejectment for a certain piece of mining ground. The defendant denied the ownership and right of possession of plaintiffs, and set up the claim that the ground was subject to location under the laws of the United States, by any citizen thereof, as vacant and unoccupied, and that in pursuance of such laws, and the local rules and regulations of the mining district in which the mineral land described in the complaint was situated, he had located the same, and that he is in possession thereof, and working it. He further denies that the plaintiffs ever had possession of the property in dispute, or that he ever ousted them therefrom or wrongfully withholds the same, or that they have suffered any damage. The court below rendered judgment in favor of the plaintiffs, from which, and an order denying a new trial, the defendant appeals.

From the facts found, it appears that the mining claim was attempted to be located on the 24th of October, 1873, by one William Jones, by posting certain notices on it, but that in making this attempt he did not mark the location of the claim so that the boundaries could be readily traced. On the 2d of July, 1877, Jones being indebted to one F. L. Tucker, he and the defendant here, S. P. Woodman, made a grant, bargain, and sale deed of this claim, called the "Tiger Mine," to Tucker, describing it. Thereafter Jones and others, for Tucker, performed labor on the mine, running tunnels into it, and crushing the quartz rock taken from it in a mill situate near by, known as the "Tiger Mill." Afterwards, on the 13th of February, 1880, Tucker deeded the property to one William T. Jones. The latter entered into possession of the claim under that deed, and during the years from 1880 to 1886 ran four tunnels in and upon the quartz vein in the claim, and expended several thousand dollars in labor and improvements upon it. As part of the purchase price, this William T. Jones executed and delivered to Tucker on the 25th of December, 1880, a promissory note for $1,400, with interest, which instrument was signed by him and William Jones and S. P. Woodman, the defendant. On the 23d of January, 1885, Tucker commenced an action against the three parties last mentioned to recover the amount due on that note, but he died shortly afterwards, and Henry Neuebaumer, one of the plaintiffs here, became the executor of his last will and testament, and, prosecuting the action, obtained judgment therein against the defendants therein on the 9th of July, 1885, for $1,529.22 and costs. The mining claim here involved was sold on execution issued on that judgment, and, no redemption having been had, it was deeded by the sheriff who made the sale to the purchasers at the sale, the original plaintiffs here, Henry Neuebaumer and F. W. Street. On the day after Tucker commenced that action, William T. Jones made a conveyance of the property in dispute to his mother, E. A. Jones. This conveyance was afterwards, at the suit of the plaintiffs here, declared fraudulent and void, canceled, and annulled. Henry Neuebaumer died after this action was commenced; and, prior to the trial, Teresa Neuebaumer, his administratrix, was substituted. In addition to these facts, it was further found, in the eighth finding of fact: "That the mining claim in the complaint described was never abandoned by the plaintiffs herein, or by their grantors, and that plaintiffs and their grantors were in continuous actual possession of the same until the 3d day of December, 1888, at which time the defendant herein, said S. P. Woodman, entered in and upon said mining claim and ejected the plaintiffs therefrom; that upon the said 3d day of December, 1888, said defendant, S. P. Woodman, made an attempted location of the mining claim in the complaint described, by posting a notice of location on the vein at each end of the claim, and by causing a copy of said notice of location to be recorded in the office of the recorder of Tuolumne mining district, in the said county of Tuolumne, on the 10th day of December, 1888, and said S. P. Woodman, the defendant herein, did no other acts in reference to the location than the posting of a notice at each end thereof; that said defendant, S. P. Woodman, did not mark the location of said claim on the grounds so that its boundaries could in any manner be traced."

The only ground of error relied on for the reversal of the judgment and order is that this finding is not supported by the evidence. The evidence shows that the defendant did not take the necessary steps to locate the mine, nor did the plaintiffs or their grantors, under section 2324 of the Revised Statutes of the United States. The point to be considered, then, is whether the plaintiffs or their grantors were in the actual possession of the claim, and had not abandoned it at the time of the ouster. By the undisputed finding, it appears that William Jones, who made the attempted location, conveyed the whole of this claim to Tucker on the 2d of July, 1877. Thereafter this Jones worked the mine for Tucker, and his possession was that of Tucker. Then it appears that on the 13th of February, 1880, Tucker conveyed the property to William T. Jones, who was the son of William Jones. William T. Jones entered into possession at once under this deed, and during the years from 1880 to 1886 remained in possession and did work on the mine, even after the action was commenced by Tucker against him in 1885. It also appears in evidence that Mrs. E. A. Jones, at the time she claimed it under her fraudulent deed from her son, William T. Jones, stated that the claim was being kept up. This continued the possession of those interested against the claim of the defendant. The plaintiffs, or those in their interest, worked on the claim in 1888, after the deed to them was made, and after the attempted location by the defendant. William T. Jones, whose interest was sold and conveyed by the sheriff under a conveyance from whom respondents claim, had been for years in possession of a large part of the claim, having entered under the deed of Tucker, who claimed the whole mine, and for whom William Jones had possession of a part thereof up to the time when the deed was made by Tucker to William T. Jones. Tucker certainly had possession after his purchase through William Jones of a part of the claim, and made a deed of the whole of it to William T. Jones, through whom the plaintiffs claim as their immediate grantor. Tucker had possession of a part, claiming the whole, described by metes and bounds, through his deed from William Jones. Thus claiming the whole, he made a conveyance of it by metes and bounds to William T. Jones, and the last immediately entered into possession, claiming the whole. This possession was continued in the respondents. This would give them the constructive possession of the whole tract as against a mere intruder, as the court finds the defendant to be. Dodge v. Yates, 76 Cal. 254, 18 Pac. Rep. 323; Atwood v. Fricot, 17 Cal. 37; English v. Johnson, Id. 107. We think the evidence on the part of the plaintiffs tends to show that the defendant Woodman did not on his attempted location mark the same on the ground so that its boundaries could in any manner be traced. The finding assailed is supported by sufficient evidence, and we advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(89 Cal. 437)

LONG v. SAUFLEY. (No. 13,273.)

(*Supreme Court of California.* June 8, 1891.)

TRIAL BY THE COURT—REVIEW ON APPEAL.

Where findings of fact have been waived, and the decision of the trial court is based upon conflicting evidence, the supreme court will not review an order refusing a new trial.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Stewart & Herrin, (*W. T. Baggett*, of counsel,) for appellant. *W. H. Sears*, (*D. H. Whittemore*, of counsel,) for respondent.

PER CURIAM. The judgment in this case has been heretofore affirmed by this court. 79 Cal. 260, 21 Pac. Rep. 757. The present appeal is from an order denying a new trial. The action was brought upon the following agreement, executed by the defendant to James H. Long, the assignor of the plaintiff: "San Francisco, April 7, 1885. For value received, I hereby agree to pay to J. H. Long or order the sum of five hundred ($500) dollars out of money collected on judgment in action of Frank vs. Kilbourn et al., No. 13,636, superior court, city and county of San Francisco, department No. 7, provided that said money shall be collected from property of defendant pointed out by the said Long. R. C. SAUFLEY." The defendant, in addition to a denial of the allegations in the complaint, alleged "for a further and separate defense to said action" that he had been induced to execute the instrument sued on by certain false and fraudulent representations made to him by said James H. Long, and that said contract was "inequitable, and wholly fraudulent and void." At the trial of the action the defendant did not deny the execution of the instrument sued on, but offered evidence for the purpose of showing the negotiations between him and said Long prior to its execution regarding the subject-matter thereof, and that in those negotiations Long had agreed that he would point out other property from which the judgment could be made than that upon which the execution was subsequently levied. Long denied that any such agreement had been made by him, or even made the subject of conversation between him and the defendant, and it was shown by the witnesses for the defendant that the execution upon said judgment was placed in the hands of Long, and that under his instructions a levy was made upon this property, and that thereafter, without any sale, the defendant accepted $4,000 from the judgment debtor in satisfaction of the judgment.

The court rendered judgment in favor of the plaintiff; and, as findings were waived, we must assume that the court found all the facts that were necessary to sustain its judgment. The effect of the written agreement of the defendant could not be limited or qualified by any oral testimony that his liability was contingent upon some condition not expressed therein. The matters alleged by the defendant in his separate answer constituted an affirmative defense, which it was incumbent upon him to establish by a preponderance of evidence. The testimony offered by him in support of this defense was contradicted by Long, and Long's testimony was in many respects corroborated by the testimony of the defendant's witnesses. Upon this conflict of evidence the court held that the defendant had failed to establish a defense to the action. Upon his motion for a new trial the defendant again presented the matter to the court, and in his statement expressly called attention to the fact that the evidence was sufficient to support his answer; but the court, after mature consideration, held otherwise, and denied a new trial. This court has repeatedly held that the decision of the trial court upon conflicting evidence is conclusive, and that when that court, upon a motion for a new trial, has refused to set aside such decision, this court will not reverse or even review its action. In view of this rule, it must be held that an appeal from an order denying a new trial, wherein the only ground urged for a reversal is that the court below did not properly consider the conflicting evidence, is frivolous. The order appealed from is affirmed, with $100 damages; and the superior court is directed to allow to the respondent that amount of money as a part of the costs on appeal.

(89 Cal. 237)

PUGET SOUND LUMBER CO. v. KRUG *et al.* (No. 13,121.)

(*Supreme Court of California.* May 27, 1891.)

AGENCY OF HUSBAND—EVIDENCE—NEW TRIAL.

In an action against a wife for the price of lumber alleged to have been furnished her through her husband as agent, the evidence showed that the husband had for a number of years lived on his wife's land, using it in his own business, and for his own profit; and that the lumber was purchased by him with his wife's knowledge, and used in erecting buildings on the land for use in his business. There was some circumstantial evidence tending to show precedent authorization of the husband to act in his wife's name in erecting the buildings, but the evidence was conflicting. *Held*, that an order setting aside a verdict for plaintiff and granting a new trial will not be disturbed.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

Jordan & Bull, for appellant. *Stanley, Stoney & Hays*, for respondents.

VANCLIEF, C. The defendants are husband and wife. This action was brought to recover from the wife the value of lumber alleged to have been purchased by her from the plaintiff though the agency of her husband. The case was tried by a jury. Verdict and judgment for $5,044.98. On motion of defendants a new trial was granted, and this appeal is from the order granting a new trial. The grounds upon which the new trial was asked were: (1) Insufficiency of evidence; (2) errors of law; and (3) that the verdict was against law. It appears, however, from the opinion of the lower court, brought up with the transcript, that the new trial was granted on the ground of insufficiency of the evidence to prove the agency of the husband; and whether it was so is the principal question for decision.

The following facts were proved by the plaintiff or admitted by the defendants: At the time of the marriage of the defendants, in 1860, the land described in the complaint (about 340 acres) was the separate property of the wife, and has ever since remained so; and the husband and wife have ever since resided thereon; and during all that time the husband has used and cultivated the land, principally in raising grapes, from which he made wines. For the purpose of making wines from those grapes, and from other grapes purchased by him from other persons, he built upon his wife's land a large wine cellar and other permanent structures necessary for making wines, called a "winery;" also, a barn, stable, and sheds. The most expensive portion of these improvements were made within six years immediately prior to the commencement of this action, during which time, and for many years before, he carried on the business of making and selling wines in his own name, and so advertised his business throughout this state, and in several eastern cities. At different times, within five years next before the commencement of this action, he ordered lumber from the plaintiff, in his own name, to be used, and which was used, in the construction of the winery and other buildings above enumerated upon the wife's land. Plaintiff, believing that the husband was the owner of the land and improvements thereon, and also of the business of manufacturing wines thereon, delivered to him, on the land, the lumber sued for, and charged it to him individually. To save time in the examination of one of the plaintiff's witnesses, counsel for defendants admitted the following facts: "That, during all the fifteen years of the witness' acquaintance with the parties, Mrs. Krug had allowed Mr. Krug to use her property as his own; that he had done it, and carried on business with it; that he had availed himself of the proceeds of it, and pocketed them, and never accounted to her for them, and she had never asked him to do so; and that he had carried on the business of wine-making in part with her property, (the property referred to and described in the complaint,) and with other property of his own; and that he had for all this time carried on his business of wine-making, using this piece of property described in the complaint belonging to his wife as though it was his own, and with her consent and knowledge; that he used the place as if it was his own; that he planted it and plowed it, and took the crops off and sold the crops and took the money; also, that he entered into a contract himself for the building of a stable and of a winery with her knowledge; that he entered into these contracts and concluded them, and that he paid various sums of money in the construction of these buildings; and that he was in the habit of so doing, and that she was living in a house on the property at the time. Mr. Jordan. And that these things were going on with Mrs. Krug's knowledge? Mr. Hays. Yes, sir. She saw the buildings going up." In 1885, after the lumber had been delivered and used as above stated, the husband failed in business, and was adjudged an insolvent debtor, and his assignees realized from the sale of all his property only about 5 per cent. of his debts. The debt to plaintiff for lumber was put in the schedule of his debts, and was proved against his estate by the plaintiff, after plaintiff had notice that the wife owned the land, but whether any dividend was paid thereon by the assignee to plaintiff does not appear. Of course the wife's land and the winery and other structures thereon, above mentioned, did not go to the husband's assignee in insolvency, and the husband and wife are still residing on the land, which, as improved, is worth about $100,000, but subject to a mortgage of $40,000 given to secure debts contracted by the husband in the business carried on by him.

The following is a part of the testimony of the husband upon being called as a witness for plaintiff: "I am one of the defendants in this action. The other defendant is my wife. I moved upon the property where we now reside, about a mile north of the post-office, at St. Helena, and described in the complaint, at the end of the year 1860. I had then about twenty-three hundred ($2,300) dollars of my own, which I used. The first money I spent on the place was to buy out Mr. Haskins, who was a squatter or renter on the place. I paid him a thousand ($1,000) dollars for moving off. I used the balance of the money in fencing, ditching, and whatever was needed. I had a business of my own at that time. I was then a winemaker, and made wine in different places in Napa county, in Napa city, in 1858, with John Patchett. After my marriage I made wine on this place, and on Mr. Yount's ranch on shares. The funds I received I used in my business. I managed the property of Mrs. Krug. I planted it and ploughed it, and reaped the income from it, and used it in my business, mingling the funds with my own, and never rendered to Mrs. Krug any account of her portion of them. She never asked me for any account. It has been my constant practice since I went in business, managing her property and my own business, to mingle the funds of myself and my wife, and continued this for thirty years. I do not know how much of my money I have used. I have sold a portion of the property of my wife. I sold I think somewhere about twenty-two or twenty-three thousand dollars' worth of her property, and used the money mostly in my business. I never rendered her any account of it. She never did ask me for any account. I have been in the habit of managing this property—her property—as though it was my own. I ceased to manage it on my own hook when I failed. I manage it to-day, but not in the style I did before. The difference is that I am doing this work for Mrs. Krug now, and the money affairs go all through her hands. We have no more wine business. The business is gone, and so I am there and work for her. She does not and never did pay me a salary. What I need I suppose she gives me,—bread and butter, and a pretty good suit of clothes." Both the husband and the wife testified that no express authority was ever given to the husband to act as agent for the wife; and there was no evidence tending to prove the expression of such authority in words, oral or written. As to whether, after the commencement of the proceeding in insolvency, the wife acknowledged her liability to plaintiff, and promised to pay the debt, or any part of it, the evidence is conflicting.

The opinion of the court in granting a new trial concludes as follows: "The evidence fails to disclose a precedent authorization to act as her agent in purchasing the lumber and materials from plaintiff, unless it can be inferred from the acts and relative situation of the parties; and, if the agency cannot be so inferred, then, if it existed at all, it must have been created by subsequent ratification. 'An agency may be created and an authority may be conferred by a precedent authorization or a subsequent ratification.' Civil Code, § 2307. The question arises here, is the evidence sufficient to warrant the jury in finding either that Charles Krug was made her agent by precedent authorization, or that there was a subsequent ratification of his acts by her? For, if there is not sufficient evidence to warrant them in so finding, the verdict should not stand; otherwise, the motion should be denied. It is not contended there was any 'precedent authorization' given to Charles Krug to act as agent for his co-defendant. In order to constitute a 'subsequent ratification' of the act by the principal it seems there must be evidence of previous knowledge on the part of the principal of all the material facts, (McClelland v. Whiteley, 15 Fed. Rep. 322; 2 Greenl. Ev. § 66;) and it would seem that a ratification is only effectual when the act is done by a person professedly acting as the agent of the party sought to be charged as principal, (1 Amer. & Eng. Enc. Law, 431, and authorities there cited; McLaren v. Hall, 26 Iowa, 305.)"

These, so far as they are conclusions of law, appear to be correct, unless the learned judge intended to be understood that the evidence on the part of the plaintiff had no substantial tendency to prove "precedent authorization" of the husband to act as the agent of the wife in erecting the fixtures above-mentioned upon her land, and in purchasing the lumber for that purpose. If he so intended, I think he was mistaken. An agency, including the agency of a husband for his wife, may be proved by circumstantial evidence, (Whart. Ag. §§ 44, 121, and 126; Burnett v. Fisher, 57 Cal. 152; Westgate v. Munroe, 100 Mass. 227; Bickford v. Dane, 58 N. H. 185;) and I think the circumstantial evidence on the part of the plaintiff in this case sensibly and substantially tended to prove precedent original authority of the husband from the wife to erect the fixtures above mentioned upon her land, and for that purpose to purchase the lumber sued for. But it is probable that the court based the order granting a new trial upon what it considered to be a preponderance in the weight of conflicting evidence in favor of defendants; and, since the trial courts have *criteria* by which to determine the credibility of witnesses and the comparative weight of evidence for and against the respective parties not furnished to the appellate court by a transcript of the evidence, the decisions of trial courts as to the weight of evidence, especially in granting new trials, are seldom disturbed. For the purpose of the new trial it is proper to add that, although the plaintiff (corporation) was not aware of the agency of the husband at the time it sold the lumber, and then understood that it was selling directly to him, yet, upon discovering the agency of the husband, if any there was, it had the right to resort for payment to either the agent or principal,—the husband or the wife. Ellis v. Crawford, 39 Cal. 523; Thomas v. Moody, 57 Cal. 215, Arnold v. Spurr, 130 Mass. 347 and 350; Raymond v. Proprietors, 2 Metc. (Mass.) 324; Whart. Ag. §§ 464 and 496. I think the order should be affirmed.

We concur: Belcher, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the order is affirmed.

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89 Cal. 231

Putnam v. Dungan. (No. 13,442.)

(*Supreme Court of California.* May 27, 1891.)

Voluntary Payment — Recovery — Joint Purchase of Land.

1. Where the owner of land, on the representation of another that he has an interest therein, pays him money for a release of his claim, with the understanding that it is to be repaid if he has no interest, he may recover the money if it is ascertained that the claimant has no interest, though a person who was present with such claimant when the land was purchased has stated to the owner the facts attending the purchase.

2. The fact that several persons unite in a note to secure money for the purchase of land

does not of itself create a joint interest in all of them in the purchase that may be made.

Department 1. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Buck & Wheeler, for appellant. *E. W. Wilson* and *P. F. Hart*, for respondent.

HARRISON, J. The real question involved in this action is whether the $1,000, which the plaintiff alleges was paid by him to the defendant, and for the recovery of which the action was brought, was paid as a compromise and in settlement of differences existing between him and the defendant, or whether it was paid upon the representation and claim by the defendant that he had an interest in the purchase of certain lands in Oregon, and upon his agreement that he would repay it if it should be subsequently ascertained that he did not have any interest therein. Underlying this question, however, is the question whether the defendant did in reality have any such interest, and whether, if he did not, he knew that he had no such interest; for, if he knew that he had no interest in the land, his representation to the plaintiff that he had was false, and, if made with a view of inducing the plaintiff to pay to him $1,000 therefor, was fraudulent. Inasmuch, moreover, as the defendant himself had been personally connected with all the acts and transactions culminating in the purchase of the land, he must be held, as a matter of law, to have known whether he had any interest in the purchase or not. Hence the first question to be determined upon the trial was whether the defendant did, in fact, have any interest in the purchase of the land referred to. In pursuance of a previous plan formed on behalf of the plaintiff, one Walker, and one Smith with the defendant and his brother, the defendant and Walker had gone to the state of Oregon from the county of Humboldt, where they all resided, for the purpose of making purchase of lands, if any could be found which would be satisfactory to them. Previous to their departure, a note for $5,000 had been given to the Humboldt County Bank by four of the parties, for which the bank had given five $1,000 drafts on the Bank of California, of which two were made payable to the order of Walker, and three to the order of the defendant. After reaching Oregon, a purchase was made of the Long ranch, and an agreement for its conveyance executed between the owner and Walker, the defendant signing his name as a witness to the agreement. After making this purchase, the defendant and Walker looked at some other tracts of land, but, finding none which suited them, returned to Humboldt county. On their route back a disagreement arose between Walker and the defendant respecting the purchase, Walker claiming that it was for himself, Smith, and the plaintiff, and the defendant claiming that he had an interest in it. After they had returned to Eureka they met Smith and the plaintiff, and the controversy was continued, until finally the plaintiff paid to the defendant the $1,000 which is the subject of this controversy; the defendant claiming that it was paid as a compromise of the difference, and for a release of his claim to the land purchased, and the plaintiff contending that it was paid upon the express agreement on the part of the defendant that he would repay it if it should afterwards be established that the defendant did not have an interest in the purchase. The cause was tried before a jury, and a verdict rendered in favor of the plaintiff for the sum claimed. The defendant has appealed directly from the judgment, bringing up the evidence which was taken at the trial in a bill of exceptions, the appeal having been taken within 60 days after the judgment. It would serve no useful purpose to recount the testimony given at the trial. Both parties to the action, as well as the other parties to the transaction, were fully examined, and testimony from disinterested witnesses, in corroboration of one or the other, was also presented. All the relations existing between the five parties to the transaction,—the conversations and preparation prior to the departure of the defendant and Walker for Oregon, the procuring of the money with which to make such purchases as they might desire, their negotiations with reference to other tracts of land, in fact everything that might serve to throw light upon the particular transaction—was placed before the jury. It is needless to say that in many respects the testimony was in direct conflict. The jury, however, had the opportunity to weigh all the evidence, and to determine the effect to be given to the testimony of each witness. They were enabled to determine the extent to which the plaintiff relied upon the statement of the defendant as an inducement to pay him the money, as well as the knowledge which he could otherwise obtain concerning the correctness of that statement. After a careful examination of all the evidence in the record, we cannot say that it is insufficient to justify the verdict. The jury were fully instructed by the court upon the questions before them. They were instructed that if this money was paid as a compromise, or in settlement of a dispute between the parties, their verdict should be for the defendant. It was left to them to determine, from all the evidence, whether the money was paid as claimed by the one party or by the other, and, where the evidence was so directly contradictory and conflicting, their verdict must be the final determination of the rights of the parties. The fact that Walker had been with the defendant at the time the purchase was made, and that the plaintiff had learned from him the facts connected with his purchase, did not of itself, make the payment to the defendant voluntary. Walker and the defendant differed radically in their version of the transaction, and in their view of the rights of the defendant in the purchase. The plaintiff was not compelled to believe that the version of either of them was correct. He had the right to further inform himself of the facts connected with the purchase, and to rely upon the statement of the defendant that these facts would show that the defendant did have an interest. If, upon such investigation, he was able to establish that the defendant did not have an interest, he had a right to demand the money back in accordance with the terms upon which he had paid it. Walker himself refused to be a party to any compromise, and the contention of the defendant, that because Walker knew all the transaction he could not have been misled by any statement of the defendant, has no application to the position of the plaintiff. He did not have Walker's knowledge, and was not compelled to rely upon his statement. He had a right to make the payment to the defendant upon the condition that, if the defendant's statement was not correct, it should be refunded, and if he should be subsequently able to establish, as he must have done to the satisfaction of the jury at the trial, that the defendant did not have an interest in the land, he had the right to maintain his action. Neither did the fact that the parties united in the note to the bank for the money with which they were to make their purchases in Oregon, of itself create a joint interest in all of the parties in whatever purchase should be made. That fact was a circumstance, but not conclusive, in determining their relations. Such arrangement could as easily have been made for the accommodation of the parties in their several rights, as in their joint rights. When the plaintiff rested, the defendant asked for a nonsuit, which was denied. There was no error in this. The court would not have been justified in withdrawing from the jury the determination from the evidence then before it of the proposition upon which the defendant asked the nonsuit. We find no error in any of the instructions or rulings of the court, and, upon well-settled principles in reference to conflicting evidence, the judgment is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

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89 Cal. 251

BLUMENTHAL *v.* GOODALL. (No. 12,638.)

(*Supreme Court of California.* May 27, 1891.)

REAL-ESTATE AGENT — REVOCATION OF AUTHORITY.

Where the owner enters into a contract authorizing a real-estate agent to sell his land on commission, within a certain time, he cannot revoke the authority, and escape liability to the agent, if he secures a purchaser before the time limited, as the result of efforts commenced before such revocation. Reversing 25 Pac. Rep. 131. MCFARLAND, PATERSON, and SHARPSTEIN, JJ., dissenting.

In bank. On rehearing.

GAROUTTE, J. This cause has been heard in department and in bank, and is now before the court in bank for decision upon an order granting a rehearing. This is an action for the recovery of commissions claimed to have been earned by a real-estate agent in the sale of certain lands belonging to defendant. Judgment for defendant. Motion for new trial denied, and appeal from both judgment and order. The court found that the defendant, being the owner of the land in question, on the 13th day of July, 1887, gave to L. Oestreicher, a real-estate agent, an authorization in writing, of which the following is a copy: "I hereby authorize Mr. L. Oestreicher to sell blocks 899, 900, 901, 903, outside lands, for the sum of fifteen hundred dollars ($1,500) each; will allow him one hundred dollars ($100) as commissions for his services on each block. This contract to be in force for ten days from date hereof." Which paper was duly dated and signed by defendant. The court further finds that on the same day Oestreicher agreed with one Fulda, orally, for the sale of the blocks at the price named, but, Fulda failing to put his agreement in writing, Oestreicher afterwards, and on the same day, executed, with O. F. Von Rhein & Co., the following agreement in writing: "Received of O. F. Von Rhein & Co. the sum of three hundred dollars ($300) on account of purchase of outside land, blocks 899, 900, 901, and 903; price agreed upon, six thousand dollars, ($6,000.) Subject to perfect record title. Thirty days allowed for examination of title; if title does not prove perfect, deposit to be returned." On the same day Oestreicher notified the defendant in writing of what he had done with Von Rhein. That on the 14th Von Rhein applied to defendant, told him of his agreement to purchase, and asked for the abstract of title. Defendant told him that he would not allow 30 days to examine title. Von Rhein replied that he would make the examination earlier if possible, and received and receipted for the abstract, the same to be returned to the defendant, but no time for its return specified. Later in the same day defendant received from Fulda a letter notifying him that he (Fulda) had agreed with Oestreicher for the purchase of the blocks, and that he was prepared to examine the title and complete the purchase, if the title proved satisfactory, demanding of defendant to complete the sale, and offering to deposit $500 on account thereof. That on the next day defendant served written notice upon both Oestreicher and Von Rhein & Co., reciting that Oestreicher had procured the authorization given to him, upon his representation that he had an eastern party who was about to depart, to whom he could sell those blocks if he had authority to act at once, but he had not time to hunt up other blocks for him before his departure. That instead of selling them, as he said he could, he had negotiated a sale of them to two different resident purchasers, and, in view of these complications and misstatements, he revoked the authority of Oestreicher, and declined to proceed further in the consummation of the sale of the property through him. That, on the nineteenth day of July, Von Rhein completed his examination of the title, and offered to complete the purchase, but the defendant refused to accept the money or make the deed. That demand of the commission had been made and refused, and the claim therefor had been duly assigned to plaintiff. It was also found that the authorization from defendant had not been secured through any fraud or misrepresentation on the part of Oestreicher. On these facts the court found, as a conclusion of law, that the plaintiff was not entitled to the relief demanded, and judgment was entered for defendant.

It is a general principle of law that, as between the principal and the agent, the authority of the agent is revocable at any time, if not coupled with an interest, and this principle is recognized by section 2356 of the Civil Code. Mechem, upon the Law of Agency, (section 209,) says: "But this power to revoke is not to be confounded with the right to revoke. Much uncertainty has crept into the books and decisions from a failure to discriminate clearly between them. * * * As has been seen, the relation of the agent to his principal is founded in a greater or less degree upon trust and confidence. It is essentially a personal relation. If, then, for any reason, the principal determines that he no longer desires or is able to trust and confide in the agent, it is contrary to the policy of the law to undertake to compel him to do so. * * * But it by no means follows that, though possessing the power, the principal has the right to exercise it without liability, regardless of his contracts in the matter. It is entirely consistent with the existence of the power that the principal may agree that for a definite period he will not exercise it, and for the violation of such an agreement the principal is as much liable as for the breach of any other contract." In section 615 the author says: "In using the expressions rightfully and wrongfully revoked, it will be understood that the question of the principal's power to revoke is not involved, but whether by express or implied agreement, having undertaken not to exercise that power, he has, nevertheless, exercised it in violation of the agreement." Section 620 reads: "* * * Thus if, after a broker employed to sell property had in good faith expended money and labor in advertising for and finding a purchaser, and was in the midst of negotiations which were evidently and plainly approaching to success, the seller should revoke the authority with the purpose of availing himself of the broker's efforts, and avoiding the payment of his commissions, it could not be claimed that the agent had no remedy. In these cases it might well be said that there was an implied contract on the part of the principal to allow the agent a reasonable time for performance, that full performance was wrongfully prevented by the principal's own acts, and that the agent had earned his commission." Section 968 uses this language: "It is entirely competent for the principal to agree that the broker shall have a certain time within which to find a purchaser, and, where he does so, he will be liable to the broker for damages, if, without the latter's fault or consent, he terminates his authority before the expiration of that period." In the case of Lane v. Albright, 49 Ind. 279, where the owner of the real estate sold it pending the negotiations of the agent in making a sale, and prior to the expiration of the time given by the owner to the agent, and where the agent within the time given did find a purchaser, the court says: "The appellant performed all that he was required by the contract to do, and was prevented by the appellee from selling the land. The appellee disabled himself from carrying out the contract of sale made by the appellant." "The fact that the appellee had authorized appellant to sell his land did not deprive himself of the power of selling it, but he could not thereby avoid his liability to appellant." In Hawley v. Smith, 45 Ind. 183, upon full consideration the court decided that the rule is that, where the performance by one party is prevented by the act of the other, the party not in fault should recover in damages such sum as will fully compensate him for the injury which he has sustained by reason of the non-performance of the contract. To the same effect is Story, Ag. § 466. In the case at bar it may be conceded that the agent had not entirely carried out his contract at the time the defendant revoked his authority, but upon the 19th day of July, and within the limit of time fixed by the contract, he did produce the purchaser, with his money in his hand, demanding a deed. The court found that the plaintiff entered into this contract in good faith, and that the writing was untainted with fraud. The record discloses that the agent was most active in his efforts to find a purchaser; indeed, the real reasons of defendant's revocation of the agency appear to be that the agent was too active, as he had found two purchasers for the property instead of one. The case of Brown v. Pforr, 38 Cal. 553, would seem to indicate upon a cursory examination, views hostile to the principles expressed in the authorities cited in this opinion, but, upon examination of that case, it can readily be seen that no hostility exists. The contract in that case does not expressly stipulate that it shall remain in force 30 days, and the opinion of Justice SANDERSON clearly intimates that, if there had been a provision in the contract that it should remain in force for such length of time, the defendant would not have been permitted to prevent performance, and escape without making compensation to the agent. The remaining cases cited by respondent upon this question add no merit to his contention. The defendant expressly agreed that his contract with the agent should remain in force for the period of 10 days. The act of the agent in finding a purchaser required time and labor for its completion, and within three days of the execution of the contract, and prior to its revocation, he had placed the matter in the position that success was practically certain and immediate, and it would be the height of injustice to permit the principal then to withdraw the authority and terminate the agency as against an express provision of the contract, and perchance reap the benefit of the agent's labors, without being liable to him for his commissions. This would be to make the contract an unconscionable one, and would offer a premium for fraud by enabling one of the parties to take advantage of his own wrong, and secure the labor of the other without remuneration. Let the judgment and order be reversed, and the cause remanded, with direction to the court below to enter judgment for the plaintiff as prayed for.

We concur: BEATTY, C. J.; DE HAVEN, J.; HARRISON, J.

We dissent; McFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

89 Cal. 471

Ex parte HALSTEAD. (No. 20,809.)

(*Supreme Court of California.* June 16, 1891.)

POLICE COURTS — FAILURE TO PAY FINE — POWER TO IMPRISON.

1. St. Cal. 1885, p. 213, (Act March 18, 1885,) establishing police courts in cities of the second class, and vesting in them jurisdiction over certain public offenses, applies to the city of Los Angeles, although the precise time at which it became a city of the class does not appear.

2. Pen. Code Cal. § 1446, providing for imprisonment in default of payment of a fine, does not conflict with the act of March 18, 1885, establishing police courts, and a person convicted in such courts may be committed to the city jail in default of such payment.

In bank. Application for writ of *habeas corpus.*

J. A. Donnell and *C. T. Howland*, for petitioner. *Jas. McLachlan*, Dist. Atty., for respondent.

PATERSON, J. The petitioner was convicted of the crime of petit larceny in the police court of the city of Los Angeles, and as a penalty therefor the court imposed a fine of $150, and, in default of payment thereof, ordered that he be imprisoned in the city jail of the city of Los Angeles one day for each and every dollar of said fine remaining unpaid. It is claimed by his counsel that there was no police court in the city of Los Angeles on the day of the arrest, conviction, and commitment of the petitioner, and that, if such court existed, there was no authority to commit the petitioner to the city jail. The judgment against the petitioner was entered on the 5th day of February, 1891. At that time, and long prior thereto, the city of Los Angeles was a city having over 30,000 inhabitants. It was intimated by the court at the oral argument that the census was complete, so far as the classification of cities is concerned, as soon as the returns were filed in the office of the superintendent of census at Washington. It is unnecessary, however, for us in this case to determine the precise time at which the city of Los Angeles passed into the class of cities having more than 30,000, and less than 100,000 inhabitants. It certainly changed long prior to the arrest, conviction, and commitment of the petitioner. We held in People v. Henshaw, 76 Cal. 436, 18 Pac. Rep. 413, that the act of March 18, 1885, popularly known as the "Whitney Act," is not obnoxious to section 11 of article 1 of the constitution, providing that "all laws of a general nature shall have a uniform operation;" that the act is not local or special legislation; that the legislature has the power to classify municipal corporations according to population; and that it has power to pass general laws affecting municipal corporations, without reference to the question whether such corporations were formed before or after the adoption of the constitution of 1879. It follows, therefore, that the city of Los Angeles, so far as its police courts are concerned, is now governed by the provisions of the Whitney act. That act confers upon the police court exclusive jurisdiction of certain public offenses, including petit larceny.

The only question which remains to be considered is whether the police court has power to imprison in the city jail as a means of collecting a fine. Section 1446 of the Penal Code provides that "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the fine." There is nothing in the Code which prescribes the place of imprisonment for non-payment of a fine. The Whitney act does provide that, "in all cases of imprisonment of persons convicted in said police court of any offense committed in the city, the persons so to be imprisoned, or by ordinance required to labor, shall be imprisoned in the city jail, or, if required to labor, shall labor in the city." There is, therefore, no conflict between the provisions of the Code and those of the act referred to, and we think there can be no doubt of the power of the police court to direct imprisonment in the city jail. The suggestion that persons imprisoned in the city jail may be required to labor, which may impose a hardship different from that suffered by persons outside of cities, cannot be considered in this proceeding. The judgment itself does not direct that the petitioner be required to labor, and, if it did, the judgment as to the imprisonment would not be void. In Ex parte Fil Ki, 80 Cal. 201, 22 Pac. Rep. 146, we held that a person convicted for contempt would be discharged from hard labor on the streets upon writ of *habeas corpus*, but would not be discharged from imprisonment by reason of being put at such labor. The petitioner is remanded to the custody of the chief of police of the city of Los Angeles.

We concur: BEATTY, C. J.; HARRISON, J.; SHARPSTEIN, J.; MCFARLAND, J.

In re MONTIJO. (No. 20,813.)

(*Supreme Court of California.* June 17, 1891.)

In bank. Application for writ of *habeas corpus.* *Willis & Appel* and *H. W. Hutton*, for petitioner. *Jas. McLachlan*, Dist. Atty., for the People.

PER CURIAM. Upon the authority of Ex parte Halstead, (Cal.) 26 Pac. Rep. 961, (No. 20,809,) the writ in the above-entitled matter is discharged, and the prisoner remanded.

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89 Cal. 467

CITY OF EUREKA v. DIAZ *et al.* (No. 13,-243.)

(*Supreme Court of California.* June 16, 1891.)

INTOXICATING LIQUORS — ILLEGAL SALE — ACTION ON LICENSE BOND.

Under an ordinance licensing saloons and forbidding any business therein "between 11 o'clock P. M. and 5 o'clock A. M. of each and every day," no recovery can be had on a bond conditioned for the lawful conduct of the business, under a complaint charging the saloon-keeper with selling liquors between 11 o'clock P. M. and 5 o'clock A. M. of the "following" day.

Department 1. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Horace L. Smith and *S. M. Buck*, for appellants. *J. N. Gillett*, for respondent.

PATERSON, J. The mayor and common council of the city of Eureka passed an ordinance which provided that it should be unlawful for any person to carry on within the limits of the city any saloon, barroom, or dram-shop without having first obtained a license therefor, and having given a good and sufficient bond in the sum of $1,000, with two sureties, approved by a majority of the members of the common council, conditioned that such saloon during the term of the license should be conducted in a lawful, quiet, and orderly manner. The ordinance provided that it should be unlawful to keep such place open, or to sell or give away any intoxicating drinks therein, "between the hours of 11 o'clock P. M. and 5 o'clock A. M. of each and every day." The complaint herein charges that the defendant Diaz, contrary to the provisions of the ordinance, on the 16th day of March kept his place of business open from 11 P. M. until 5 A. M. of the following day, and sold spirituous and fermented liquors, beer, and wine. The defendants Huk and Lundblade were sureties in the bond given by Diaz. Plaintiff had judgment for the sum of $1,000. Defendants moved for a new trial. The motion was denied, and an appeal was taken from the order and from the judgment.

The demurrer to the complaint should have been sustained. The provision of the ordinance upon which the plaintiff relies is not ambiguous or uncertain. It may be that it does not express what the mayor and common council intended to express, but the court cannot make or amend ordinances. It is a cardinal rule in the construction of statutes that the intent of the legislator should be followed, but this is subject to the imperative and paramount rule that the court cannot depart from the meaning of language which is free from ambiguity, although the consequence would be to defeat the object of the act. In Rex v. Barham, 8 Barn. & C. 99, the court said: "Our decision may in this particular case operate to defeat the object of the act; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the legislature." In Smith v. State, 66 Md. 217, 7 Atl. Rep. 49, the court said: "Even when a court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity. As was said by Lord DENMAN, in Green v. Wood, 7 Q. B. 185: 'Those who used the words thought they had effected the purpose intended. But we, looking at the words as judges, are no more justified in introducing that meaning than we should be if we added any other provision. We can do no more than give such a meaning as the words authorize.' The supreme court of Ohio, in Woodbury v. Berry, 18 Ohio St. 462, emphatically say: 'It is our legitimate function to interpret legislation, but not to supply its omissions.'" The business of the interpreter is, of course, to seek for the intention of the legislature, but that intention is not to be ascertained at the expense of the true meaning of the words. The question is not what the legislature meant, but what its language means. "The court knows nothing of the intention of an act, except from the words in which it is expressed; * * * the meaning of the law being the law itself. * * * Every departure from the clear language of a statute is in effect an assumption of legislative powers by the court." End. Interp. St. §§ 5-8. If the words "each and every day" were eliminated from the provision of the ordinance above referred to, we should hold that the period of time named in the prohibitory clause is that between the hour of 11 P. M. one day, and the hour of 5 A. M. of the next day, but we have no more right to eliminate those words from the ordinance than we have to enlarge its terms. There is but one period in every day between the hours of 11 P. M. and 5 A. M. It is the same period whether you designate it as the period between 11 P. M. and 5 A. M., or between 5 A. M. and 11 P. M. of each and every day. The term "day" has a well-known signification. It is defined by the Code to be "the period of time between any midnight and the midnight following." Pol. Code, § 3259. And this is the interpretation which has always been put upon the word in the construction of prohibitory statutes. Pulling v. People, 8 Barb. 385; Kane v. Com., 89 Pa. St. 522; Haines v. State, 7 Tex. App. 33. The judgment and order are reversed, and the cause is remanded with directions to sustain the demurrer to the complaint.

We concur: HARRISON, J.; GAROUTTE, J.

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88 Cal. 595

MARSH v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 14,300.)

(*Supreme Court of California.* April 13, 1891.)

WRIT OF REVIEW—PLEADING.

A writ of review will not be granted to consider an order removing an assignee under an assignment for the benefit of creditors where the petition does not show that the order was made without notice to the assignee, and there are no direct allegations that the petition for removal did not charge that the assignee had violated or was unfit to execute his duties.

In bank. Petition for writ of review.

Carroll Cook and *J. E. Foulds*, for petitioner.

PER CURIAM. The petition herein is insufficient to authorize the issuance of the writ asked for. The petition does not show that the order of the superior court removing B. T. Whiteside from the position of assignee or trustee under the deed of assignment executed for the benefit of the creditors of the insolvent firm of Blum, Eppstein & Co., was made without notice to Whiteside. The averment that the petition filed in the superior court, asking for the removal of said Whiteside, contained "no allegations of any legal cause why said Whiteside should be removed," is but the statement of a conclusion of law, and is not equivalent to a direct allegation that said petition did not charge that said Whiteside had violated or was unfit to execute the duties of trustee under said deed of assignment. Application for writ denied.

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89 Cal. 129

ELLIS v. WOODBURN. (No. 13,532.)

(*Supreme Court of California.* May 18, 1891.)

ATTORNEYS — CONTINGENT FEES — ACTION FOR PLEADING AND EVIDENCE.

In an action for attorney's fees, where it is alleged in one count of the complaint that the services were reasonably worth $1,500, of which $500 had been paid, and in another count that they were rendered for the agreed price of $500, and the further sum of $1,000 in case of success, and the answer denies the reasonable worth, and alleges that the agreement was for $500 and no more, evidence as to what would be a reasonable contingent fee in such case is irrelevant. Affirming 24 Pac. Rep. 893. BEATTY, C. J., dissenting.

In bank. Appeal from superior court, El Dorado county; GEORGE E. WILLIAMS, Judge.

Blanchard & Swisler, for appellant. *Ben Morgan, A. C. Ellis, George H. Ingham*, and *Roger Johnson*, for respondent.

DE HAVEN, J. This is an action by the plaintiff, who is an attorney at law, to recover from defendant the sum of $1,000, alleged to be due on account of professional services rendered by plaintiff to defendant. The plaintiff recovered judgment for the sum demanded, and the defendant appeals from such judgment and an order refusing him a new trial. The complaint is in two counts, the first of which states in substance, that defendant retained plaintiff as his attorney, and that as such attorney, and upon his said retainer, he rendered services in defending a case in the superior court of El Dorado county, in which the Lake Valley Railroad Company was plaintiff, and this defendant and the El Dorado Wood & Flume Company were defendants, "and in counseling and advising therein, and conducting negotiations to a settlement thereof;" and that said services so rendered were reasonably worth the sum of $1,500, of which $500 have been paid. The second count alleges that plaintiff was employed by defendant as his attorney in the action referred to in the first count, "to defend him against said action, and, if possible, to prevent a condemnation of his land as aforesaid, and to negotiate a sale of his said land, or the timber growing thereon, to said company, and in case said Lake Valley Railroad Company should procure such judgment of condemnation, and construct such railroad, then, in case said railroad company should fail or neglect to operate and carry on such railroad in accordance with the laws of the state of California, to commence proceedings to procure a forfeiture of its right to operate and carry on such railroad" for the agreed price of $500, and "the further sum of one thousand dollars, if he should succeed in procuring such judgment of condemnation, or in procuring a sale of defendant's said lands or the timber thereon, or in procuring a forfeiture of the right of said railroad company to operate said railroad in case the same should be constructed and not operated in accordance with law." The answer of the defendant, as we construe it, denies that the services of plaintiff, as alleged in the first cause of action, were reasonably worth any greater sum than $500; and, as to the second cause of action, denies that he ever agreed to pay plaintiff $1,000, or any other sum, on either of the contingencies therein alleged; and alleges that he (defendant) "entered into an express contract with plaintiff, whereby plaintiff agreed to render his services as an attorney at law in defending defendant against said action set forth in said complaint, and in all matters connected with said action, and, if possible, to negotiate the settlement thereof by sale of defendant's timber for the sum of five hundred dollars, and no more," and that the same had been paid. The issues thus presented for trial were: (1) If the services of plaintiff were rendered under an express contract, were the terms of such contract as alleged by plaintiff, or did the answer of defendant correctly state the contract? (2) If the evidence was not sufficient to enable the jury to say that there was an express contract, and what were its terms, then the question would arise as to the reasonable worth of the services actually rendered by plaintiff.

Upon the trial the court admitted the testimony of attorneys as to what would be a fair compensation to plaintiff for the services rendered by him, the witnesses testifying upon the hypothesis that he had contracted to perform them under an express contract for a retainer of five hundred dollars cash, "and the remainder of his fee contingent upon success, in case of compromise." This evidence was objected to by appellant as irrelevant and incompetent. The first cause of action alleged in the complaint is upon an implied contract to pay the reasonable worth of the services rendered, and the evidence objected to was clearly irrelevant as to this, because the law never implies, from the rendition of service, a promise to pay what is known to the legal profession as a "contingent fee." Such a promise, if it exist at all, is the creation of an express contract, and if it should be conceded that it is competent for parties to contract for such a fee, leaving the amount to be fixed by evidence as to what would be a "reasonable contingent fee," no such contract is alleged in the first cause of action, and as to that there was no issue to which such evidence could apply.

2. Was the testimony relevant to any issue made by the pleadings as to the express contract between the parties? The answer to this will depend upon whether such evidence has any tendency to prove the contract alleged by plaintiff or disprove the one set up by the defendant; and we cannot see how proof of this kind could afford the least aid in determining whether the contention of plaintiff or that of defendant is right in regard to the terms of the contract made by them. If there had been a dispute as to the amount of a contingent fee to be paid, then such evidence would have been relevant, if competent at all, as having a bearing upon

the probabilities of the case. Testimony as to value or usual price has been frequently admitted in aid of proof of an express contract, where the only fact in dispute was as to the sum agreed to be paid for services rendered thereunder or for property sold. The principle upon which the evidence is admitted in such a case is that proof of reasonable value or usual price has some tendency to show the probable price actually agreed on, that being the fact in dispute. Thus, in Swain v. Cheney, 41 N. H. 234, the court, in passing upon this point, says: "That there was a contract was admitted, and it would seem that there was no controversy about the terms of it, except as to the agreed price for drawing the lumber between the top of the hill and the depot; and while the plaintiff testified positively, as it would seem, that this agreed price was one dollar and fifty cents per thousand, the defendant probably testified just as positively that the agreed price was but one dollar per thousand. Here, then, there was a single point in dispute for the jury to settle; and, as the evidence was conflicting, the jury must find the fact to be either one way or the other, according to the preponderance of the evidence; and, if the direct testimony was evenly balanced, then they must consider the probabilities of the case, and weigh them, and thus come to a conclusion. And it seems to us that the evidence offered tended to show what was the common price for conveying that precise kind of lumber over the same road, and at the same time would, we think, be competent as tending to show whether it was more probable that the price agreed to be paid was one dollar or one dollar and fifty cents per thousand." In the present case there was no controversy as to what would have been a reasonable contingent fee, but whether there was any agreement at all to pay such a fee, and it is manifest that proof of what would be a reasonable contingent fee can have no legitimate tendency to show that there was, in fact, an express contract for that kind of fee. The opinion evidence should have related to the case stated in the first cause of action, or to the particular contract alleged by the defendant. Evidence tending to show that the fee claimed by the defendant as that agreed upon was not the usual or reasonable fee for such services would have been admissible, as bearing upon the probability whether plaintiff would have made such a contract. But the evidence we have been considering was entirely irrelevant to any issue involved in the case, and, as the verdict is general, so that it is impossible to say that the jury disregarded it, and based their verdict upon the other evidence, the judgment must be reversed. This case was heretofore determined in bank, and the same conclusion reached. 24 Pac. Rep. 893. **For the reasons here given the judgment and order are reversed.**

We concur: PATERSON, J.; HARRISON, J.; SHARPSTEIN, J.; GAROUTTE, J.

MCFARLAND, J. I concur in the judgment; but, in my opinion, no evidence of the reasonableness of a contingent fee is admissible under any circumstances.

I dissent: BEATTY, C. J.

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89 Cal. 459

WHEATLAND MILL CO. v. PIRRIE, (two cases, No. 13,343.)

(*Supreme Court of California.* June 15, 1891.)

TRIAL BY THE COURT — REQUESTED FINDINGS OF LAW—REPLEVIN—COSTS.

1. After a trial has practically ended, and the court has orally announced its decision, but has not filed its findings, it cannot be required to pass upon propositions submitted to it as proposed findings of law.

2. Acts Cal. 1865–6, p. 66, § 6, providing that the prevailing party shall be allowed 5 per cent. costs on the amount recovered in litigated cases, not to exceed $100, does not apply to an alternative judgment in replevin for the return of property or for its value.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Mastick, Belcher & Mastick, for appellant. *Cope, Boyd & Fifield* and *Lloyd & Wood*, for respondent.

FOOTE, C. This is an action of claim and delivery for a quantity of flour by the Wheatland Mill Company against William Pirrie. Judgment was rendered for the defendant for the return of the flour which the plaintiff had received, or the value thereof, and interest. From that judgment and an order refusing a new trial the plaintiffs have appealed. The defendant appeals from an order retaxing costs, by which the sum of $100, claimed as percentage, under section 6 of the act of the legislature, to be found in statutes 1865–6, at page 66, in relation to fees in the city and county of San Francisco, was struck from his memorandum of costs. The appellant contends that the trial court committed error "in denying their request that it would pass upon certain propositions of law presented by plaintiff, and give the same as applicable to the case, and in refusing to pass upon said propositions, and to rule that the same were correct, and applicable to the case." The cause came on to be tried, the court sitting without a jury, on the 20th day of March 1888, and on that day, upon the evidence produced, was considered and heard by the court; and it was then submitted for decision on briefs to be filed by respective counsel, which was done. On the 4th day of May following, the court announced its decision orally for the defendant. Upon the 16th day of the same month, before the written findings were filed, the propositions of law, which are nothing more than instructions to the court, by the court, put in such a form that such tribunal could answer "Yes" or "No," and thus put itself on record as to its views of the proposition of law therein involved, were presented to the court, and it refused to consider them, making two indorsements thereon on the 21st day of May, 1888,—one indorsement refusing to pass upon or give them as applicable to the case, the other treating them as proposed findings,—and refusing the request to sign and settle the same, because the court had upon that day signed and filed findings of fact in accordance with its decision.

We fail to perceive any good ground upon which it ought to be contended that the practice as here suggested should be held to prevail in any court. If rulings are needed as to the admission or exclusion of evidence involving the determination of questions of law or rulings upon a motion for a nonsuit, or upon any motion or matter which may arise during the progress of the trial, and which are authorized by law to be determined by the court, when counsel on both sides may be present, and can state their views, such rulings can be had before the cause is submitted to the court for final decision. But upon what sound reason a court to whom a cause, upon the law and facts, after hearing, has been submitted for decision, and the trial has practically ended, can then be compelled to instruct itself, as a jury, and at the same time prematurely commit itself as a court to propositions of law in advance of its decision which is made, by its findings of fact and conclusions of law, we do not perceive. There is no statutory provision which prescribes any such course of action, and we can see nothing whatever to recommend it. None of the cases cited by appellant are, we think, in point. If the propositions are to be considered as findings presented to the court, then it was a species of dictation to which the court was not compelled to submit. The question in all such cases is whether the written findings made by the court are sufficient, and the presence or absence of a request to make findings is utterly immaterial; and there is nothing here to show that the findings made were insufficient. Pereira v. Smith, 79 Cal. 233, 21 Pac. Rep. 739.

The further point is made that the findings of the court as to the ownership of the property for the possession of which the action was brought are not sustained by the evidence. We do not concur in this view of the matter, and think the evidence was sufficient. It does not seem to be questioned by either party here, but that the statute under which this percentage may be recovered is still in force, as decided in Whitaker v Haynes, 49 Cal. 596. That statute is in effect that "the prevailing party shall be allowed five per cent. on the amount recovered," etc., "in litigated cases," not to exceed $100 on any one judgment. The test here is what is the meaning to be given to the words "amount recovered," as to the judgment under consideration. It is in the alternative, under section 667 of the Code of Civil Procedure, for the return of the property mentioned in the complaint, or, in case a return thereof cannot be had, for the sum of $1,837.50 and interest, making in the aggregate, $2,386.85, with interest on that amount at 7 per cent. from rendition of judgment, and costs, on which amount, to the extent of $100, the percentage was claimed. The "amount" recovered is not the primary and absolute result of the judgment. It may never be recovered, because the whole property or a part thereof may be returned, in which event there would be a percentage given for an amount which was not recovered at all, and in this case it does not appear whether the property, or any part of it, would be returned or not. Hence we do not think that the statute in question includes such a judgment as the one in hand. It follows that the judgment and order refusing a new trial, and the order retaxing costs, should be affirmed, and we so advise.

We concur: TEMPLE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order refusing a new trial, and the order retaxing costs, are affirmed.

(3 Cal. Unrep. 415)

PEOPLE v. BRUGGY. (No. 20,706.)

(*Supreme Court of California.* June 16, 1891.

REHEARING—NEW QUESTIONS—DEATH SENTENCE.

On appeal from a sentence of death, the supreme court will consider questions raised for the first time in a petition for rehearing.

On rehearing. For former report, see 26 Pac. Rep. 756.

PER CURIAM. In this case we are entirely satisfied with the correctness of the decision heretofore rendered upon all the points discussed in the opinion of the court. But in their petition for a rehearing counsel for the defendant present an altogether new point, as to which we have grave doubts. In civil cases we have invariably refused to grant a rehearing for the purpose of considering a suggestion of error made for the first time in the petition for rehearing, but we feel constrained to relax this rule in a criminal case in which the defendant is appealing from a judgment of death. Rehearing granted.

(89 Cal. 440)

PORTER v. JENNINGS, Sheriff, *et al.* (No. 13,469.)

(*Supreme Court of California.* June 10, 1891.)

INJUNCTION—SALE OF LANDS ON EXECUTION—DISSOLUTION ON ANSWER.

1. In an action to restrain the sale of land under execution against plaintiff's grantor the court should continue the restraining order pending final determination, and it is an abuse of discretion to dissolve it upon the filing of an answer denying the allegations of the bill.

2. While denials upon information and belief, authorized by Code Civil Proc. Cal. § 437, are sufficient to raise an issue, they are not such denials as will justify the dissolution of a temporary injunction on the ground that the bill is fully denied by the answer.

Department 1. Appeal from superior court, Santa Cruz county; F. J. MCCANN, Judge.

A. S. Kittredge, for appellant. *T. H. Laine* and *Z. N. Goldsby*, for respondents.

GAROUTTE, J. This is an action for a perpetual injunction to restrain Jennings, the sheriff of Santa Cruz county, from selling the land of plaintiff, under an execution issued on a judgment in favor of defendant Cummings against one William N. Cummings. The complaint was full and complete. The answer denied plaintiff's ownership, specifically averring that the deed from the execution debtor, Cummings, to one Ketchum was in fact a mortgage, and that the deed from Ketchum to plaintiff conveyed no title. Upon the filing of the complaint, an order was made on defendants to show cause why an injunction should not be granted to stay proceedings pending the final determination of the suit, and a temporary restraining order was issued. The matter was heard upon the complaint and answer, and upon a decree of the court made in the case of Cummings v. Cummings, which does not appear to be material. The restraining order was set aside by the court, which was, in effect, a refusal to grant the injunction. Hicks v. Michael, 15 Cal. 109. From this order denying the application for an injunction *pendente lite* plaintiff appeals.

The rule is so well established in this state that an order granting or dissolving an injunction is a matter of discretion with the lower court, which this court will not review, except where an abuse of that discretion is urged, that a citation of authority upon the question is useless labor. Applying this well-established principle to the case under examination, can the action of the trial court be sustained? The plaintiff claims to be the owner of a tract of land, purchased in good faith, for a valuable consideration, in the actual possession thereof, and now seeks to prevent a sale under execution against the original grantor. It is settled law in this state that injunction is the proper remedy in this character of action, and that a dissolution of the restraining order does not follow as a matter of course upon the filing of the answer denying the equities of the complaint. Conceding that the denials in the answer of defendants are complete and unobjectionable, still it would seem in the exercise of a sound discretion the lower court should have held the sale in abeyance until the final disposition of the case upon its merits. "Especially will this discretion be exercised where fraud is the *gravamen* of the bill, or when it is apparent to the court that a dissolution of the injunction would result in greater injury and hardship than its continuance to the hearing, or where it is apparent that by a dissolution complainant would lose all the benefit which would otherwise accrue to him should he finally succeed in his cause. * * * So, where the case, as presented by the bill, is one which seems to require investigation, and the effect of dissolving the injunction would be to place the property, which is the subject of controversy, beyond the control of the court in which the action is pending, and would be equivalent to a complete denial of the relief sought by the bill, the injunction will not be dissolved." Sections 1508, 1509, High, Inj. "If the continuance of the injunction, even admitting defendant's answer to be true, cannot prejudice or imperil his rights, and on the other hand its dissolution might seriously impair the rights of complainant, the motion to dissolve upon the coming in of the answer should not be allowed." Section 1511, Id. "It is also held that where the injunction is not merely ancillary to some other or principal relief sought by the action, but is itself the principal relief desired, and its dissolution would be equivalent to a dismissal of the action, if a reasonable doubt exists in the mind of the court whether the bill is sufficiently negatived by the answer, it is proper to refuse a dissolution, and continue the injunction to the hearing." Section 1512, Id. "Thus, in the case of an injunction against a sheriff's sale of real property under an execution, while a serious question is pending and undetermined as to whether the land is really subject to sale in satisfaction of the judgment, a motion to dissolve will not be granted, but the injunction will be continued to the hearing." Section 1543, Id. It must be conceded that, if plaintiff prove the allegations of his complaint at the trial, he will be entitled to a judgment of perpetual injunction, but then his judgment is a nullity; the calamity has befallen him; the horse has already been stolen; the sale has already been made; the relief has come too late; the cloud upon his title is an accomplished fact. The judgment of the trial court in denying the injunction deprived plaintiff of all benefit of the right to which the law declares he is entitled. It is virtually dismissing the action because defendants deny plaintiff's right. It is practically rendering judgment for defendants because they deny the allegations of the complaint. In this case defendants could not have been prejudiced, nor their rights imperiled, by the granting of the injunction. The execution had been levied; the lien, if any, was secure; no injury, aside from delay, (which a bond would fully satisfy,) could result to defendants. "To dissolve the injunction, and permit the plaintiff's farm to be sold, under this judgment at sheriff's sale, to the highest bidder, while a serious question is pending here whether it can be sold at all under the judgment, would be indiscreet." Van Mater v. Holmes, 6 N. J. Eq. 593.

In the case of Hicks v. Compton, 18 Cal. 210, the court used the following language: "The rights of the defendants are protected by a bond, and no injury can result to them from a continuance of the injunction. The plaintiff has no security whatever, and the dissolution of the injunction leaves him at the mercy of the defendants. The granting and continuing of injunctions of this nature are to some extent matters of discretion, and this discretion should always be exercised in favor of the party most liable to be injured." In the case of Hunt v. Steese, 75 Cal. 624, 17 Pac. Rep. 920, where the trial court refused an injunction *pendente lite* to restrain waste in an action of ejectment, this court said: "In all cases of this kind, an injunction should be granted pending the determination of the issue as to ownership, unless it appears that the plaintiff's title is bad, or, at least, that there is no reasonable ground for the assertion of title by the plaintiff." And again: "Not only should there be an answer to the merits, but it should be made reasonably certain by the pleadings and the affidavits that the attack upon the patent will be ultimately successful, or the injunction should be granted." And thereupon this court directed the lower court to issue the injunction. To sustain respondents in this appeal would deprive appellant of all benefit which would accrue to him should he finally succeed in his cause, and would be a complete denial of the relief sought by the complainant. The injunction prayed for is not merely ancillary to other relief; it is itself the principal relief desired, and its denial is equivalent to dismissal of the action. Upon the authorities heretofore quoted, and upon principles of sound reason and justice, we think an injunction should have issued pending the final judgment in the cause.

Certain allegations of the complaint are denied upon information and belief. While denials in this form are authorized by section 437 of the Code of Civil Procedure as matters of pleading, and are sufficient to raise an issue, yet they are not such denials as will serve as the basis of a motion to dissolve an injunction on the ground that the equities of the bill are fully denied by the answer. Judge STORY says: "Such negation affords no presumption against the plaintiff's claim, but merely establishes that the defendant has no personal knowledge to aid it or disprove it." Poor v. Carleton, 3 Sum. 77, 78; High, Inj. § 1514. The order refusing to grant the injunction should be reversed, and the trial court directed to issue the injunction asked for by plaintiff, pending the final determination of the cause upon its merits.

We concur: PATERSON, J.; HARRISON, J.

(89 Cal. 464)

RESPINI v. PORTA. (No. 13,252.)

(*Supreme Court of California.* June 16, 1891.)

LANDLORD AND TENANT—ABANDONMENT OF PREMISES—DAMAGES.

1. Under Civil Code Cal. § 3300, providing that for breach of contract the measure of damages is that amount which will compensate the party for all detriment proximately caused thereby, a landlord whose premises are abandoned by his tenant, and who thereupon leases the same to another, can recover as damages only the difference between the amount he should have received under the first lease and that which he actually did receive under the second.

2. Civil Code Cal. § 3302, providing that the detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the obligation, does not apply to an action by a landlord to recover damages for the abandonment of the leased premises by the tenant.

Department 1. Appeal from superior court, Santa Cruz county; F. J. MCCANN, Judge.

Joseph H. Skirm, for appellant. *Z. N. Goldsby*, for respondent.

PATERSON, J. On November 1, 1884, the plaintiff leased certain real and personal property to the defendant for the term of five years at an annual rental of $2,400, payable quarterly in advance. The defendant entered into possession of the lands, and held the same, and paid the rent regularly for one year. On November 2, 1885, plaintiff demanded payment of the rent due for the first quarter of the second year, but the defendant replied that he had no more money, could not pay the rent, and was going to leave the place and give up everything. Plaintiff answered that he had not come to take possession of the property, but to ask for his rent, but if the defendant was going to abandon the property he would take possession of the same to protect it. The defendant thereupon surrendered possession of the property to the plaintiff. A few days after the 2d day of November, 1885, the plaintiff leased the property to one Filippini at a rental of $2,000 per year, and the latter has ever since held possession and paid rent at that rate. This action was brought by the plaintiff to recover the sum of $600, being the amount claimed to be due him from defendant on November 1, 1885, together with interest thereon at the rate of 7 per cent. per annum from that date. The court below held that the defendant was entitled to a credit of $500, the amount the plaintiff had received from Filippini.

It was properly held by the court below that the abandonment of the premises to the plaintiff, and the taking possession by him against his wish, and the subsequent letting of the property to another tenant, was not a surrender and termination of the lease under the circumstances. A landlord, upon a wrongful abandonment by his tenant, may, if he choose, decline to meddle with the property at all, and at the end of the term sue for the rent. He is not, however, driven to this course, and run the risk of damage to his property, or the insolvency of his tenant. In this case the plaintiff pursued the right course in letting the property to Filippini, and we presume that he procured the highest rent that could be obtained. But we cannot support him in his contention that because the defendant, against his (plaintiff's) wishes, and without right, abandoned the property, he is entitled to recover the full amount provided for by the terms of the lease to defendant. Our Code provides that "for the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." Section 3300, Civil Code.

We think plaintiff's rights are measured by the provisions of this section, and not by section 3302, Id. In cases of this kind the landlord is not entitled to recover for rent of the premises after the abandonment of them by the defendant, but has compensation for the injury, and his measure of damage is the difference between the rent he was to receive and the rent actually received from the subsequent tenant, provided there has been good faith in the subsequent letting. Gear, Landl. & Ten. §§ 128, 176; Ledoux v. Jones, 20 La. Ann. 540; Bloomer v. Merrill, 29 How. Pr. 259; Randall v. Thompson, 1 Tex. Civil Cas. Ct. App. 1102; Auer v. Pennsylvania, 99 Pa. St. 370; Field, Dam.

§ 523. Appellant contends that, as nearly two years had passed between the time of the abandonment by the defendant and the trial of this action, the court below ought to have allowed the plaintiff about $800, that being the amount of damage up to that time through the defendant's breach of his obligation as lessee. The complaint, however, was filed on November 28, 1885, and no claim was made therein for anything beyond the amount of the first installment. Under the pleadings the court could not allow for any subsequent installments. Judgment affirmed.

We concur: Harrison, J.; Garoutte, J.

89 Cal. 456

Walker v. Emerson *et al.* (No. 13,408.)

(*Supreme Court of California.* June 10, 1891.)

Injunction—Water-Rights—Easements.

A land-owner may have an injunction against a stranger, who, under claim or right, is taking water from his canal by means of a ditch across his land, even though the amount of water taken is inappreciable, since its continued use would ripen into an easement in the land.

Department 2. Appeal from superior court, Contra Costa county; Joseph P Jones, Judge.

A. H. Griffith and *A. C. Hartley*, for appellants. *W. S. Tinning* and *W. S. Wells*, for respondent.

McFarland, J. This action was brought to enjoin defendants from depositing dirt upon plaintiff's land, and from diverting water from plaintiff's canal, on his said land, and for damages. Judgment was rendered for plaintiff, enjoining defendants as prayed for, and defendants appeal from the judgment and from an order denying a new trial. We think that the evidence supports the findings.

Plaintiff owns a tract of land through which there is an artificial water-way or canal, about 7 feet deep and 40 feet wide, which is wholly owned and controlled by plaintiff, and was originally constructed mainly for purposes of navigation. It receives its waters—or most of them—from a slough connected with the San Joaquin river, and is filled and emptied by the flow and ebb of the tides of the Pacific ocean, although the water which flows into it is river water and fresh. The appellants divert water from said canal by means of a ditch which they dug through and over plaintiff's land, and connected with the canal by a box. They seem to take the position that when the canal is filled by the influence of the tides, the amount of water in it is inexhaustible, and incapable of being diminished; that, therefore, the amount diverted by them can do respondent no damage; and that, therefore, an injunction will not lie. If there is any such principle with respect to water-rights, it certainly could be applied only to a case where a party, without intruding upon the possessions of others, and without committing any direct trespass upon another's land, took water from a stream at a point where he had a right to approach it, to the alleged damage of persons claiming water-rights at other points on the stream. But there is clearly no principle by which a mere intruder can go upon the land of another, and take water from an artificial ditch thereon. Such an act is an injury to the right, and, if threatened to be continued, should be enjoined, whatever opinion persons other than the owner may have about the extent of the damage that may result. "The right to an injunction, therefore, in such a case, does not depend upon the extent of the damage, measured by the money standard; the maxim *de minimis* does not apply." Learned v. Castle, 78 Cal. 461, 18 Pac. Rep. 872, and 21 Pac. Rep. 11, and cases there cited. It is true that the court finds in one place that plaintiff was not actually damaged by the taking of the water that had occurred; which means, we suppose, that the court could not make any money estimate of such damage; but the court also finds that "if said defendants are not restrained and enjoined from using said water, and conducting the same through said ditch, said use thereof by defendant will ripen into an easement on the part of the defendants, and prevent the unrestricted use of said canal by plaintiff, and cause plaintiff great and irreparable injury." The question of damages is irrelevant. The threatened act of appellants "disturbs the plaintiff's possession, and, if permitted to continue, will ripen into an easement. That of itself is sufficient to entitle him to an injunction." Richards v. Dower, 64 Cal. 64. The threatened filling up of plaintiff's land with dirt, thus destroying his fruit-trees, etc., is of the same character as the digging of the ditch and the diversion of the water; and upon the same principle such acts were properly enjoined. We see no error in the rulings of the court below. The judgment and order appealed from are affirmed.

We concur: De Haven, J.; Sharpstein, J.

89 Cal. 268

Hihn v. Mangenberg. (No. 13,355.)

(*Supreme Court of California.* May 28, 1891.)

Ejectment — Sufficiency of Complaint — Description of Lands.

1. In ejectment, a complaint alleging that plaintiff is seised in fee of the realty, and defendant is in possession, and against plaintiff's will detains and withholds the possession thereof, is sufficient on demurrer.

2. Where, in ejectment, the land is described as being in S. township, S. C. county, California, and bounded on the north-east by Bay avenue, on the S. E. by the land of M. E. Land, and on the S. W. and N. W. by S. creek, the description is sufficient on special demurrer.

Appeal from superior court, Santa Cruz county; F. J. McCann, Judge.

Z. N. Goldsby, for appellant. *Charles B. Younger*, for respondent.

Garoutte, J. This is an action of ejectment. The complaint was attacked by a general demurrer, and also by a special demurrer, as to the sufficiency of the description of the land involved in the litigation. The demurrer was overruled, and an answer filed by defendant, denying the allegations of the complaint, and setting up a lease by plaintiff to G. Mangenberg, the husband of defendant, and alleging that she was the surviving widow of said deceased lessee, and that no administration has been had upon his estate. This is an appeal by the defendant from the judgment and order denying her motion for a new trial. The demurrer was properly overruled. The complaint alleges that the plaintiff is seised in fee of the realty; that the defendant is in possession, and against plaintiff's will detains and withholds the possession thereof. After a careful review of the law upon this question, this court, in Payne v. Treadwell, 16 Cal. 243, held such a complaint sufficient. To the same effect is Rego v. Van Pelt, 65 Cal. 254, 3 Pac. Rep. 867.

The demurrer to the complaint, as to the insufficiency of the description of the realty, was not well taken. The land was described as being in Soquel township, Santa Cruz county, state of California, and bounded on the north-east by Bay avenue, on the south-east by the land of M. E. Land, and on the south-west and north-west by Soquel creek. We cannot hold, from this description in the complaint, that it is impossible for the proper officer to identify the land in the field. Carpentier v. Grant, 21 Cal. 140; Lawrence v. Davidson, 44 Cal. 180. The lease from plaintiff to appellant's husband did not give her any greater right than the lessee would have had if he had lived. The lease was for a fixed period of five years, which expired December 31, 1888. Had the lessee been living at the expiration of this period, his tenancy surely would then have been at an end. Canning v. Fibush, 77 Cal. 196, 19 Pac. Rep. 376. The fact that the lessee died before the expiration of the lease could not prolong the term, and plaintiff had no interest or right in the property after the expiration of the lease. We have carefully examined appellant's exceptions upon the admission of certain evidence, and find no error in the rulings of the lower court. Let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

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89 Cal. 271

McCORD & BRADFIELD FURNITURE CO. v. WOLLPERT *et al.* (No. 13,281.)

(*Supreme Court of California.* May 28, 1891.)

PRINCIPAL AND AGENT—SCOPE OF AGENCY—LIABILITY TO THIRD PERSON.

A manufacturer wrote to a customer that for the next year he had 14 new patterns of furniture, and that "our Mr. W. will call on you early in January, and talk to you about handling the line next year." The agent called, and defendants claim to have bought old patterns of goods, which were not delivered. *Held*, the letter only gave authority to sell the new patterns, and the customer could not recover for a failure to deliver old patterns of furniture.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

John H. Dickinson, for appellant. *Olney, Chickering & Thomas*, for respondents.

FOOTE, C. The plaintiff brought this action against the defendants for the recovery of $881.67, alleged to be due it for goods sold and delivered to the defendants, who set up a counter-claim to an amount greater than that sued for by the plaintiff. The court found in favor of the plaintiff to the extent of its demand, and also for the defendants to the extent of $1,658, and rendered judgment in favor of the latter for the difference between the value of the goods sold and delivered and the amount allowed on the counter-claim. This appeal is from that judgment and an order denying a new trial.

The first point made by the appellant is that the court erred in finding, upon the evidence, that the plaintiff ever agreed to sell the defendants the goods which the former failed and refused to deliver the latter; the argument in this connection being that the proof showed that the alleged sale was made by an agent of the plaintiff of goods that were to be manufactured, which agent was one selling furniture on commission, and that it was not within the scope of his authority directly or ostensibly to make such a sale binding on the plaintiff. The evidence as to the scope of the agent's authority was to this effect: That the plaintiff, the McCord & Bradfield Furniture Company, a corporation, was doing business at Grand Rapids, Mich.; that Frank Wenderoth, its alleged agent, was a member of the firm of Wenderoth Bros. in the city of Chicago, whose business was that of merchants to sell furniture on commission; that he had for several years been coming twice a year to San Francisco, selling the goods of the plaintiff and of other manufacturers to the defendants; that through him the latter had made purchases of goods at various times from plaintiff. This being the ordinary course of business between the parties, the defendants on the 10th of December, 1886, received a letter from the plaintiff, to the effect that for the next year the latter had 14 new patterns of furniture, which it would be ready to submit to the inspection of the former, by the end of the month, concluding with this sentence: "Our Mr. Frank Wenderoth will call on you early in January, and talk to you about handling the line for next year." After the reception of this letter by the defendants, Wenderoth called upon them, and exhibited photographs of the furniture of the new patterns referred to in that communication, and also of certain old patterns. The defendants claim that he (Wenderoth) made a contract for the plaintiff to sell some furniture of the old patterns. Wenderoth testified that he only agreed to try to induce the plaintiff to make and furnish "the old patterns which the defendants had contracted to sell to a third party in California at a profit." The plantiff refused to fill the order because it had none of the old pattern furniture in stock, and would not manufacture it to fill the order, as it would not pay it to do so, and it had ceased to manufacture such goods. One of the defendants testified that Wenderoth was the general agent of plaintiff, authorized to make all contracts for the sale of its goods west of the Missouri river, and assigned as a reason for this knowledge that they never knew of or heard of any one else selling its goods. So far as the defendants' knowledge as to the scope of Wenderoth's agency was derived from the plaintiff, it was from the letter above adverted to, and a similar one, written some years before this transaction, and the bills sent for goods by the plaintiff had written on them that they were sold by Frank Wenderoth or Wenderoth Bros. So far as the direct authority goes which Wenderoth had from the letter introduced in evidence, and from the one which had been previously written, it seems that his authority to sell only extended to the new patterns of furniture which were in process of manufacture, were already manufactured, or were offered to be manufactured by these letters, which were written mainly for the purpose of notifying the defendants that the agent would be on hand, as he had been in previous years, and would endeavor to sell the new styles of furniture.

Upon the matter of the ostensible agency, to be deduced from what had occurred in former years, it does not appear that the course of business was other than that the agent sold the goods of the manufacturing company, presumably those that it was willing to manufacture, or that it was manufacturing, or that it had on hand. There is nothing to show positively that it would or would not have authorized the sale of old-style goods, which it had ceased to manufacture. The only instance where, according to the testimony of one of the defendants, the agent had undertaken to sell goods that were no longer manufactured, and not in stock, was the present instance. The agent had in at least one instance before this sold goods under a letter similar to the one in evidence, that is, containing authority to sell new pattern goods; and he had in previous years also sold whatever his principal had to sell; but it is not shown that he ever, in any of those years, undertook or did sell goods which had ceased to be manufactured by his principal. We do not see that his ostensible authority, independent of the letters, went any further than to sell goods that his principal had on hand, or was willing to manufacture, or was manufacturing. One who acts in one year for the sale of goods manufactured for sale for that year cannot be said from that circumstance to be the agent to sell the same goods for the next year, unless they are continued to be manufactured or are in stock, and the principal wishes to sell them. The very sending of an agent out to sell carries with it the idea that he is expected by the principal to sell to his advantage, and, this being so, it would seem to be going a long distance out of the way to say that, because he is expressly authorized to sell manufactured goods, he is also authorized to sell those that have ceased to be manufactured, and could not be except at a loss. We do not think that the evidence shows either direct or ostensible authority in the agent to sell goods that his employer had ceased to manufacture, and did not carry in stock, and could not manufacture except at a loss. An agent authorized to sell the property of his principal when manufactured has no authority to sell before it is manufactured. Merriam v. De Turk, 66 Cal. 549, 6 Pac. Rep. 424. By parity of reasoning, an agent who is shown to have authority to sell new pattern goods to be manufactured (and, so far as this evidence shows, the agent had no further authority than to do this, and to sell what his principal had already manufactured, or was willing to manufacture) cannot be said to have authority to sell what is not being manufactured, and will not be by his principal, because to manufacture it would result in a loss, which is not the prevalent idea in any business. We do not think that under such circumstances a reasonable man would believe that a principal would carry out any such contract, or had apparently intended to authorize his agent to make it. It becomes unnecessary to notice any other point made by the appellant, and we advise that the judgment and order be reversed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

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89 Cal. 367

STUART v. ADAMS *et al.* (No. 13,184.)

(*Supreme Court of California.* June 1, 1891.)

WHAT CONSTITUTES MINING PARTNERSHIP — LIABILITY OF PARTNERS — AUTHORITY OF SUPERINTENDENT.

1. Civil Code Cal. § 2442, providing that every general partner is jointly liable to third persons for firm debts, applies to members of a mining partnership.

2. A mine superintendent has the right to expend partnership funds for necessary supplies for the mine without express authority.

3. A contract by which a stranger agrees to work the mine, pay one-half the expense, and receive one-half the product as compensation, does not constitute him a partner, under Civil Code Cal. § 2511, providing that a mining partnership exists where several persons owning a claim actually engage in working it.

Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Nagle & Nagle, for appellants. *Hutchinson & Campbell* and *Alfred Dixon*, for respondent.

GAROUTTE, J. This is an action to recover $2,795.18 upon contracts for labor, and for money advanced. The defendants are mining copartners doing business under the firm name of the Alabama Bar Mining & Canal Company. Plaintiff performed labor for them at their mine, and a portion of the time acted in the capacity of superintendent. In this action he recovered a joint judgment for $2,311.16. This is an appeal from the judgment and order denying defendants' motion for a new trial.

Appellants insist that, as members of a mining partnership, they are only liable, *pro rata*, for the liabilities of the partnership according to their respective interests as part owners in the mine. No authority directly bearing upon this question has been presented for our consideration by counsel upon either side. In those states where mining partnerships are common we find many cases where judgments have been rendered against all the defendants (mining copartners) for the full amount recovered, and no question raised as to their validity upon that ground, and such has been the practice in this state. Jones v. Clark, 42 Cal. 181; Taylor v. Castle, Id. 367; Skillman v. Lachman, 23 Cal. 198; McConnell v. Denver, 35 Cal. 365. In McConnell v. Denver, supra, page 372, where the trial court rendered a joint judgment against some of the defendants, this court said: "Upon the findings the judgment should have been against Latham, as well as the other defendants. If he was a member when the contract sued on was made, and the contract was executed by a party duly authorized, he must, of course, be bound by it as well as the other members." While the language may tend towards the position of respondent, yet the court's attention does not appear to have been directed in that particular line. It is passing strange, if defendants' position is correct, that they have been allowed to quietly rest so long; yet its novelty does not deprive it of careful consideration by the court. "Mining partnerships, where there are no partnership articles, are governed by the law of ordinary partnerships, except so far as the general usage of persons engaged in similar pursuits, or the established practice of the particular company, has established a different rule. The only difference generally existing, as established by the decisions of this court, is such as legitimately flows from the fact that in such copartnerships there is no *delectus personæ*." Jones v. Clark, 42 Cal. 193. "Every general partner is liable to third persons for the obligations of the partnership, jointly with his copartners." Section 2442, Civil Code. We do not believe that the fact that in mining partnership there is no *delectus personæ* takes them out of the rule laid down in the foregoing section of the Civil Code. In all the cases we have examined which attempt to enumerate the differences existing between general partnerships and mining partnerships arising from the fact that in the latter there is no choice of partners, as already stated, we find none to assert that one of the distinctive features is that mining copartners are only liable to creditors for a *pro rata* amount of the indebtedness. There is no good reason in saying that "my partner is not one of my choice, and therefore can only bind me for a *pro rata* of the indebtedness." The proportion of the indebtedness for which he shall be bound to a third party has no relation whatever to the fact that his associate in business is not one of his choice, and does not legitimately flow from the absence of *delectus personæ*. A member of a mining partnership is bound or not bound by the acts of a copartner, who is forced upon him according as the copartner acts with or without authority, and, if he is bound at all, it would seem that he is bound to the full extent of the liability. Section 2513 of the Civil Code, which provides that a member of a mining partnership shares in the profits and losses thereof in the proportion to his interest, etc., seems to reiterate the law of ordinary business partnerships. It does not add to the weight of appellants' contention; for it must be construed as referring to the relations of the partners as to each other, and has no reference to the liabilities of the partnership to third parties. Section 2514 of the Civil Code reads: "Each member of a mining partnership has a lien upon the partnership property for the debts due the creditors thereof, and for money advanced by him for its use." Section 2520, Id.: "The decision of the members owning a majority of the shares or interests in a mining partnership binds it in the conduct of its business." It is difficult to see why each partner should have a lien upon the partnership property for the debts due the creditors, if such partner be not liable to those creditors for the debts. It is apparent this lien is given for the purpose of enabling him to collect from his copartners their proportion of the indebtedness which he has been compelled to pay in full. By reason of the foregoing views, and from the additional fact that if the legislature, in framing the provisions of the Civil Code defining and governing mining partnerships, had intended to place such a great innovation upon the universal law of ordinary partnerships, to-wit, that a partner is only liable to creditors for his proportion of their claims, according to his interest, it would have so declared in explicit terms, we conclude that appellants' contention has no merit.

Plaintiff, as superintendent of the mine, had the right to expend for the partnership moneys in the purchase of articles that were necessary for the conduct of the mine in the usual manner, without express authority. "The company being a mining partnership, managed by a superintendent, it follows that the superintendent could not bind the partnership, except upon such contracts as are usual and necessary in the ordinary prosecution of the work. He could purchase the supplies and materials necessary for the usual working of the mine upon credit." Jones v. Clark, 42 Cal. 180.

Plaintiff contracted with defendants to work the mine, pay one-half the expenses thereof, and receive one-half the product of the mine for his labor. This contract does not constitute a mining partnership between plaintiff and defendants. "A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it, and extracting the mineral therefrom, actually engage in working the same." Section 2511, Civil Code. "* * * The relation arises from the ownership of shares or interests in the mine, and working the same for the purpose of extracting the minerals therefrom." Section 2512, Id. In the construction of a contract very similar to the one under discussion, this court said in Hudepohl v. Water Co., 80 Cal. 558, 22 Pac. Rep. 339: "Such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered. It is in all essential features a contract for labor to be performed and to be paid for by a share of the profits realized from such labor." Appellant insists that the evidence does not show that the defendant Adams had any authority to employ plaintiff under the verbal contract of May, 1884. It would serve no good purpose to enter into a detailed statement of the evidence upon this question as disclosed by the record. There was certainly ample evidence to justify the court in denying the motion for a nonsuit, and allowing the jury to pass upon this question of fact. The instructions appear to contain a very full and fair statement of the law of the case. Let the judgment and order be affirmed.

We concur: Paterson, J.; Harrison, J.

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89 Cal. 316

Brock v. Luning. (No. 13,327.)

(*Supreme Court of California.* May 28, 1891.)

Municipal Corporations — Local Improvements —Contracts—Assessments.

1. The time specified by the board of supervisors for the completion of certain street work in the published proposals for bids, and the award of the contract, was 25 days, but the contract made by the superintendent of streets and contractor gave 30 days. *Held*, the contract was void, and assesssments to pay for work done thereunder could not be enforced.

2. Where the action of the superintendent of streets was void, the assessment could not become valid by failure of defendant to appeal from the board of supervisors, as allowed by Act Cal. 1872, § 12.

Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

J. M. Wood, (*J. C. Bates*, of counsel,) for appellant. *Langhorne & Miller*, for respondent.

Per Curiam. This appeal is from a judgment in favor of the defendant, and is brought up on the judgment roll alone. The action was instituted to foreclose a street assessment made by the superintendent of streets of the city and county of San Francisco. The court below found that the contract entered into by that officer and the person to whom the street work was awarded by the board of supervisors of that city and county was void, because the time within which it specified the work was to be done was a different time than that authorized by the board in the notice inviting sealed proposals by bidders to do the work, and in the award of the contract; and that the assessment based upon such void contract was also void, and not to be enforced. It seems from the findings that the time specified in the published proposal to bidders and in the award of the contract was 25 days from the signing of the contract, but the contract actually made and entered into by the superintendent of streets, and the contractor to whom the assessment was issued, was that the work should be completed in 30 days from the signing of the contract.

The appellant contends that the difference in time between the contract authorized to be entered into and that actually entered into was a mere irregularity, and did not affect the validity of the assessment, the board of supervisors having once acquired jurisdiction to do the work; and that the defendant could have appealed to the board of supervisors under section 12 of the street act of 1872, and that, not having done so, the assessment was valid, and should have been enforced. He further claims that, even if the contract was void as to 5 days of the time specified therein in which it was agreed to be done, yet it was good as to 25 days, and, if the work was done in that time, the assessment was properly made. It has been held in many cases that neither the board of supervisors nor the superintendent of streets possesses the power to grant extensions of time for the performance of work under a street contract after the expiration of the time limited in the contract, and that an order granting such extension is void. Raisch v. City and County of San Francisco, 80 Cal. 4, 22 Pac. Rep. 22; Beveridge v. Livingstone, 54 Cal. 54; Fanning v. Schammel, 68 Cal. 428, 9 Pac. Rep. 427; Dougherty v. Coffin, 69 Cal. 454, 10 Pac. Rep. 672. "The statute itself makes time of the essence of contracts for street work." Raisch v. City and County of San Francisco, 80 Cal. 5, 22 Pac. Rep. 22. The extension of time after that contracted for has expired is forbidden, because of the fact that the contract entered into by the superintendent of streets, as the mere ministerial act of an agent to do a certain thing under the statute, must follow the letter of authority, which is the resolution of award made by the board of supervisors. If the time mentioned in the award as that within which the work to be contracted for must be finished, and which is then put into the contract and becomes of the essence of it, cannot be extended after it has expired, can it not be said that by parity of reason the ministerial agent cannot go outside, in the inception of his ministerial act, of his letter of authority, and extend the time in making the contract, thus making the time, which is of the essence of the contract, different from that in the award, which is the very source of his authority? If he can thus diverge from the letter of his authority to the extent of 5 days, he can do so for 5,000; and so the very object of the law, that is, that the board of supervisors shall be the power to fix the time within which street work is to be done, is done away with, and the discretion of the superintendent of streets, not contemplated by the street act, is substituted.

If it should be argued that the notice to bidders to make proposals, and the putting in of a bid, and the award of the contract, shall be said to authorize the contractor to do the work in the time mentioned in the award, without entering into the written contract with the superintendent of streets, or giving the bonds required by law, then it would appear that these last conditions necessary to be done, as prescribed in the law of 1872, pp. 808, 809, are superfluous, and need not be regarded. This view cannot be maintained. Time is of the essence of the contract, and it must be the time set out in the award, and the proceedings upon which such an assessment as here involved are based, being *in invitum*, must be strictly pursued, in strict compliance with the law under which they are taken. Raisch v. City and County of San Francisco, 80 Cal. 5, 22 Pac. Rep. 22. The award by the board of supervisors of the contract here was the measure of the superintendent's power as to time, which was to be of the essence of the contract. If the contract, by him a purely ministerial act, did not follow the award, it was not the contract which he was authorized to make, and it was therefore invalid. Dougherty v. Hitchcock, 35 Cal. 524. As the action of the superintendent of streets was void, it could not become valid by the failure of the property owner to appeal, under section 12 of the law of 1872, to the board of supervisors. He could not appeal unless "aggrieved." Such owner was not aggrieved, for the contract made was void, and affected his rights no more than would a void judgment. "The failure of the contractor to appeal did not operate (1) to create a grievance on the part of the defendants, or (2) to estop them from complaining of it." Burke v. Turney, 54 Cal. 486. The judgment is affirmed.

(89 Cal. 583)

Dennis v. Strassburger. (No. 13,151.)[1]

(*Supreme Court of California.* June 25, 1891.)

Vendor and Vendee—Rescission—Tender.

1. Where one makes a deposit upon a contract for the sale of real estate, which provides that 15 days shall be allowed for the examination of title, and, if defective, 30 days shall be allowed to perfect the same, he cannot sue to rescind, and recover the amount deposited, upon the ground of failure of title, before the expiration of the 30 days.

2. Where a deposit is made in part payment of real estate, under a contract for a deed, the vendee cannot recover the amount so deposited if he fails to tender the full amount of the contract price, and demand a deed as therein provided.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

J. C. Bates, for appellant. *E. F. Preston*, for respondent.

Garoutte, J. This action is brought to recover $800 as a deposit and part payment of O. L. block 986 in the city and county of San Francisco, under a contract in writing, set forth in the complaint, as follows: "I. Strassburger and Co., Real-Estate Agents, 326½ Montgomery St., Safe-Deposit Building. San Francisco, August 22, 1887. Received of S. W. Dennis eight hundred dollars as a deposit and in part payment of the following property, being situate in the city and county of San Francisco and state of California, and more particularly described as follows, to-wit, O. L. block 986, sold to him this day for the sum of eight thousand dollars, U. S. gold coin, fifteen days allowed for examination of title and completion of purchase, *i. e.*, seventy-two hundred dollars is to be paid upon the tender of a good and sufficient deed conveying the title; if title is defective, thirty days are allowed to perfect the same; and if, after the expiration of said term, unless extended by mutual consent, the title shall not have been perfect, the deposit is to be returned on demand. If the sale is not consummated according to the foregoing conditions, the deposit is to be forfeited, and become the property of the undersigned. Time is the essence of this contract. [Signed] I. Strassburger." The complaint further alleges that the title was defective; that no deed was tendered within 30 days after the making of the agreement, or at any time, and the time was not extended by mutual consent; that plaintiff has done and performed all the conditions and terms of the contract on his part to be done and performed, and that defendant has refused to return to plaintiff said deposit of $800, although demanded so to do, upon September 22, 1887. Defendant by his answer admits the making of the contract; denies that the title is defective; admits that he never tendered a deed, and that the time was not extended by mutual consent; denies that plaintiff has done and performed all the conditions and terms of the contract set forth in the said complaint on his part to be done and performed; admits that he refused to deliver the amount paid to plaintiff upon demand. At the trial plaintiff introduced evidence showing the pendency of two certain suits in the superior court of the city and county of San Francisco, one in ejectment and the other in partition, and which litigation included, among other land, the land described in the complaint.

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[1] Petition for rehearing pending.

It was further testified that these suits included within their claims the larger portion of the city of San Francisco, and that the witness had no knowledge as to the merits of the litigation. Defendant gave to plaintiff's attorney an abstract of title to the property September 3d, and, shortly after, said attorney rejected the title; and upon September 22d a demand was made for a return of the money, plaintiff at that time notifying defendant that he was not satisfied with the title. Plaintiff rested his case, whereupon defendant made a motion for a nonsuit, which motion was granted, and plaintiff appeals from that judgment, and from the order denying his motion for a new trial. The grounds upon which the motion for a nonsuit was based are not stated as clearly and concisely as they should be, but they appear to be mainly that plaintiff failed to show that the title to the land was defective, and, again, if the title was defective, defendant was entitled to thirty days under the contract to remove such defects, and that he neither had notice that such defects existed, nor was given 30 days in which to correct or remove them.

This is an action to rescind a contract, and, in order for plaintiff to recover, it was necessary for him to allege and prove that he had performed all the conditions on his part to be performed, and that defendant was in default as to conditions to be performed by him. Under the contract, 15 days was allowed plaintiff to examine the title, and then, if the title was defective, defendant was allowed 30 days to perfect the same. It is extremely difficult to comprehend how plaintiff was entitled to recover back the $800 until he had first given defendant 30 days' time to perfect the title, (if the title was defective.) In order to recover in this action, plaintiff should have tendered the balance of the purchase price and demanded his deed; and, if such demand was refused, he should then have demanded the return of his money. If he based his right of recovery upon defective title, he should have notified defendant that the title was defective, and if, upon the expiration of 30 days from that time, defendant had not perfected his title, then he should have demanded the return of the amount paid, and a refusal would have formed a basis for a good cause of action. He demanded a return of the money upon September 22d. If he based his right to rescind upon defective title, then his demand for a return of the amount paid was premature, and of no avail; for the time in which defendant was allowed to perfect his title had not yet expired. The allegation and proof that the defendant, within 30 days after the making of the contract, did not tender plaintiff a deed adds no weight to his contention; for it was as much the duty of the plaintiff to tender the money as it was the duty of the defendant to tender the deed. "The obligation of the parties to an agreement for the sale of land are mutual and dependent, where one is to convey and the other at the same time to pay the purchase price; neither can put the other in default except by tendering a performance on his part, unless the other party waives the tender, or by his conduct renders it unnecessary." Englander v. Rogers, 41 Cal. 420. To the same effect are Hill v. Grigsby, 35 Cal. 661; Barron v. Frink, 30 Cal. 488. Conceding the title to be defective, and conceding the allegation of plaintiff's complaint to be true, by reason of the insufficiency of the defendant's denial thereof, to-wit, "that plaintiff has done and performed all the conditions and terms of the contract on his part to be done and performed," yet, in addition to these facts, he must prove that defendant has made default in the performance of some of the conditions upon his part to be performed; and we look in vain, either in allegation or proof, for anything alleging or showing neglect or refusal to perform such conditions upon his part. The defendant not being in default, the plaintiff has shown no ground upon which to base a rescission of the contract. The contract was a valid, binding contract, and it was only requisite that it should be signed by the party to be charged. Cavanaugh v. Casselman, (Cal.) 26 Pac. Rep. 515. For the foregoing reasons let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

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89 Cal. 602

WATT *et al.*, Directors, v. SMITH. (No. 13,417.)

(*Supreme Court of California.* June 26, 1891.)

SUPPORT OF INSANE PERSON—HUSBAND'S LIABILITY.

Acts Cal. 1885, pp. 32, 33, which provide that, in case an insane person is able to pay actual expenses, a guardian may be appointed, whose duty it shall be to pay such expenses to the board of directors of the insane asylum, and, if indigent insane persons have kindred of degree of husband or wife of ability to pay, they shall support, etc., give such board power to collect a debt due the directors from a husband of an inmate, and they may maintain an action for such recovery as trustees of an express trust.

Commissioners' decision. Department 2. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

This was an action brought by Watt and others, as directors of the state insane asylum at Stockton, against one Smith, to recover for the charges and expenses of his wife while an inmate of the asylum. Judgment was rendered upon the pleadings in favor of defendant, and plaintiffs appeal.

Wm. Fitzmaurice and *Louttit, Woods & Levinsky*, for appellants. *N. C. Briggs*, for respondent.

TEMPLE, C. This appeal is from the judgment and on the judgment-roll. The action is to recover from defendant, as husband of an inmate, the amount fixed by the directors to be paid by paying patients. Judgment was entered for defendant on the ground that plaintiffs were not the real parties in interest, and had not legal capacity to sue; and this is the only question raised here. All the facts necessary to enable the plaintiffs to recover, if they can sue in their own names, are found by the court. The defendant's wife was an indigent inmate, duly committed to the asylum; and the board had by resolution, in due form, fixed the amount to be paid by paying patients. The powers of the board are defined by section 2137 of the Political Code; but neither in that nor in any other statute existing at the time this suit was commenced is the board expressly authorized to sue. Such authority was given them by act of March, 1889, passed after this suit was commenced. The duties of the board with reference to such moneys are defined by St. 1885, pp. 32, 33. It is provided, in case an insane person is able to pay actual charges and expenses, a guardian may be appointed, whose duty it shall be to pay such expenses to the board; and "if indigent insane persons have kindred of degree of husband or wife, father, mother, or children, living within this state, of sufficient ability, who are otherwise liable, said kindred shall support such indigent insane person to the extent prescribed for such paying patients;" and, further: "All moneys belonging to the state received by the board of trustees other than that appropriated by the state shall be kept by said trustees in a separate fund, to be known as a 'contingent fund,' and the same shall by the said trustees be expended at such times and in such manner as to the said board appears for the best interest of said asylum, and for the improvement thereof, and of the grounds and buildings therewith connected. A full, strict, and itemized account of such receipts and expenditures shall be included in the biennial report of said board of trustees." It appears from the Code that all the expenses of the asylum are paid from the money appropriated by the state; and we have not found any source from which moneys belonging to the state can come into their possession except these funds, received by them in payment for inmates as provided in this act. At all events, these constitute a portion of this contingent fund, which the board is authorized to receive and to expend, and which, impliedly, it is made their duty to collect.

The obligation is fixed and certain upon the defendant to pay. Independently of the statute, he is liable for the support of his wife. The statute makes it his duty to pay the directors for such support. It is a debt due from him to the directors, as trustees of the asylum. Authorities may be found to the effect that all public officers have an implied power to take all legal measures in their official character which may be requisite to enable them to execute the trust or discharge the duty imposed upon them by law, where there is no statute prescribing the means by which such trust shall be executed; and therefore, if to accomplish their official duty, or to discharge their trust, it is necessary to sue, power to do so is implied. Cornell v. Town of Guilford, 1 Denio, 510 and authorities cited. This seems a rational conclusion, and logically follows from the fact of the trust or duty imposed, which can be performed in no other way. The difficulty arises from our Code, which requires all suits to be brought in the name of the real party in interest, except (section 369, Code Civil Proc.) an executor, administrator, trustee of an express trust, or one specially authorized by statute to sue. This last clause, it must be confessed, raises a presumption against the authority of any officer to sue unless specially authorized by statute; and we accordingly find, wherever similar Code provisions have been adopted, care is generally taken to authorize suits where it may be necessary. If the plaintiffs have capacity to sue, it must be on the ground that they are trustees of an express trust. And we see no reason why they are not such. The moneys are never to go to the state treasury. So long as the law is unchanged, the state can exercise no control over the funds, except to compel a faithful execution of the trust. The fund really belongs to the board as trustees, and the terms of their trust and their duties are plainly declared. Among these duties is that of collecting the money which shall constitute the fund, and there is no procedure prescribed. Under such circumstances, we think it a part of plaintiffs' duties to collect by suit if necessary, and as trustees of an express trust they may do so. It follows that the judgment should be reversed, and judgment entered for plaintiffs on the findings for the sum demanded in the complaint.

We concur: Belcher, C. C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to enter judgment for the plaintiffs on the findings for the sum demanded in their complaint.

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89 Cal. 324

BLAKELY v. BLAKELY. (No. 13,410.)

(*Supreme Court of California.* May 29, 1891.)

Divorce—Cross-Complaint—Harmless Error.

In an action for divorce for abandonment, where a cross-complaint was filed alleging a subsequent abandonment of defendant, and the court refused to consider the same except by way of answer, it was error without injury, where the findings show that defendant abandoned plaintiff at the time alleged, and lives apart from him against his will and without his consent.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Louis F. Dunand and *Henry Eickhoff*, for appellant. *Geo. B. Gillin*, for respondent.

Fitzgerald, C. This is an appeal upon the judgment roll from a judgment granting to plaintiff a divorce on the ground of desertion. The complaint alleges their intermarriage on the 22d day of September, 1887, and the willful desertion of plaintiff by defendant on the 23d day of September, 1887. The allegation of desertion is denied by the answer, and the defendant, by her cross-complaint, seeks affirmative relief on the same ground, and fixes the date thereof on the 24th day of February, 1888. This is denied by the answer to the cross-complaint. It appears from the record that the court below refused to consider the cross-complaint except by way of answer and defense, and declined to grant any affirmative relief based thereon, because no cross-complaint, as such, could be considered in an action for divorce. This ruling of the court, which was excepted to at the time, and is assigned for error, was clearly erroneous, (Wadsworth v. Wadsworth, 81 Cal. 182, 22 Pac. Rep. 648; Mott v. Mott, 82 Cal. 413, 22 Pac. Rep. 1140; Kirsch v. Kirsch, 83 Cal. 633, 23 Pac. Rep. 1083,) and unless the record affirmatively shows that the defendant was not injured thereby the judgment should be reversed, (Spanagel v. Dellinger, 38 Cal. 278; Leonard v. Kingsley, 50 Cal. 628.) The court in its decision found "that on the 23d day of September, 1887, the defendant willfully and without cause deserted and abandoned the plaintiff, and ever since has and still continues so to willfully and without cause desert and abandon said plaintiff, and to live separate and apart from plaintiff without any sufficient cause or any reason, and against plaintiff's will and without his consent." As none of the evidence taken at the trial was brought up by the record, it will be presumed that the finding is supported by evidence. It therefore follows that the allegation of the cross-complaint that plaintiff deserted the defendant on the 24th day of February, 1888, could not in point of fact be true, for the reason that the court found that the defendant deserted the plaintiff on the 23d day of September, 1887, and that she "ever since has and still continues to so desert * * *." It might, perhaps, be well to state, in this connection, that the same evidence necessary to sustain the allegation of desertion made by the cross-complaint would be equally competent in support of defendant's answer denying the desertion; hence the ruling of the court in refusing to consider the cross-complaint "was error without injury." We deem it but fair to the learned judge who presided at the trial of this case in the court below to state that while the point upon which his ruling was evidently based was not decided in De Haley v. Haley, 74 Cal. 491, 16 Pac. Rep. 248, yet it is manifest that what was said by Mr. Justice McKinstry in that case (the cases above cited not having been decided when this case was tried) was accepted by him as a very strong indication of what the action of this court would be when this question came fairly before it for decision. We advise that the judgment appealed from be affirmed.

We concur: Foote, C.; Vancliff, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

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89 Cal. 474

Yates v. James. (No. 13,404.)

(*Supreme Court of California.* June 17, 1891.)

Contract to Convey Lands—Breach—Measure of Damages — Increased Value — Objections Waived.

1. Civil Code Cal. § 3306, provides that the detriment caused by the breach of an agreement to convey realty is the price paid, and expense of examining title, with interest, and, in case of bad faith, the difference between the price paid and the value of the land at the time of the breach, with expenses in preparing to enter on the land; and where the failure to convey was caused by the refusal of the vendor's wife to join in the deed, the vendor being willing to convey, there is no bad faith, and it is error to allow as damages the increase in the value of the property.

2. The failure of defendant to object to evidence of the increase in value, and his concurring in submitting that question to the jury, does not prevent him from urging the error on appeal.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Ernest Sevier, (*Wilson & Wilson*, of counsel,) for appellant. *J. H. G. Weaver*, for respondent.

Paterson, J. On November 15, 1884, the parties to this action entered into a verbal agreement, by the terms of which the defendant agreed to convey the land in controversy to the plaintiff upon the payment to him by plaintiff of the sum of $300, which was to be paid on or before the end of four years from the date of the contract. The court found that at the time the contract was made the defendant was, and ever since has been, the owner in fee-simple of the property; that immediately after the contract was entered into, defendant delivered the possession of the property to the plaintiff in pursuance of the agreement, and that plaintiff has ever since held the same, and has placed thereon improvements amounting in value to the sum of $280; that defendant saw the improvements as they were made, and offered no objection thereto; that the land has increased in value over the price agreed to be paid to defendant $250 per acre; that before the expiration of the four years, to-wit, on or about November 11, 1887, plaintiff offered in writing to pay defendant the full sum of $300, but defendant refused to accept the offer, and declared that he would not make a deed to the land; that plaintiff has performed all the conditions of the contract on his part to be performed; that $40 is the value of the use and occupation of the premises, which consist of three acres; that plaintiff has received from the sale of wood taken from the premises the sum of $36. The court further found that on September 2, 1884, defendant executed and filed a declaration of homestead, claiming as a homestead, together with other lands, the lands in controversy, and that the same has not been abandoned. It will be seen from the findings of the court that the plaintiff was allowed as damages $750, the enhanced value of the land, and the sum of $280, the value of his improvements, amounting in all to $1,030. From this amount the court deducted the sum of $76, that being the amount received from the sale of wood, and the value of the use and occupation of the premises, and rendered judgment in favor of the plaintiff for $954 and costs.

We think the court erred in allowing the plaintiff $750 on account of the increase in value of the property. Section

3306, Civil Code, provides: "The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." In this case bad faith on the part of the defendant was not alleged, found, or proved. It appears in evidence that the defendant would have conveyed the premises as he had agreed to if his wife had been willing to unite in the deed, but she refused. There has been much conflict of judicial opinion on the question as to what is the just measure of damages in such cases. Mr. Parsons, speaking on the subject, says. "If the action is brought on a contract to sell, and against the party who had promised to sell, and had failed to do so, many authorities have held that the result may depend upon the cause of the failure. For, if the intended vendor was honest, and was prevented from making the sale by causes which he did not foresee and could not control, then the plaintiff recovers only nominal damages, or, if he has paid the price, the same with interest, adding perhaps, in both cases, his expenses in investigating the title, or for similar purposes." 3 Pars. Cont. *229. The provisions of our Code referred to above were doubtless intended to settle the matter in accordance with the rule stated. In England this rule is sustained upon the ground that the purchaser should investigate the title before he is justified in taking any other step. Flureau v. Thornhill, 2 W. Bl. 1078; Walker v. Moore, 10 Barn. & C. 416. In this country, although the expense of investigating the title is not allowed in some of the states, the rule is generally based upon the analogy between this class of cases and actions upon covenants for title, in which the measure of damages where there has been an eviction is in many states the amount of the consideration money, with interest. Baldwin v. Munn, 2 Wend. 399; Peters v. McKeon, 4 Denio, 546. It has been held that where the seller knew he did not have a good title, but had reason to believe that he would be able to secure it before conveyance was required, there was no bad faith. Sikes v. Wild, 4 Best & S. 421, 1 Best. & S. 587.

It is claimed by respondent that inasmuch as the appellant made no objection to the evidence offered by plaintiff as to the increased value of the property, and concurred in submitting to the jury the question, "How much has this land increased in value since November 15, 1884?" he is now bound by the answer of the jury, and the finding of the court based thereon. We think, however, that as there is no allegation in the complaint upon which such a finding can be supported, the defendant is not estopped by his conduct at the trial from claiming the benefit of the objection which he now makes. The cause is remanded, with directions to the court below to modify the judgment by striking out from the last clause thereof the words and figures following: "$954 damages, and his costs and disbursements incurred in this action, amounting to the sum of $65," and inserting in lieu thereof, "$204 damages, and that each party pay his own costs."

We concur: Harrison, J.; Garoutte, J.

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89 Cal. 478

Crim *et al.* v. Kessing. (No. 13,279.)

(*Supreme Court of California.* June 18, 1891.)

Amendment of Record—Final Judgment—Authentication of Judgment—Limitations.

1. Where, on foreclosure, the judge made an order substituting in place of plaintiff his successor in interest, but such order was not entered by the clerk, a subsequent order *nunc pro tunc* making the substitution becomes a part of the judgment roll, as provided by Code Civil Proc. Cal. § 670, and binds the judgment debtor in an action by the judgment creditor's executors to collect the same.

2. Section 577 defines a judgment as "the final determination of all the rights of the parties." Section 532 requires the court's decision to be "given in writing and filed with the clerk." Section 726 provides that on foreclosure proceedings the judgment shall direct a sale of the property, and an application of the proceeds to the costs, etc., "and the amount due to the plaintiff." *Held*, that an entry by the clerk at the end of the trial of the amount for which plaintiff was entitled to recover in a foreclosure suit does not constitute a judgment; and the statute of limitations does not begin to run until the decision has been "given in writing, and filed with the clerk," and recorded.

3. A judgment rendered by one judge is not impaired by his failure to authenticate it, and the authentication thereof after the expiration of his term of office by another judge, since the statute does not require a judgment to be signed.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action to recover a judgment by Maria L. Crim and another against John F. Kessing. From a judgment for plaintiff defendant appeals.

Henry C. Firebaugh, for appellant. *Blake, Williams & Harrison*, for respondents.

ARRISON, J. April 23, 1877, Carrie A. Beach commenced an action in the late twelfth district court, upon a promissory note executed by the appellant, and to foreclose a mortgage on certain real property given to secure the payment of the same. May 20, 1882, the cause was tried upon the complaint and the answer of the appellant, before Hon. J. M. Allen, who on the same day announced his decision, which was thereupon entered in the minutes of the court, but findings were not filed until December 29, 1882. The term of office of Judge Allen expired December 31, 1882, and on January 10, 1883, the court made an order *nunc pro tunc*, as of March 20, 1882, that "Samuel Crim, the successor in interest of the plaintiff herein, be, and he is hereby, substituted as the plaintiff in this action, and that this action continue in his name as such plaintiff, in the place and stead of Carrie A. Beach, plaintiff therein." September 28, 1883, a judgment of foreclosure and for the sale of the mortgaged premises, signed by Hon. J. F. SULLIVAN, judge of said court, was entered of record in the cause. On the same day an order of sale was issued upon said judgment, under which the sheriff sold the mortgaged premises, and thereafter, on the 17th day of November, 1883, he made and filed his return of the same, showing a deficiency of $947.17, for which amount judgment was on that day docketed against the appellant, and in favor of Samuel Crim. September 4, 1888, the respondents, as the executors of the last will and testament of said Crim, commenced this action against the appellant to recover the amount of said judgment. In his answer the defendant denied the rendition of the judgment alleged in the complaint, and alleged that certain proceedings which had been taken in the case of Beach v. Kessing, prior to the entry of the judgment, were unauthorized, and without the jurisdiction of the court, and also pleaded the statute of limitations. The action was tried by the court without a jury, and judgment rendered in accordance with the prayer of the complaint. A motion for a new trial having been made and denied, an appeal has been taken to this court from both the judgment and order denying a new trial. When the plaintiffs offered in evidence the judgment roll in the case of Beach v. Kessing, the defendant made various objections thereto, which were overruled. The admissibility of the judgment was to be determined by the court upon its inspection, and, inasmuch as it was a judgment of the same court, and in terms purported to be the judgment alleged in the complaint in favor of plaintiffs' testator, and against the defendant, in an action against the defendant in which he had appeared, and of which the court had jurisdiction, the court committed no error in admitting it in evidence. The objection that the complaint was upon a judgment in an action wherein Samuel Crim was plaintiff, whereas the one offered in evidence was a judgment in favor of Carrie A. Beach, was answered by the fact that the judgment was entitled "Samuel Crim, substituted in place of Carrie A. Beach, Plaintiff, vs. John F. Kessing et al., Defendants;" and, after directing a sale of the mortgaged premises, adjudged that for any deficiency upon such sale "the clerk of the court docket a judgment for such balance against the defendant John F. Kessing, and that the defendant John F. Kessing pay to the said Samuel Crim the amount of said deficiency and judgment."

The judgment of a domestic court of general jurisdiction is conclusively presumed to be correct, unless the record itself of the judgment shows that the court did not have jurisdiction of the subject-matter of the action, or of the person of the defendant. When the court has such jurisdiction, its record speaks absolute verity, because it is the court's record of its own acts; and such jurisdiction will be conclusively presumed, unless the contrary appears upon the face of the record. Whenever such judgment is received as evidence in another proceeding, it cannot be impeached; "for it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea or even proof be admitted to the contrary." 3 Bl. Comm. 24. In Carpentier v. City of Oakland, 30 Cal. 439, an action of debt was brought upon a judgment that had been previously rendered in an action between the same parties; and it was held in the court below that the defendant could not show that service of the summons had not been made upon it in the original action. In affirming this ruling, the supreme court used the following language: "The maxim of the law is that the judgment of a court of general jurisdiction imports absolute verity, and its truth cannot be questioned, either by showing otherwise than by the record itself that the court had no jurisdiction, or that its jurisdiction was fraudulently procured. Both upon the merits of the cause of action and upon all jurisdictional facts, the record imports absolute verity in law, and is to be tried by the court on inspection of the record only." In Drake v. Duvenick, 45 Cal. 455, a judgment in ejectment was offered in evidence, and it was objected to by the defendant upon the ground that no judgment had ever been rendered by the court, and that the clerk had no power to enter the judgment by default. The court said, (page 462:) "Purporting to be a judgment of the court, and found regularly entered in its minutes, the presumption is it was entered in pursuance of an order of the court. The rule is elementary that upon collateral attack all intendments are indulged in support of the judgments of courts of superior jurisdiction. Their records are conclusively presumed to speak the truth, and whatever is upon their records is presumed—the contrary not appearing—to be rightfully there." At the common law the only plea that was allowed to an action upon a judgment was *nul tiel record*, and the trial of this issue was by the record alone; "for as Sir Edward Coke observes, a record or enrollment is a monument of so high a nature, and importeth in itself such absolute verity, that, if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself." 3 Bl. Comm. 331. Such answer was in effect pleaded by the defendant in the present case, but the record of the judgment itself, having been produced and received in evidence, established the allegations of the complaint. Under our system of pleading, the defendant could have set up in his answer matter which would constitute an equitable defense to the judgment; but, as was said in Carpentier v. City of Oakland, supra, "he must plead such defense as fully as if he were bringing a suit, instead of defending one, * * * and file an answer which in matter of allegation would be a good bill in equity under the old system." An examination of the answer herein shows that it falls far short of this requirement, and, in fact, has not been regarded by the appellant, either at the trial or on this appeal, as an equitable defense to the judgment, within the rule above mentioned. The appellant maintains, however, that the verity of the judgment is impeached by an inspection of its record, and in his argument maintains that the various proceedings that were had subsequent to the entry in the minutes in March, 1882, were without the jurisdiction of the court, and that the judgment as finally entered was void.

1. The court had jurisdiction to make the order of January 10, 1883, by which Crim was substituted as plaintiff in the place of Beach, and its action in making such order is conclusive against any collateral attack. All courts of record have the inherent power to correct their records so that they shall conform to the actual facts, and speak the truth of the case; and such correction may be made at any time, either upon the motion of the court itself, or at the instance of any party interested in the matter. Ordinarily, a court would require notice of the motion to be given to all parties interested; but it has the power to make the correction without such notice. When made, the record so corrected, as well as the order making the correction, is conclusive upon any other court in which the record is offered in evidence. Balch v. Shaw, 7 Cush. 282. It appears by the order made in the present case that proof was made to the satisfaction of the court that at the trial of the cause, March 20, 1882, such order of substitution was in fact made, but had not been entered by the clerk. That court was the sole judge of the sufficiency of the proofs offered in support of the motion, and its action is conclusive, except in direct proceedings to vacate the order. The order making the substitution, being an order "relating to a change of parties," became a part of the judgment roll, (Code Civil Proc. § 670,) and imported the same verity as the other parts of the record.

2. The clerk's entry in the minutes of the trial, March 20, 1882, did not constitute a judgment. It was only a record of a portion of the proceedings in the case. "A judgment is the final determination of the rights of the parties in an action or proceeding." Code Civil Proc. § 577. The complaint prayed for the foreclosure of a mortgage, and the sale of the premises mortgaged to secure the payment of the note. The answer did not deny the execution and existence of the mortgage, but alleged that after the action had been commenced, and while it was pending, the defendant made a payment upon the principal of the note, and also of the costs of the action, and that it was then agreed by the plaintiff that the action should be dismissed. This was the only issue presented by the pleadings to be tried by the court; and the court, having found against the defendant upon this issue, ascertained the amount due upon the note, and ordered judgment for that amount. Both parties had appeared at the trial, and there was no waiver by them of findings of fact. Although the court then ascertained the amount of money for which the plaintiff was entitled to a judgment, yet, inasmuch as the payment of that amount was secured by a mortgage, it was necessary that the judgment when entered should "direct a sale of the incumbered property, and the application of the proceeds of the sale to the payment of the costs of the court, and the expenses of the sale, and the amount due to the plaintiff." Id. § 726. It would have been error for the court to enter a mere money judgment against the defendant for the amount then ascertained to be due on the note. Until after a sale of the mortgaged premises, there could be no personal judgment docketed against him. The court did not, as is claimed by appellant, "refuse" the plaintiff any other relief than the money judgment. Its only action at this time was to determine the amount for which judgment should be entered, leaving the form of the judgment by which this amount should be collected until it should render its "decision" upon the whole case. The statute required its decision to be "given in writing and filed with the clerk," (Id. § 632,) and in it the facts found and conclusions of law were to be separately stated, (Id. § 633.) The "decision" upon which, by section 633, the judgment is to be entered, is that which by section 632 is to be given in writing and filed with the clerk; and until so given and filed there is no "decision" upon which judgment can be entered, and consequently no authority for entering any judgment. Accordingly, the judge before whom the case was tried made his findings of fact, and they were filed December 29, 1882. This was the rendition of the judgment which the clerk could thereafter at any time enter at length in the records of the court. The entry of a judgment after it has been rendered by the court is but the ministerial act of the clerk. The judgment, when entered, becomes the record of what the court has determined, and then becomes as binding upon the parties as if entered immediately upon its rendition. "The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial." Freem. Judgm. § 38. Under the system of practice which prevailed in this state prior to the adoption of the Codes in 1872, findings were not essential to the entry or validity of a judgment, (Prac. Act, § 180;) and under that system it was held that the entry in the clerk's minutes of the decision as announced by the court, constituted the "rendition of the judgment," (Gray v. Palmer, 28 Cal. 416; Genella v. Relyea, 32 Cal. 159.) But under the provisions of the Code of Civil Procedure, whenever findings are required, there can be no "rendition of the judgment" until they are made and filed with the clerk. Findings of fact, however, are required only "upon the trial of a question of fact," and they may in all instances be waived. Whenever they are waived or are not required, the entry of its decision in the minutes of the court constitutes the "rendition of the judgment" in the same manner as it did under the former system. In the case of Cook v. Cook, which was under consideration by this court in Re Cook's Estate, 77 Cal. 220, 17 Pac. Rep. 923, and 19 Pac. Rep. 431, the defendant, after service of the summons

upon him, made default, and, the referee to whom the matter had been referred to take the necessary proofs having made his report, the court upon the hearing thereof made an order, which was then entered in its minutes, decreeing a divorce between the parties to the action; and this court held that, inasmuch as, in case of a default, findings are not required, the entry in the minutes constituted the "rendition of the judgment."

3. The subsequent authentication to the clerk by Judge SULLIVAN of the judgment to be entered did not impair its effect. The cause had been fully tried before Judge ALLEN, and he had rendered his decision before going out of office. The entry of the judgment upon that decision, being but a ministerial act, could be performed by the clerk after Judge ALLEN'S term of office had expired with as much effect as before. Roberts v. White, 39 N. Y. Super. Ct. 272. There is no provision in our statute requiring any judgment to be signed by a judge, and it has been held that a judgment which is produced from the original records of the court in which it was rendered needs no signature or exemplification. Clink v. Thurston, 47 Cal. 29. The signature by the judge is "merely to give the clerk a surer means of correctly entering what has been adjudged." In re Cook's Estate, 77 Cal. 227, 17 Pac. Rep. 923, and 19 Pac. Rep. 431. Whether, if the clerk had, without any authentication from the court, entered the judgment which was subsequently entered, it would have been error, for the reason that in the conclusions of law made by Judge ALLEN there was no direction for a sale of the mortgaged premises, we are not called upon to decide in this case. The court could at any time before entry of judgment change its conclusions of law upon the facts that had been found, (Condee v. Barton, 62 Cal. 1;) and such change could be made by another judge than the one who had tried the cause. The complaint contained a prayer for the sale of the mortgaged premises; and the findings of fact, taken in connection with the facts that were admitted by the answer, would have justified the court in giving such relief. If it were necessary for the court to give any notice of such action, we could assume that the form of the judgment as entered was made by the court after notice to the defendant, and upon a proper showing therefor. As was said by this court in Re Cook, 83 Cal. 418, 23 Pac. Rep. 392, "so long as the decree stands, it is conclusive as to all matters of evidence necessary to its validity." In Sanford v. Sanford, 28 Conn. 6, after the defendant had appeared in the action, the court, upon the motion of the plaintiff, had entered an order of nonsuit. Nearly two years thereafter, in the absence of the defendant, and without any proof appearing upon the record that notice had been given to him, the court proceeded to try the cause, and rendered judgment against him. In an action upon that judgment, the supreme court of Connecticut held that the jurisdiction of the court must be presumed to have been properly exercised, and that its action, in the exercise of such jurisdiction, could not be collaterally impeached; saying: "If it were conceded to be necessary to the validity of the order of the court setting aside the nonsuit in question that notice of the motion for that purpose should have been given to the defendant, the presumption is that such notice was given, and this presumption supersedes the necessity of an express statement to that effect on the record." This principle is not affected by the fact that in the present case the court finds that the judgment in question was entered "without notice to the defendant Kessing, and in his absence from court," since, as we have before seen, the judgment itself cannot be impeached by any evidence outside of its own record. Even an inconsistency between the findings and the judgment will not impair the judgment, "for the question whether the findings support the judgment—in other words, whether the judgment is erroneous—cannot be raised in a collateral action." Johnston v. Savings Union, 75 Cal. 139, 16 Pac. Rep. 753. From the time that the court acquires jurisdiction of the defendant until the entry of the judgment, all the steps that are taken by the court are movements within its jurisdiction; and, however irregular such movements may be, they constitute only error, which must be remedied on a direct proceeding for that purpose. It follows from the foregoing considerations that the objections made by the defendant to the sufficiency of the judgment cannot be sustained.

The only remaining question presented by the record is whether the judgment sued upon was barred by the statute of limitations. This, however, we think cannot be considered an open question in this state. In Trenouth v. Farrington, 54 Cal. 273, it was expressly held that the statute of limitations does not begin to run until the entry of the judgment, and in Condee v. Barton, supra, it was held that a judgment is not final until it is recorded. The evidence of Crim, which was objected to, did not tend to vary or contradict the record. It was, in fact, immaterial, and it was not necessary that the plaintiff should have offered it. We do not think, however, that it could by any possibility have prejudiced the defendant. Hobbs v. Duff, 43 Cal. 489. The judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; PATERSON, J

(89 Cal. 501)

CLAUDIUS v. AGUIRRE. (No. 14,322.)[1]

(*Supreme Court of California*. June 22, 1891.)

FRAUDULENT CONVEYANCE — CHANGE OF POSSESSION—REPLEVIN—JUDGMENT.

1. Though Civil Code Cal. § 3440, declares that transfers of personal property are conclusively presumed to be fraudulent where they are "not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred," it is a question for the court what constitutes immediate delivery and continued change of possession, and its finding thereon, upon conflicting evidence, will not be disturbed on appeal.

2. Though Code Civil Proc. Cal. § 667, pro

[1] Petition for rehearing pending.

vides that, "in an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had," a judgment for possession alone is sufficient, where delivery was made to plaintiff at the beginning of the action.

Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

H. W. Latham and *M. L. Graff*, for appellant. *Adams & Mitchell*, for respondent.

HARRISON, J. The plaintiff brought this action against the sheriff of the county of Los Angeles, to recover the possession of certain personal property which had been levied on by him under a writ of attachment issued in an action against the plaintiff's vendor, and at the time of issuing the summons made the statutory claim therefor under which the property was taken from the defendant and delivered to him. Upon the trial of the cause the court rendered judgment in favor of the plaintiff for the possession of the property, together with damages for its detention, but made no finding as to its value. From this judgment and an order denying a new trial the defendant has appealed, upon the grounds that the transfer of the personal property to the plaintiff from his vendor was fraudulent, inasmuch as it was not accompanied by an immediate change of possession; and that the judgment as entered is erroneous, for the reason that it does not provide for a recovery of the value of the property in case a delivery cannot be had.

1. Section 3440 of the Civil Code declares that "every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession." What constitutes an "immediate delivery" or an "actual and continued change of possession" is, however, a fact to be determined by the court upon the evidence presented in each particular case. Godchaux v. Mulford, 26 Cal. 322. The circumstances connected with a transfer of personal property are so varied that it would be impossible to frame a rule applicable to each case, or to determine in advance what acts would be sufficient to meet the requirements of the statute. When the transfer is challenged as fraudulent under this section, all the circumstances connected therewith are essential to a determination of its character, and it can very rarely be the case that there will not be such a conflict of testimony as to preclude this court from re-examining its sufficiency. In the present case the court found upon such conflicting evidence "that on the 15th day of March, 1890, one A. P. Stone, the then owner of the property described in the complaint herein, sold, transferred, and delivered the said property to the plaintiff herein for a valuable consideration;" and also "that plaintiff was the owner, in the possession of, and entitled to the possession of, the said property continuously from March 15, 1890, until the same was taken by the defendant under said writ of attachment on March 18, 1890, without the consent of plaintiff." The evidence upon the subject of these findings is set out in the bill of exceptions, and, although it presents strong characteristics of an attempt to evade the provisions of the section, we cannot say that the conclusion reached by the court is not authorized; and, under well-settled principles, the finding of the trial court is conclusive.

2. Section 667, Code Civil Proc., declares that, "in an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had, and damages for detention." The evident purpose of this provision is that if the plaintiff, after obtaining judgment for its possession, is unable to obtain a delivery of the property, he may, in the same action, have a judgment for its value. The primary object of the action is to recover the possession of the property. Whetmore v. Rupe, 65 Cal. 238, 3 Pac. Rep. 851. But, if the plaintiff has already obtained this possession before judgment, there is no occasion for any judgment for its value, as the condition is wanting upon which such clause in the judgment is authorized, viz., "if a delivery cannot be had." The plaintiff need not avail himself of the provisional remedy for obtaining possession prior to judgment, or, if he does, the defendant may have retaken the property, or, without retaking it, may obtain judgment for its return. In either of these cases the judgment must be in the alternative, in order that, in case a delivery cannot be had, the prevailing party may recover its value, (De Thomas v. Witherby, 61 Cal. 92,) or in order to determine the amount to be recovered from the sureties upon the undertaking, (Nickerson v. Stage Co., 10 Cal. 520.)

Under the provisions of section 627, Code Civil Proc., in an action for the recovery of specific personal property, the jury are authorized to find the value of the property, if their verdict be in favor of the plaintiff, only "if the property has not been delivered to the plaintiff," and, *e converso*, if the property has been delivered to the plaintiff, they are not required to find the value; and, in the absence of such finding, there is no verdict upon which to base an alternative judgment. In Waldman v. Broder, 10 Cal. 379, the plaintiff, under a provisional remedy, had obtained possession of the property prior to the judgment. At the trial a verdict was rendered in favor of the defendant, and judgment thereon entered for a return of the property, without any mention of its value. Upon the objection on appeal that such judgment was erroneous, the court said: "Nor is there anything in the failure to give an alternative judgment for the value of the property. This omission might be complained of by defendants if they had shown the value, but it is no ground of complaint on the part of the plaintiff."

In Brown v. Johnson, 45 Cal. 76, the judgment was for the value of the property without the alternative for its return. Upon appeal it was urged that the judgment should be in the alternative, but the court held that if it had been shown that the property had been destroyed, so that a judgment for its delivery would have been necessarily unavailing, "the failure to render judgment for its possession would, at most, be but a technical error or omission,—one for which we would not reverse the judgment." In Whetmore v. Rupe, supra, where the alternative judgment for the value of the property was for less than the value as found, the court said: "Appellant cannot complain that the judgment was for less than the value of the property." In Burke v. Koch, 75 Cal. 356, 17 Pac. Rep. 228, it was said: "Conceding that this action is, as claimed by appellant, an action of claim and delivery, it does not follow that the judgment is void or erroneous because not in the alternative." We can see no difference in principle between a judgment for the value of the property sued for without the alternative for its delivery, and a judgment for the delivery of the property without an alternative for its value. If the former is free from error, the latter must be equally so. Certainly the defendant against whom a judgment for the possession has been rendered, where a delivery was obtained by the plaintiff before trial, cannot complain or feel aggrieved because the judgment as rendered does not also authorize a recovery from him of the value of the property. We are aware that in Berson v. Nunan, 63 Cal. 550, under a state of facts similar to those in the present case, this court reversed the judgment, and remanded the cause, with directions to enter a judgment in the alternative form. It will be observed, however, that in that case the judgment as rendered was "for a return of the property or its value and costs," and that the judgment as entered varied from that which was rendered by not including the value of the property. This ruling was afterwards cited with approval in Brichman v. Ross, 67 Cal. 601, 8 Pac. Rep. 316, but the judgment in this latter case was reversed upon other grounds. We think, however, that the mere failure to include in the judgment a clause which cannot have any operative effect, or confer any right or protection upon either the plaintiff or the defendant, does not affect the substantial rights of either party, and is not a sufficient ground for the reversal of the judgment, (Code Civil Proc. § 475,) and that the cases last mentioned should not be regarded as authority for such reversal. The judgment and order denying a new trial are affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

(89 Cal. 517)

ETCHEBARNE *et al.* v. ROEDING *et al.* (No. 13,102.)[1]

(*Supreme Court of California.* June 22, 1891.)

APPEALABLE ORDER—REFERENCE.

An order setting aside as premature an order settling the account of a referee in a suit to vacate a fraudulent assignment is not appealable, as it is neither a "final judgment" nor a "special order made after final judgment," within the meaning of Code Civil Proc. Cal. § 939.

Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

William Matthews, for appellants. *Rosenbaum & Scheeline*, *Jarboe & Harrison*, *Neuman & Eickhoff*, and *Edward R. Taylor*, for respondents.

MCFARLAND, J. On February 3, 1877, one Estanislao Hernandez, a defendant herein, being insolvent, made an assignment of his property—consisting of several tracts of land, and a large amount of live-stock and other personal property—to Frederick Roeding, also a defendant, in trust for the payment of his debts and the benefit of his creditors. At the time of the assignment Hernandez made an inventory and statement which purported to set forth his property, his debts, and his creditors. The present action was brought by a large number of creditors of said Hernandez. It is averred in the complaint "that the assignment was fraudulent; that, by collusion between said Hernandez and said Roeding, property of the former of great value was fraudulently omitted from said inventory, and pretended, but not real, debts were set forth in said statement as owing to certain persons, who are also made parties defendant; that after the assignment Roeding allowed Hernandez to remain in possession and receive the profits of a large part of the property; that Roeding for a long time failed to render any account as assignee, and, when pressed to do so by plaintiffs, rendered a simulated and fraudulent account; and that Roeding has no knowledge of agricultural pursuits, is incompetent to manage the trust-estate, and has greatly wasted it. There are other averments not necessary to be mentioned. The prayer is that the assignment be declared void as to all property remaining in the hands of the assignee; that he render a full account to plaintiffs of all his transactions as assignee; that he be removed from his office as assignee; that a receiver be appointed to take possession of all the property; that the property be sold and the proceeds of the sale be paid to plaintiffs 'according to their respective rights;' that the assignee be restrained from doing any further acts in the premises; that said pretended debts be declared fraudulent, and that plaintiff have such other relief as the court may deem just." The answer of defendants denies nearly all the material averments of the complaint, except the assignment itself. It appears from a number of papers printed in the transcript, and not objected to by respondents, and from a short bill of exceptions duly authenticated, that on June 22, 1886, the court made a large number of "findings." In these most of the issues of fraud were determined in favor of defendants; it is declared that Roeding should not be removed from his office; and it is found that a preliminary order restraining him from controlling the property or selling it should be set aside. Certain other issues are disposed of in these findings. It is ordered that an account be taken, and, further, that, "inasmuch as it is impossible to examine said account in open court, a reference will be ordered and a referee appointed, on application and notice, to take and report such account to the court." It is also further ordered that, "upon the rendition of such account, such order will be made by this court as to the disposition of the moneys in his hands as shall best serve to protect the rights of all parties interested in said fund." Afterwards, on August 9, 1886, a document was signed by the judge of the court and filed, which is called a "decision," but which appears to be an interlocutory decree, and intended to carry out the mandates of the findings. It also appears from other straggling papers printed in the transcript that certain sales of property were made by said assignee on the order of the court, and that the sales were approved. There is also printed in the transcript what purports to be a report of a referee, which sets forth four schedules or balance-sheets, so that the court might adopt either one of the four as a statement of the account of the assignee; and the bill of exceptions states that a referee was appointed in accordance with the directions of the said "findings." The full order of reference does not appear; but the scope of it certainly was not to try the issues of the action and report a judgment, but to ascertain some fact or facts necessary to enable the court to determine the action, as provided in the second subdivision of section 638 of the Code of Civil Procedure. The bill further shows that the report of the referee was set for hearing for a certain day, and was argued and submitted to the court for decision; that on May 23, 1888, the judge rendered an "opinion," (which is given in full,) and in accordance with said opinion caused a minute order to be made, as follows: "In this cause the motion to settle the account of receiver and referee herein having been heretofore duly submitted to the court for consideration and decision, and, the court now being fully advised, it is ordered that balance-sheet No. 1, as submitted by the referee, be adopted and settled as account of referee." (This order read literally means nothing, as it was the account of the assignee, and not of the "referee," that was under consideration; but, as counsel make no objection, we will assume that "assignee" was meant where "receiver and referee" and "referee" were written in the first and last parts of the order.) It further appears from the bill of exceptions that a few days afterwards, May 31, 1888, the court, without notice to plaintiffs, made the following order: "In this cause, on motion of Messrs. Harrison and Rosenbaum, ex parte, and it appearing to the satisfaction of the court that the order made and entered in this cause on the 23d day of May, 1888, settling the account of the referee appointed herein, be, and the same is hereby, vacated and set aside, on the ground that said order was prematurely made; further ordered that order to settle account of referee be placed on calendar for further argument." From this last order of May 31st, setting aside said order of May 23d, and from said order alone, the plaintiffs in the case at bar appeal. (It may be remarked that the words, "account of referee appointed herein," as used in the last order, are quite confusing; for, if "assignee" was meant, there was no assignee "appointed herein.") We have given the history of the case at some length, so that its character, and the exact situation at the time of the last two orders, can be readily understood.

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[1] Petition for rehearing pending.

The said order of May 31st was clearly not appealable. It was not one of the orders mentioned in section 939 of the Code of Civil Procedure, other than an order after final judgment; and it was not a "special order made after final judgment." This negative is specially emphasized by the provision of said section that there may be an appeal from an order affecting the report of referees "in actions for partition of real property." The order set aside was not in any sense a "final judgment," within the meaning of section 939. It does not purport to be a final judgment, and was not such in legal effect. No execution or other writ could have been issued upon it by which either of the parties could have enforced a right against another. It was merely one of the various steps taken by the court at various times in its approach to a final judgment and decree which would settle the rights of all the parties, dispose of all the property, and wind up the administration of the trust. The authorities cited by appellants do not support their contention. The cases referred to by counsel which are nearest in point are Williams v. Conroy, 52 Cal. 414, (cited by respondents,) and Harris v. Refining Co., 41 Cal. 393, (cited by appellants;) and they both favor the view above expressed. Whether or not the order appealed from was properly made, or whether there should have been a motion for a new trial, need not be here discussed. That question could be raised only upon an appeal from the final judgment, or, perhaps, upon *certiorari* to test the jurisdiction. The appeal is dismissed.

We concur: Sharpstein, J.; De Haven, J.

(89 Cal. 572)

People v. Webster. (No. 20,761.)

(*Supreme Court of California.* June 24, 1891.)

Assault with Deadly Weapon—Evidence—Impeachment.

1. On an indictment for assault with a deadly weapon, while it is competent, as showing the present relation between the parties, to show by the prosecuting witness that he has since the assault instituted proceedings against defendant for a breach of the peace, it is error to allow him to testify further that these proceedings were based on an unprovoked attack on him by plaintiff since the original assault.

2. Where the witness has stated the reputation of another for veracity from what he has heard of it in the neighborhood, it is error for the court to state that he can only testify to what he knows of it of his own personal knowledge.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county; R. M. Dillard, Judge.

W. P. Butcher, for appellant. *W. H. H. Hart*, Atty. Gen., and *Walter B. Cope* Dist. Atty., for the People.

FITZGERALD, C. The defendant was convicted in the court below of assault, upon an information charging him with an assault with a deadly weapon. It appears from the record that several exceptions were taken by the defendant to the rulings of the court, but only two of them are urged here, and they are upon questions involving the admission and exclusion of evidence. At the trial one J. N. Marsh, who is the subject of the injury complained of in the information, was called and sworn as a witness for the prosecution. On cross-examination the question was asked him if he, "witness, had not since the arrest of defendant upon this charge had defendant arrested and tried in the justice's court on a charge of disturbing the peace, and if the jury did not acquit him of the charge." This question was answered by the witness in the affirmative, without objection from the prosecution. On redirect examination he was asked by the district attorney to "state the facts of that case." This he was permitted to do by the court, against the defendant's objection, he (the witness) stating, among other things, in this connection, "that the defendant had tried to ride over him with his horse while he was peaceably walking along the public highway," on which occasion defendant called him names, not necessary or fit to be repeated here. While the question asked on cross-examination, and affirmatively answered without objection, was competent for the purpose of showing the relations between the parties, and the state of feeling of the witness towards the defendant, yet under no rule or principle with which we are familiar could such evidence be justified as that which was admitted, against objection, on the redirect examination of the witness Marsh, and through which was injected into the trial of this case the facts involved in and brought out at the trial of the other case, the probable effect, if not the purpose, of which was to put in issue his character, and thereby to excite in the mind of the jury feelings of prejudice against the defendant. People v. Markham, 64 Cal. 163; People v. Dye, 75 Cal. 108, 16 Pac. Rep. 537, People v. Taylor, 36 Cal. 255.

The only other ruling of the court which we propose to notice, and to which exception was taken, was upon a question of evidence involving the general reputation of the prosecuting witness Marsh, for "honesty, truth, and veracity," and which was offered for the purpose of impeachment. It appears from the bill of exceptions that the witness Tallant, who was called for the defense, was asked "whether he knew the general reputation of the prosecuting witness Marsh in the community where he lived for 'honesty, truth, and veracity.' The witness answered 'that he only knew from what he had heard people generally say of him.' Here the court interposed and 'told the witness he could only testify to what he knew of his reputation of his own personal knowledge.'" This ruling of the court, reversing as it did an old and very familiar common-law rule, of which the plain provisions of section 2051 of the Code of Civil Procedure are but declaratory, was excepted to at the time, and is assigned as error. The question as propounded was perfectly competent to show such general reputation, and while technically it should have been answered directly, "Yes," or "No," still the response was such in effect, and in addition thereto clearly showed the competency of the evidence for the purpose for which it was sought to be introduced. People v. Methvin, 53 Cal. 68. For these prejudicial errors we advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

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69 Cal. 522

CODY v. MURPHEY. (No. 14,498.)

(*Supreme Court of California.* June 22, 1891.)

CONSTITUTIONAL LAW—LOCAL ACTS—REDUCTION OF SALARIES—SHERIFF'S COMPENSATION.

1. Act Cal. March 14, 1891, readjusting the salaries of all county officers of counties of the thirty-fifth class, and reducing the salaries of the sheriffs thereof, is not repugnant to Const. Cal. art. 1, § 11, providing that all "laws of a general nature shall have a uniform operation," nor to article 4, § 25, prohibiting the passage of any local or special law "affecting the fees or salary of any officer."

2. Act March 31, 1891, reclassifying the counties for the purpose of regulating the compensation of county officers, but making no provisions as to sheriffs of counties of the thirty-fifth class, and providing that the act, unless otherwise provided, so far as it relates to all officers named, * * * shall not affect the present incumbents, does not affect Act March 14, 1891, so far as the latter relates to the salaries of such sheriffs.

In bank. Original petition for *mandamus* by M. J. Cody against J. D. Murphey.

Fox, Kellogg & King, for plaintiff. *W. H. H. Hart*, Atty. Gen., for defendant.

GAROUTTE, J. This is an original proceeding for a writ of mandate against the defendant, county auditor of the county of Mono, to compel him, as such auditor, to issue his warrant on the county treasurer of said county in favor of the plaintiff, who is the sheriff of said county, for the sum of $333.33 as and for his salary as such sheriff for the month of April, 1891. Under the county government act of 1883, Mono county became a county of the thirty-fifth class. Section 197 of the act of 1883, as amended in 1885, fixed the salaries of the county officers of counties of the thirty-fifth class, and by that section the sheriff's salary was fixed at $4,000 per annum. By an act of the legislature, approved March 14, 1891, (St. 1891, p. 106,) and which was to take effect from April 1, 1891, section 197 of the act of 1885 was amended, readjusting and reducing the salaries of all county officers of counties of the thirty-fifth class, and fixing the compensation of the sheriffs thereof at $2,000 per annum. Plaintiff contends that this act is local and special, and therefore in conflict with article 1, § 11, of the constitution of the state, which requires that all "laws of a general nature shall have a uniform operation," and also that it is in conflict with article 4, § 25, which prohibits the passage by the legislature of any local or special law "affecting the fees or salary of any officer." Subdivision 29. If the foregoing act is a general law, as contradistinguished from a local or special law, within the meaning of those terms as used in the constitution, then there can be no question as to its being uniform in its operation, for it acts upon all counties and all officers of counties of the thirty-fifth class. The case of Miller v. Kister, 68 Cal. 142, 8 Pac. Rep. 813, is not in point. Chief Justice SEARLS, in drawing a distinction between that case and People v. Henshaw, 76 Cal. 444, 18 Pac. Rep. 413, said: "The distinction attempted to be made by the statute under consideration in that case is not found here. It dealt with 48 classes of officers, and was to take effect as to all of them, except 3 classes, upon the expiration of the terms of office of the incumbents. It was a general law applying alike to all classes, but took effect at different times upon different classes." "No such distinction is made by the law under consideration here. The statute we are reviewing operates alike upon all the persons to whom it applies, and it applies equally to all persons in the same category." And, again, the chief justice says: "To so classify them that general laws applicable to these separate classes [referring to the classification of municipal corporations] will meet the necessities of the case was a wise provision; and a law which applies to one or more, but not to all, of these cases, is not for that reason special legislation." People v. Henshaw, 76 Cal. 444, 18 Pac. Rep. 413. See, also, Longan v. County of Solano, 65 Cal. 125, 3 Pac. Rep. 463; Thomason v. Ashworth, 73 Cal. 73, 16 Pac. Rep. 615. Justice SCOTT, in Knickerbocker v. People, 102 Ill. 229, appears to state the same rule when he says: "General laws are those which relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operation, or by constitutional restraints. A law applicable to all the counties of a class as made or authorized by the constitution is neither a local nor special law. If it applies to all the counties of a class authorized by the constitution to be made, it is a general law; and whether there may be few or many counties to which its provisions will apply is a matter of no consequence." It follows that the act of March 14, 1891, was a general law, of uniform operation, and therefore not hostile to the provisions of the constitution heretofore quoted. It becomes a part of the county government act of 1883, as amended by subsequent acts of the legislature, and is in full force and effect unless repealed by later legislation.

Subsequent to the 14th day of March, 1891, the legislature passed "An act to establish a uniform system of county and township governments." It was approved March 31, 1891, went into effect immediately, and repealed all acts and parts of acts inconsistent with its provisions. St. 1891, p. 295. Among other things it reclassified the counties of the state for the purpose of regulating the compensation of the county officers of the various counties, had fixed the salaries of all such officers. Section 234 of said act reads: "The provisions of this act, unless otherwise herein provided, so far as it relates to the fees and salaries of all officers named, except justices of the peace and constables, shall not affect the present incumbents." There can be but one construction placed on this provision of the act, and that is, the legislature intended, except where it was otherwise provided in the act, that the compensation of all county officers holding office upon the 31st day of March, 1891, should not be affected by the act. There appears to be nothing in the act "otherwise providing;" and it necessarily follows that the compensation provided for county officers by the act of March 31, 1891, does not affect the plaintiff in this case. The act of March 14, 1891, went into effect April 1, 1891, unless repealed by the later act of March 31st; but we have already held, in consonance with the views of plaintiff, that the provisions of the act of March 31st, relative to salaries of county officers, do not affect present incumbents, and consequently do not repeal, until the expiration of the terms of the present officers, the provisions of the act of 1883, with its amendments relating to the compensation of county officers. Therefore the act of March 14, 1891, being an amendment of the act of 1883, and not being repealed, is in full force and effect, and the plaintiff is entitled to his salary thereunder. Let the application for the peremptory writ be denied.

We concur: BEATTY, C. J.; PATERSON, J.; HARRISON, J.; MCFARLAND, J.; SHARPSTEIN, J.

89 Cal. 492

PEOPLE v. RIBOLSI. (No. 20,785.)

(*Supreme Court of California.* June 18, 1891.)

RECEIVING STOLEN GOODS—INDICTMENT—ALLEGATION OF OWNERSHIP—INSTRUCTIONS.

1. An information charging defendant with feloniously receiving stolen goods, "the property of the estate of G. H. Tay and O. J. Backus, copartners doing business under the firm name of G. H. Tay & Co.," is sufficiently direct and certain as to the ownership of the stolen property.

2. It is not necessary that the information should state the name of the person who stole the goods.

3. Pen. Code Cal. § 956, provides that when an offense involves the commission of a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured is not material. *Held*, that where the charge was feloniously receiving goods stolen from the estate of G. H. Tay and O. J. Backus, copartners, and the proof showed that one of the partners was dead, and his executors were the legal owners of his property, the variance was not material.

4. A statement in an instruction that if, on full consideration of all the evidence, you are "fairly and clearly satisfied" of defendant's guilt, is equivalent to saying that the jury must be "entirely satisfied."

5. Under Pen. Code Cal. § 1111, providing

that an accused cannot be convicted by the evidence of an accomplice, unless corroborated by other evidence "tending to prove" defendant's complicity, an instruction that a conviction for receiving stolen goods cannot be had on the testimony of the thief, unless corroborated by such evidence as tends to impute to defendant knowledge that the goods were stolen, is not erroneous in using the expression "tends to impute," instead of "imputes."

6. On a trial for feloniously receiving stolen goods, the court charged that "under our statute the following presumptions are to be regarded as satisfactory, if uncontradicted, but may be controverted, viz.: That an unlawful act was done with unlawful intent, and that a person intends the ordinary consequences of his voluntary act. The effect of these rules is that when the doing of an act is proven which, if there be guilty intent, would be a violation of law, the burden of proving the act to have been without such intent is in most cases upon the accused." *Held* erroneous, where the defense was confined to the original transaction on which the accusation was founded, and no special defense, as insanity, was interposed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; F. W. VAN REYNEGOM, Judge.

Davis Louderback, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of feloniously receiving and buying stolen goods for his own gain and profit, and to prevent the owner thereof from again possessing them, under section 496 of the Penal Code. From the judgment rendered against him, and an order refusing a new trial, he has taken this appeal. He contends that the information on which he was tried was obnoxious to a demurrer he filed thereto, in the respects that it does not give the particular circumstances of the offense charged, and that it is not direct and certain as to such offense; that it does not set forth the names of the persons from whom the goods were received, or the names of those who stole them; that it is not direct and certain as to the ownership of such goods. The information states, among other things, that the stolen goods received by the defendant at the city and county of San Francisco were the "personal property of the estate of Geo. H. Tay and Oscar J. Backus, copartners in business, and doing business in said city and county under the firm name and style of George H. Tay & Co." We do not perceive but what the defendant was thereby informed in ordinary and concise language, without repetition, in such a manner as that he was enabled, being a person of common understanding, to know what property it was intended to charge he had feloniously bought and received, etc. Section 959, subd. 6, Pen. Code. We do not think he was at all in doubt about the matter from the language used. The sufficiency of indictments or informations in this state depends upon whether or not they are in conformity to statutory provisions; and tested by that rule, and in accordance with what has been determined as to similar objections raised to such pleadings in People v. Ah Sing, 19 Cal. 598; People v. Barnes, 65 Cal. 16, 2 Pac. Rep. 493; People v. Henry, 77 Cal. 445, 19 Pac. Rep. 830; People v. Goggins, 80 Cal. 229, 22 Pac. Rep. 206; People v. Arras, (Cal.) 26 Pac. Rep. 766,—it would clearly appear that the information in hand is entirely sufficient to save all the defendant's legal rights as to a proper statement of the ownership of the property feloniously received and bought.

"There is nothing in the section defining the crime which by necessary implication requires that the name of the thief shall be alleged in the indictment, and it is therefore unnecessary." People v. Avila, 43 Cal. 199. The information was therefore sufficient, as against the demurrer.

It is further claimed that there was a material variance between the proof and the allegations of the information as to the ownership of the property; that the proof showed that Tay, one of the partners, was dead, and that his estate was represented by executors, who were the legal owners of the property; and that such ownership must necessarily have been alleged in the information. Section 956 of the Penal Code, reads: "When an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." Here there is, if anything wrong, an erroneous allegation as to one of the owners of the property, who is now dead, but who, when alive, was a partner with the living alleged owner. It would seem, therefore, that there could be no doubt as to the sufficiency of the description in other respects so accurate and satisfactory as to leave no doubt as to the identity of the act charged to have been committed. This is entirely sufficient. People v. Watson, 72 Cal. 403, 14 Pac. Rep. 97; People v. Anderson, 80 Cal. 204, 22 Pac. Rep. 139; People v. Arras, (Cal.) 26 Pac. Rep. 766.

It is further objected that the following portion of the charge of the court is erroneous: "But if, upon a full and fair consideration of all the evidence in the case, you are fairly and clearly satisfied that the defendant committed the crime charged against him, you should find him guilty by your verdict, notwithstanding the proof of his good character." The criticism made by the appellant seems to be that the words "fairly and clearly satisfied" do not convey the idea that the jury must be "entirely satisfied of the defendant's guilt." But the appellate court has said: "A juror would have no excuse for saying that he did not 'feel an abiding conviction to a moral certainty' of the truth of a fact which had been 'clearly established by satisfactory proof.'" People v. Wreden, 59 Cal. 395.

Again, it is said that the court erred in not giving instruction No. 3 asked for by defendant, and in giving it after modification. As requested, it read: "In case you should find that the witness Duket [an alleged accomplice,] either alone or with another, stole the goods described in the information, then I instruct you that in this case you cannot convict on the testimony of the thief, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the thief, imputes to the defendant a knowledge that the goods were stolen." As given, it read: "In case you find that the witness Duket, either alone or with another, stole the goods described in the information, then I instruct you that in this case you cannot convict on the testimony of the thief, unless he is corroborated by other evidence which in itself, without the aid of the testimony of the thief, tends to impute to the defendant a knowledge that the goods were stolen." The argument of the defendant is that the word "imputes" should not have been changed to "tends to impute." Section 1111 of the Penal Code establishes the rule that an accused cannot be convicted by the evidence of an accomplice alone, unless corroborated by "other evidence tending to prove the defendant's complicity in the offense charged." People v. Clough, 73 Cal. 353, 15 Pac. Rep. 5. We perceive no merit in the contention as made. As to the other portions of the charge objected to, with the exception of that hereafter noticed, we do not see, considering it as a whole, and giving to it a fair interpretation, that it is subject to the objections made in this behalf.

As a portion of the charge to the jury, the trial court said: "Under our statute the following presumptions are to be regarded as satisfactory if uncontradicted, but they may be controverted by other evidence, namely: That an unlawful act was done with an unlawful intent, and also that a person intends the ordinary consequences of his voluntary act. *The effect* of these statutory rules of evidence *is that when the doing of an act which, if coupled with a guilty intent, would be a violation of law, is proven, the burden of proving the act to have been done without a guilty intent is in most cases thrown upon the accused.* The portion which we have italicised is assailed as being misleading, and as stating the law erroneously. It is plain that where the court announces a rule of evidence, and states that it is applicable to "most cases," the jury would be justified in accepting it as the rule laid down for their guidance in the case which they were then engaged in considering. In cases like this, the crime is made out if the accused received or bought the stolen goods knowing them to be such, either for his own gain, or to prevent the owner from again possessing his property; the guilty intent consisting either in receiving or buying them for his own gain, or to prevent the owner from again possessing his property. People v. Avila, 43 Cal. 199; Pen. Code, § 496. The instruction, then, must have been understood by the jury to mean that in this case, if it was proved that the defendant received or bought the stolen property, knowing it to be such, then it was proved he did an act which, if coupled with the intent to receive or buy it for his own gain, or to prevent the owner thereof from again possessing it, he would be guilty of the offense charged against him; and that when the doing of the act of receiving or buying the property, knowing it to be stolen, was once proved, then the burden of proving the want of guilty intent, as above stated, is thrown upon the accused. It is plain that the trial court laid down the rule as to the extent of the burden of proofs necessary to rebut the presumption of guilty intent raised by the proof of the acts of receiving or buying the property knowing it to be stolen, as if the case had been one of homicide, under section 1105 of the Penal Code, in which case the rule would be as declared in People v. Bushton, 80 Cal. 164, 22 Pac. Rep. 127, 549; for in the transcript it is said: "There is a marked difference in the degree of proof required to establish any fact against the defendant and that sufficient to establish any in his favor. As against the defendant, every fact material to the issue must be proved to a moral certainty, and beyond a reasonable doubt, or the jury should acquit. Any fact necessary to the defense only needs to be established sufficiently to create a reasonable doubt of the defendant's guilt when taken into consideration with all the evidence in the case. And, if the facts proved in favor of the defendant are sufficient to create a reasonable doubt of his guilt, he should be acquitted." But in such cases as this the statutory rule declared in the case last referred to, under section 1105 of the Penal Code, does not apply; and when the defendant relies upon no distinct, separate, or independent fact, such as insanity, but confines his defense to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof never shifts, but remains upon the people throughout the whole case to prove the act committed a criminal one beyond a reasonable doubt. People v. Mize, 80 Cal. 41, 22 Pac. Rep. 80; People v. Gordon, (Cal.) 26 Pac. Rep. 502. To declare otherwise would be to say that the mere proof of the taking away of the horse of another from a pasture, without permission of the owner,—a mere trespass,—would throw upon a party doing that act, if charged with larceny, the burden of proving that he did not take the horse and carry it away with intent to steal, at least to an extent sufficient to raise a reasonable doubt of the existence of such intent. We perceive no other error, but for the reasons given we advise that the judgment and order be reversed.

We concur: **Fitzgerald**, C.; **Belcher**, C. C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed.

(89 Cal. 552)

BAIRD v. MILFORD LAND & LUMBER CO.

(No. 13,143.)

(*Supreme Court of California.* June 23, 1891.)

LEASE OF TIMBER-LAND—CONSTRUCTION.

A contract leasing certain land, with the privilege of removing timber therefrom, provided that the lessee should remove at least 1,500,000 feet the first year, and 2,000,000 each succeeding year and pay one dollar per thousand feet therefor, in quarterly installments: provided that, if he should not remove such amount in any one year, he should pay therefor, and remove the same in any subsequent year without further charge; the lease to continue 20 years, renewable at the option of the lessee, on certain stated terms. *Held*, that such contract provided only for the sale of the timber, and not for a continuous rent, and, where the timber is all removed before the end of the lease, the lessor cannot recover rent for the remainder of the term, though the lessee is still entitled to possession.

Department 1. Appeal from superior court, Humboldt county; J. J. DEHAVEN, Judge.

John A. McQuade, *John R. Jarboe* and *J. H. Henderson*, for appellant. *S. M. Buck*, for respondent.

PATERSON, J. On April 21, 1875, plaintiff and defendant's assignors entered into an agreement by the terms of which the former leased unto the parties of the second part certain lands for general lumbering purposes. The contract provides: "Said parties of the second part hereby agree and bind themselves to cut and remove from said land all of the merchantable timber fit for saw-logs on said land as follows: The first year at least fifteen hundred thousand feet, board measure, and each and every year thereafter two million feet, board measure, and as much more as they may think proper, and pay said party of the first part therefor one dollar in United States gold coin for each and every thousand feet, board measure, of merchantable lumber, so as aforesaid to be by them taken from said land, such payments to be made in equal installments, quarterly, each year: provided, however, that if said parties of the second part do not remove the amount of timber above specified to be taken in any one year, they shall, nevertheless, pay therefor; and they may remove the same in any subsequent year, without further charge or pay. * * * The term of this lease, and the rights hereby granted, shall be and continue twenty years from the date hereof, and, at the expiration of said term, said parties of the second part may, at their option, renew this lease for such length of time as they shall choose, on making a written demand of said party of the first part, and on paying rent, at the rate of ten dollars per year, in addition to the stumpage rent hereby reserved for each year, the same shall be occupied under such renewed lease for lumbering or milling purposes." Plaintiff contends that under this contract he is entitled to recover $500 quarterly as rent or royalty, so long as the defendant remains in possession of the land under the contract, whether the timber has been removed or not. The court below held that the defendant was liable only for the value of the merchantable timber fit for saw-logs at one dollar per thousand, and gave judgment in favor of the plaintiff for $3,343, the value at $1 per thousand of the timber remaining on the land, and not paid for, with interest thereon and costs of suit. Plaintiff moved for a new trial, claiming that the court ought to have given him a judgment for $5,000, the amount of rent at $2,000 per annum since the last payment. The motion was denied, and plaintiff appealed from the order and from the judgment. We think the court properly construed the contract, and that the judgment is correct.

Whatever may be the rights or liabilities of either of the parties at the end of the term of 20 years, under the clause providing for a renewal we think it clear that plaintiff sold all the merchantable timber fit for saw-logs at one dollar per thousand feet, and gave the parties of the second part and their assigns 20 years in which to remove the same. There is nothing in the language of the clause which fixes the liability of the defendant, indicating an intention to provide for a dead or sleeping rent. The price of the lumber is the sole consideration named, and to guard against any misunderstanding, apparently, it is expressly provided that timber, which has been paid for in the payment of the quarterly installments, but not removed, may be removed "in any subsequent year, without further charge or pay." It is certain that defendant cannot be deprived of the use of the land "for general lumbering purposes" until the end of the 20 years named, whether the timber is removed or not, and we do not think that the parties intended that any consideration should be paid to plaintiff during that term other than the value of the merchantable timber at the price fixed. Mills had to be built and roads constructed. It was uncertain how fast the timber could be cut, sawed, and marketed. The parties of the second part were given 20 years in which to remove it, but plaintiff protected himself against unnecessary delay by a provision that the timber should be paid for in regular installments, commencing with the first quarter of the first year of the lease, whether it was removed or not. The timber was the basis of his compensation, and he evidently did not care how long the lessee might take to remove it, so long as it was promptly paid for. It might remove it all in a year if they desired, but, in any event, the plaintiff should be paid $1,500 the first year, and $2,000 every subsequent year, until all of it should be paid for at one dollar per thousand. Appellant asks: "Suppose the defendant was still in possession, and had never cut a stick of timber, * * * admitted the lease, but said there was not, and never had been, any timber upon the land. * * * What distinction can there be in principle between the cases of the land being originally devoid of timber and having become so during the term?" That is not a supposable case. We are construing the contract, and must consider all the circumstances as they appeared to the parties. There was a large amount of timber on the land, and it was all visible when the contract was made. In this respect, as well as in the terms used, the contract differs from the mining contracts in the cases cited by appellant.

Whether the defendant will be entitled to a renewal of the lease at the end of the 20 years, if at that time all the timber shall have been removed from the land, or if not removed it be made to appear that the failure to remove it was caused by bad faith, negligence, or want of diligence, we are not called upon to determine; but it would seem that, under such circumstances, a fair interpretation of all the terms of the contract would not give the defendant the right to renew the contract for an additional term at a rental of $10 per year, whatever may be the meaning of the expression, "stumpage rent hereby reserved." Although appellant does not discuss the matter, and it is therefore unnecessary to notice it, we think that the court did not err in refusing to add 10 per cent. for waste in sawing to the amount of timber found by the jury to be on the land. The judgment and order are affirmed.

We concur: Garoutte, J.; Sharpstein, J.

89 Cal. 513

People v. Dollar. (No. 20,773.)

(*Supreme Court of California.* June 22, 1891.)

Assault with Deadly Weapon—Self-Defense—Instructions.

On a trial for assault with a deadly weapon, an instruction that if the jury find that defendant did make an assault with a knife, which was a deadly weapon, and not in necessary self-defense, it is their duty to find him guilty, but if they find that he made the assault in necessary self-defense, in order to prevent D. O. from committing a violent assault upon him, then he is not guilty, does not exclude the consideration of apparent necessity.

Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

J. A. Cooper, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

McFarland, J. The appellant was convicted of an assault with a deadly weapon, and the main point upon which he relies for a reversal is the omission of the court to charge the jury fully enough on the subject of self-defense. Neither party asked any instruction upon any subject. The charge of the court given on its own motion was brief, and what is contained on the subject of self-defense was as follows: "Now, if you find from the evidence that this party did make any assault with a knife, and you find that knife to be a deadly weapon, and he did it not in necessary self-defense, it is your duty to find him guilty as charged. If you find that he made the assault, and that he did it in necessary self-defense, in order to prevent this Dan Olie from committing a violent assault upon him, then he is not guilty." At the conclusion of the charge the court, turning to counsel, said: "Anything further than that?" Counsel made no answer. The point made by appellant is that the charge ignored the doctrine of "apparent necessity," and excluded the jury from considering that defendant, as a reasonable man, might have believed himself in danger, although as a matter of fact there was no real danger. But it is not true that the charge of the court excludes the consideration of apparent necessity. "Necessary self-defense," as explained in the text-books, as defined in our Penal Code, and, indeed, as generally understood by laymen as well as by lawyers, includes every case where "there is reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury," and where the circumstances are "sufficient to excite the fears of a reasonable man." If a defendant were charged with injuring or killing a man who was apparently about to shoot him, no jury would convict because it turned out afterwards that the fire-arm used was not loaded, whether the court instructed on the subject or not. The cases cited by appellant's counsel are not in point. They were cases where the express language of the instructions excluded the doctrine of apparent necessity. In the main case relied on, (People v. Anderson, 44 Cal. 65,) the trial court, in defining "self-defense" to the jury, told them that the right "cannot be exercised in any case or to any extent not necessary. The party making the defense is permitted to use no instrument and no power beyond what will prove simply effectual." And on appeal this court held that "this definition excludes all that class of cases," etc. In People v. Flanagan, 60 Cal. 2, in the instruction held to be erroneous, the court used the language, "manifestly endeavoring and intending to commit a felony," while in the Code "or" is used instead of "and." In People v. Gonzales, 71 Cal. 569, 12 Pac. Rep. 783, the jury were told in the seventeenth instruction that "the necessity must be apparent, actual, imminent, absolute, and unavoidable;" and this court held the instruction to be contradictory and misleading. It was also said in that case that the eighteenth instruction excluded certain considerations from the jury; but, as the instruction is not given in the report, it does not appear how they were excluded. The sections of Wharton's Criminal Law referred to merely state the general doctrine, nowhere disputed, that apparent danger is sufficient. There are no other citations, and in all the cases cited the error of the instruction was one of commission, and not of omission. No doubt, in a case where the evidence at all warrants it, the court should instruct about apparent necessity when counsel for defendant requests it; and, perhaps, it is possible to imagine a peculiar case where it would be error for the court not to do so on its own motion; certainly it should not use express language which excludes that doctrine. In the case at bar there was no question before the jury as between real and apparent danger. According to the evidence of the prosecution, defendant made an entirely unjustifiable attack on the injured party, and said afterwards that he wanted to kill him. Defendant testified that the injured party first struck him; that he grabbed defendant by a handkerchief which was around his neck, and hit him several times with a rock which he had in his hand; that defendant told him that if he did not let go he would cut him; that he would not let go; that he cut him in the arm to make him let go; that as soon as defendant was released he ran away, and that the other party threw the rock after him. If the jury had believed defendant they would have acquitted him, and would not have been confused by any distinction between real and apparent danger. And it was peculiarly a case where counsel should have asked further instruction on the subject if he desired it, within the rule stated in People v. Marks, 72 Cal. 46, 13 Pac. Rep. 149; People v. Flynn, 73 Cal. 511, 15 Pac. Rep. 102; and People v. Olsen, 80 Cal. 122, 22 Pac. Rep. 125. The court expressly asked counsel if any further instruction was desired. We think, therefore, that the judgment should not be rereversed on account of said charge of the court.

2. The other error assigned is the refusal of the court to strike out the answer of the witness Olie, on his redirect examination, that he had known the defendant "since he was at San Quentin." But this error is not material, because the witness had said the same thing on his cross-examination by defendant's counsel without any objection being made to it. The judgment and order denying a new trial are affirmed.

We concur: SHARPSTEIN, J.; DE HAVEN, J.

(89 Cal. 526)

SMITH v. SCHULTZ *et al.* (No. 12,376.)[1]

(*Supreme Court of California.* June 22, 1891.)

PARTNERSHIP—FARMING LEASE.

A contract recited that the party of the first part, in consideration of certain agreements by the parties of the second part, "their heirs, executors, and assigns," "granted, demised, and let" a certain ranch for three years, with the privilege to the second parties to keep hogs thereon until a certain date succeeding the expiration "of this lease." The second parties were to plant certain crops and make certain improvements; the first party to furnish farming implements, seed, and materials, and make certain improvements. The increase of certain hogs and fowls belonging to the first party, and certain crops, were to be divided in certain proportions, the sales thereof to be made only upon "mutual consent." The first party could re-enter, etc., in case of default in any of the covenants by the second parties; but, if such covenants were performed, then the second parties might during such term hold the premises without hindrance from the first party, "his heirs and assigns." *Held*, that such contract is one of lease, and not of partnership.

Department 2. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

Action by J. C. Smith against Henry Schultz, L. E. Caldwell, and A. P. Caldwell to set aside an alleged partnership. From a judgment for plaintiff, defendants appeal.

E. F. Swortfiguer and *Geo. A. Wentworth*, for appellants. *L. B. Mizner* and *Ben Morgan*, for respondent.

MCFARLAND, J. The complaint sets forth a certain written instrument, executed December 10, 1883, by plaintiff, J. C. Smith, as party of the first part, and the defendants Schultz and L. E. Caldwell, parties of the second part, and avers that said instrument created a partnership between said three persons "in the business of raising hogs," to be conducted on a certain tract of land or ranch owned by the plaintiff, and which, by the terms of said instrument, is leased to said Schultz and L. E. Caldwell for the term of three years, from the 1st day of December, 1883. It is also averred that said L. E. Caldwell and Schultz were given and took possession of said land, and certain live-stock and personal property thereon, and that they failed to perform certain things enumerated in said written instrument, and abandoned said land and stock. It is further averred that the other defendant, A. P. Caldwell, claims to have purchased the interests of said Schultz and said L. E. Caldwell in said instrument, and to have succeeded to their rights under the same. It is also averred that said A. P. Caldwell is incompetent to carry out the agreements of said instrument; that he made said purchase against plaintiff's wishes; that plaintiff has no confidence in his ability or integrity; that he is insolvent; that he is in possession of the ranch, and the live-stock thereon, and refuses to give them up; and that the personal property is in danger of being lost and injured. The prayer is for judgment against Schultz and L. E. Caldwell for a dissolution of the alleged partnership, an accounting and settlement, the appointment of a receiver, etc., and that said A. P. Caldwell be adjudged to have no interest or title to any of the property, and no rights under said written instrument. Schultz answered, admitting the averments of the complaint as against him, but averring that on March 5, 1884, he sold and assigned to the defendant A. P. Caldwell all his right to the partnership land and property described in the complaint, and that he has no interest therein. He prayed to be discharged. Separate answers were filed by the Caldwells, in which all the material averments of the complaint were denied, except the execution of the said written contract, and it was denied that said instrument created a partnership. It was also averred in said answers that said instrument was the result of negotiations between plaintiff and the defendant A. P. Caldwell, who is the father of said L. E. Caldwell; that at plaintiff's request A. P. Caldwell allowed Schultz to be united with him as a party to the instrument; that L. E. Caldwell had advanced, or was to advance, some money to his father, A. P., and that for his security the name L. E. instead of A. P. Caldwell was inserted in the instrument with the consent of plaintiff; that the real contract was between plaintiff on the one part, and A. P. Caldwell and Schultz on the other, and that it was well understood and consented to by plaintiff that L. E. Caldwell would not enter upon the land, or take possession of the personal property, or carry out the contract, but that the same should be done by A. P. Caldwell and Schultz, who, with the knowledge and consent of plaintiff, took possession of the premises and property, and proceeded to comply with the provisions of said instrument; that on March 5th the said Schultz, with the knowledge and consent of plaintiff, sold and assigned all his interest in said instrument and property to said A. P. Caldwell, who afterwards, and until the commencement of this action, (which was December 26, 1884,) remained in possession and continued to comply with the provisions of said instrument, with the knowledge and consent of plaintiff; and that on December 6,

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[1] Petition for rehearing pending.

1884, said L. E. Caldwell, for the purpose of putting the legal title in A. P. Caldwell, assigned to the latter all his interest in said instrument.

The court tried the case upon the theory that the written instrument, of its own force, created a partnership between plaintiff, Schultz, and L. E. Caldwell; that plaintiff could at any time, at his own pleasure, dissolve said alleged partnership, put an end to the further operation of the instrument, ignore the term of three years therein provided for, and take immediate possession of the ranch. By the findings the main averments of the complaint are found to be true, and the material averments of the answers of the Caldwells untrue. By the judgment and decrees the partnership was dissolved; a receiver was appointed, who took possession of all the property: a referee took an accounting; judgment was rendered against L. E. Caldwell and Schultz for a large sum of money to be paid out of the assets, and A. P. Caldwell was decreed to have succeeded to their rights in the property, and to be entitled to any surplus remaining out of the assets after payment of the judgment and other charges; and it was decreed that plaintiff "be fully restored to his possession of all the real property described in the complaint, and to all the original stock owned by him on the premises at the date of the agreement of December 10, 1883, or which he may have put thereon at any time since, which has not been sold and accounted for by the receiver." The defendants L. E. and A. P. Caldwell made a motion for a new trial, and from an order denying said motion they appeal.

We do not see how the judgment can be maintained. At the trial the only evidence introduced by the plaintiff was (1) the instrument itself, upon which there was the following indorsement: "March 5, 1884. For value received I hereby sell, assign, transfer, and set over unto A. P. Caldwell, his heirs and assigns, all my right, title, and interest in and to the within indenture of lease and the land therein described. [Signed] Henry Schultz." (2) A statement by plaintiff, as a witness, as follows: "Subsequent to December 6, 1884, I have not made any contract or agreement to carry on business with A. P. Caldwell. The land is used for pasturage, pasturing stock exclusively. I have no confidence in A. P. Caldwell. I know that he don't pay me his bills. He couldn't pay me; that is all I know about it." And, (3) a statement by A. P. Caldwell, called as a witness by plaintiff, as follows: "I reside on Smith's ranch. I am one of the defendants in this suit. I am not on the tax-roll in this county. I have no money in bank anywhere. I owe some money in this county, and some outside this county." There was a cross-examination of plaintiff by defendants' attorney, and many of his questions were ruled out on objections made by plaintiff. The exceptions to these rulings need not be here examined. Sufficient evidence was admitted on the cross-examination to show that down to the latter part of September, 1884, at least, the plaintiff recognized and dealt with A. P. Caldwell as rightfully in possession of the land and property and carrying out the contract. Defendants moved for a nonsuit on proper grounds, and the motion was overruled. Defendants then introduced uncontradicted evidence showing that the substantial averments and denials of the answers of the Caldwells were true, and also that valuable permanent improvements had been made on the land by the lessees, which would be lost to them if the term of the lease were shortened. Under these circumstances, we do not think that any finding of the court upon any material issue is supported by the evidence. Moreover, we think that the motion for a nonsuit should have been granted. Plaintiff's case in chief depended entirely upon the proposition that the said instrument in writing constituted a partnership, and we do not think that such proposition can be maintained.

The instrument is in form a lease. The first part of it (omitting immaterial matters) is as follows: "This indenture, made the 10th day of December, 1883, between," (naming Smith as party of the first part, and Schultz and L. E. Caldwell as parties of the second part,) "witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, reserved, and contained on the part and behalf of said parties of the second part, their executors, administrators, and assigns, to be kept and performed, has granted, demised, and let, and by these presents doth grant, demise, and let, unto the said parties of the second part, all that farm, ranch, and tract of land," (here follows a description of a certain tract of land in Contra Costa county, containing 485 acres,) "for the term of three years from the first day of December, 1883, with the privilege to the said parties of the second part to keep fattening hogs on said ranch until the first day of January next succeeding the expiration of this lease." Then follow certain covenants and agreement to be performed by each of the parties. The principal agreements by the parties of the second part are that they are at stated times during the term to put certain fields in alfalfa, barley, carrots, etc., and to build certain fences, and make certain improvements,—some in the first year, some in the second year, and some in the third year, of the term,—and to manage the ranch in a farmer-like way. The plaintiff was also to furnish certain farming implements, and seed and feed, to make certain improvements, and to furnish certain materials for fencing, etc. The instrument recites that there are certain hogs belonging to plaintiff on the ranch, and provides that they are to remain the property of plaintiff, but "the increase of hogs and the profits thereon" are to be divided one-half to the party of the first part, and the other half to the parties of the second part,—sales to be made, however, only upon the "mutual consent of the parties hereto." There is also a provision about certain fowls on the ranch, "the increase, yield, and profits" of which are to be divided, one-third to go to the party of the first part. There is also a provision about alfalfa hay, which is to be baled by the parties of the second part, and put into a warehouse, or delivered at a landing, and divided equally between the parties. Mention is also made about certain horses and cattle, and some provisions made in relation to them. There are other stipulations and agreements not material to the determination of the character of the instrument. It closes with the provisions that "in case default shall be made in any of the covenants herein contained on the part of said parties of the second part, their executors, administrators, and assigns, to be kept and perfomed," then the party of the first part may re-enter, etc.; but that, if said covenants are so performed, then said parties of the second part "shall and may at all times during said term peaceably and quietly hold and enjoy said premises without any suit, let, trouble, or hindrance of or from said party of the first part, his heirs or assigns."

This instrument certainly created a lease of the land for a term of three years, from December 10, 1883; and we cannot see upon what recognized principle plaintiff, at his own pleasure, could terminate it during the first year. His right to do so could come only from some breach of covenant by the lessees, which by the terms of the lease, or operation of law, worked a forfeiture, and gave a right of reentry. But plaintiff did not show, or attempt to show, any such breach. The lease on its face was expressly assignable; and plaintiff offered no evidence that either the original lessees named in the instrument, or the assignee, A. P. Caldwell, failed to perform any of the things undertaken to be performed by the parties of the second part. The theory that the instrument created an ordinary partnership between the three persons, Smith, Schultz, and L. E. Caldwell, which gave to either of them the right, at his own pleasure, to end at any time the relation which the instrument created, is erroneous. It was in form and legal effect a lease for a definite term of years, and the relation which it created was that of landlord and tenant. It did not create a partnership. In the first place, neither the word "partnership" nor "partner," nor any other word or phrase ordinarily employed in written contracts of copartnership, was used. The use of such words, of course, is not essential when the whole instrument shows clearly that a partnership was meant; but their absence is significant when such intent is not clear. In the second place, the idea of a permanent lease for a definite term of years is at war with the notion of such an indeterminate and fitful a relation as that of a partnership. And in the third place, there is nothing in any of the language of the instrument that expresses or suggests the intention that plaintiff was to be a general partner in business with the defendants, or either of them, (and certainly there was no special partnership, within the provision of the Code.) It gives no power to one to bind the others; it contemplates no common liability; it does not make one the agent for the others in carrying on any business whatever; it contains no agreement, either express or implied, for the division of any losses; and there is no intimation in it that plaintiff was to be "liable to third persons for all the obligations of the partnership jointly with his copartners." Civil Code, §§ 2442, 2443, 2429, 2404.

Nor does it contain any agreement among themselves that the party of the one part should be bound to any extent for the obligations of the party of the other part. They were not to be partners, therefore, either as to third persons or *inter sese*. The instrument was a letting upon shares, and cannot be distinguished in principle from the one considered in Walls v. Preston, 25 Cal. 60. In that case the instrument was in form a lease for a certain term, with covenants by the lessee that he would properly cultivate the land and give to the lessor a certain share of the crops. It was there sought to "explain away" the lease by the theory that it was not indeed a partnership, but a cropping contract. The court, after an elaborate consideration of the subject, RHODES, J., delivering the opinion, concludes as follows: "It clearly appears to us that the parties in this case intended to make a lease, and that the instrument executed by them was a lease; but its effect as such was not destroyed by their having contracted for the payment to the lessor of a portion of the specific crops to be produced, and that that covenant was an agreement to pay the rent of the premises out of the crops." And so in the case at bar the legal effect of the covenant of the lessees is simply that they will deliver as rent certain shares of the increase of certain live-stock, as well as certain shares of crops. A similar contract as to the increase of sheep was held in Robinson v. Haas, 40 Cal. 478, not to constitute a partnership. See, also, on the general subject of partnership, Wheeler v. Farmer, 38 Cal. 213; Barber v. Cazalis, 30 Cal. 98; and Smith v. Moynihan, 44 Cal. 57. There being no partnership, the judgment was therefore erroneous. If the lessees, or their assignee, broke the covenants of the lease, the respondent has a clear remedy. The order appealed from is reversed, and the cause remanded for a new trial.

We concur: GAROUTTE, J.; DE HAVEN, J.

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89 Cal. 507

HIBERNIA SAV. & LOAN SOC. v. JONES *et al.*

(No. 12,995.)

(*Supreme Court of California.* June 22, 1891.)

FORECLOSURE—REVERSAL OF DECREE—INCONSISTENT CLAIMS—AMENDMENTS TO PLEADINGS.

1. Where lands were sold under a decree of foreclosure against two persons, and brought in by the mortgagee, and on appeal the decree was reversed as to one, the mortgagee cannot thereafter treat the original decree as valid against the latter for the purpose of retaining title under the foreclosure, and invalid for the purpose of charging interest and taxes.

2. In an action for an accounting, it is not an abuse of discretion to permit defendant to file an amended answer denying certain averments as to taxes paid after the evidence was closed.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Tobin & Tobin and *Thos. F. Barry*, for appellant. *Shafter, Parker & Waterman*, (*Parker & Eells*, of counsel,) for respondents.

McFARLAND, J. This action was brought by plaintiff against Charles Carroll Moore and Mary Adams Moore to foreclose two certain mortgages. The complaint contained two counts, and stated two causes of action. The first was upon a promissory note for $57,500, and a mortgage upon eight different pieces or lots of land to secure it. The note and mortgage were signed by said Charles Carroll Moore, and purported to have been signed by said Mary Adams Moore, by her attorney in fact, the said Charles. The second cause of action was upon another promissory note for $7,500, and a mortgage upon the same property to secure it, both of which were signed by said Charles and by said Mary Adams Moore personally. The seven pieces of land first mentioned in said mortgage were the property solely of said Charles; the eighth was the property of said Mary alone. Mary Adams Moore answered, denying all liability on the said first cause of action, and averring that said Charles had no authority to sign her name to the note or mortgage therein named; but she made no defense as to the second cause of action on the note and mortgage for $7,500. The court rendered judgment on the 29th day of December, 1881, against the said Charles for the principal and interest of the said first note, amounting to $76,463.35; and against said Charles and said Mary for the principal and interest of said second note, amounting to $9,055.70; and decreeing a foreclosure of both of said mortgages against both said Charles and said Mary; and providing that the proceeds of the sale of said eight pieces of land should be applied first to the satisfaction of the amount found due on said first note and mortgage set up in the first count of the complaint. Mary Moore appealed, but gave no stay-bond, and plaintiff proceeded to have the property sold under the decree. All of said lots were so sold by the sheriff to plaintiff on February 20, 1882; and, no redemption having been made, they were conveyed by the sheriff to plaintiff on August 24, 1882. The lots were sold separately; the seven lots of Charles for $53,000, and the lot of Mary Moore for $20,000. The amount due at the time on the said first note and mortgage was $78,165.95. Afterwards, on November 30, 1885, this court sustained the appeal of said Mary, and adjudged that "the decree against the defendant Mary A. Moore, and the order denying her motion for a new trial, are reversed, and cause remanded for further proceedings." 68 Cal. 156, 8 Pac. Rep. 824. In this court the case was treated entirely as an appeal from that part of the judgment which decreed her property to be subject to the lien of the said first mortgage for $57,500. No mention is made in the opinion of the court, or in the report of the case, of the said second mortgage for $7,500, to which she had made no defense in the court below. When the case went back to the superior court, the plaintiff filed an "amended and supplemental complaint against Mary Adams Moore," which is of a somewhat anomalous character. It commences as though it were a complaint *de novo* against said Mary alone upon the said second note and mortgage for $7,500, making no mention of the said first mortgage for $57,500; but it proceeds afterwards to aver the facts about the former decree of foreclosure, the sale under the decree to plaintiff, and its ownership of the eight lots through the sheriff's deed, as hereinbefore stated. No other or further decree of foreclosure is sought, but "plaintiff therefore prays the aid of the court in the premises; that the amount due to the plaintiff upon said note and mortgage be ascertained and determined; that plaintiff be allowed a reasonable counsel fee, to be fixed by the court, together with its costs and disbursements in this action; that plaintiff be credited with the total amount of such indebtedness, and be charged with $20,000, the amount for which it purchased the property; that plaintiff have judgment against the defendant Mary Adams Moore for any amount that may remain unpaid," and for such other relief, etc. To this supplemental pleading the said Mary demurred upon various grounds, and the demurrer was overruled. Shortly afterwards the said Mary died, and the defendant Francis H. Jones, having been appointed her administrator, answered, setting up all the previous history of the case. By an amendment to his answer he denied the payment by plaintiff of certain taxes and assessments, pleaded the statute of limitations, and, uniting with plaintiff in a prayer for an accounting, asked that plaintiff be accredited with the amount of the original judgment on said second note and mortgage, viz., $9,055.70, with interest from the date thereof until the date of plaintiff's said purchase of said eighth lot; that the same be deducted from the $20,000 for which said lot sold; and that defendant have judgment against plaintiff for the amount due on such accounting. The court took an accounting, and gave judgment for defendant for $12,971.61. Plaintiff appeals from the judgment, and from an order denying a motion for a new trial.

It is not necessary to inquire whether plaintiff's supplemental complaint was a proper pleading, or whether the relief sought by it could be obtained against an objecting party. That point would arise only upon an appeal by defendant. Plaintiff, having sought that mode of procedure cannot now object to it. If no error has been committed in any other respect, and justice has been done between the parties upon the plan devised by plaintiff, then the judgment should stand. We see no error committed by the court against the plaintiff. Plaintiff was credited with the amount of the original jugment, $9,055.70, with interest to the date of his purchase of the land, and also with a counsel fee of $500, and the further sum of

$1,168.22 for taxes which he is found to have paid. If any error was committed as to the taxes, it was in plaintiff's favor, for there was certainly no greater amount than that proved; and it is doubtful if he was entitled to any allowance for taxes or counsel fees. The amounts thus credited to plaintiff were deducted from the $20,000 for which defendant's land was sold, and defendant was given judgment for the balance, with legal interest. In this we see no error. Plaintiff's theory seems to be that it can treat the former judgment as intact for one purpose, and as no judgment at all for another purpose; that while retaining the title to defendant's land, which he obtained through the foreclosure sale in 1882, he can also consider the judgment as open for the purpose of charging interest at the conventional rate of the note, compounded monthly, down to the date of the present judgment, which was January 17, 1888. But it is evident that such a position is not tenable. When plaintiff proposed an accounting upon the theory that the foreclosure should stand, and that his title under it should remain undisturbed, the only proper basis for such accounting was the one adopted by the court.

The court allowed defendant, by an amended answer, to plead the statute of limitations, and also to deny certain averments in the complaint of taxes and assessments, after the evidence was closed; and appellant attacks these rulings as erroneous. As to the statute of limitations, it is sufficient to say that its consideration did not enter into the judgment, and that therefore it cuts no figure in the case. In regard to the taxes, we see no abuse of discretion in allowing the amendment. It was in furtherance of justice. Appellant was allowed $1,168.22 for taxes, which was more than the plaintiff, upon the evidence, and upon the theory of an accounting without a new decree of foreclosure, was entitled to. Plaintiff did not ask to introduce further evidence. There are no other points necessary to be noticed. The judgment and order denying a new trial are affirmed.

We concur: SHARPSTEIN, J.; DE HAVEN, J.

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3 Cal. Unrep. 415

THORNTON v. PETERSEN. (No. 13,195.)

(*Supreme Court of California.* June 22, 1891.)

REVIEW ON APPEAL—WEIGHT OF EVIDENCE.

Where the sole question is one of fact, and the evidence is sufficient to support the findings, the judgment will be affirmed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

J. C. Bates, for appellant. *Whittemore & Sears*, for respondent.

TEMPLE, C. This appeal is from the judgment, and from an order denying plaintiff's motion for a new trial. The only alleged errors are specifications under the claim that the evidence was insufficient to justify the decision. We have carefully examined the record, and are satisfied that there is abundant evidence to sustain all the findings. It is really an attempt to have this court weigh the evidence, and decide the case according to the preponderance. The appeal ought not to have been taken. The judgment and order should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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89 Cal. 611

BRYANT *et al.* v. STERNFELD *et al.* (No. 13,053.)

(*Supreme Court of California.* June 26, 1891.)

STATEMENT FOR NEW TRIAL—TIME TO SERVE—EXTENSION.

Code Civil Proc. Cal. § 659, subd. 3, provides that, if a motion for a new trial is made upon a statement of the case, the moving party must within 10 days after service of the notice, or such further time as the court may allow, prepare a draft of the statement, and serve the same or a copy therefor upon the adverse party. *Held*, that an order allowing 30 days to prepare a "statement on motion for a new trial" carries with it the same extension of time to serve the statement.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Action by George Bryant and Dennis A. Mullin, copartners under the firm name of Bryant & Mullin, against Adolph, Herman, and Morris Sternfeld, copartners under the firm name of Sternfeld Bros. & Co. Plaintiffs appeal.

G. E. Harpham and *Smith & Murasky*, for appellants. *M. J. Platshek* and *M. S. Eisner*, for respondents.

FITZGERALD, C. The transcript in this case contains two appeals,—one upon the judgment roll from a judgment rendered in favor of defendants; the other from an order dismissing plaintiffs' motion for a new trial. It appears from the record that the order appealed from was made upon the ground that the order granting to plaintiffs an extension of time for 30 days "to prepare their statement on motion for a new trial," did not extend the time to serve it. Section 1054, Code Civil Proc., under which the court or judge derives the authority to make the order for such extension, provides only for the preparation of statements, and the word "service," as there used, is expressly limited in its application to notices other than appeal. The order here made, extending the time for the purposes therein stated, is in strict compliance with the provisions of this section, and carries with it the same extension of time to serve the statement. Curtis v. Superior Court, 70 Cal. 390, 11 Pac. Rep. 652; Burton v. Todd, 68 Cal. 485, 9 Pac. Rep. 663. Subdivision 3 of section 659, Code Civil Proc., upon which counsel for respondent mainly rely in support of their contention, that the order referred to did not extend the time to serve the proposed statement, has no application, as we have already shown, to an order granting an extension of time to prepare such statement, but simply provides that the moving party must within the time therein prescribed, or the time allowed by the court or judge, prepare a draft of the statement, and serve the same or a copy thereof upon the adverse party. And the record shows that the proposed statement was prepared and served upon defendants' counsel within the time fixed by the order. It follows, therefore, that as the court below erred in making the order appealed from, it should be reversed, and the cause remanded for further proceedings on the motion for a new trial. No error appearing on the judgment roll, the judgment should be affirmed, and we so advise.

We concur: FOOTE, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and the cause remanded for further proceedings on the motion for a new trial, and the judgment is affirmed.

89 Cal. 590

HYDE v. BOYLE *et al.* (No. 14,190.)

(*Supreme Court of California.* June 25, 1891.)

BILL OF EXCEPTIONS—STRIKING OUT PORTIONS—POWER OF SUPREME COURT.

1. Under Code Civil Proc. Cal. § 649, which provides that a bill containing the exceptions to any decision may be presented to the court or judge for settlement, and, after having been settled, shall be signed by the judge, and filed with the clerk, the supreme court has no power to strike out part of the bill settled and certified by the trial court.

2. A trial judge may amend a proposed bill of exceptions to conform to the facts, although the opposite party does not propose amendments.

In bank. Appeal from superior court, city and county of San Francisco; J. P. HOGE, Judge.

Action by Hyde against Boyle and others. Defendants appeal. Code Civil Proc. Cal. § 649, provides that a bill containing the exceptions to any decision may be presented to the court or judge for settlement, and after having been settled shall be signed by the judge and filed with the clerk.

Geo. H. Buck and *Edward F. Fitzpatrick*, for appellants. *T. M. Osmont*, for respondent.

PER CURIAM. The appellants ask to have struck out of the printed transcript filed herein a portion of the bill of exceptions that had been settled and certified by the judge of the superior court, prior to the filing of the transcript, upon the ground "that no part of the said matter was read, referred to, or submitted to the court below upon the hearing of the motion upon which the order appealed from was made and entered;" and have presented certain affidavits in support of their motion, and of the grounds upon which it is made. We think that the subject-matter of this motion was substantially passed upon by this court in its refusal to grant the petition of the appellants "to prove an exception in this case," (Hyde v. Boyle, 86 Cal. 352, 24 Pac. Rep. 1059;) and that the reasons then given for refusing their petition are applicable to the present motion. The statute provides that a bill of exceptions shall be settled by the judge who heard or tried the cause, and, except in the single instance in which the judge "refuses to allow an exception in accordance with the facts," (Code Civil Proc. § 652,) has provided no other mode of settling the bill, and has made no provision whatever for any review of his action in settling a bill. The settlement of a bill of exceptions is one of the duties imposed upon a judge by virtue of his office, and is to be performed by him under the sanction of his official oath. It is not to be presumed that he will in any instance so far violate his official obligation as either willfully or knowingly to insert in the bill any matter that is not properly there, or exclude therefrom any matter that should be inserted. This court is not the tribunal to determine whether he has in any instance violated his duty in this respect, or from which a litigant is to seek redress for any such violation. When the bill of exceptions has been settled and allowed by the judge before whom the proceedings were had, it must, for all purposes of reviewing the action of the court, be deemed by this court to be a correct statement of what took place. If the judge has refused to allow an exception, the statute has provided a remedy by which a party may prove that exception, but it has given to this court no authority for striking out from a bill matters which are alleged not to have occurred in the court below. It would lead to endless confusion if, after the judge has solemnly settled and signed the bill, his action could be set aside, or a portion of the bill struck out, upon the affidavits of spectators or parties in interest. As was said by this court in Vance v. Superior Court, 87 Cal. 393, 25 Pac. Rep. 500: "If it be an evil that a statement of what evidence was introduced, made by a judge who presided over the trial, and who acts in his judicial character, and under his judicial oath, cannot be overcome by the contrary statement of somebody else, it must be put into the large class of evils (real or imaginary) which this court has no jurisdiction to remedy." We do not wish to be understood as holding that everthing that is contained in a bill of exceptions is always to be considered by this court in reviewing the action of the court below. It may frequently happen that irrelevant matters are incorporated into the bill, and the bill itself may show upon its face that the matters therein recited were not presented to the court at the time it made its rulings, or could not have any weight in determining the correctness of such rulings. This court will consider only such matters as by the bill of exceptions itself purport to be pertinent, and to have been considered by the court below.

The fact that the respondent did not propose any amendments to the draft of the bill that had been proposed by the appellants did not preclude the judge from making the same conform to the facts. The time within which the judge may settle a bill after it has been presented to him is not fixed by statute. If no amendments are proposed, the bill is to be presented to the judge for settlement; and it is the duty of the judge, in settling the bill, to make it conform to the facts. He is not precluded from so doing by reason of the failure on the part of the opposite party to propose such amendments to the draft as will cause the same to correctly represent what transpired before him. The provision in the statute that he is "to strike out all redundant and useless matter, so that the exceptions may be presented as briefly as possible," is not a limitation upon his functions in settling the bill, but is more in the nature of a definition of the course which the judge is authorized to adopt "in settling the bill." Motion denied.

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89 Cal. 564

SWAIN v. BURNETTE *et al.* (No. 13,085.)

(*Supreme Court of California.* June 23, 1891.)

SPECIFIC PERFORMANCE—ORAL AGREEMENT TO EXCHANGE — PART PERFORMANCE — STATUTE OF FRAUDS—MEMORANDUM.

1. In an action for specific performance, the evidence showed that defendant placed the property in the hands of an agent to sell or exchange, and by his efforts met plaintiff, and agreed orally to exchange with him. Plaintiff left a deed with the agent, but defendant refused to accept it. *Held*, that a delivery to the agent was not a delivery to defendant, so as to constitute part performance, and take the agreement out of the statute of frauds.

2. Where one orally agreed to convey property, and made a deed, which was not delivered, such deed cannot be treated as a memorandum of the agreement, in the absence of evidence showing that it contained the terms thereof.

3. An oral agreement for the exchange of land cannot be enforced by one whose title is defective, when the agreement was that the exchange should be made if titles were satisfactory.

Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Geo. W. Lewis, (*Ben. Morgan*, of counsel,) for appellant. *J. C. Plunkett*, (*N. B. Malville*, of counsel,) for respondents.

DE HAVEN, J. This is an action to enforce the specific performance of an alleged agreement for an exchange of lands. The making of the agreement was denied by defendants. The answer alleges that defendant Nellie C. Burnette, who is the wife of the other defendant, E. T. Burnette, is the owner of the land in controversy. The evidence in the record before us shows that the defendant E. T. Burnette employed one Crane, a real-estate agent, to effect a sale or an exchange of said land, by a writing, the material part of which is as follows: "I will place this property in your hands for sale, and will pay you five per cent. commissions on the amount of sale. Price, $5,000. You to pay all advertising expenses. Or you can trade this property for property in Oakland that will be satisfactory to me. I will accept the same as cash." It appears that Crane, acting under this employment, brought the plaintiff and the defendants together, and it may be inferred from the testimony of Crane that an oral agreement was made between the parties for an exchange of their lands. It was further shown that on July 15, 1884, the plaintiff left with Crane for the defendants a deed properly signed and acknowledged by him in form conveying to Mrs. Burnette the land which he claims he was to give in exchange for that in controversy, but the defendants refused to accept this deed. It also appears that at some time during the negotiations the defendant Mrs. Burnette signed and acknowledged a deed of the land in controversy. In it the plaintiff was named as grantee, but it was never delivered, nor did Mrs. Burnette in any manner part with its possession, and she finally destroyed it. Its contents were not shown further than that it was sufficient in form, if delivered, to convey the land which it described. In addition to this, there was also introduced in evidence the following letters written by defendant Mrs. Burnette to the said Crane, in relation to the proposed contract with plaintiff: "Haywards, Cal., June 26, 1884. A. E. Crane—Dear Sir: My husband has returned, and has ascertained from the records of Alameda county there is a claim against the property you propose exchanging, belonging to Mr. Swain. The claim is known as the 'Dungan Title,' now pending in the superior court of Alameda county, and entered February 9, 1882. Therefore you can consider the trade at an end, as you both told me there was no suit over it. You can take the property off your books, as I will not sell the property through you." "Haywards, July 11, 1884. Albert E. Crane—Dear Sir: The ten days have expired in which Mr. W. B. Swain was to furnish me a good title of his property on Filbert street. There still stands on record a mortgage not released; also the Dungan title, not released. Therefore you can take the property off your books, and I will take up my deposit of $250.00, as I consider the trade at an end." Upon this evidence the plaintiff was nonsuited, and on this appeal he contends—*First*, that the evidence shows such a part performance by him of the oral agreement as to entitle him to its specific performance by defendants; *second*, that there was a sufficient memorandum in writing of the agreement to satisfy section 1624 of the Civil Code.

1. There was no part performance by plaintiff of the oral agreement, within the meaning of the rule relating to that subject. It may be conceded that, if he had conveyed his own land in accordance with the terms of such agreement, this would have been such a performance by him that a court of equity would have compelled the defendants to perform their part of the contract. Caldwell v. Carrington, 9 Pet. 86; Pom. Spec. Perf. Cont. § 134. But the evidence falls far short of showing that he conveyed to the defendant Mrs. Burnette the land which he claims he was to exchange for the land in controversy. She refused to accept the deed; and the delivery to Crane, even if unconditional, was not a delivery to her, as it does not appear that Crane was her agent for the purpose of accepting a delivery of this deed. Certainly, the written authority to effect a satisfactory exchange of her

land signed by her husband, and, we may assume, ratified by her, did not constitute Crane her agent to enter into a binding contract for such exchange, or to accept a deed for her if she afterwards made a contract for the exchange of her land. By this writing there was reserved to the defendant, signing or adopting it, the right to make his or her own contract; and Crane was only authorized, so far as relates to an exchange of lands, to find some one who would make a satisfactory exchange with defendant, and in the event of his success Crane was to be allowed the same commission as on a sale for $5,000 in money, and its main purpose seems to have been to fix the compensation to which Crane would be entitled under such employment. But, in addition to this, we think the fair inference to be drawn from the evidence is that plaintiff left his deed with Crane, to be delivered to Mrs. Burnette only on condition that she executed her deed to plaintiff, and, as this condition was not performed, plaintiff's deed never took effect as a conveyance. For both of these reasons we think there was no part performance by appellant.

2. The appellant further insists, that the deed signed by the defendant Mrs. Burnette, although not operative as a conveyance because not delivered, may yet be regarded as a sufficient memorandum of the oral agreement within the meaning of section 1624 of the Civil Code. We do not think so. It is unnecessary for us to determine, at this time, whether a deed not delivered, nor intended by the party signing it as a memorandum, if otherwise sufficient, could be treated as a memorandum of an agreement for the sale of land, within the meaning of the statute, because there is nothing in the evidence to show that this writing, which lacked only delivery to constitute a deed, contained a memorandum of the terms of the agreement which plaintiff claims that he made with defendants in reference to an exchange of lands, and, unless it did, it would not satisfy the statute. It may have been sufficient in form to have operated when delivered as a conveyance, and yet have been entirely silent as to the agreement in pursuance of which it was made, and therefore insufficient as a memorandum of such agreement. Campbell v. Thomas, 42 Wis. 441; Cagger v. Lansing, 43 N. Y. 553.

3. The letters do not purport to state the terms of any completed agreement. The first, of June 26th, is simply a rejection of the proposition to make the exchange. It is apparent from this letter that the matter of an exchange had been submitted to her for consideration, and, upon examination of the records, the proposition was not accepted by her. In regard to the letter of July 11th, it may also be said that it does not state the terms of a completed agreement, such as plaintiff claims was made. It simply states that the title of plaintiff's property is not satisfactory, and that the time within which he was to make a good title had expired, and that she did not intend to pursue the matter further. And it is very clear from both of these letters that the question of plaintiff's title was under consideration and discussion at all times during the negotiation between the parties, and that until satisfied it was good the defendant did not propose to make an exchange. These letters do not furnish sufficient evidence of the agreement alleged by plaintiff to entitle him to the judgment he seeks to obtain.

4. The order refusing to modify the judgment is not an appealable order. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; McFARLAND, J.

(89 Cal. 613)

BURDELL v. TAYLOR. (No. 13,303.)

(*Supreme Court of California.* June 26, 1891.)

BOUNDARIES—EVIDENCE—INTERLINEATIONS—EVIDENCE OF HANDWRITING.

1. In ejectment to recover land claimed by plaintiff to be included in his surveys of swamp and overflowed land, and by defendant as being included in another survey to him, the county surveyor who made all the original surveys, and his successor, testified that the land was in plaintiff's survey, and there was a natural monument still standing at which the surveys were begun. The surveyor employed by defendant commenced at a stake which defendant told him was the section corner, but about which he knew nothing. *Held*, that the evidence warranted a finding for plaintiff.

2. Where the maker and recorder of a survey testifies that interlineations appearing therein were made by him before its execution, the survey is admissible in evidence.

3. The successor of a county surveyor, having charge of the documents in the office, who testifies that he has made frequent examination of documents purporting to be in his predecessor's handwriting, is competent to testify that interlineations appearing in a survey made by his predecessor are in his handwriting.

Commissioners' decision. Department 2. Appeal from superior court, Marin county; E. B. MAHON, Judge.

T. J. Crowley, for appellant. *Hepburn Wilkins*, for respondent.

FOOTE, C. This is an action in ejectment to recover possession of certain parcels of land claimed by the plaintiff. The trial was had before a jury, who returned a verdict for the plaintiff. Judgment was thereupon rendered, from which, and an order refusing a new trial, the defendant appeals. One ground of error claimed is that the evidence does not support the verdict. The plaintiff claimed title through certain state patents to swamp and overflowed land, surveys numbered 56 and 61, and certain mesne conveyances made under those patents. The defendant claimed some of the land in controversy as being within the lines of a Mexican land grant, to which he had title, and by virtue of a certain state patent of swamp and overflowed land, survey No. 55, and by adverse possession for five years. We think the evidence sufficient to show that no such adverse possession ever took place. The real conflict in the matter was as to whether the land in controversy lay within the patents for surveys Nos. 61 and 56, or lay within the Mexican grant and the state patent for survey No. 55. The county surveyor who made all the original surveys for these patents, Mr. Easkoot, and Mr. Dodge, who succeeded him, testify that the two parcels of land last described in the complaint are within the patent for swamp land survey No. 56; and the defendant, in his original brief, at page 2, concedes as much. This being so, it cannot be said that the jury were wrong in their verdict to that extent, particularly when we come to look at the testimony for the defendant, which falls far short of satisfactorily showing that this land was within the patent for swamp-land survey No. 55. Easkoot seems to have made all the surveys of these swamp lands, and to have commenced at a certain bay tree, a natural monument, still standing, as an initial point. Dodge followed his plan in locating the boundaries on the ground. But the surveyor employed by the defendant commenced at a stake at the south-west corner of section 32, which he was told by the defendant was a section corner, but about the truth of which he knew nothing. Neither he nor the defendant satisfactorily established this as the true corner of that section; and, when Easkoot was recalled to rebut their evidence, he stated that, in making the surveys for these swamp-land patents, he never set any stake at that corner, never made any survey by reference to it, and never saw one there. In fact, the evidence did not show in any satisfactory way that this stake from which the defendant's surveyor commenced his survey to locate the line between the land embraced in patents for survey 55 and survey 56 was the true south-west corner of section 32 at all. This being so, the jury were fully warranted in finding, as they did, for the plaintiff, whose evidence as to the true line between these surveys was virtually uncontradicted. So as to the land claimed by plaintiff as being in survey 61, to which he had title, the evidence is conclusive that it was within the survey on which his patent was based. It is claimed, further, for the appellant, that certain instructions given by the court were erroneous. We have searched the transcript laboriously, and find no such instructions asked for, given, or excepted to.

The further point is made that the court erred in admitting in evidence the record of survey No. 61, because it appeared to be interlined, and no sufficient explanation given thereof. Even conceding that the objection made was sufficient, although not pointing to the particular respect in which the document was inadmissible, by stating that it was because of an interlineation, still it appears that Easkoot, the maker and recorder of the survey, showed that the interlineation was made before execution thereof by him. This was sufficient. Code Civil Proc. § 1982; Sedgwick v. Sedgwick, 56 Cal. 213.

We think, also, that the evidence of Dodge, as to the interlineation being in the handwriting of Easkoot, was admissible and proper, under the rule announced in Sill v. Reese, 47 Cal. 344; it being shown that Dodge was Easkoot's successor as county surveyor, and had charge of the official documents of that office, and had given frequent examination to numerous documents therein purporting to be in Easkoot's handwriting, and which Easkoot also testified as being in his handwriting. It is also urged that a certain question, viz., "In running that line in the direction that you did, did it fall north or south of the wharf?" asked by defendant's counsel of defendant, Taylor, as a witness, ought to have been allowed by the court to be answered. The defendant's counsel, in his brief, states that the question is to be found in the transcript. But there is no such question there. On page 79, at the end of what is marked as an answer, this question appears to have been put and not allowed to be answered. This jumbling up of the record is unfortunate, but, after searching through it, we have found that the question was probably asked, and an answer disallowed. But we cannot perceive that this worked any prejudice to the defendant. The defendant, the witness, was not possessed of any knowledge where the true line between surveys 55 and 56 ran, and his statement that the line he was following fell north or south of the wharf could prove nothing as to the accuracy of the line. Again, the evidence of his surveyor and himself, as to the boundaries of the survey, commencing at a stake which was not sufficiently shown to be the south-west corner of section 32, which they claimed it to be, would not have warranted the jury in finding for the defendant, as against the uncontradicted evidence of Easkoot and Dodge, as to the true lines of the surveys, even if the defendant had been allowed to state where the line he and his surveyor were running fell. We perceive no merit whatever in this appeal, and advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(89 Cal. 547)

LOUIS v. ELFELT *et al.* (No. 13,036.)[1]

(Supreme Court of California. June 23, 1891.)

MASTER AND SERVANT—DISSOLUTION OF PARTNERSHIP — TERMINATION OF CONTRACT OF EMPLOYMENT.

The dissolution of a copartnership by the death of a partner terminates a contract of employment for a year between the firm and a salesman, under Civil Code Cal. § 1996, providing that every employment in which the power of the employe is not coupled with an interest in the subject, is terminated by notice to him of the death of the employer, and, if the surviving partners retain him to assist in winding up the affairs of the partnership without an express agreement, the implied contract is only for such time as his services may be needed, and at such a salary as his services may be reasonably worth.

Commissioners' decision. Department 1.

Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Naphtaly, Freidenrich & Ackerman, for appellants. *Jos. Rothchild* and *Morris C. Baum*, for respondent.

[1] Petition for rehearing pending.

Vanclief, C. This action was brought to recover from the defendants $500 alleged to be due the plaintiff, as salary for his services as salesman for Elfelt & Co., during the month of December, 1886. The answer of defendants denies that plaintiff was employed by Elfelt & Co. or by the defendants for any part of the month of December, 1886, and denies that he rendered any services to Elfelt & Co. or to defendants during that month. The plaintiff had judgment for the sum demanded, from which, and from an order denying their motion for a new trial, defendants appeal. The material facts are: (1) That on January 1, 1884, and until June 14, 1886, Elfelt & Co., a copartnership composed of A. B. Elfelt, Alfred P. Elfelt, S. Goldsmith, George A. Kohn, and Philip Kohn, were engaged in the wholesale clothing business in San Francisco, generally carrying a stock of merchandise of the value of $600.000 to $700,000. (2) That prior to April, 1884, the plaintiff had been employed by the firm as traveling salesman, at a salary of $350 per month and his expenses. (3) That in April, 1884, he was employed as city salesman, at a salary of $6,000 a year, he paying his own expenses, and the increased salary to commence from January 1, 1884. (4) No other express agreement was ever made as to salary, or as to the length of time he should be employed; but he continued in the employment by tacit consent of all parties, and was paid the same salary, until June 14, 1886, when Alfred P. Elfelt died. (5) On the death of Alfred P. Elfelt, the surviving partners continued the business for the mere purpose of winding it up, and plaintiff continued in their employment, without any new express agreement, until some time in October, 1886, when they notified him that his services would not be required after November following. Plaintiff continued in the service through the month of November, and on December 1st offered and claimed the right to continue until the end of the year; but defendants then discharged him according to previous notice. After his discharge he reported himself as ready for work from time to time, and was ready and willing to continue his services throughout the month of December; but he was told there was nothing for him to do, and his services were not accepted during any part of that month. (6) On December 1, 1886, the stock of the concern was so much reduced that they could not supply their customers with the assortments ordinarily required, and most of the remnants of stock were sold at auction during that month and January following; and the business was entirely closed out in January, 1887. As conclusions of law the court found—"*First*, that said contract of employment between plaintiff and the copartnership of A. B. Elfelt & Co. was an entire one, by the year, and not otherwise, to-wit, from January, 1, 1884, to January 1, 1885; *second*, that said contract was renewed by consent of the parties thereto on the 1st day of January, 1885, and again on the first day of January, 1886, and was in full force and effect during the entire month of December, 1886; *third*, that said defendants, as surviving partners of said copartnership, assumed said contract, and all obligations arising thereunder, and during the month of December, 1886, were guilty of a breach of the terms thereof without cause or right."

This third conclusion of law is also found as a fact; but, as there is no evidence that the surviving partners assumed any obligation not devolved upon them by law, it must have been intended as a mere conclusion of law, and, as such, may be correct as to all obligations not dissolved by the dissolution of the copartnership. There is no finding or evidence of any copartnership agreement as to continuing the business, nor as to the mode of winding up the business, after a dissolution by death of one of the copartners. Appellants contend that the term for which plaintiff's employment was renewed, on the 1st day of January, 1886, (one year,) was terminated by the death of Alfred P. Elfelt, and the consequent dissolution of the copartnership on the 14th day of June, 1886, and I think this point should be sustained. No doubt the contract for a year's service was presumptively renewed on the 1st day of January, 1885, and again on the 1st day of January, 1886, by implied consent of the parties, (Civil Code, § 2012;) but the dissolution of the copartnership by the death of Alfred P. Elfelt (Id. § 2450) dissolved the contract, (Wood, Mast. & S. 165; Whart. Cont. § 322; Civil Code, §§ 1996, 1997;[1] Tasker v. Shepherd, 6 Hurl. & N. 575; Farrow v. Wilson, L. R. 4 C. P. 744.) The death of Alfred P. Elfelt extinguished the copartnership and business of the copartnership in which the plaintiff was employed. Upon the dissolution of the copartnership, the law devolved upon the surviving partners the power and duty to "settle the affairs of the partnership without delay." Code Civil Proc. § 1585. If deemed advisable, and for the interest of the concern, they might have sold the entire partnership stock of goods at auction or otherwise within a month after the dissolution, but it was within their discretionary power to continue to dispose of the stock to the customers of the concern in the ordinary way, if that was deemed more beneficial to the interest of all parties concerned, and for that purpose to employ the necessary salesmen and other agents. So far as the plaintiff served the surviving partners, he was by implication newly employed by them to assist in settling the affairs of the extinct copartnership. For this employment, in the absence of special agreement, he was entitled to such compensation only as his services were reasonably worth. They paid him $500 per month, and there is no complaint that this was not the full value of his services. It was neither their duty nor within their lawful power to retain and pay him a salary a single day after they considered his services unnecessary and unprofitable to the business of settling the affairs of the copartnership. Civil Code, §§ 2458, 2462, inclusive. I think the judgment should be reversed, and that the trial court should be directed to enter judgment for the defendants upon the findings.

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[1] Civil Code Cal. § 1996, provides that every employment in which the power of the employe is not coupled with an interest in the subject shall be terminated by notice to him of the death of the employer

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to enter judgment for defendants upon the findings.

PATERSON, J., (*concurring*.) I am fully satisfied with the reasons stated by Commissioner VANCLIEF, and with his conclusion. It is a general rule that death does not absolve a man from his contracts, but there are exceptions as well settled as the rule itself. Contracts of a purely personal nature do not survive. An executor as such cannot maintain a suit or be sued for breach of promise. The death of a servant within the term of hiring discharges the contract, and no action can be maintained against his executors for its non-performance. The death of the plaintiff within the year would have been a legal excuse from the further performance of his contract, and the effect of death upon the survivor must be mutual. The defendants are prevented by the act of God and the operation of law from continuing the partnership affairs. There are cases which hold that the dissolution of a firm does not discharge the contract, but they are cases in which the dissolution resulted from the act of the parties. The question whether damages can be recovered depends upon the question whether the dissolution resulted from the act of God and the operation of the law, or from the act of the parties.

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89 Cal. 535

LEONARD v. FLYNN *et al.* (No. 13,454.)

(*Supreme Court of California.* June 23, 1891.)

EJECTMENT—TITLE BY JUDICIAL SALES—ABATEMENT—ANOTHER ACTION PENDING.

1. One who takes a conveyance, before expiration of the time for redemption, from the purchaser at a sale under execution, and afterwards receives a deed from the sheriff, acquires a perfect title.

2. The pendency of an action of ejectment by one having the equitable title under a conveyance by a purchaser at a judicial sale before expiration of the time for redemption is not a bar to another action by him after acquiring the legal title by a deed from the sheriff.

3. The statute of limitations does not begin to run against a purchaser of land at a sheriff's sale, or his grantees, until delivery of the sheriff's deed.

4. The fact that before the purchaser at a sheriff's sale, or his grantees, has received a deed from the sheriff, a person claiming title through a conveyance from the judgment debtor has entered into possession and made valuable improvements, without objection by the purchaser at the sheriff's sale, or his grantees, is not sufficient to constitute an equitable estoppel against the latter.

Department 1. Appeal from superior court, Santa Cruz county; F. J. MCCANN, Judge.

Charles B. Younger, for appellant. *Julius Lee*, for respondents.

GAROUTTE, J. This is an action to recover possession of 16.73 acres of land described by metes and bounds, and situate in Santa Cruz county. Defendant Eugene Flynn disclaims all interest and possession. Defendant Patrick Flynn denies the allegations of the complaint; alleges title in himself; alleges that the cause of action is barred by the provisions of sections 312, 318, and 325 of the Code of Civil Procedure; "that another action is pending between the same parties, asking for the same relief; that for a long time prior to November 12, 1884, defendant's grantor was seised in fee and possessed of said tract of land, and upon said day she transferred her interest therein to defendant, who thereupon entered into the actual possession of said land, and ever since that time has had and now has the actual, exclusive, notorious, and adverse possession thereof, against all the world, claiming the same in his own right, and during said time has paid all the taxes assessed thereon." Defendant also sets out facts which he claims constitute an equitable estoppel against plaintiff. As conclusions of law, the court found "that defendant and his grantor had been in the adverse possession of the land for more than five years prior to the commencement of the action; that plaintiff was not the owner, and was not entitled to the possession, thereof; that the action is barred by reason of the pendency of the former action; that plaintiff is estopped," etc. This is an appeal by plaintiff from the judgment and order denying his motion for a new trial. Plaintiff and defendant claimed title from a common source. Plaintiff's title rests upon a sheriff's deed based upon a judgment and execution against Mary J. Roache, who was originally seised of the property in fee.

1. It is conceded that the proceedings of the sheriff in selling the tract of land under execution were valid; that Edward Briody was the purchaser at such sale, and the certificate of sale was issued to him December 13, 1873. Briody conveyed to Margaret Curn, who was a grantor of plaintiff. Defendant claims title by virtue of a quit-claim deed from Mary J. Roache, dated November 13, 1884. The court found that Robert Orton, as ex-sheriff of Santa Cruz county, upon May 28, 1888, made a deed to Edward Leonard, based upon the aforesaid execution and sale of this tract of land. Leonard at that time was the equitable owner of the land, under mesne conveyances from Briody. The court further found that the deed from Briody to Curn was made June 11, 1874, and prior to the expiration of the time for redemption. The fact that the deed was made prior to the expiration of the time for redemption is immaterial, for it operated to transfer Briody's interest in the property, and was equivalent to an assignment of the certificate of sale. In Page v. Rogers, 31 Cal. 301, Justice SAWYER, after an exhaustive examination of the law pertaining generally to this matter, held that the estate of a purchaser of realty, at a judicial sale, may be seized and sold under execution, and that, too, prior to the expiration of the time for re

demption. He says: "If a sale of a purchaser's interest after the time for redemption expires operates as an assignment of the sheriff's certificate of sale, a sale before the time expires must have the same operation." To the same effect is Green v. Clark, Id. 591; Ward v. Dougherty, 75 Cal. 244, 17 Pac. Rep. 193. Upon May 28, 1888, Edward Leonard, claiming the property through mesne conveyances from Briody, the time for redemption having long since expired, and being the assignee of the certificate of sale by reason of these conveyances, certainly had a perfect equitable title to the realty as against Mary J. Roache, the judgment debtor, and all parties having notice of these matters, and was entitled to a deed of the property from the sheriff.

The deed of the sheriff, dated May 28, 1888, conveyed to him the dry legal title, which, in conjunction with his equity, gave him a perfect title, which he passed by conveyance to his grantee, the plaintiff here.

2. We will now examine the conclusion of the court "that there is another action pending between these parties involving the same subject-matter." In a case such as we have under investigation here, where, in addition to the defense of abatement by reason of the pendency of another action, the defendant relies upon other defenses, which go directly to the merits of the cause, it would seem to be the better practice for the trial court to require the defendant to present his evidence upon his plea in abatement at the opening of his defense; for, if proven to be meritorious, it would in many cases save much useless labor and great expense in litigating other defenses. In addition to finding favorably to the defendant upon his plea in abatement, the court found that the plaintiff had no title, and was not entitled to the possession, that the plaintiff was estopped, and that the defendant had gained title by adverse possession, and proceeded to pass final judgment upon the merits of the action. The defendant, by his answer, asked that this action abate by reason of the pendency of a prior action. The court found that such action was pending, and instead of abating this action, by reason of such fact, for all practical purposes, it proceeded to abate the prior action by adjudicating upon all matters involved therein. It would be an absurdity for the trial court to hold that the action should abate, and then proceed at once to try it upon its merits, and render final judgment. This proposition needs no authority to support it; but Larco v. Clements, 36 Cal. 134, and Coubrough v. Adams, 70 Cal. 379, 11 Pac. Rep. 634, are directly in point. In the former action between these parties, after the plaintiff had presented his evidence to the court and rested, upon motion of the defendant he was nonsuited and immediately thereafter filed the complaint in this action. Respondent's contention, that that action is now pending, cannot be sustained in the face of the provisions of section 1049 of the Code of Civil Procedure, and also, if we may be allowed to speak *de hors* the record, in face of the fact that that case is now pending before us under final submission, and ripe for decision. Conceding that in all other respects these two actions are identical, yet the finding of the court in this regard must be set aside, because appellant acquired the legal title to the land in litigation after the commencement of the first action. A plaintiff may have two suits against the same defendant for the recovery of the possession of the same land, pending at the same time, if the second is brought on a title acquired after the commencement of the first. Vance v. Olinger, 27 Cal. 358; Mann v. Rogers, 35 Cal. 318; Larco v. Clements, 36 Cal. 132; Murray v. Green, 64 Cal. 368. The finding of the court, therefore, that another action was pending between these parties, etc., is not supported by the evidence, and is erroneous; but this finding upon the question of abatement, being erroneous, presents the anomalous proposition that for that reason, perchance, the judgment should be affirmed, for we are now compelled to examine respondent's defenses to the merits of the cause.

3. Plaintiff's grantor, as we have already seen, was not possessed of the legal title to this tract of land until he received the deed from the sheriff, May 28, 1888. He had no right of entry until that time, and it was only at that time that his cause of action accrued. The statute of limitations does not begin to run until the cause of action has accrued. Collins v. Driscoll, 69 Cal. 550, 11 Pac. Rep. 244. If he had no right of entry until 1888, it would be a harsh rule to hold that a title by adverse possession was undergoing the process of creation against him prior to that time; yet there are some reasons and also authority from other states supporting such rule of law. Pratt v. Pratt, 96 U. S. 704. We will not enter into a detailed discussion of this question, owing to the fact that it is essentially a rule of property, and therefore it is of vast importance that the law as heretofore laid down by this court should be deemed unquestioned and conclusive. "The statute of limitations does not commence running against a purchaser of land at a sheriff's sale until the sheriff's deed has been delivered to the purchaser." Jefferson v. Wendt, 51 Cal. 573. For the foregoing reasons we deem it unnecessary to enter into a detailed examination of the evidence upon which the defendant relies to create his title by reason of an adverse possession for the period of five years.

4. The facts that defendant relied upon to constitute an estoppel, as shown by his answer, are: "That shortly after his entry upon this tract of land he placed valuable improvements thereon. That at that time plaintiff and his grantors well knew that he was making such improvements, and claimed the land as his own, and they did not object to the making of such improvements; nor did they, or any one of them, make known to him that they claimed any interest in said land." The court found in conformity with the foregoing allegations, and, in addition, found that, at the time, plaintiff and his grantors knew their title, and

that it was the same at the commencement of the action. Neither the facts alleged nor the facts found are sufficient to constitute an equitable estoppel. Boggs v. Merced Min. Co., 14 Cal. 279. Let the judgment and order be reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; PATERSON, J.

(89 Cal. 543)

LEONARD v. FLYNN. (No. 13,490.)

(*Supreme Court of California.* June 23, 1891.)

EJECTMENT—EVIDENCE OF TITLE—POSSESSION.

Prior possession of plaintiff, or parties through whom he claims for many years, is sufficient evidence of title to support ejectment.

Department 1. Appeal from superior court, Santa Cruz county; F. J. MCCANN, Judge.

Charles B. Younger, for appellant. *Julius Lee*, for respondent.

GAROUTTE, J. This is an action to recover the possession of a tract of land in Santa Cruz county. Plaintiff appeals to this court from a judgment of nonsuit rendered against him. His complaint was in the ordinary form, and the evidence upon which the trial court acted in granting the motion for nonsuit was as follows: The tract of land which forms the subject of this litigation was a part of the Rancho San Andreas. Upon August 18, 1873, by partition proceedings, the tract in dispute was set apart to Mary J. Roache in fee. Upon December 13, 1873, it was sold by the sheriff of Santa Cruz county under and by virtue of an execution against her to Edward Briody, who received a certificate of sale thereof, containing the usual recitals. Upon June 12, 1874, Edward Briody conveyed it by grant, bargain, and sale deed to Margaret Curn. Upon January 22, 1880, it was conveyed in the same manner by John Curn and Margaret Curn to Edward Leonard. Upon December 19, 1887, it was conveyed by Edward Leonard and Mary E. Leonard to James Joseph C. Leonard. Upon January 13, 1888, it was conveyed by the above-named grantee to the plaintiff in this action. From June 12, 1874, until some time in 1886, plaintiff and his grantors were in the possession of the tract of land in dispute, claiming title to the same. Defendant's answer denied the ownership of plaintiff, and set up title and possession in himself. Defendant's motion for a nonsuit was made and granted upon the grounds that plaintiff had not shown any legal title in himself, either paper title or by adverse possession, or any other title. At the time Edward Briody conveyed the property, he had no title other than a certificate of sale issued by the sheriff under an execution sale of the property. Under such circumstances the legal title remained in the judgment debtor, and Briody had an equitable estate in the lands, conditional, but which would become a perfect equity upon the expiration of the time allowed by law for redemption. Page v. Rogers, 31 Cal. 301. Owing to the views we hold upon another branch of the case, it will not be necessary to pass upon the ruling of the court refusing to admit in evidence the deed from the sheriff based upon the certificate of sale.

The possession required by a plaintiff, in order to recover in ejectment, where his documentary evidence is lacking, does not go to the extent demanded in order to ripen an adverse possession into legal title. "It is incumbent on the plaintiff in ejectment to prove the proper conveyances from a party having the title. If the conveyance is from a party in peaceable possession, claiming title at the time it was executed, that is sufficient; for possession is *prima facie* evidence of title." Tyler, Ej. p. 541. In Morton v. Folger, 15 Cal. 283, Chief Justice FIELD used the following language in the opinion of the court: "But, aside from all considerations of the grant, the evidence was *prima facie* sufficient to go to the jury on the ground of the prior possession shown in Sutter. * * * As prior possession in a plaintiff or his grantors is of itself sufficient to warrant a recovery, it would be strange if an unsuccessful attempt to add to it the additional weight of documentary evidence should operate to destroy its original and legitimate effect." The same eminent jurist says in Nagle v. Macy, 9 Cal. 427. "It is the settled doctrine of the law, repeatedly affirmed by this court, that the prior possession of the plaintiff, or parties through whom he claims, is sufficient evidence of title to support the action of ejectment." Foot v. Murphy, 72 Cal. 104, 13 Pac. Rep. 163. When plaintiff proved that he and his grantors had been in the possession of this tract of land for many years, and up to within a short time prior to the commencement of this action, claiming title thereto, under conveyances from their respective grantors, he established a *prima facie* case which entitled him to the possession, and the motion for a nonsuit should have been denied. Let the judgment be reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; PATERSON, J.

(93 Cal. 253)

FAY v. PACIFIC IMP. CO. (No. 13,350.)[1]

(*Supreme Court of California.* June 23, 1891.)

INNKEEPER'S LIABILITY—LOSS BY FIRE—GUESTS—BOARDERS.

1. Under Civil Code Cal. § 1859, making an innkeeper liable for the loss of personal property placed by his guests under his care, "unless occasioned by an irresistible superhuman cause," a loss occurring by a fire which originated in the battery room of an hotel cannot be considered occasioned by an "irresistible superhuman cause."

2. One who keeps a house for the entertainment of all who choose to visit it, and extends a general invitation to the public to become guests, is an innkeeper, and liable as such, though the house is situated on inclosed grounds.

3. A guest at a public inn may retain personal custody of necessary wearing apparel; and jewelry worn daily by her need not be deposited with the innkeeper, when not in use, to make him liable for its loss by fire.

4. Where one went to a public inn, and was assigned a room, the fact that she inquired as to the price of room and board is not sufficient to show that she was received as a boarder, and not as a guest.

Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

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[1] Rehearing granted.

Geil & Morehouse, for appellant. *D. M. Delmas*, for respondent.

De Haven, J. The plaintiff recovered judgment against the defendant for damages occasioned by the loss of her jewelry, wearing apparel, and other articles of personal property consumed by fire at the burning of the Hotel Del Monte, April 1, 1887, of which the defendant was at that time the proprietor. The court below found that the Hotel Del Monte was at the date named a public inn, and that plaintiff was a guest therein. On this appeal the defendant claims that the evidence does not sustain these findings; and also that the burning of the hotel was an irresistible superhuman cause for which it is not liable, and that it is not, in any event, liable for plaintiff's diamonds and other jewelry, because not deposited in defendant's safe.

1. An inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation,—an hotel. In Wintermute v. Clarke, 5 Sandf. 247, an "inn" is defined as a public house of entertainment for all who choose to visit it, and this definition was quoted with approval by this court in Pinkerton v. Woodward, 33 Cal. 596. The fact that the house is open for the public, that those who patronize it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation, or agreement as to the duration of their stay, marks the important distinction between an hotel or inn and a boarding-house. This difference is thus stated in Schouler on Bailments: "An inn is a house where the keeper holds himself out as ready to receive all who may choose to resort thither and pay an adequate price for the entertainment, while the keeper of a boarding-house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode." Schouler, Bailm. p. 253. We think that the evidence in this case is full and complete to the point that the Hotel Del Monte was a public inn. It not only had a name indicating its character as such, but it was also shown that it was open to all persons who have a right to demand entertainment at a public house; that it solicited public patronage by advertising, and in the distribution of its business cards, and kept a public register in which its guests entered their names upon arrival, and before they were assigned rooms; that the hotel, at its own expense, ran a coach to the railroad station for the purpose of conveying its patrons to and from the hotel; that it had its manager, clerks, waiters, and in its interior management all the ordinary arrangements and appearances of an hotel, and the prices charged were for board and lodging. These facts were certainly sufficient to justify the court in finding, as it did, that the appellant was an innkeeper. Krohn v. Sweeney, 2 Daly, 200. Nor was the force of this evidence in anywise modified by the fact that the hotel was not immediately upon a highway, or that the grounds upon which it stood were inclosed, and the gates closed at night. The location of the hotel, the extent of the grounds surrounding it, and the manner in which these grounds were improved, and reserved for the exclusive use and enjoyment of those who patronized it, doubtless made the hotel more attractive to those who chose to make a transient resort of it, but did not convert it into a mere boarding-house. An hotel is none the less one because in some respects it may be conducted differently or have more attractions than other public hotels, so long as it is held out to the public as a place for the entertainment of all transient persons who may have occasion to patronize it. "Modes of entertainment alter with the fashion of the age, and to preserve a clear definition is not easy. It is not wayfarers alone, or travelers from a distance, that at the present day give character to an inn; the point being rather that people resort to the house habitually, no matter whence coming or whither going, as for transient lodging and entertainment." Schouler, Bailm. p. 249.

2. The evidence shows that the plaintiff was a guest, and not a boarder. The fact that upon her arrival, and before being assigned to her room she ascertained what she would have to pay for the room and board, is not sufficient of itself to show that she was not received as a guest. Pinkerton v Woodward, 33 Cal. 597; Hancock v. Rand, 94 N. Y. 1; Jalie v. Cardinal, 35 Wis. 118; Hall v. Pike, 100 Mass. 495, Woolen Co. v. Proctor, 7 Cush. 417. The Del Monte being a public hotel, in the absence of evidence showing that plaintiff went there as a boarder, the presumption would be that she went there as a guest. Hall v. Pike, supra. Not only does the evidence fail to overthrow this presumption, but the testimony of the plaintiff shows that she was there as a mere temporary sojourner, without any agreement as to the time she should stay, and with only the intention on her part of resting a week or two, and then proceeding to the east. She obtained no reduction of price in consideration of an agreement to remain a definite time, or as a boarder; nor was there anything said from which it could be inferred that there was any understanding between her and the defendant that she was to be received as a boarder, and not as a guest.

3. Under section 1859 of the Civil Code, an innkeeper is liable for the loss of personal property placed by his guests under his care, "unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one he brought into the inn." In this case the loss was occasioned by the burning of the hotel, and the origin of the fire is not shown further than that it broke out in one of the rooms in which there was nothing except the batteries which supplied the bells with electricity. Under this state of facts the defendant is liable. Hulett v. Swift, 33 N Y. 571. A fire thus occurring cannot be considered an "irresistible superhuman cause," within the meaning of section 1859 of the Civil Code.

The words "irresistible superhuman cause" are equivalent in meaning to the phrase "the act of God," and refer to those natural causes the effects of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ. 1 Amer. & Eng. Enc. Law, 174. A loss arising from an accidental fire is not caused by the act of God, unless the fire was started by lightning or some superhuman agency. Miller v. Navigation Co., 10 N. Y. 431; Railroad Co. v. Sawyer, 69 Ill. 285.

4. The court finds that the property lost was such as was needed for the present personal use of the plaintiff. We cannot say that the evidence does not support this finding. It certainly cannot be said that jewelry worn by a woman daily must, when not actually upon her person, be deposited with the innkeeper in order to make him responsible for its loss in the inn. If worn daily, it does not cease to be needed for present personal use, when its possessor lays it aside upon retiring for the night. Nor is it necessary, in order to render the innkeeper liable, that the property should have been delivered into his exclusive personal possession. "The guest may retain personal custody of his goods within the inn, as of his trunk and its contents, his wearing apparel and other articles in his room, and any jewelry or valuables carried or worn about his person, without discharging the innkeeper from responsibility." Jalie v. Cardinal, 35 Wis. 126. We have examined the other points made by appellant, but do not think they call for special discussion. The rule which makes an innkeeper liable for the value of the property of his guest, in case of its loss by fire, may at first thought be deemed a harsh one; but the loss must fall somewhere, and section 1859 of the Civil Code provides upon whom it should properly fall, and the innkeeper's liability, in this respect, is one of the burdens pertaining to the business in which he is engaged, and in view of which it must be supposed that he regulates his charges. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

(3 Cal. Unrep. 416)

HEWITT v. DEAN *et al.* (No. 14,011.)

(*Supreme Court of California.* June 25, 1891.)

JUDGMENT OF DEPARTMENT—REHEARING IN BANK—EFFECT.

A motion before one department of the supreme court, to set aside a sale of real property, will be dismissed, without prejudice to its renewal, where the judgment of that department on which it rests has been set aside, and a hearing in bank ordered.

Department 2. Motion before supreme court.

Victor Montgomery, for appellants. *Ray Billingsby*, for respondent.

PER CURIAM. This cause is pending before this department upon a motion to set aside the sale of certain real property; but as the judgment in this court upon which said motion rests has been set aside, and a hearing in bank ordered, the motion is dismissed without prejudice to its renewal, if the circumstances under which it was made again occur.

(89 Cal. 617)

NICHOLSON v. TARPEY *et al.* (No. 13,177.)[1]

(*Supreme Court of California.* June 26, 1891.)

CONTRACTS—PAROL EVIDENCE—PRIOR CONVERSATIONS.

Though the written contract on which plaintiff sues may be lost or otherwise inaccessible to him, so that parol evidence is necessary to prove its contents, evidence of conversations between the parties pending the negotiations which resulted in the contract, which conversations were had before its execution, is incompetent.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county; F. E. SPENCER, Judge.

D. M. Delmas, for appellants. *Louis Lee* and *King, Rogers & Lindley*, for respondent.

TEMPLE, C. This is the defendant's second appeal. 70 Cal. 608, 12 Pac. Rep. 778. It is from the judgment and an order refusing them a new trial, upon a bill of exceptions, wherein are stated certain rulings, admitting evidence against the defendants, and claimed to be erroneous. The action is for the specific performance of a contract alleged to have been made in writing by Mathew Tarpey, the ancestor of the defendants. It is charged that Tarpey induced plaintiff by fraudulent representations to accept a deed for a portion of the premises, under the belief that it conveyed the whole. This action, is, in effect, to reform the deed. Defendants admit a parol contract for the premises conveyed by Tarpey, and deny that any other contract was made. The plaintiff claimed that the contract was executed in duplicate, each party retaining one, and that his copy was surrendered to Tarpey, and destroyed when he received the deed. The issue tried was whether there was a written contract, and, if so, as to its contents. The alleged contract was in May, 1867. The deed was delivered and received as performance in October, 1868. Plaintiff built a house and went upon the land to live in 1871, and claims to have had possession of the whole tract ever since. The tract comprised about 400 acres, was evidently much of it unsuitable for cultivation, and was not inclosed. It does not appear whether there was any improvement or cultivation upon the part now in dispute. Mathew Tarpey died in 1873. The line between the part agreed to be conveyed and that retained was not fenced until 1879, shortly before the commencement of this litigation.

The testimony objected to is the same deposition, same objections to which were considered on the last appeal, and respondent claims that that decision has become the law of the case. To this it is sufficient to reply that the objections are not the same. Depositions are taken subject to all legal exceptions, except as to the form of the interrogatory, and when read on the retrial parties were at liberty to interpose new objections. The witness, having stated that plaintiff and Tarpey went to look at the land while negotiations were in progress, was asked: "Did you hear any conversation between them after they returned that day? and, if so, state fully what it was." It was objected to as irrelevant, immaterial, and incompetent, and that negotiations and conversations preceding the execution of the written contract were merged in it, and that it did not purport to call for the contents of the writing. Plaintiff's counsel then stated that they desired to prove by it the contents of the bond, which was in the possession of the defendants, and beyond their control, and promised to account for its non-production. The objections were renewed and overruled, defendants excepting. The witness then proceeded to detail the conversation between Tarpey and plaintiff, in response to numerous direct questions, explicitly calling for such testimony, all of which were duly objected to and exceptions reserved. For example: That Nicholson said he was to pay $1,500 in wagons, etc. "That he bought this piece of land from Mr. Tarpey, running from a certain corner of the San Juan road,—corners with Juan Anser,—running down San Juan road to a picket fence; thence up to Castro line, corner of Castro; thence cross to the three stakes; thence back to beginning,—being the land in dispute,—for $1,500." That Tarpey said there was wood enough on it to pay for it, that the spring was included, and was worth more than all the ranches around there, etc. This evidence was offered and received expressly to prove the contents of the writing, which the witness stated was made at that time, and was all composed of remarks previous to, or at best contemporaneous with, the execution of the writing. It was clearly incompetent.

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[1] Petition for rehearing pending.

The question on the former appeal was, apparently, whether, when the deposition was read, the loss of the original had been sufficiently proven. The court evidently misapprehended the facts of the case. It seems to have supposed that Mathew Tarpey was the defendant, and had in his possession a duplicate of the writing. He had been dead about seven years before the action was commenced. There is no evidence which tends to show that the bond was ever in the possession of the defendants, who are the heirs of Mathew Tarpey. Apparently, too, the court overlooked section 1855, Code Civil Proc., which expressly requires reasonable notice to a party, before his failure to produce the writing will justify oral testimony of its contents. In Goldman v. Davis, 23 Cal. 256, this court said: "The law deems all such stipulations merged in the writing, which, in the absence of fraud, accident, or mistake, is treated as the exclusive medium of ascertaining the agreement to which the parties bound themselves." To the same effect is section 1625, Civil Code. There is no claim of mistake or fraud in regard to the written agreement. It is assumed that it correctly stated the contract. The final agreement may have differed widely from propositions made during negotiations. The parties may both have been mistaken in regard to whether the agreed boundaries would include the spring. By-standers were quite likely to have misunderstood the agreement. The material question was as to the language of the written contract. The final agreement and negotiations preceding it throw a very uncertain light upon that issue. Whether lost or not, there can be no evidence, in the absence of mistake or fraud, of the intention of the parties, other than the written instrument itself. The rights of the parties must be ascertained from its terms. Section 1856, Code Civil Proc. The Code expressly provides, in case of lost instruments, for oral evidence of its contents. Sections 1855, 1870, subd. 14. Evidence of the character received in this case imposes upon the court the construction of the contract by the witness. In U. S. v. Britton, 2 Mason, 264, Mr. Justice Story remarked: "If no such copy exists, the contents may be proved by parol evidence, by witnesses who have seen and read it, and can speak pointedly and clearly to its tenor and contents." The precise question was decided in Tayloe v. Riggs, 1 Pet. 591. Chief Justice Marshall said: "This not being an action for deceit and imposition, but on a written contract, the right of the plaintiff to recover is measured precisely by that contract, and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement forms no part of it; nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view in construing the instrument itself. Had the written paper been produced, neither party could have been permitted to show his inducements to make it, or to substitute his understanding of it, for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this. * * * "When a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and, if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired if they could be established upon uncertain and vague impressions made by a conversation antecedent to the reduction of the agreement." See, also, Vincent v. Cole, Moody & M. 258; Dennis v. Barber, 6 Serg. & R. 426. We think the judgment and order should be reversed, and a new trial ordered.

We concur: Belcher, C. C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

89 Cal. 593

HELM v. WILSON. (No. 13,214.)

(*Supreme Court of California.* June 26, 1891.)

EJECTMENT—INSTRUCTIONS—AGREED LINE.

1. In ejectment, where defendant claims by virtue of the statute of limitations, and also by reason of an alleged settlement of the line between him and plaintiff by their respective grantors, failing which defenses there is no question of plaintiff's right to the land, it is not error to instruct that plaintiff is entitled to recover, unless defendant shows title in one of the ways pleaded, and that the fact that he has in good faith made improvements on the land in controversy cannot affect the verdict.

2. An instruction that the agreed line claimed by defendant must have been "distinctly agreed on" is not misleading, as impliedly excluding evidence to prove the agreed line from the acts, situation, acquiescence, and relation of the parties.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

Yell & Seawell, for appellant. *J. A. Cooper* and *T. L. Carothers*, for respondent.

BELCHER, C.C. This is the second appeal in this case. The decision on the first appeal is reported in 76 Cal. 476, 18 Pac. Rep. 604, and the facts involved in the case are there very fully stated. The new trial again resulted in a judgment for the plaintiff, from which, and from an order refusing a new trial, defendant appeals. The question in controversy was as to the true location of the line dividing the lands of plaintiff and defendant. The defendant pleaded the statute of limitations, and then alleged that, while the line was uncertain and in dispute, the grantors of plaintiff and defendant agreed upon and established the line claimed by defendant as the true line, and erected and maintained a fence thereon; that they and their successors in interest thereafter, till the commencement of this action, acquiesced in the line so agreed upon and established, and respectively held and claimed possession up to the same. The defendant further, "as a set-off for all damages and rents claimed by the plaintiff, or that may be recovered by him," alleged that he had placed certain permanent improvements upon the disputed strip of land, and that in the erection of the improvements he acted in good faith, and believed he had a good title to the said strip. At the trial the evidence upon most of the issues raised by the answer was conflicting. The court gave to the jury eight instructions at the request of the plaintiff, and six at the request of the defendant. These instructions state the law applicable to each party's theory of the case, and should be read together; when so read, they seem to cover the whole case, and to be clear and explicit. The only points made in support of the appeal are that the court erred in giving the sixth and seventh instructions asked by the plaintiff, and in modifying one of the instructions asked by the defendant. The sixth instruction was to the effect that the plaintiff was entitled to recover, unless the defendant had acquired title to the land in dispute in some one of the ways set up in his answer, "and the fact that defendant has placed improvements upon the property in dispute should not make any difference with the verdict you should give in the case." We see no error in this instruction. It was not and is not questioned that the plaintiff owned the land, unless the defendant had acquired title to it as against him; and, if he did own it, certainly his action could not be defeated by a showing that defendant had placed improvements upon it. The seventh instruction was, in substance, that the burden was upon the defendant to establish an agreed line by parol testimony, and that, unless the line claimed by defendant was distinctly agreed upon by the adjacent owners, the jury could not find in favor of the defendant, upon the theory of an agreed line. It is claimed that the word "distinctly," as used in the instruction, "was calculated to mislead the jury in this: that they were impliedly told no parol evidence was admissible to prove an agreed line from the facts, situation, acquiescence, and relations of the parties." We do not understand this to be the effect of the instruction. In the eighth instruction asked by the plaintiff, and in the third asked by the defendant, the court very clearly told the jury when and under what circumstances a division line would become established by the acquiescence of the parties. Here the court was speaking of a line claimed to have been established by an oral agreement, and the jury were simply told that, to make such an agreement effective, it must have been distinctly made; that is, the minds of the parties must have fully met. In this we see no error prejudicial to the defendant. Defendant's instruction, which was modified and given, was upon the subject of estoppel. Other instructions upon that subject were given at his request, which very fully stated the law applicable to the case. The instruction complained of did not state all the elements or conditions necessary to constitute an estoppel *in pais*, and it might properly have been refused. As modified, we do not think it misled the jury or prejudiced the defendant. The judgment and order, in our opinion, should be affirmed, and we so advise.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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89 Cal. 557

DYER v. BRADLEY. (No. 13,165.)

(*Supreme Court of California.* June 23, 1891.)

INSOLVENCY — DISCHARGE — OPPOSITION — PREFERENCES.

1. The insolvent act of California, §§ 49, 55, declare void "fraudulent preferences contrary to provisions of this act," preferences "made in contemplation of becoming insolvent," and preferences "made within one month before filing a petition in insolvency." *Held*, that allegations by a creditor that an insolvent made certain preferences more than a year before the filing of his petition, knowing himself then to be insolvent, do not show valid grounds of opposition to the insolvent's discharge, and hence the insolvent is not required to answer or demur thereto, under section 50.

2. Nor is it a valid ground of opposition that opponent's debt was created by a fraud of the insolvent, and while a fiduciary relation existed between the parties, since under section 52 such debts are not affected by the discharge.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; Noble Hamilton, Judge.

Campbell & Wright, for appellant. *Pillsbury & Blanding*, for respondent.

Belcher, C. C. This is an appeal from an order granting the respondent, Joseph P. Dyer, a discharge from his debts, under the insolvent act of 1880. It appears from the record that Dyer filed his petition in insolvency on the 3d day of August, 1888, and was adjudged to be an insolvent debtor. Subsequently the appellant, Richard Bradley, proved his debt against the insolvent, amounting to $5,928.50. At the proper time thereafter the respondent applied to the court by petition for a discharge from his debts. The appellant objected to his discharge, and filed specifications in writing of the grounds of his opposition. These specifications were, in substance, as follows: (1) That on December 6, 1886, the respondent paid to the Nevada Bank of San Francisco, one of his creditors, a large sum of money, not less than $70,000, with the intent to prefer the bank as a creditor, and to pay it in full, and did in paying the said money to said bank prefer the same as a creditor, and pay it in full, and did thereby defraud his other creditors. (2) That on the 2d day of December, 1886, the respondent, knowing that he was insolvent and unable to pay his just debts, paid to M. C. Blake, a creditor, a large sum of money, not less than $35,000, the same being greatly in excess of any amount due the said Blake from the respondent, and that such payment was made with the intent to prefer him as a creditor, and to pay him in full, and the respondent in paying this money to Blake did prefer him as a creditor, and pay him in excess of the full amount due him, and did thereby defraud his other creditors by reason of such preference. (3) That the relationship existing between the appellant and respondent was a fiduciary one, and the indebtedness of respondent to appellant was created by reason of such fiduciary relationship, and in this way: During the year 1866 the respondent was a stock-broker, engaged in buying, selling, and holding stocks for his patrons. The appellant, reposing special confidence and trust in the honesty and solvency of respondent, deposited with him divers mining stocks of the value of $5,928.50, to be kept and taken care of for appellant, and to be subject only to his order. These stocks the respondent afterwards sold and converted to his own use, without the knowledge, consent, or order of appellant. (4) That on the 3d day of December, 1886, the respondent, well knowing his insolvency, but contriving and wishing to defraud appellant, in answer to inquiries, assured appellant that he was perfectly solvent, and that the property intrusted to him by appellant, as aforesaid, was perfectly safe and secure, and that by leaving the same with him the appellant could and would run no risk of losing the same; that appellant, relying on said assurances, took no steps to secure and recover his property as he otherwise could and would have done; and that the indebtedness of respondent to appellant was created by the loss of said property, and that by reason of said deceit appellant was defrauded. (5) That the debt owing by respondent to appellant is a fraudulent debt, and was fraudulently created; that is to say, prior to December 3, 1886, respondent was a stock-broker, and was intrusted by appellant with certain mining stocks, of the value of $5,928.50, which he wrongfully and fraudulently converted to his own use, and by reason of such conversion became indebted to appellant for the value thereof. Afterwards, pursuant to an order to show cause why the discharge should not be granted, the parties appeared in court, and the attorneys for respondent then orally moved the court to strike out the opposition of appellant, and for an order discharging respondent from his debts, notwithstanding the opposition, on the ground that it did not appear that the appellant was entitled to make the opposition; and that the alleged opposition did not state facts sufficient, and was not in form or substance sufficient, to constitute any valid ground of opposition to the discharge. The attorneys for appellant objected that the respondent had not filed any demurrer or answer to the opposition, and asked the court to require the respondent to file his demurrer or answer before any further proceedings should be taken. The court refused to make the order requested. The application for a discharge was then taken under advisement by the court, and was subsequently granted, and a certificate of discharge given to respondent in the form prescribed by statute. Hence this appeal.

The appellant contends that the court erred in refusing to require the respondent to demur or answer to the specifications of the grounds of his opposition, and in granting the discharge without any trial of the issues tendered thereby. On the other hand, the respondent contends that the specifications tendered no material issues, and that no demurrer or answer was therefore required. The insolvent act (section 50) provides: "Any creditor opposing the discharge of a debtor shall file specifications, in writing, of the grounds of his opposition, and after the debtor has filed and served his answer thereto, which pleadings shall be verified, the court shall try the issue or issues raised, with or without a jury, according to the practice provided by law in civil actions." Under this section, we think the opposing creditor must state in his specifications facts which, if denied, will raise material issues, and, if admitted or established, will constitute valid grounds of opposition to the discharge. If he does not do this, but states only irrelevant and immaterial matters, the specifications may, on motion, be stricken out or disregarded as surplusage. This is a long-settled rule as to immaterial matters stated in pleadings in civil actions, and we think it equally applicable to proceedings under the insolvent act.

The only question, then, is, did the facts stated by appellant in his specifications, if true, constitute a valid ground of opposition to the discharge? It will be observed that the charges against respondent may be divided into three classes: (1) That, a year and eight months before he filed his petition in insolvency, he, knowing that he was then insolvent, paid two of his creditors in full, with intent to prefer them to other creditors; (2) that the debt to appellant was created while respondent was acting in a fiduciary character; (3) that the debt to appellant was created by fraud on the part of respondent.

The provisions of the insolvent act bearing on the question are as follows: Section 49 provides that no discharge shall be granted, or, if granted, shall be valid, "if, within one month before the commencement of such proceedings, he [the debtor] has procured his lands, goods, money, or chattels to be attached or seized on execution; * * * or if he has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property; * * * or if he has, in contemplation of becoming insolvent, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts." Section 55 provides that, "if any person being insolvent, or in contemplation of insolvency, within one month before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, * * * makes any payment, assignment, transfer, or conveyance of any part of his property, * * * the person receiving such payment * * * having reasonable cause to believe that such person is insolvent, and that such * * * payment * * * is made * * * with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, * * * such transfer, payment, conveyance, pledge or assignment is void, and the assignee may recover the property, or the value thereof, as assets of such insolvent debtor." And section 52 declares that "no debt created by fraud or embezzlement of the debtor, * * * or while acting in a fiduciary character, shall be discharged under this act, but the debt may be proved, and the dividend thereon shall be a payment on account of said debt."

1. Unless made so by the above-quoted provisions of the statute, the preferences complained of were neither fraudulent nor unlawful. Dana v. Stanford, 10 Cal. 269; Randall v. Buffington, Id. 491; Wheaton v. Neville, 19 Cal. 46; Dean v. Grimes, 72 Cal. 447, 14 Pac. Rep. 178. It is true, it is charged that the payment to Blake was in excess of the amount due him; but that we regard as of no consequence, for, so far as appears, the excess may have been paid by mistake, and may have been returned or properly accounted for before the proceedings in insolvency were commenced. It is also charged that by making the payments respondent "did thereby defraud his other creditors," but that was a mere conclusion of law. No facts were stated from which it can be said that the payments constituted a fraud upon the other creditors, or that the respondent intended thereby to defraud his other creditors. It will be noticed that section 49 speaks of only two kinds of preferences which will prevent or make invalid a discharge, one a "fraudulent preference, contrary to the provisions of this act," and the other a preference made "in contemplation of becoming insolvent;" and section 55 only declares void a preference made "within one month before the filing of a petition" in insolvency. These sections are parts of the same act, and must be read together. When so read, the question is, within what time must the inhibited preferences be made, in order to impose the penalty declared by section 49? It seems to us the answer is found in sections 49 and 55, and that the time there named is controlling. Certainly it could not have been intended that the time might extend back indefinitely, possibly for years. In Bump's Law and Practice of Bankruptcy (page 708) it is said: "No preference can be fraudulent under the act, unless it is made within four months [the time named in similar provisions of the bankrupt act] before the filing of the petition in bankruptcy;" citing authorities.

2. The charges that the debt to appellant was created while the relations of the parties were of a fiduciary character, and by the fraud and wrongful conversion of the respondent, are not grounds for opposing a discharge. Under section 52, a debt so created is not affected by the discharge, and such a creditor has therefore nothing to complain of. Herrlich v. McDonald, 80 Cal. 472, 22 Pac. Rep. 299; In re McEachran, 82 Cal. 224, 23 Pac. Rep. 46. We see no error in the rulings of the court below, and therefore advise that the order appealed from be affirmed.

We concur: FITZGERALD, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

DYER *v.* MARTIN. (No. 13,166.)

(*Supreme Court of California.* June 23, 1891.)

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; NOBLE HAMILTON, Judge.

Campbell & Wright, for appellant. *Pillsbury & Blanding*, for respondent.

BELCHER, C.C. The facts of this case are identically the same as those involved in Dyer v. Bradley, 26 Pac. Rep. 1103, (just decided,) except as to the amount of the debt due from the respondent to the appellant. On the authority of that case, the order here appealed from should be affirmed.

We concur: FITZGERALD, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(89 Cal. 623)

HARGRO *et al.* v. HODGDON. (No. 13,317.)[1]

(*Supreme Court of California.* June 26, 1891.)

DEDICATION OF PUBLIC ALLEYS — NUISANCE — PLEADING.

1. Where the owners of a block, by mutual agreement, opened an alley, and the same was recognized as an alley for more than 30 years, such dedication is sufficient to maintain an action to abate a private nuisance in obstructing the same.

2. A house built in a public alley so as to partly abut upon plaintiff's lot, and prevent access to the public highway, is a private nuisance, and plaintiff may maintain an action to abate it, although she has suffered no actual pecuniary damage.

3. Where a complaint to abate a nuisance does not explicitly state that plaintiff has sustained an injury different in kind to the general public, it is insufficient on special demurrer; but when such injury appears by inference it is proper to overrule a motion for judgment on the pleadings at the commencement of the trial.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

John D'Arcy and *Otto Tum Suden*, for appellant. *Hutchinson & Campbell*, for respondents.

TEMPLE, C. Appeal from judgment and order denying defendant's motion for new trial. This action is brought to abate a nuisance, — to remove an obstruction placed by defendant in what is alleged to be a public alley, extending from Sixteenth street northerly to Fifteenth, through the block bounded by these streets and Mission street and Julian avenue, in the city and county of San Francisco. The alleged alley is known as "Lida Place" or "Court." From the complaint it appears that plaintiff Selina Hargro owns a lot extending from Julian avenue to Lida place, and that defendant has erected a house in the alley, occupying the whole of it for a distance of 30 feet. From the measurements given, it can be ascertained that for the greater part of this distance it abuts upon the property of plaintiff Selina, who is the wife of the other plaintiff, James Hargro, thus shutting her off to that extent from access to the alley. But there is no express allegation of such fact. It is averred that the obstruction greatly damages plaintiff, decreases the value of her real estate, and jeopardizes her right in the alley; "that said house interferes with plaintiff's use and enjoyment of said alley, and plaintiff has already been damaged by said erection and maintenance of said house on said alley-way by the defendant in the sum of two thousand ($2,000) dollars United States gold coin." The defendant denies all the allegations of the complaint, except that, in regard to the erection and maintenance of the obstruction, the denials are qualified by the word "unlawfully," and avers ownership in defendant of the land claimed as an alley.

At the commencement of the trial, defendant moved for judgment on the pleadings, because the complaint states no special damage or injury to plaintiff. The motion was denied. The same point is urged here, in connection with the further point that there was no evidence which tended to show peculiar injury to plaintiff. In regard to the objection to the pleading, it may be noted that it was not made by demurrer, either special or general. It may be admitted that if the complaint does state injury to plaintiff different in kind, and not in amount merely, to that sustained by the general public, it does so by inference only, and not by explicit, positive averment, as the rules of pleading require. In such a case the pleading would fall before a special demurrer, and the pleader would be permitted to amend. But when a party craftily lies by, in presence of such an objection, to spring it when, if sustained, it would be lethal, the sufficiency of the pleading will be tested by a very different rule. Then the pleading will be upheld, if the essential fact appears by plain and necessary implication. The matter will be more fully considered in connection with the objection to the proof and, if our views as there expressed are correct, it will be manifest that, tried by such a test, the complaint is sufficient. In regard to the obstruction, the facts are found as stated in the complaint; expressly stating, however, that the house abuts upon the rear of plaintiff's lot, and cuts off 20 feet and 6 inches, or over two-thirds, of the alley frontage of her lot. The court also found that she suffered special injury thereby, but assessed no damages. It was further found that plaintiff's lot had never been occupied or improved.

It is claimed that this action cannot be maintained unless the plaintiff has suffered actual pecuniary damage; that the failure of the court to find any amount of damage is a finding that she has suffered none, much less damage peculiar or special to her, different in kind from that suffered by other members of the community; and it is asserted that there was no evidence tending to show such damage. The doctrine asserted in Bigley v. Nunan, 53 Cal. 403, that it is pecuniary damage which constitutes the basis of the action is expressly limited to actions at law for damages. As to bills in equity, it is only said that the injury complained of must be special in character, and not merely greater in degree than that of the general public. If a substantial right has been invaded, especially if the wrong be in the nature of a continuing trespass of such a character that its continuance will create a right against the plaintiff's estate, or operate to deprive plaintiff of a substantial right incident to her property, the nuisance will be abated, although the damage is merely nominal. Indeed, the fact that a threatened injury is of such a nature that it is incapable of pecuniary estimation is a well-known ground of equitable relief. Webb v. Manufacturing Co., 3 Sum. 189; Wood, Nuis. pp. 825, 826, and cases there cited. That the plaintiff has suffered injury from the obstruction peculiar to herself, differing in kind from that suffered by others, is clear. The cases in this state seem to hold that to obstruct a public highway so as to completely prevent travel will not constitute a special injury to an individual, such as will enable him to maintain a private action to abate the nuisance, even where such highway constitutes the only means by which the individual can reach his property. Aram v. Schallenberger, 41 Cal. 449; Ranch Co. v. Brooks, 74 Cal. 463, 16 Pac. Rep. 250. But it has never been held that an individual cannot maintain an action to abate an obstruction which, while obstructing the public highway, also cuts off access from his premises to the public highway. So far as it does this it becomes a private nuisance. His complaint is not that it obstructs the street or road, but that it prevents him from reaching it. Such was the case in Blanc v. Klumpke, 29 Cal. 156. The water frontage of plaintiff was cut off by piles driven in front of his lot, shutting him out from the common highway,—the navigable waters. The same character of obstruction existed in Schulte v. Transportation Co., 50 Cal. 592, and in Ford v. Railroad Co., 59 Cal. 290. In these cases it was held that special injury resulted to the complainants from a public nuisance. The result is the same as though it had been held that it constituted both a public and a private nuisance, although the latter would seem the more accurate statement; for it is the obstruction of the street which renders it a public nuisance, and that is not the injury to the individual; that is, that it cuts him off from the street.

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[1] Petition for rehearing pending.

The only remaining question of importance in the case is, does the evidence justify the decision to the effect that the alley in question is a public alley by dedication? There is a general finding to this effect; and the probative facts, or some of them, are also found. It is not stated that the general finding is based upon the probative facts found, but their correctness is not disputed, and so far as they go they constitute a convenient statement of the evidence conceded to be correct. It appears from these findings that in October, 1853, Joseph H. Moore and Thomas Varney owned all of this block on the westerly side of the center line of the alleged public alley, and Ferdinand Vassault, Lucien Herman, and P. Theodule Brou owned the land on the east side of this line. Vassault and Herman proposed in writing to Moore and Varney as follows: "We * * * agree to give ten feet from off the depth of our lots for the purpose of opening an alley twenty feet wide between our property and the property owned by yourself and others on the rear of ours, provided yourself and others owning said rear property will also give ten feet from the east line of yours, in order that the alley may be made continuous from Center to Tracy streets. * * * Please let us know if you accept the proposition." The next day Moore and Varney accepted this proposition, also in writing. Center and Tracy streets were afterwards called, respectively, "Sixteenth" and "Fifteenth" streets. Brou did not sign either part of this contract, but it is found that he consented to the dedication. At the trial it was stipulated "that all the deeds, mortgages, and transfers of lots in Mission block 35, between Julian avenue and Mission street, from those of the original owners down to those under which the present owners hold, recognize the alley on the block [in question] * * * by making the depth of the lots fronting on Mission street 182 feet, and those on Julian avenue 84 feet, and most of them recognize the alley by name, and that a number of deeds and mortgages made and recorded from 1865 to January, 1886, executed by defendant, recognize said alley by name." There can be no doubt that there was an offer to dedicate this alley on the part of all the proprietors, and that all of the present owners purchased with the understanding that it was a public alley, and had a right to so conclude from the acts of their vendors in selling the property. As to such owners it is perhaps unnecessary to go further. Stallard v. Cushing, 76 Cal. 472, 18 Pac. Rep. 427. But it is found that from the year 1857 the alley has been continuously, and is now, open and accessible to the public, and actually used by the public, 165 feet northerly from Sixteenth street. That portion of the street is the only part involved in this case. It is a strong circumstance in this connection, that if this strip of land was not dedicated it still belongs to the original owners, not one of whom now owns a lot in this block. None of the present lot-owners claim to have purchased any part of this strip. The defendant claims under the statute of limitations. It is plain, therefore, that he and his vendees have regarded it as a public alley.

It is claimed that defendant has for many years had actual possession of the portion of the alley involved in this case. If it were a public alley, no rights could be acquired as against the public by such adverse holding. But the possession was not adverse. Defendant put a gate across the alley near Sixteenth street, with the consent of abutting owners, to prevent the alley from being made a dumping-ground for rubbish; and the gate was opened, and the alley at all times freely used, by all who had occasion to make use of it. So far from tending to show an exclusive claim on the part of Hodgdon, it shows a recognition by him of the rights of others. He testifies that he himself made it an alley, and sidewalked it as such.

There was no error in the admission of the map and the street assessment. If they did not tend to prove an official acceptance of the alley, they were still admissible as tending to show general knowledge of the existence of the alley. There was no objection to the testimony of Center, and we think it could not have been harmful. The judgment and order should be affirmed.

We concur: BELCHER, C. C.; FITZGERALD, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(89 Cal. 575)

BUTLER v. HYLAND *et al.* (No. 13,162.)

(*Supreme Court of California.* June 25, 1891.)

TRUSTS—DEED ABSOLUTE—LIMITATIONS—LACHES.

1. In an action to recover property claimed to have been conveyed in trust to plaintiff's aunt by deed which was absolute, the plaintiff testified that she signed a paper, and her aunt said, "I will hold the property for you;" that she did not know what the paper was, and did not discover it until her aunt's death; and that she received nothing for the conveyance. *Held* sufficient to establish the trust.

2. Where a trustee voluntarily assumes a trust, with an implied agreement to reconvey upon request, the statute of limitations does not run against the beneficiary.

3. Although plaintiff did not commence suit for 2 years after her trustee's death, 8 years after marriage, 16 years after attaining her majority, and 19 years after executing the deed, the delay will not be considered laches, when it appears that she lived with her trustee most of the time, and that the defendants have expended nothing upon the lands.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

F. J. Castelhun, for appellant. *T. C. Coogan*, for respondents.

TEMPLE, C. Plaintiff appeals from a judgment of nonsuit, and from an order refusing a new trial. Plaintiff's father, as she avers, died June 5, 1858, leaving, as heirs, plaintiff, aged 8 years, and her brother, aged about 14. Her mother had previously died. Her father was the owner, at the time of his death, of the lot in controversy. Just before her father's death, her aunt, who was a widow with three children, the present defendants, came to live with her father on the lot in suit, and plaintiff became at once a member of her aunt's family, and lived with her until her own marriage, in 1879. While she was a minor, living with and in the custody of her aunt, her aunt represented to her that her brother would get her property from her, and said if plaintiff would convey it to her she would hold it in trust for plaintiff. Upon this representation and agreement she conveyed her right to her aunt. That by mistake the deed was made absolute in form, and purported to be made for a consideration of $500. That she and her aunt were both ignorant of this fact. That she received nothing for the conveyance, and did not discover the mistake until after the death of her aunt, in 1885. She never demanded or received a deed from her aunt, who remained in possession up to her death, and the defendants, who are the only descendants of her aunt, although fully aware of her rights, repudiate and deny them, and claim to be themselves the owners. She sues to recover the property, for a conveyance, and for general relief. The defendants do not deny the ownership of plaintiff's father, or the facts which show that plaintiff was his heir, but they deny the trust, and aver that the deed was in fact an absolute conveyance for a valuable consideration. They also plead the statute of limitations, and charge laches in the bringing of the suit.

At the trial the plaintiff was the only witness examined. She testified that her father died June 5, 1858, leaving herself and her brother as the only children, her mother having died before; that shortly before her father's death her aunt came to live with her father upon the lot in suit, and after her father's death they all continued to live there together. She said: "I continued to live with my aunt in the same house. My aunt took care of me, sent me to school, and I had no one else to provide for or look after me; but my uncle sometimes sent money to my aunt for me. I was received in and become a member of her family, and so continued until the time of my marriage, which took place April 30, 1879. * * * After my father's death, when I was about sixteen years old, and while I was still living under my aunt's care, my brother tried to get me to sign a paper while I was visiting him, and I wouldn't sign it; and when I got home I told my aunt what he wanted me to do. My aunt said, 'I will fix it so he can't get your property from you.' The next day a notary called at the house, and I signed a paper. My aunt said, 'I will hold your property for you.' I did not know what the paper was, and never discovered it until my aunt's death, and a short while before this suit was brought, but I suppose it was read over to me before I signed it. My aunt gave me nothing and I received nothing for signing the paper, and I was under age at the time." The witness recognized a deed shown her as the deed she executed, dated October 12, 1866, purporting to be in consideration of $500, acknowledged and recorded on the same day. She testified that her aunt died September 10, 1885, leaving, her surviving, the defendants, her children; that she never asked her aunt for a deed, and never received one. The rental value was $7.50 per month. On cross-examination she said that her aunt was in exclusive possession of the property at the time the deed was executed, and had paid all taxes and assessments, and that plaintiff had continued all the time to reside in the city and county of San Francisco, and knew these facts. The plaintiff here rested her case, and the defendants moved for a nonsuit, which was granted. In the motion for a nonsuit the alleged defects in the proof were specifically pointed out, but need not be formally repeated here. Such a motion is in the nature of a demurrer to evidence. The truthfulness of the testimony is admitted, but its sufficiency is challenged. The evidence shows that a confidential relation existed between plaintiff and the mother of defendants, and that at her request plaintiff conveyed to her an undivided half interest in the property, with the understanding that her aunt would hold it for her. The law, under such circumstances, implies an agreement to reconvey upon request, and it is immaterial that there was no proof of a distinct understanding that the trust was to have been set out in express terms in the deed, and was omitted by mistake. Immediately upon the death of her father, plaintiff became the owner of one undivided half interest in the premises, and it was not necessary for her to show administration and distribution of his estate.

This is not an action to disaffirm plaintiff's deed as the act of a minor, and to recover property thus conveyed. Plaintiff asks no relief which would not have been her due under the same circumstances had she been of mature age. Her minority is material only as tending to establish that the relations between herself and her aunt were confidential. It was not necessary, therefore, for her to disaffirm, under section 35 of the Civil Code. The testimony of plaintiff being taken as true, there can be no doubt that it establishes a trust under the rule laid down in Brison v. Brison, 75 Cal. 525, 17 Pac. Rep. 689.

Nor can any plausible claim be made that the action is barred by the statute of limitations. It was not a constructive trust forced upon the conscience of the trustee, but one voluntarily assumed, and which, by the understanding of the parties to it, was to be a continuing one. The trustee—so far as the evidence goes—continued to hold according to the understanding, and never repudiated the relation, or did any act inconsistent with it. Love v. Watkins, 40 Cal. 565; Tiff. & B. Trusts, 19.

There is more plausibility in the claim that there have been such laches as will prevent the plaintiff obtaining relief. As respondent has succinctly stated, she commenced her suit "two years after her aunt's death; eight years after her marriage; sixteen years after she had attained her majority; nineteen years, eleven months and twenty days after the deed had been executed and recorded." But it must be remembered that, by the terms of the trust, her aunt was to hold the title for her. The conveyance was made for that purpose. For most of the time she was a member of her aunt's family, who stood *in loco parentis* to her. Between four and five years only elapsed after her own marriage before her aunt's death. The rental value of the place was small, and she knew that her aunt was paying the taxes, assessments, and repairs, the amount of which are not shown. The doctrine of laches is not applied so strictly between near relatives. 2 Story, Eq. Jur., §1520. On the other hand, nothing is shown which would make it inequitable to enforce the trust. It does not appear that plaintiff has stood by allowing the trustee to treat the property as her own, and under that belief expending money in improvements. There is nothing tending to show that up to her death Mrs. Hyland ever supposed or claimed that she had any interest in the property. The defendants have expended nothing upon the property. It does not appear, even, that the premises have been included in their mother's estate by any proceedings in probate. If any injury has resulted through the delay, it must be in rendering proofs of the real facts difficult, but there certainly was no culpable delay until after her aunt's death, since which nothing has occurred to increase the difficulties of the defendants as to the evidence. That the plaintiff waited so long after she ceased to be a member of her aunt's family before asserting her claim to the property may possibly have some bearing upon the probability of her story,—that is, upon her credibility. We have not considered the value of the testimony, weighed against other proofs or circumstances. We think the judgment and order should be reversed, and a new trial awarded.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and a new trial awarded.

CALIFORNIA REPORTER

27 PACIFIC REPORTER

90 Cal. 177

WHITE v. BUELL. (No. 14,077.)

(*Supreme Court of California.* July 10, 1891.)

VENDOR AND VENDEE—FORFEITURE.

A contract for the sale of land provided for a payment of $1,000 at date of contract, $4,000 within 30 days, and $35,000 at a later date, and declared that, if the vendee failed to pay the $4,000 or the $35,000 as agreed, the contract should terminate, and the vendor need not return the $1,000. The vendee paid the $1,000, and the $4,000, and then abandoned the contract, and the vendor sold the land to another. *Held*, that the vendee was entitled to a return of the $4,000 Following Cleary v. Folger, 84 Cal. 316, 24 Pac. Rep. 280.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Wilber F. George, for appellant. *W. C. Stratton*, for respondent.

BELCHER, C. C. The facts stated in the complaint in this case are as follows On the 20th day of August, 1887, the parties to the action entered into a written contract, whereby the defendant agreed to sell to the plaintiff certain lands in Santa Barbara county for the sum of $120,000, to be paid as follows: $1,000 at the date of the contract; $4,000 within 30 days thereafter; $35,000 on or before November 1, 1887; and $80,000 at such time thereafter as the plaintiff should on November 1, 1887, elect, not exceeding 3 years from date. The contract then says: "At the time of the payment of said thirty-five thousand dollars, the party of the first part [defendant] shall execute to the party of the second part [plaintiff] a proper deed, conveying to said party of the second part said land by good title, free from incumbrances, and at the same time the party of the second part shall either pay to the party of the first part the balance of said purchase price, or shall execute to the party of the first part a first mortgage on said property to secure the payment of said eighty thousand dollars, with interest thereon at the rate of eight per cent. per year, payable yearly. It is further understood and agreed that if the party of the second part does not pay said four thousand dollars within thirty days, or said thirty-five thousand dollars on or before the first day of November, 1887, this contract shall terminate, and the party of the first part shall not thereafter be under any obligations by reason of this contract, nor need he return said one thousand dollars, or any part of it." As required by the contract, plaintiff paid to the defendant $1,000 at the time of the execution thereof, and $4,000 within 30 days thereafter. Nothing further was done by either of the parties until on or about November 1, 1887, when plaintiff decided and elected to proceed no further under the contract, and to forfeit the $1,000 first paid by him. He then so notified defendant, and demanded that he repay the said sum of $4,000, but defendant refused, ever since has refused, and still refuses, to pay the same, or any part thereof. Some time in 1888 defendant sold, conveyed and delivered possession of the property mentioned in the contract to other parties. Wherefore plaintiff prayed judgment against the defendant for the sum of $4,000, with interest and costs. The defendant interposed a general demurrer to the complaint, and it was sustained by the court. The plaintiff declined to amend, and thereupon judgment was entered that he take nothing. From that judgment plaintiff appeals. We think the demurrer was improperly sustained. The case in all material respects is like Cleary v. Folger, 84 Cal. 316, 24 Pac. Rep. 280, and Drew v. Pedlar, 87 Cal. 443, 25 Pac. Rep. 749; and on the authority of those cases we advise that the judgment be reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

We concur· **Fitzgerald, C.**; **Foote, C.**

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with instructions to the court below to overrule the demurrer.

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90 Cal. 179

Bellegarde v. San Francisco Bridge Co.

(No. 13,215.)

(*Supreme Court of California.* July 10, 1891.)

Negligence—Appeal—Review.

In an action for injury to plaintiff's property caused by defendant in filling in a street, the court, in its instructions, limited plaintiff's right of recovery to the hypothesis of defendant's negligence, and the jury found for the plaintiff. *Held*, that as there was some evidence of negligence, and as the defendant asked for a reversal only in case of error in law, the judgment should be affirmed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

O'Brien, Morrison & Daingerfield and *Hepburn Wilkins*, for appellant. *J. D. Sullivan* and *Henry McCrea*, for respondent.

Foote, C. This is an action for "willfully, recklessly, and without care or caution, dashing huge car-loads of rock and earth, weighing many tons, around and against" certain piles supporting the plaintiff's house, whereby these supports of the house were forced from their position, and that structure was pitched into the water which surrounded it, the result being, as claimed, the damages for which the suit is brought. The answer denies these allegations, and claims that what was done by the defendant was justifiable in prosecuting certain street work under its contract with the city and county of San Francisco; that the injury resulted, not from carelessness or negligence, but from the dumping of rock and earth into the mud and water across a part of the waters of the bay of San Francisco, in order to construct a street of said city, called "Railroad Avenue," and that this dumping of rock and earth onto the soft bottom of the bay, where the mud lay very deep, had the natural and inevitable effect to force out the mud from the sides of this avenue as it was being constructed of the rock and earth, so as to impinge upon the piles supporting the plaintiff's house, and without fault of the defendant, but as the unavoidable result of the prosecution of a lawful work, caused the damage to the plaintiff. It is evident that, according to the instructions of the court, the jury, under the facts, could not have found for the plaintiff except upon the idea that the defendant was negligent in prosecuting a lawful work. The defendant seems to be of the opinion that unless the appellate court shall declare that there is no evidence in the record to support this apparent view of the matter by the jury, or unless some different statement of the law than that laid down by the trial court shall be enunciated here, it would be useless and undesirable for it to have a reversal of the judgment and orders. In its opening brief it is announced that "we prefer an affirmance to a reversal involving a heavier verdict." They ask this court "to say, in its opinion deciding this cause, that Mr. Bellegarde has proved no case against appellant, or, at least, to lay down very unmistakably the law regarding the liability of street contractors. We prefer an affirmance rather than to be handed over to the tender mercies of another anti-corporation jury, without the protection of some such intimation from this court." We cannot say that the jury had no evidence on which to base their verdict, nor do we perceive any error in the law as laid down by the trial court, and given to the jury. It was as favorable as the defendant could ask. There is no necessity to enter into an abstract disquisition as to any further principles of law applicable to street contractors in some instances, perhaps, but inapplicable to the case in hand; and therefore we recommend that the judgment and orders be affirmed.

We concur: **Fitzgerald, C.**; **Vanclief, C.**

Per Curiam. For the reasons given in the foregoing opinion the judgment and orders are affirmed.

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3 Cal. Unrep. 417

Romine v. Cralle *et al.* (Nos. 13,117, 13,228.)

(*Supreme Court of California.* June 30, 1891.)

Judgment — Failure to File Briefs — Affirmance.

Where appellant has filed no brief showing the particular ground on which he relies for reversal, and on examination of the record no error prejudicial to him is apparent, the judgment will be affirmed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

John F. Burris, Carroll Cook, and *R. M. Swain,* for appellant. *Laughlin & Thompson,* for respondent.

BELCHER, C. C. The judgment in this case was rendered by the superior court of Sonoma county on October 1, 1888. Subsequently three appeals were taken by the defendant Hirschler. The first appeal was dismissed, without prejudice, on the ground that the transcript was not filed in time. The second appeal was from the judgment alone, on a bill of exceptions. The third appeal was from the judgment, and an order denying a new trial, and, in so far as it was from the order, was dismissed on September 30, 1889. 80 Cal. 626, 22 Pac. Rep. 296. The records on the last two appeals from the judgment are the same, and they may be disposed of together. No brief has been filed on behalf of the appellant, and we are therefore not advised on what particular ground or grounds he relies for a reversal. We have, however, examined the records, and in our opinion no error prejudicial to the appellant is therein shown. We advise that the judgment be affirmed.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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90 Cal. 168

PALMER *et al.* v. MARYSVILLE DEMOCRAT PUB. CO. (No. 14,069.)

(*Supreme Court of California.* July 2, 1891.)

APPEAL—REVIEW—NONSUIT.

A nonsuit will be set aside on appeal where it does not appear that the attention of the court and of the plaintiff was called to the grounds on which it was asked.

In bank. Appeal from superior court, Yuba county; PHILIP W. KEYSER, Judge.

Gordon & Young and *E. A. Davis,* for appellants. *J. H. Craddock,* for respondent.

PER CURIAM. This is an action to recover possession of a certain printing-press delivered by plaintiffs' assignors to one McWhorter under a contract similar in terms to that which was under consideration in the case of Palmer v. Howard, 72 Cal. 293, 13 Pac. Rep. 858. When the plaintiffs rested at the trial, the defendant moved the court for a nonsuit upon several grounds. The motion was granted, and the only question for consideration is whether the court erred in its ruling. McWhorter sold the property to Holland & Crane, and they had full notice of the terms and conditions under which the former had secured possession of it. The agreement of June 27, 1887, was binding not only upon McWhorter, but upon subsequent purchasers with notice of the conditions under which McWhorter took and held the property. Assuming that the plaintiffs were required to prove that the defendant took the property with notice of the facts, the grounds of the motion for a nonsuit do not specify a failure to prove such notice; and, under the rule well established here, a nonsuit cannot be granted, unless the ground upon which it is supported was called to the attention of the court and the plaintiffs at the time the motion was made. None of the grounds stated in the statement on motion for a new trial is well taken. Judgment and order reversed, and cause remanded for a new trial.

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90 Cal. 122

RAYMOND v. MCMULLEN *et al.* (No. 14,357.)

(*Supreme Court of California.* June 30, 1891.)

APPEAL—RECORD—TIME OF FILING—STIPULATION.

When the sole consideration of a stipulation allowing appellants' counsel additional time to file his transcript was his agreement to do all things necessary to the speedy determination of the appeal in another case involving the same questions, and he fails to do so, the consideration has failed, and respondent will be entitled to a dismissal for failure to file the transcript in apt time, as if no stipulation had been made.

In bank. Appeal from superior court, city and county of San Francisco.

Motion to dismiss the appeal.

R. Percy Wright, for appellants. *Edward R. Taylor,* for respondent.

HARRISON, J. The appeal in this case was taken January 29, 1889. At the same time, appeals were taken on behalf of the same appellants in several other actions involving the same or similar questions, one of which actions was Hartshorne v. McMullen; and on the 2d of February, 1889, at the request of the attorney for the appellants, the attorney for the respondent made the following stipulation: "In the supreme court of the state of California. Frances B. Raymond, Respondent, v. J. McMullen et al., Appellants. It is hereby stipulated that the appellants may have ten (10) days after the filing of the *remittitur* in the superior court of the city and county of San Francisco, in Hartshorne v. McMullen et al., on appeal to this court from the judgment and order denying the motion of defendants for a new trial, within which to file and serve their transcript on appeal herein. TAYLOR & HAIGHT, Attorneys for Respondent." The transcript in Hartshorne v. McMullen was filed in this court August 27, 1889, and the cause was placed upon the calendar of this court for the January session of the present year, and set down to be argued February 19, 1891. No points or authorities were filed on behalf of appellants, as required by rule 2 of this court; and on the 17th of February, upon the *ex parte* motion of the appellants, the appeal was dismissed. Prior to the issuing of the *remittitur* thereon, the respondent made a motion to dismiss the appeal in this cause upon the ground that no transcript had been filed in this court; and in response to the above stipulation, relied upon by the appellants in resisting his motion, contends that the consideration upon which the stipulation was given has failed, and that he is not bound thereby. In support of this contention, he presents an affidavit wherein he states "that, soon after said appeals were perfected, Mr. R. Percy Wright, the attorney for defendants and appellants, came to the office of this affiant, and represented to affiant that it would cost a good deal of money to print and file the transcripts on appeal in all of said actions, and that it was useless to do so, as one case in each set of said cases would probably determine all of the rest; and proposed to affiant that the transcripts in two of the said cases only be printed and filed, and that the necessary points and argument be made and presented on them, so that they might be determinative of the rest, and expense be saved to each party litigant; that affiant thereupon agreed to the said proposition of said Wright upon the express condition, and no other, that the two cases in which the transcripts were to be printed and filed should be fully argued by said Wright in the regular course of business of this court, to the end that the decision in said cases should, as soon as might be, serve to advise the parties litigant as to their legal rights; that the stipulation relied upon on this motion by defendants was signed by affiant upon the aforesaid express condition, and upon no other; and that there was no consideration for affiant's entering into said stipulation save that of the benefit which would result to his clients from having the aforesaid two cases, in which the transcripts were to be filed, fully argued and decided on the merits; and affiant further says that said Wright, at the time of the signing of the said stipulation by affiant, well knew, and has always known, that affiant would not have signed the same except upon the aforesaid condition and consideration." These facts are practically conceded by the respondent, as in his affidavit in reply thereto he merely avers that "neither at the time said stipulations were signed by the attorneys for respondent, nor at any time previous thereto, was it ever stated to the appellants, or to this deponent, that said stipulations were to be, or were, given upon any condition or on any terms other than those expressed therein."

It is very evident from the foregoing history of the case, and from the affidavits offered in behalf of the respective parties, that the only consideration for the stipulation given by the respondent was that the appellant should take such steps in the case of Hartshorne v. McMullen as would result in a decision of this court being rendered therein which should be a guide to the parties in determining the course to be pursued in the other cases. It was not necessary that the consideration should be expressed in the stipulation. A stipulation is only an agreement, and as in the case of any other agreement, not only can the consideration for making it be established outside of the agreement itself, but it can also be shown that such consideration has failed, and, when so shown, the stipulation cannot be invoked by the party through whom the failure has occurred. In the present case it is evident that the stipulation was for the sole benefit of the appellants. By obtaining it they were relieved from paying the costs of the appeal, as well as the expenses of printing the transcript. On the other hand, unless there should be some decision by this court in the case of Hartshorne v. McMullen by which a rule should be laid down for guidance in the other cases, the respondent gained nothing whatever, and was in reality deprived of advantages which but for the stipulation he would have enjoyed. The actions were brought for the purpose of removing a cloud from the title of the respective plaintiffs to certain land in San Francisco, caused by an adverse claim of the appellants thereto, and involved the same questions of law and fact. Judgment had been rendered in the court below in favor of the plaintiffs in the several actions, and the defendants had appealed from each of those judgments. By virtue of these appeals the operative effect of the judgments was suspended, and the adverse claim of the defendants left undetermined. The respondents were therefore deprived of the benefit of their judgment pending this appeal, and the cloud was left upon their title to the land involved in the action. The respondent would naturally be desirous of having the judgment become final at as early a day as possible, and without this stipulation would have realized this desire at the same time with the decision in the other case. The dismissal of the appeal before its presentation to this court, and the consequent failure on the part of the appellants to procure a decision of this court upon the matters in controversy, deprived the respondent of the benefit of having his judgment become final, and left it in the same condition in which it was at the time the stipulation was given, so that he failed to receive any of the benefit offered to him as the consideration for making the stipulation. We hold, therefore, that, inasmuch as the consideration for the stipulation has failed, it cannot be invoked as binding upon the respondent, and that he is entitled to have the appeal herein dismissed, and it is so ordered.

We concur: Beatty, C. J.; Sharpstein, J.; McFarland, J.; Paterson, J.; De Haven, J.

Hartshorne v. McMullen *et al.* (No. 14,358.) Goodbody v. Mertens *et al.* (No. 14,359.) Preston v. Same. (No. 14,360.) California Dry Dock Co. v. Same. (No. 14,361.) Protestant Episcopal Old Ladies' Home v. Same. (No. 14,362.) Hartshorne v. Same. (No. 14,363.)

(*Supreme Court of California.* June 30, 1891.)

In bank. Appeal from superior court, city and county of San Francisco.

Per Curiam. Upon the authority of Raymond v. McMullen, (No. 14,357,) 27 Pac. Rep. 21, the appeals in the above-entitled actions are dismissed.

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90 Cal. 15

Egan v. Egan. (No. 13,352.)

(*Supreme Court of California.* June 30, 1891.)

Judgment—Amendment—Excusable Neglect.

Before the court's decision in a suit for divorce plaintiff entered into a stipulation to pay to defendant, whatever the decision might be, $1,000 in consideration of the release by defendant of all claims to plaintiff's property. Before judgment defendant, through her attorney, presented the stipulation to the judge in chambers, and asked that it be incorporated in the judgment, which request was refused by the judge. Judgment was entered for plaintiff. Defendant moved for a new trial, which was refused, but made no further request to have the stipulation included in the judgment. *Held*, that the omission of the stipulation from the judgment was a matter for which a remedy should have been sought on the motion for a new trial, or by appeal, and the court erred in subsequently amending the judgment to include it, on defendant's motion, on the ground that the omission was through inadvertence and excusable neglect.

Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

W. N. Barrows and *J. F. Wendell*, for appellant. *M. L. G. O'Brien*, for respondent.

HARRISON, J. A decree of divorce was rendered in this action February 6, 1888, in favor of the plaintiff, upon the ground of cruelty on the part of the defendant, and was entered of record February 8, 1888. It was alleged in the complaint that there was no community property, and that certain real estate described therein was the separate property of the plaintiff. In the decree it is recited "that all of the material allegations of the complaint are true, and all of the allegations of defendant's answer and cross-complaint are untrue, except those particulars wherein they corroborate the allegations of the complaint;" and, after decreeing a dissolution of the marriage, the court set apart and awarded to the plaintiff the said real estate "absolutely free and clear of all rights therein on the part of the defendant." February 16, 1888, the defendant served and filed her notice of intention to move for a new trial, and her statement on said motion was settled and filed June 27th. August 24, 1888, the court made and entered an order denying a new trial. Thereafter, on the 21st of November, 1888, defendant gave notice to the plaintiff of her intention to move the court for an order amending the judgment "so as to insert therein a provision awarding to the defendant the sum of $1,000, and requiring the plaintiff to pay the same as by him stipulated and agreed by written instrument, dated February 6, 1888," and stated in her notice that said motion would be made "on the grounds that said judgment was taken, made, and entered against her through her mistake, inadvertence, surprise, and excusable neglect," and upon the further ground "that the same was not made a part of said decision, judgment, and decree through the mistake, inadvertence, surprise, and excusable neglect of defendant and her attorneys." Affidavits and oral testimony were presented to the court in support of the motion, and in opposition thereto; and after hearing the same the court, on the 29th of March, 1889, made the following order: "On motion of M. L. G. O'Brien, attorney for defendant herein, notice thereof having been duly served on plaintiff's counsel, and after hearing thereon, it is hereby ordered that the decree heretofore made and entered herein be, and the same is hereby, modified, as follows, to-wit: The following clause is hereby added to said decree: Plaintiff is further ordered to pay to defendant the sum of $1,000, as by him stipulated herein, said stipulation having been signed previous to the entering of judgment in said cause. March 29, 1889. WALTER H. LEVY, Judge." From this order the plaintiff has appealed.

It appears from the bill of exceptions that after the trial of the cause, and its submission to the court for decision, the parties by their attorneys entered into the following stipulation: "It is hereby stipulated and agreed that the plaintiff in the above-entitled action will pay to the defendant therein the sum of one thousand ($1,000) dollars in full satisfaction of all right and claim of every kind whatever that said defendant has or claims to have in that certain real property described in plaintiff's complaint herein, and also in full satisfaction and release of all claims against said plaintiff for support or otherwise. Said sum of $1,000 shall be paid to the defendant as soon as said defendant shall execute proper conveyance of her interest in, abandon homestead upon, and move out of said property. This agreement shall not be in any way affected by the decision in said action, but may be enforced by the court in the event of a divorce being granted to either party. W. H. BARROWS, Attorney for Plaintiff. GUSTAVE TOUCHARD, Jr., Attorney for Defendant."

After the stipulation had been signed by the attorneys for the respective parties, and before the decision of the cause, it was presented by them to the judge at his chambers, with the request that he would incorporate its provisions into the decree. The judge, however, declined to do so, upon the ground that, as he had no power or jurisdiction to award the defendant any of the plaintiff's separate property, he could not give any effect to the stipulation in the judgment that he might render. Thereupon, at the request of the defendant's attorney, the plaintiff's attorney caused the plaintiff himself to sign the stipulation in the following form: "I hereby consent to the above agreement, and ratify the same. MICHAEL EGAN. February 6, 1888." After having been thus ratified by the plaintiff, the stipulation was delivered to the defendant's attorney, but was never filed in the action. It also appears that the stipulation was fully explained to the defendant before its execution, and that it was made upon the understanding that it was a settlement of all property rights between the parties, and that, whatever might be the decision of the court in the cause, no appeal or motion for a new trial should be made. After the decision in the cause had been rendered, the defendant repudiated the stipulation, and, having employed another attorney, made her motion for a new trial, which was denied, as above stated, and thereafter she made the foregoing motion for an amendment to the judgment.

Section 473, Code Civil Proc., provides that the court may, "upon such terms as may be just, relieve a party, or his legal representative, from a judgment, order, or other proceeding taken against him through mistake, inadvertence, surprise, or excusable neglect, provided that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken." Inasmuch as the motion in the present case was made more than six months after the judgment was entered, the court had no jurisdiction under this section of the Code to order the judgment to be amended. The appellant, however, contends that, inasmuch as every court has an inherent power to correct its records at any time so as to enable them to speak the truth, the court was authorized to grant the motion.

In the present case, however, it cannot be claimed that the judgment was taken against the defendant through any mistake, inadvertence, surprise, or excusable neglect. Before it was rendered her attorney had presented the stipulation to the judge, with the request that he give effect to it in the judgment, and, upon being informed by the judge that he could not do so, caused it to be signed by the plaintiff in person, persumably for the purpose of having a personal obligation against him for the amount which had been agreed upon as the sum to be paid by him in settlement of all property differences between him and the defendant. Moreover, the defendant, after the entry of the judgment, made a motion for a new trial in the action. Upon this motion she had an opportunity to present to the court any surprise or excusable neglect on her part as a ground for granting her a new trial; and, if the court had been satisfied that such was the fact, her motion would have been granted. So, too, if the court had rendered its decision without sufficiently providing for her support, or if in making its decision it had failed to give to the stipulation such weight as in her opinion it should have received, she could have presented these facts as other reasons why a new trial should have been granted. In making her motion it was incumbent upon her to present to the court all the grounds upon which she had a right to have it granted. After a motion for a new trial in a cause has been denied by the court, a party is not at liberty to make a second motion therefor, either upon any grounds on which the court has once denied it, or upon any grounds which might have been presented in the first instance. The doctrine of *res adjudicata* applies to a decision of a motion for a new trial as fully as to the judgment in the cause. Neither can a party under the form of a motion to amend the judgment obtain relief which, if proper to be granted under any circumstances, should have been sought through a motion for a new trial. Courts have the power at all times to allow amendments to judgments for the purpose of having the judgment as entered express that which was rendered, so that the record will contain the actual decision of the court; and such amendments can be made after the expiration of six months from the entry of the judgment. Where the clerk fails to enter judgment as it was pronounced, the court has always the power to correct the matter, and order the proper entry to be made. Clerical misprisions can be corrected at any time by an order of the court, but judicial errors can be remedied only through a motion for a new trial or on appeal Freem. Judgm. § 70; Forquer v. Forquer, 19 Ill. 68; Insurance Co. v. McCormick, 20 Wis. 265; Thompson v. Thompson, 73 Wis. 84, 40 N. W. Rep. 671; McLean v. Stewart, 14 Hun, 472. It clearly appears in the present case that the matter contained in the amendment made by the order appealed from was not omitted from the judgment by reason of any neglect of the clerk in recording the same, but was intentionally excluded therefrom by the court itself at the time it rendered the judgment. If it should be admitted that the court ought to have included the provisions of this stipulation in its decree, its failure to do so was an error resulting either from a misconception of the law applicable to the facts before it, or from a failure to give sufficient consideration to those facts. In either case it was an error of law committed at the trial, which the defendant should have sought to remedy through her motion for a new trial. The order appealed from is reversed.

We concur: Beatty, C. J.; Garoutte, J.

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90 Cal. 78

Rayner *et al.* v. Jones *et al.* (No. 9,021.)

(*Supreme Court of California.* June 30, 1891.)

CONTRACTS—BREACH—MEASURE OF DAMAGES—NEW TRIAL.

1. Where notice of a motion for a new trial is served and filed in due time, the court should either grant or deny it, though the judgment has been appealed from before the hearing on the motion; and, if the motion is dismissed, the appeal will be considered as an appeal from the judgment, and from an order denying a new trial.

2. Plaintiffs conveyed certain land to defendants, and took from them an undertaking conditioned that they should by a certain time furnish plaintiffs with Texas land-warrants for 3,200 acres of land. In an action on the undertaking for defendants' failure to furnish the warrants, the court found that, at and after the time for their delivery, warrants could have been readily obtained for $47.50 each, locatable on 640 acres. *Held*, that the measure of damages was the value of the warrants, ($237.50,) and not the difference between the value of the land conveyed by plaintiffs to defendants, and the liens thereon, assumed by defendants as part of the purchase money.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

W H. H. Hart, for appellants. *Wal. J. Tuska* and *P. J. Morgan*, for respondents.

Foote, C. The complaint filed in this action is in this language: "Plaintiffs above named, complaining of defendants above named, for cause of complaint aver and allege: That on, to-wit, the 8th day of February, 1881, at, to-wit, the city and county of San Francisco, state of California, the said defendants, for a valid and valuable consideration, made and executed their undertaking in writing, a copy whereof is hereto annexed and made a part of this complaint; that in and by the terms of said undertaking it is stipulated and expressed that defendant Jones (the principal in said undertaking) agrees to furnish to these plaintiffs certain Texas land-warrants for three thousand two hundred (3,200) acres of land; said warrants to be of the nature and character more particularly specified in said undertaking, (and to be deposited by said defendant Jones on or before the 1st day of April, A. D. 1881, at the banking-house of John Bremon, in the city of Austin, in said state of Texas.) That the condition therein specified, to-wit, the deposit of said Texas land-warrants, has not been fulfilled and carried out by said defendant Jones, or by any of or either of said defendants, and said defendant Jones has wholly failed and neglected to comply with the said condition on or before said 1st day of April, 1881, or at any time, and still fails and neglects to comply with the same. That by reason of the neglect and refusal of said defendant Jones to comply with the condition of said undertaking, as aforesaid, there was and became due on, to-wit, the 2d day of April, A. D. 1881, to these plaintiffs from these defendants, under and by the terms of said undertaking, the sum of $4,800, which sum, or any part thereof, the said defendants then, and ever since then, have wholly failed and refused to pay, and still so fail, neglect, and refuse. Wherefore plaintiffs pray for judgment against said defendants in the sum of $4,800, and for their costs." The bond mentioned therein is as follows: Know all men by these presents, that we, C. J. Jones, and J. C. Fisk and J. C. Beatty as sureties, parties of the first part, are held and firmly bound unto Wm. Rayner and Maggie Rayner, his wife, of the city of San Francisco, state of California, party of the second part, in the sum of four thousand eight hundred ($4,800) dollars, gold coin of the United States of America, to be paid to the executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, heirs, executors, administrators, firmly by these presents. Sealed with our seals, and dated the eighth day of February, A. D. one thousand eight hundred and eighty-one. The condition of the above obligation is such that, whereas, the party of the first part has sold to the party of the second part Texas land-warrants for three thousand two hundred (3,200) acres, and has received payment in full, except three hundred and fifteen ($315) dollars, which is secured by promissory note made and executed by Wm. Rayner and Maggie Rayner, his wife: Now, the party of the first part agrees to furnish Texas land-warrants for the above number of acres; said warrants to be of such a series that they can be located upon any of the unlocated public lands of the state of Texas; said warrants to be free from all liens, incumbrances, and transfer fees, and deposited with the banking-house of John Bremon, in the city of Austin and state of Texas, and to be held by him until the said note of three hundred and fifteen ($315) dollars is paid. The said warrants and note to be deposited by the party of the first part on or before the first day of April, A. D. 1881, at said banking-house, and the said Rayner to have any time thereafter, and before the first day of January, A. D. 1882, to pay said note, and secure the transfer of said warrants. Now, if the said Jones shall well and truly deliver said warrants on or before the first day of April, A. D. 1881, then the above obligation to be void; otherwise, to remain in full force and virtue." A demurrer was interposed to the complaint, and overruled. A motion for a nonsuit was made, and denied. The cause was then tried, and resulted in a judgment for the plaintiffs in the sum of $1,350 and costs.

A notice of motion for a new trial was served and filed in due season, and upon the hearing of the motion the trial court dismissed it, upon the theory, evidently, that, as the judgment made and entered had been appealed from when the motion for a new trial came on for hearing, the court below had lost jurisdiction to determine it. This view of the matter is untenable, and the court should have heard the motion, and either granted or denied it, upon the bill of exceptions presented, which is a part of the record here on the appeal from the order of dismissal; the action of the court being, in legal effect, a denial of the motion for a new trial. Section 946, Code Civil Proc.; Naglee v. Spencer, 60 Cal. 10; Hayne, New Trials, § 2, p. 26; Carpentier v. Williamson, 25 Cal. 167, 168; Hayne, New Trials, p. 494; Chase v. Evoy, 58 Cal. 352. The case, then, is to be considered here as on appeal from the judgment and an order denying a new trial. As against the demurrer as filed, we think the complaint sufficient, although a special demurer to it, as not properly alleging damages suffered, might have been sustained. After making certain findings of fact based upon evidence adduced on the trial, the court reached the conclusion of law that the plaintiffs should recover "the value of equity, over and above the mortgage, on the real estate in San Francisco, conveyed by the plaintiffs to defendant Jones, which was $1,000; also the value of the San Diego lot, amounting to $350,—making, in all, $1,350,—with interest from commencement of the suit." And the judgment of the court rendered thereupon went upon the idea that Jones and his sureties were responsible to the plaintiffs, by the terms of this bond, for the non-delivery of the warrants, to the extent of the difference between the value of certain real estate not mentioned or referred to in the bond sold and conveyed to defendant Jones, and the mortgage thereon, made before that time in favor of other parties, which Jones had assumedto pay as a part of the purchase price. This contract did not assume to fix the amount of damage in anticipation of a breach of the obligation of the instrument, as condemned by section 1670 of the Civil Code; nor does it appear from it, or the evidence, that it would be impracticable or extremely difficult to fix the actual damage as allowed by section 1671 of the Civil Code.

The court below, as we think, improperly admitted evidence against the objection of the defendants, and made findings thereon upon the theory that the measure of damages recoverable for the failure to deliver the warrants at the time and place specified in the bond was the difference between the value of certain real property which the plaintiffs had sold and deeded to the defendant Jones (which was the origin of the execution of the bond) and the amount of a certain mortgage debt existing as against a portion of the property conveyed; that is, the sum of $1,350. It is found, upon sufficient proof, in the twelfth and thirteenth findings of fact: "That on the 1st day of April, A. D. 1881, and for several months thereafter, the market value of land-warrants specified in finding 7th have been $47.50 each at Austin, Texas, and readily obtainable in and on the market at said city of Austin, Texas, at said price of $47.50 each, on said 1st day of April, A. D. 1881, and at any time for and during the several months thereafter, if they had seen fit so to do." "That said warrants set out in finding No. 7 are of the same class and kind that the defendant Jones was to deliver to the plaintiffs, under the terms of said undertaking, and that they are and were free from all liens and incumbrances and transfer fees, and are and were of the character to be delivered by said Jones to said plaintiffs; that each warrant is locatable on 640 acres of land, on the conditions in said warrant specified." It would appear, therefore, that the measure of damages recoverable in the action was the value of the warrants as specified in the twelfth finding, viz., $237.50, with legal interest on same from the time when they should have been deposited according to the terms of the bond, subject to a reduction of $315 for amount due on the note. As it appears that the trial court erroneously measured the damages by a different rule, to the manifest prejudice of the appellants, the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

90 Cal. 25

SMITH *v.* DAVIS *et al.* (No. 13,319.)

(*Supreme Court of California.* June 30, 1891.)

TRUSTS—ENFORCEMENT—JURISDICTION — PARTIES.

1. Where a deed of trust of land in another state is executed in California by persons residing there, stipulating that, if the trustee named therein cannot act, a court of competent jurisdiction may appoint a new trustee, a court of California, having jurisdiction of the parties, may appoint a new trustee, and direct him to carry out the trust.

2. A deed of trust purporting to be signed by the trustee is not affected by his failure to sign it, if his signature formed no element of the consideration for the signatures of the other parties, and the deed expressly provides that it shall be binding regardless of the trustee.

3. A judgment rendered in one state appointing a trustee to enforce a trust for the conveyance of land situated in another state will not be reversed on the ground that a third person, to whom the donor conveyed the land after his execution of the deed, was not made a party, if it does not affirmatively appear that such party was a resident of the state in which the court had jurisdiction.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Whittemore & Sears and *James G. Maguire*, for appellants. *James L. Crittenden*, for respondent.

GAROUTTE, J. Respondent filed his complaint in equity to appoint a trustee, and to have the execution of a trust relating to certain lands in Washington Territory decreed. The complaint filed May 23, 1885, alleges that on July 27, 1881, said Smith and Davis executed and delivered each to the other a certain document, purporting to be an "indenture tripartite," whereby they purported to convey said land to the London & San Francisco Bank, Limited, (a corporation) in trust for certain specified purposes; that by the terms of its charter said bank was incapable of taking the title sought to be conveyed by the indenture, and was without power to act as trustee in the indenture specified; that defendant Davis refused to regard and carry out the conditions of the indenture; and plaintiff asks that the court appoint a trustee, and that the said trustee be directed to execute the trusts therein contained. Defendants filed a general demurrer, which was overruled, when defendant Davis answered, setting out, among other things, that after the filing of the complaint in this action he sold and transferred all his interest and right in the land described to one Margaret H. McDonald, and that since that time he has had no interest in and to said real estate. The defendant bank answered that it had no legal capacity to take the title sought to be conveyed; never consented to act as trustee, and refused so to act. The findings of the court are in consonance with the allegations of the complaint; and the court also found that defendant Davis had transferred his interest as set forth in his answer. This appeal is from the judgment appointing a trustee, and directing an execution of the trust.

Appellants insist that the court had no jurisdiction or authority to appoint or constitute a trustee of land lying outside of the territorial limits of the state of California. There is no question as to the general principle of law that in respect to realty every attempt of any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory; for land is held by the laws of the country where it is situated, and the tribunals administering those laws are the proper forums in which titles to realty should be litigated. The effect of a court's decree is necessarily limited by the boundary lines of its jurisdiction. In the case of Lindley v. O'Reilly, 50 N. J. Law, 636, 15 Atl. Rep. 379, where a court of Pennsylvania adjudged a conveyance of land in New Jersey to be a mortgage, and canceled the same, all the parties living in Pennsylvania, the court said: "The decree cannot operate *ex proprio vigore* upon the lands in another jurisdiction to create, transfer, or vest a title. The courts of one state or country are without jurisdiction over title to lands in another state or country." While the rule is as above stated, yet there is another rule firmly established and of universal application, and it is: "In cases of fraud, trust, or contract, the jurisdiction of a court of chancery is upheld wherever the person be found, although lands in another state may be affected by the decree." In the case of Massie v. Watts, 6 Cranch, 158, MARSHALL, C. J., said: "Was this cause, therefore, to be considered as involving a naked question of title,—was it, for example, a contest between Watts and Powell,—the jurisdiction of the circuit court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of the legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found; and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

In Wimer v. Wimer, 82 Va. 901, we find this language of the court: "But, while this is true, it is undoubtedly well settled that, in cases of fraud, trust, or contract, courts of equity will, whenever jurisdiction over the parties has been acquired, administer full relief without regard to the nature or situation of the property in which the controversy had its origin, and even where the relief sought consists in a decree for the conveyance of property which lies beyond the control of the court, provided it can be reached by the exercise of its powers over the person, and the relief asked is of such nature as the court is capable of administering." Story quotes the following language of Lord KENYON, used in a case pending before him: "These cases clearly showing that, with regard to any contract made in equity between persons in this country, respecting lands in a foreign country, particularly in the British dominion, this court will hold the same jurisdiction as if they were situated in England." Story, Eq. Jur. § 1293. Referring to trusts, Story says: "If the proper parties are within the reach of the process of the court, it will be sufficient to justify the assertion of full jurisdiction over the subject in controversy." Barger v. Buckland, 28 Grat. 850, was a suit of creditors to subject to the payment of their claim lands of their debtor, situate in Virginia and West Virginia, which lands had been conveyed in trust to secure other debts. The trust was created in Virginia; the parties resided in Virginia, except the trustee, who resided in West Virginia, and who neglected or refused to carry out the trust. In Poindexter v. Burwell, 82 Va. 514, the court, in reviewing the decision in Barger v. Buckland, supra, says: "Upon default of payment, there being no trustee to execute the contract of the parties to sell the land and pay the debt, under the circumstances, the court, in order to perform the contract of the parties, and to fulfill its own maxim, that a trust shall not fail for want of a trustee, decreed that, unless the grantor should pay the debt within a prescribed period, then certain named persons should execute the trust by selling the land and applying the proceeds to the payment of the debt."

Upon principle, this case appears to be identical with the case at bar. If the London & San Francisco Bank had been competent to accept the trust, and had accepted it, and this plaintiff was here asking that the trustee execute the trust, there is no question but what a decree to that extent would be sustained by this court, for the authorities are universal to that effect. If the court has the power, and if it is its duty, to execute the trust, can it be deprived of that power and released from that duty because there is no trustee to carry out the mandate of the court? or, rather, is it not specially within the line of its duty to create an instrument whereby its decree may effect the true purpose and object intended? The decrees of courts of equity primarily and properly act *in personam*, and, at most, collaterally only *in rem*. If the parties are within the jurisdiction of the court, an injunction will be granted to stay proceedings in a suit in a foreign country. A trust will be enforced pertaining to realty, regardless of the situation of the property. Courts of equity have, as between the parties, reviewed the judgments of foreign courts, and even sales made under those judgments, when fraud or undue advantage was shown. A specific performance of a contract of sale of lands situated in a foreign country will be decreed in equity. These actions will be supported where the court has jurisdiction of the parties, and are familiar illustrations found in Story's Eq. Jur. § 1290 et seq. A decree to convey land lying in another state does not affect the title; it only operates upon the person who is to make the conveyance, and it is his act in making the deed that affects the title. This deed of trust was made and executed in San Francisco, Cal., by the plaintiff and defendant Davis, and was recorded in King county, Wash. T. It expressly provided that "the trusts hereby created shall not lapse or become void by reason of the failure or refusal of the party of the third part to accept or carry out the same;" and further provided that a new trustee should be appointed by the mutual consent of the parties, or by a court of competent jurisdiction, upon the happening of any of the foregoing contingencies. It is further provided that all the conditions and provisions of this agreement "shall apply to and be binding upon their heirs * * * or any other trustee that may be appointed in its place or stead." The defendant bank under its charter could not take the title to the realty, but the parties of the first and second part expressly guarded against such contingency defeating the trust provisions of the indenture by covenanting that, notwithstanding the happening of such event, the indenture should still remain in full force and effect as between themselves, and that a new trustee should be appointed to carry out the trusts, and that all the provisions and conditions of the agreement should apply to and be binding upon such trustee. There can be no question but that this indenture is still alive and in full force and effect as between the plaintiff and defendant Davis, for they expressly provided that such should be the fact.

Upon a careful reading of the decree of the court we find it simply appoints a trustee, and commands him to enforce the trust; there is nothing contained therein purporting or attempting to transfer title to or vest title in the trustee appointed by the court. If title to the Washington Territory realty does not vest in the trustee, then appellant is not injured, and his contention has no support. If the title to this realty does vest in the trustee, it must be by operation of law or by virtue of the contract of the parties, for the decree does not so provide, and does not purport *ex proprio vigore* to vest a title in the trustee Brittan. In this case the trust did not fail, as between the parties, by reason of the incapacity and refusal of the original trustee to act. "The assent of the trustee is not necessary to the validity of the trust-deed. He may refuse to act, be unable to comply with the statute, or die, and in such or similar cases a court of chancery will execute it." Furman v. Fisher, 4 Cold. 630; Field v. Arrowsmith, 39 Amer. Dec. 185, and note; Flint, Trusts, § 132. In Vidal v. Girard's Ex'rs, 2 How. 188, Justice STORY said: "It is true that, if the trust be repugnant to or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it, but that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court possessing equity jurisdiction to enforce and perfect the objects of the trust. This will be sufficiently obvious upon an examination of the authorities, but a single case may suffice. In Sonley v. Clock-Makers' Co., 1 Brown Ch. 81, there was a device of freehold estate to the testator's wife for life, with remainder to his brother C. in tail male, with remainder to the Clock-Makers' Company in trust to sell for the benefit of testator's nephews and nieces. The devise, being to a corporation, was by the English statute of wills void, that statute prohibiting devises to corporations; and the question was whether, the devise being so void, the heir at law took beneficially or subject to the trust. Mr. Baron Eyre in his judgment said that, 'although the devises to the corporation be void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise.' This is the ground upon which courts of equity have decreed in cases where no trustee is named."

The objection to the complaint that it is fatally defective in this: that it shows affirmatively that the indenture or deed of trust was intended to be signed by three parties, and was signed by only two,—cannot be sustained. The signature of the party of the third part formed no element of the consideration for the signature of the other two parties, and they expressly agreed that the indenture should be binding as between them, regardless of the third party.

The appellant insists that the judgment should be reversed because Margaret H. McDonald is not made a party defendant in this action. If said Margaret was a resident of the state of California when the answer was filed, we are at a loss to understand why she was not joined as a co-defendant, either upon the application of one of the parties or upon motion of the court. In order for appellant to successfully maintain his position he must show affirmative error, and in this case he has not shown by the record that she was a resident of the state of California, and therefore that the court had the power to order her joined as a defendant. We are not called upon to determine to what extent Margaret H. McDonald's interests have been adjudicated in this action. Respondent's position is that, owing to the fact she had notice of the recordation of the indenture in Washington Territory, and also purchased the land from appellant after the commencement of this action, that, therefore, she is bound in all respects by the judgment, to the same extent as if she were a party defendant. In this action no *lis pendens* was filed; indeed, it is quite difficult to see how or where one could have been filed to have had any vitality or effect. In this state the act of filing a complaint is no notice to the world of the matters contained therein, and, said Margaret having no actual or constructive notice of the proceedings at the time she purchased the realty, it is difficult to discern how she is in any worse position by reason of having purchased after the filing of the complaint than if she had purchased prior to that event. Again, the fact that she purchased with notice of the indenture of trust did not give the trial court the right of jurisdiction to litigate her title to the land. Appellant in making a deed to her undoubtedly repudiated the entire theory of trust, and she has probably bought and now holds in hostility to the trust; the question of her title is a matter to be hereafter considered in *locus rei sitæ*.

But, aside from all these considerations, how is the defendant injured by the fact of not having the company of this lady as a codefendant during the progress of the litigation? and, if her company, aid, and assistance were necessary to the best welfare of his interests in the cause, why did he not ask the court to have her joined with him? The court is expressly authorized by statute to make such order in a proper case. What is appellant's cause of complaint? If he has no interest in the subject-matter of this litigation, why did he not file a disclaimer in the lower court, and thus rid himself of the vexations of the law, and thereby escape a judgment against him for costs? If he has any interests which are affected by the judgment in this cause, he has had his day in court, and was held to be in the wrong. Why should he demand a new trial because a third party had interests which were not litigated? If the plaintiff has secured a judgment against the wrong party, he has done an idle thing, and his sins rest on his own head. We think the appellant should not be heard to insist upon a reversal of the judgment upon the last ground considered. Let the judgment be affirmed.

We concur: BEATTY, C. J.; HARRISON, J.

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90 Cal. 95

SMITH *et al.* v. BUTTNER. (No. 13,241.)

(*Supreme Court of California.* June 30, 1891.)

NEGLIGENCE — DEFECTIVE PREMISES — PLEADING.

In an action for personal injuries, the complaint alleged that, while plaintiff was in possession of defendant's house as tenant, he raised it, and failed to provide safe or suitable means of exit therefrom; that, by reason of his negligence in failing to provide safe and proper means of exit, plaintiff, in attempting to descend to the ground from the house, fell, and was injured. *Held*, that the complaint did not state a cause of action, since it did not show whether the cause of the accident was a latent or patent defect.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Joseph Leggett, for appellants. *Otto Tum Suden*, for respondent.

TEMPLE, C. This appeal is on the judgment roll from a judgment against the plaintiffs on the pleadings. The plaintiffs are husband and wife, and the action is brought to recover damages for injuries received by the wife. Plaintiffs were occupying a house belonging to defendant as a residence, being his tenants from month to month. The complaint shows that some time prior to June, 1887, while plaintiffs were in possession as tenants, defendant caused the dwelling-house to be raised some six or seven feet; that plaintiffs continued to reside in the house after it had been raised, and to pay rent to defendant as before: that after raising the house, and while plaintiffs and their family were living in it, defendant wholly failed and neglected to provide any safe and proper means of entrance to or egress from the house, and, "by reason of the negligence and failure of defendant to provide safe, suitable, or proper means of exit from said house, said plaintiff Dora Smith, on said 30th day of June, 1887, in endeavoring to descend from said house to the ground, for a proper and lawful purpose, while in the exercise of due care and diligence, and without any fault or negligence on her part, fell to the ground, and dislocated her left wrist, and broke the bone of her left arm near the wrist, and sustained other severe and painful injuries," etc. To this complaint the defendant answered, specifically denying every allegation, except as to the relation of landlord and tenant. A jury being impaneled for the trial of the cause, plaintiff Dora was sworn as a witness, and her testimony taken. Thereupon counsel for the defendant moved for judgment on the pleadings, and the motion was granted.

It is manifest from the the complaint that the injury to plaintiff Dora did not occur while the work of raising the house was in progress. The complaint fails to show how long before the injury it was since defendant had been engaged in the work, but it is averred that they continued to occupy the house after it had been raised, and paid rent as before, and that the injury occurred after. The negligence consisted simply in failing to provide a safe, proper, and suitable means of entrance to or egress from the house, and it is alleged that this negligence caused plaintiff to fall. But no fact is averred which shows that such negligence had anything to do with the accident. How did it cause her to fall? It may have been because defendant neglected to provide any means of egress whatever, or through some patent defect in the plan of the contrivance, whatever it was. In such case plaintiff could not recover in this action. Sieber v. Blanc, 76 Cal. 173, 18 Pac. Rep. 260. It may have been, consistently with this general statement, because the structure was insufficiently secured, and therefore gave way, although properly used. In such case, perhaps, plaintiffs might recover. Such complaint does not state the facts constituting plaintiffs' cause of action. It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence caused or contributed to the injury. To illustrate: Suppose a plaintiff injured by the falling of a sign, negligently and insecurely fastened by defendant. It would not suffice for him to allege the negligence in hanging the sign; that plaintiff, in lawfully and without negligence passing under it, was thrown down and injured through such negligence. This would be a mere assertion of the cause. It would be necessary to show that the sign fell upon him in consequence of such negligence, thereby causing his injury. Such a complaint would, however, be less objectionable than this now under consideration, for there would be but one conceivable way in which the injury could be supposed to result from the negligence; but, as here, that the negligence was the cause would rest upon the naked assertion as to causalty, and would not appear through the statement of a fact. In construing pleadings before judgment, it is presumed the pleader has stated his case in the most favorable manner to himself possible. As we have seen, it is entirely consistent with the allegations of this complaint to suppose the injury occurred because defendant neglected to provide any mode of egress whatever. We are not at liberty to suppose anything gave way through the latent insecurity of the structure, for it is not so alleged. The presumption is, therefore, that the accident arose from a patent defect, and that the pleader has failed to make a more specific statement, because such a statement would have weakened his case. We think the judgment should be affirmed.

We concur: FOOTE, C.; FITZGERALD, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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90 Cal. 64

Dore v. Thornburgh. (No. 13,477.)

(*Supreme Court of California.* June 30, 1891.)

Action on Foreign Judgment—Pleading—Limitations.

1. A complaint, in an action on a judgment given against defendant in a foreign court, which alleges that, in the action in which the judgment was obtained, plaintiffs signed final judgment for £3,920, "which said judgment was then and there duly given, made, and entered," is not demurrable on the ground that it does not aver that the court ever made or gave the judgment.

2. Code Civil Proc. Cal. § 339, requiring to be brought within two years an action upon a contract, obligation, or liability, founded upon an instrument of writing "executed" out of the state, does not apply to actions on a foreign judgment, but such action is within section 343, providing that "an action for relief not hereinbefore provided for must be brought within four years after the cause of action shall have accrued."

Commissioners' decision. Department 2. *Doyle, Galpin & Zeigler,* for appellant. *T. I. Bergin,* for respondent.

Fitzgerald, C. Appeal from a judgment of the superior court of the city and county of San Francisco. This action was commenced by plaintiff on the 4th day of October, 1888, to recover upon a judgment given against the defendant on the 9th day of May, 1885, in the queens' bench division of the high court of justice in England. The complaint is demurred to on the grounds: (1) That it does not state facts sufficient to constitute a cause of action; (2) that the alleged cause of action is barred by the provisions of section 339 of the Code of Civil Procedure. The demurrer was sustained by the court below, and, upon plaintiff failing to amend the complaint, judgment final was rendered in favor of defendant. The appeal is taken upon the judgment roll alone.

The objection raised under the first ground of demurrer—that there is no averment in the complaint that the court ever made or gave the alleged judgment—is not well founded. The complaint alleges "that thereafter, to-wit, upon the 9th day of May, 1885, the said plaintiffs signed final judgment in the said action for the said sum of £3,920, in accordance with the terms of the said order, and which said judgment was then and there duly given, made, and entered." This allegation we think sufficient, as against a general demurrer.

Under the second ground of demurrer, the question presented for our determination is whether this action, which is founded upon a judgment rendered by an English tribunal, is barred by the statute of limitations within two years. Subdivision 1, § 339, Code Civil Proc., upon which respondent relies in support of her contention that the action is barred within that time, reads as follows: "An action upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state." That the judgment herein is not such an instrument in writing (Patten v. Ray, 4 Cal. 287) is evident from the use here made of the word "executed," which must be construed to apply to the act of the party sought to be charged. But it is a contract in writing in the full sense of the term "contract or obligation," as employed by our statute, (Stuart v. Lander, 16 Cal. 375; Reed v. Eldredge, 27 Cal. 346; Wallace v. Eldredge, Id. 498; Bean v. Loryea, 81 Cal. 152, 22 Pac. Rep. 513;) and, as such, is not embraced in the two-years limitation prescribed by the provisions of that subdivision of the section. Section 343, Code Civil Proc., ("An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued,") was construed by this court in Piller v. Railroad Co., 52 Cal. 42, (which was an action for damages for injuries caused by the alleged negligence of the defendant,) to apply "to all suits in equity not directly of concurrent cognizance in law and equity," and that the two-years limitation found in the first clause of the first subdivision of section 339 is applicable to all actions at law not specifically mentioned in other portions of the statute." In Lux v. Haggin, 69 Cal. 269, 10 Pac. Rep. 674, which was an action for equitable relief, its meaning was extended so as to embrace "all suits in equity as well as at law." And, while we do not think that the construction put upon this section was necessary to the decision of either case, we are satisfied with the reasoning and the conclusion reached in the latter, and regard it as the correct interpretation of the intention of the legislature as there expressed.

We are therefore of the opinion that this action, which is not specifically provided for by any other section of the statute of limitations, falls within the meaning of section 343; and, as it was commenced within the period of time therein prescribed, it follows that the court below erred in sustaining the demurrer. We advise that the judgment be reversed, with directions to the court below to overrule the demurrer.

We concur: Foote, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, with directions to the court below to overrule the demurrer.

Allen v. Allen *et al.* (No. 13,005.)

(*Supreme Court of California.* June 30, 1891.)

Mortgages—Redemption — Conflict of Laws—Limitations—Pleading.

1. Appellant caused land in California to be conveyed absolutely to respondents as security for a loan made in New York, of which state all were residents. After respondents' right to sue for the money loaned was barred in New York, appellant sued in California to redeem. *Held* that, as respondents' right of action for the loan was barred in New York, a suit by them to foreclose the mortgage was barred in California, under Code Civil Proc. Cal. § 361, which provides that when a cause of action has arisen in another state, and by the laws thereof an action cannot be maintained by reason of the lapse of time, an

action cannot be maintained against him in California, except in favor of one who has been a citizen of California. The right to foreclose being barred in California, the right to redeem was barred also.

2. The time for redemption from a mortgage is fixed by the laws in force at the time the mortgage is given, and cannot be extended by subsequent legislation.

3. Persons entering into a contract, relying on a decision of the supreme court, are bound in the performance thereof by the law as declared by a subsequent decision of the same court overruling the former decision as erroneous.

4. Under Code Civil Proc. Cal. § 458, providing that in pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be generally stated that the cause of action is barred by a certain section of the Code, and, if such allegation be controverted, the party pleading must establish the facts showing the bar, a plea of the statute of limitations to a cause of action which arose in another state need not allege facts to show that the cause of action arose in that state, and under the laws of that state is barred by the statute of limitations.

Department 1. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

J. N. Gillett and *E. W. Wilson*, (*Stanley, Stoney & Hayes*, of counsel,) for appellant. *Chamberlin & McGowan* and *S. M. Buck*, for respondents.

PATERSON, J. Appellant received from the state a certificate of purchase for the lands described in the complaint on March 28, 1860, and in August following assigned the same to one Collins to secure an indebtedness of $30, and thereafter a patent was issued from the state to Collins. Appellant paid Collins the amount due him; and the latter, by request of appellant, conveyed the land to John H. Allen, who paid no consideration therefor. Respondents thereafter advanced to the appellant certain sums of money for the payment of taxes which had become delinquent, and, to secure the repayment to them of said sums the appellant, on June 12, 1869, caused said John H. Allen to convey the lands to them as security for the repayment of the money they had advanced. This deed was absolute in form. John H. Allen received no consideration for the deed. Neither of the parties has ever been in actual possession of the land. The contract of loan was oral, and no time was fixed in which appellant was to make repayment. Plaintiff never made any demand for an accounting, or any offer to redeem, prior to the year 1885, and defendants did not prior to that time assert any claim of title to the lands adverse to plaintiff's right to a reconveyance upon payment of the indebtedness. This action was commenced March 15, 1887. The court below rendered judgment for the defendants. A motion for a new trial was denied, and plaintiff appealed from the order, and from the judgment.

1. The court below held that plaintiff's cause of action was barred by the provisions of section 361, Code Civil Proc. That section provides: "When a cause of action has arisen in another state or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued." It is claimed by appellant that under that section it was incumbent on respondents to set out the facts upon which they rely, to show that the cause of action arose in the state of New York, and that under the laws of that state it was barred by the statute of limitations. A complete answer to this contention is found in section 458, Id., which provides: "In pleading the statute of limitations, it is not necessary to state the facts showing the defense, but it may be generally stated that the cause of action is barred by the provisions of section [giving the number of the section and subdivision thereof, if it is so divided, relied upon] of the Code of Civil Procedure; and, if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred." The rule thus established was intended to simplify the form of pleading such defenses, and is one which the court cannot depart from on a conjecture that the legislature intended to except from its operation cases of this kind. The contract was made in New York, where all the parties resided, and neither of them was in this state thereafter until the year 1885; and it is claimed by appellant that under sections 346, 351, Id., and 2903, Civil Code, the respondents' right to foreclose their mortgage was not barred at the date of the commencement of this action; that appellant remained the equitable owner of the property, and his right to redeem was kept alive. Those sections read as follows: "Sec. 346. An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage." "Sec. 351. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action." "Sec. 2903. Every person, having an interest in property subject to a lien, has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed." Civil Code. In support of this contention, counsel for appellant say, in substance: "Respondents' action to foreclose could have been brought only in this state. The word 'return,' as employed in section 351, supra, is applicable to persons coming from abroad, as well as to citizens who have left the state for a temporary purpose, and returned thereto. The statute had not commenced to run in 1885, because the respondents had never been in the actual occupancy of the premises. Section 2903, Civil Code, and section 346, Code Civil Proc., provided

rules of limitation different from those which had previously been followed by the courts of this state, and those new rules are applicable to mortgages made before, as well as those made after, the adoption of the Codes, unless the remedy was extinguished at the time the Codes took effect. Respondents were not only mortgagees, but trustees, of appellant; and the statute could not commence to run in their favor until an offer to redeem was made by appellant. There could be no laches on the part of appellant, because the legal title remained in him, and no adverse claim was made by respondents." These contentions cannot be lightly passed over. They deserve to receive, and they have received, our careful consideration.

In the solution of the question presented as to the effect of the deed, we must read as a part of the contract the laws of this state existing at the time the contract was made, (Klinck v. Price, 4 W. Va. 4; U. S. v. Crosby, 7 Cranch, 115,) although the nature and construction of the contract of loan, which was made in New York, are determined by the laws of the latter state, (De Wolf v. Johnson, 10 Wheat. 367.) It is true, an action to foreclose must be brought where the property is situated; but it does not follow that respondents could have maintained an action to foreclose at the time this suit was commenced. Both parties resided in the state of New York, where the contract was made, and either could have maintained an action there on the contract. The plaintiff could have enforced his right to redeem, and the defendants could have recovered the amount for which they held the land as security. Montgomery v. Spect, 55 Cal. 352; Kanawha Coal Co. v. Kanawha & O. Coal Co., 7 Blatch. 415; Gardner v. Ogden, 22 N. Y. 327; Williams v. Fitzhugh, 37 N. Y. 444. In this state, when an action on a promissory note, secured by mortgage of the same date upon real property, is barred by the statute of limitations, the mortgagee has no remedy upon the mortgage. Lord v. Morris, 18 Cal. 482; Heinlin v. Castro, 22 Cal. 100. The debt is regarded as the principal, and the mortgage as a mere incident. When the debt is barred, the remedy upon the mortgage is also barred. McCarthy v. White, 21 Cal. 495. If, therefore, respondents could not maintain an action in New York for the recovery of the money due, they could not maintain an action in this state to foreclose the mortgage. Section 361, Code Civil Proc. At the time the conveyance was made by John H. Allen to the respondents, a deed absolute in form, but intended as a mortgage in this state, transferred the legal title, and there was left in the person executing it a mere equity of redemption; and whenever the debt, to secure which the deed was made, became barred by the statute of limitations, the right to redeem was barred. Hughes v. Davis, 40 Cal. 117; Espinosa v. Gregory, Id. 58. The right to redeem and the right of the creditor to sue on a contract were reciprocal. Where one was lost, the other could not be enforced. Cunningham v. Hawkins, 24 Cal. 403; Arrington v. Liscom, 34 Cal. 366; Grattan v. Wiggins, 23 Cal. 35. No subsequent legislation could change the rights or obligations of the parties, or extend the time for action. The right and time to redeem were fixed by the laws in force at that time. Bronson v. Kinzie, 1 How. 316; Walker v. Whitehead, 16 Wall. 318; Heyward v. Judd, 4 Minn. 483, (Gil. 375;) Phinney v. Phinney, 81 Me. 450, 17 Atl. Rep. 405. Under the decisions just cited, section 346, Code Civil Proc., is inapplicable, because it would effect a material change in the rights and obligations of the parties. Phinney v. Phinney, 81 Me. 450, 17 Atl. Rep. 405; Heyward v. Judd, 4 Minn. 483, (Gil. 375.) And for the same reason Raynor v. Drew, 72 Cal. 307, 13 Pac. Rep. 866, and other and later cases declaring the rule stated in that section are not in point. They are based upon that section of the Code, and it was passed posterior to the time the parties entered into the contract.

That plaintiff's cause of action was barred by the laws of New York at the time this action was commenced there can be no doubt; and it is immaterial whether the court below based its conclusion upon the proper section of the statute of limitations of that state or not. It was shown that both of the parties resided in the state of New York for 16 years after the contract was entered into before they came to this state, and during that time no action was taken by either of them to put the other in default; and, if it be conceded that the section of the statute of New York which was put in evidence has no bearing upon the question at issue, it must be presumed that the laws of that state are the same as our own. Marsters v. Lash, 61 Cal. 624; Tolman v. Smith, (Cal.) 24 Pac. Rep. 744; Osborn v. Blackburn, (Wis.) 47 N. W. Rep. 175.

It is claimed that at the time the contract was entered into it was the established rule in this state that a conveyance absolute in form, but intended merely as security, did not pass the legal title to the grantee. It is true, there had been decisions to that effect; but, in the year following, it was held (Espinosa v. Gregory, and Hughes v. Davis, supra) that a deed absolute in form, intended as a mortgage, did convey the legal title. These decisions did not change the law; they simply declared what was the law. Every one is conclusively presumed to know the law, although the ablest courts in the land often find great difficulty and labor in finally determining what the law is. The courts cannot make or repeal a law. "They can say what a law means; and if, afterwards, they see that they have made a mistake, they can correct their error by an overruling of a former decision; the consequence of which overruling is that the blunder is thenceforward deemed never to have been law." Bish. Cont. § 569; Boyd v. Alabama, 94 U. S. 649. It has been held here that, although it appears the parties have entered into a contract relying upon a previous decision of the supreme court, they will not be relieved from the obligations thereof because of a subsequent decision by the same court overruling the former one, and declaring a different rule upon the same subject. Kenyon

v. Welty, 20 Cal. 637. There are some cases in which the supreme court of the United States has held that the construction given to a statute by the highest tribunal in the state, whether sound or not, must be taken as correct, so far as contracts made under the act are concerned, and no subsequent decision altering the construction can impair their validity. The construction becomes a part of the statute; as much so as if it were an amendment made by the legislature. Gelpcke v. Dubuque, 1 Wall. 175; Louisiana v. Pilsbury, 105 U. S. 294; Douglass v. Pike, 101 U. S. 677; Thomson v. Lee, 3 Wall. 327. These cases, however, all involved the question as to the validity of negotiable securities, and in one of them a distinction is made between cases of that kind and cases like the one at bar in which the court had previously applied the doctrine stated above. Gelpcke v. Dubuque, supra, 214. We think the court below held the right view of the case, and the judgment and order are therefore affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

STEVENS v. LOVEJOY. (No. 13,825.)

(*Supreme Court of California.* July 2, 1891.)

SWAMP LAND—APPLICATION BEFORE SURVEY.

The swamp lands granted to the state by Act Cong. Sept. 28, 1850, are not subject to application for purchase until they have been segregated to the state by a United States survey, and an application filed prior to such segregation confers no rights on the applicant, though it is subsequently approved, and a certificate of purchase issued after segregation. Following Buchanan v. Nagle, (Cal.) 26 Pac. Rep. 512.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action by Stevens against Lovejoy to determine a contest arising in the state land-office as to the right to purchase from the state certain swamp and overflowed lands granted to the state by Act Cong. September 28, 1850. The court below found, among other things, that defendant's application to purchase was made before the land was surveyed and segregated to the state by the United States, and that no rights attached by reason of the application or its subsequent approval, and the issuance of a certificate of purchase based thereon. Judgment for plaintiff, new trial denied, and defendant appeals.

N. O. Bradley and *G. E. Lawrence*, for appellant. *W. B. Wallace*, *T. McNamara*, and *Mickle & Irwin*, for respondent.

PER CURIAM. Upon the authority of Buchanan v. Nagle, (Cal.) 26 Pac. Rep. 512, (No. 13,705, opinion filed April 4, 1891,) the judgment and order denying a new trial are affirmed.

(90 Cal. 126)

SWIM v. WILSON. (No. 12,634.)

(*Supreme Court of California.* July 1, 1891.)

STOCKBROKERS—INNOCENT SALE OF STOLEN STOCK—LIABILITY TO OWNER.

A stockbroker is liable to the owner for the value of mining shares received for sale from one who had stolen them, although he acted in good faith, without notice, and paid the proceeds to the thief, relying on his representations of ownership. BEATTY, C. J., and PATERSON, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Wilson & Wilson, for appellant. *Tilden & Tilden*, for respondent.

DE HAVEN, J. The plaintiff was the owner of 100 shares of stock of a mining corporation, issued to one H. B. Parsons, trustee, and properly indorsed by him. This stock was stolen from plaintiff by an employe in his office, and delivered for sale to the defendant, who was engaged in the business of buying and selling stocks on commission. At the time of placing the stock in defendant's possession, the thief represented himself as its owner, and the defendant relying upon this representation, in good faith, and without any notice that the stock was stolen, sold the same in the usual course of business, and subsequently, still without any notice that the person for whom he had acted in making the sale was not the true owner, paid over to him the net proceeds of such sale. Thereafter the plaintiff brought this action to recover the value of said stock, alleging that the defendant had converted the same to his own use, and, the facts as above stated appearing, the court in which the action was tried gave judgment against defendant for such value, and from this judgment, and an order refusing him a new trial, the defendant appeals. It is clear that the defendant's principal did not by stealing plaintiff's property acquire any legal right to sell it, and it is equally clear that the defendant, acting for him and as his agent, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property. "It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is a wrong-doer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title." Kimball v. Billings, 55 Me. 147; Coles v. Clark, 3 Cush. 399; Koch v. Branch, 44 Mo. 542. In Stephens v. Elwall, 4 Maule & S. 259, this principle was applied where an innocent clerk received goods from an agent of his employer, and forwarded them to such employer abroad; and, in rendering his decision on the case presented, Lord ELLENBOROUGH uses this language: "The only question is whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit, when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under the authority of another, who had himself no authority to dispose of it." To hold the defendant liable, under the circumstances disclosed here, may seem upon first impression to be a hardship upon him. But it is a matter of every-day experience that one cannot always be perfectly secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one whom it now appears was a thief, and, relying on his representations, he aided his principal to convert the plaintiff's property into money, and it is no greater hardship to require him to pay to the plaintiff the value of this property than it would be to take it away from the innocent vendee who purchased and paid for it. And yet it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner, and this rule has been applied in this court to the innocent purchaser of shares of stock. Barstow v. Mining Co., 64 Cal. 388, 1 Pac. Rep. 349; Sherwood v. Mining Co., 50 Cal. 413.

The precise question involved here arose in the case of Bercich v. Marye, 9 Nev. 312. In that case, as here, the defendant was a stockholder who had made a sale of stolen certificates of stock for a stranger, and paid him the proceeds. He was held liable, the court in the course of its opinion saying: "It is next objected that, as the defendant was the innocent agent of the person for whom he received the shares of stock, without knowledge of the felony, no judgment should have been rendered against him. It is well settled that agency is no defense to an action of trover, to which the present action is analogous." The same conclusion was reached in Kimball v. Billings, 55 Me. 147, the property sold in that case by the agent being stolen government bonds, payable to bearer. The court there said: "Nor is it any defense that the property sold was government bonds payable to bearer. The *bona fide* purchaser of a stolen bond payable to bearer might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases, nor to the agent of one not a *bona fide* holder. * * * The rule of law protecting *bona fide* purchasers of lost or stolen notes and bonds payable to bearer has never been extended to persons not *bona fide* purchasers, nor to their agents." Indeed, we discover no difference in principle between the case at bar and that of Rogers v. Huie, 1 Cal. 571, in which case, BENNETT, J., speaking for the court, said: "An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase money, would be compelled to deliver the property to the true owner or pay him its full value; and there is no more hardship in requiring the auctioneer to account for the value of the goods than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them." It is true that this same case afterwards came before the court, and it was held, in an opinion reported in 2 Cal. 571, that an auctioneer, who in the regular course of his business receives and sells stolen goods, and pays over the proceeds to the felon, without notice that the goods were stolen, is not liable to the true owner as for a conversion. This latter decision, however, cannot be sustained on principle, is opposed to the great weight of authority, and has been practically overruled in the later case of Cerkel v. Waterman, 63 Cal. 34. In that case the defendants, who were commission merchants, sold a quantity of wheat, supposing it to be the property of one Williams, and paid over to him the proceeds of the sale before they knew of the claim of the plaintiff in that action. There was no fraud or bad faith, but the court held the defendants there liable for the conversion of the wheat. In this case it was the duty of the defendant to know for whom he acted, and, unless he was willing to take the chances of loss, to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a liability by the conversion of property not belonging to such principal. Judgment and order affirmed.

We concur: GAROUTTE, J.; McFARLAND, J.; SHARPSTEIN, J.

We dissent: BEATTY, C. J.; PATERSON, J.

(90 Cal. 90)

GILLASPIE v. HAGANS *et al.* (No. 13,037.)

(*Supreme Court of California.* June 30, 1891.)

LANDLORD AND TENANT — ACTION FOR RENT — PLEADING — HARMLESS ERROR — EVIDENCE — APPEAL.

1. Where a counter-claim for damages for breach of covenant by a landlord to build a laundry on the premises was set up in an action for rent, and that issue tried, the overruling a demurrer to the complaint, on the ground that it neither alleged performance nor excused nonperformance of the covenants, was error without prejudice, where it appears that the tenants agreed to use other portions of the building as a laundry, and that the verdict for plaintiff for rent was diminished by more than the amount of damages shown to have been sustained by the breach.

2. Where a complaint contained a count for rent due on a lease, and one for damages for breach of covenant by the tenant to restore the property to its former condition, error in overruling a demurrer on the ground of misjoinder is without prejudice, where the count for damages was abandoned on the trial, and the court so charged, and the verdict was for less than the rent claimed.

3. Questions as to the monthly value of the use of a laundry attached to the leased building, or one like it, do not correctly state the rule of damages for breach of covenant to build a laundry on the premises, and are properly disallowed.

4. Error in excluding competent evidence is cured by afterwards admitting.

5. Where counsel fail to indicate the particular objections to a charge, errors assigned thereon will not be considered on appeal.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. McGARVEY, Judge.

T. L. Carothers, for appellants. *J. A. Cooper*, for respondent.

FITZGERALD, C. This action is brought by plaintiff against the defendants to recover the sum of $1,002.93 for rent alleged to be due and unpaid on certain leased premises, described in the amended complaint as the "Capitol Hotel," and for damages in the sum of $200 for breach of covenant to restore the property in the condition provided for by the terms of the lease. The amended complaint, which is unverified, separately states two independent causes of action, in both of which the contract of lease, which is in writing, is pleaded *in hæc verba*. In the first count it is substantially alleged that on the 13th day of May, 1884, plaintiff let to the defendants upon the terms and conditions set forth in the lease the property known as the "Capitol Hotel," and described therein as the hotel then in the possession of one Fairbanks. The second cause of action, after adopting paragraphs 1 and 2 of the complaint, sets up the covenant in the lease to restore the property, and avers damages in the sum of $200 for breach thereof. The instrument in writing executed by the parties hereto, and set out as stated in each of the foregoing causes of action, contains, as we think, two independent contracts of lease of separate and distinct properties, with the rent specifically fixed for each, and the terms commencing at different periods of time, as will be seen from the terms and conditions thereof, which are substantially as follows: One of the properties referred to is the building in course of construction at the time of the execution of the lease, and afterwards known as the "Palace Hotel." The lease of this property was for the term of five years from the date of its completion, at a monthly rental of $150, payable on the first day of each month, plaintiff agreeing to finish the building within a reasonable time, according to the original plans and specifications, except as varied by consent of parties, and to build on the premises a laundry and wood-shed of rough boards. It was further agreed that all improvements made upon the property during the said term should be enjoyed by defendants without further rent. "But that the store-house under the hotel was no part thereof." The other piece of property, designated as the "Capitol Hotel," plaintiff "also leases" to defendants for the term of five years from the date of the expiration of the lease of one Fairbanks, then in the possession thereof, at a monthly rental of $25, payable on the first day of each month, defendants agreeing to yield up the premises in as good condition as when leased, reasonable wear thereof and damages by the elements excepted. But it is immaterial, in the view that we take of this case, whether this instrument in writing is construed as one contract of lease for both properties, or as separate contracts of lease for each piece thereof. Defendants demurred generally to each cause of action stated, and specially on the ground that the amended complaint improperly unites in one action a claim for money due on a written contract with a claim for unliquidated damages for waste and injury to realty. The demurrer was overruled by the court, and thereupon defendants answered by a general denial, and as a separate defense set up as counterclaim damages in the sum of $6,137.50, for breach of covenants to complete the Palace Hotel according to plans and specifications, and to build a laundry upon the premises thereof, and pray judgment therefor and costs of suit. The case was tried by a jury, and a verdict rendered and judgment entered thereon in favor of plaintiff for $833.73, from which judgment and the order refusing a new trial this appeal is taken.

Defendants base their contention in support of the first ground of demurrer on the failure of the complaint to allege performance, or excuse non-performance, of the terms and conditions of the lease, out of which it is alleged this action arose. The amended complaint alleges the execution of the lease, which is set out in full therein, possession of the premises thereunder, and the non-payment of the rent alleged to be due and unpaid thereon. The covenants, the breach of which are set up as counter-claim for damages, are contained in and apply only to the lease of the Palace Hotel property. There are no such covenants in the lease of the Capitol Hotel property. But, conceding that the amended complaint should have alleged performance or excused non-performance of these covenants, they are set up in the counter-claim, and the breach thereof alleged, and, as the case was tried upon those issues, we fail to perceive in what way the defendants were injured thereby.

It is further contended that the court erred in overruling the demurrer to the amended complaint on the ground of misjoinder of causes of action. As to whether the second cause of action is in tort, or for breach of covenant to return the property in good condition, we are not called upon, in view of what transpired at the trial of the case, to decide. Admitting, however, that the causes of action were improperly united, and that the court erred in overruling the demurrer, it appears that this cause of action was wholly abandoned by plaintiff at the trial of the case, and no evidence offered thereon, and that the court so charged the jury. It is therefore evident that the jury could not have considered the question of damages claimed thereunder in the rendition of their verdict, which position is further strengthened by the verdict itself, which was for a sum less than the amount claimed to be due for rent. It therefore follows that the ruling of the court on this ground of demurrer, if erroneous, is affirmatively shown by the record to be error without injury. Code Civil Proc. § 475; Hayne, New Trials, § 286; Campbell v. Water, etc., Co., 35 Cal. 682; Reynolds v. Lincoln, 71 Cal. 184, 9 Pac. Rep. 176, and 12 Pac. Rep. 449.

It is further claimed that the court erred in granting plaintiff's motion to strike out the testimony of the witness Tanner, as to the value of the use of the laundry to the Palace Hotel. Admitting that the evidence was competent for this purpose, and that the court erred in striking it out, the error was cured by this witness being subsequently recalled, and giving substantially the same testimony without objection.

The other rulings of the court excepted to and assigned for error are, save one, upon questions as to the value of the use per month of a laundry attached to the Palace Hotel, or to an hotel like it. The objections to these questions were properly sustained, as they failed to correctly state the rule of damage in such cases. It is indisputably shown by the evidence that the building of the laundry was waived by the defendants, and that they agreed to use the west wing of the Capitol Hotel as such, and that, after plaintiff had prepared it by making the necessary improvements at his own expense for that purpose, it was so used by the defendants during the remainder of the time they were in the possession thereof. The witness Hagans, one of the defendants, testified that such a laundry as the one referred to would be worth from $8 to $15 per month; and by the witness Tanner, that, in connection with the Palace Hotel, it would be worth $20 per month. The evidence shows, and it is nowhere contradicted, that the amount of rent due was $1,002.93. The verdict was for $833.73, thus allowing the defendants the very liberal sum of $169.20 for the three months that they had the washing done elsewhere.

It is lastly claimed that the court erred in its charge to the jury, but counsel for appellant has failed to point out what particular part of it he objects to. We have, however, carefully gone over the charge, and, if any objection can be urged to it, it would come, it seems to us, more appropriately from the other side. We therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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90 Cal. 110

PACIFIC FACTOR CO. v. ADLER (No 13,354.)

(*Supreme Court of California.* July 1, 1891.)

ILLEGAL CONTRACTS — MONOPOLIES — LIQUIDATED DAMAGES—PLEADING—MOTION TO STRIKE OUT.

1. Where a contract for the sale of grain-bags provides that the vendee shall have the exclusive sale of the same to the amount of 187,500, and the vendor agreed not to sell or offer the same for sale to any other person, and, if the vendee failed to sell the full amount, the vendor agreed to accept the sale of a *pro rata* amount, and such contract is a part of a scheme to gain a monopoly, it is void, as against public policy, and there can be no recovery for a breach thereof.

2. Civil Code Cal. § 1670, provides that "every contract by which the amount of damages to be paid * * * for a breach of an obligation is determined in anticipation thereof is to that extent void, except as expressly provided in next section." Section 1671 provides that "the parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages." *Held*, that a contract for the sale of grain-bags, which provides that the vendor shall pay the vendee three cents for each bag which he refuses or neglects to deliver as liquidated damages, is void, although it recites that, from the nature of the case, it will be extremely difficult to determine the damages.

3. Where, in an action for a breach of contract, the answer is in avoidance, alleging that contracts were made as part of a scheme to gain a monopoly, but fails to allege that the contract sued upon was a part of the scheme, the defect cannot be taken advantage of by motion to strike out such allegation. The proper practice would be to demur.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Henry K. Mitchell, for appellant. *Naphtaly, Freidenrich & Ackerman*, for respondent.

GAROUTTE, J. This is an action upon a contract to recover liquidated damages. The portions of plaintiff's complaint necessary to consider in the decision of this cause are: "That plaintiff is a corporation, incorporated in this state for the purpose of conducting and carrying on the business of buying, selling, and otherwise dealing in goods, wares, and merchandise, either in its own behalf or as agent for others on commission; that on the 16th day of May, 1888, in consideration of one dollar, defendant entered into an agreement in writing with plaintiff, whereby he agreed to give it (plaintiff) the exclusive sale of all grain-bags or burlaps amounting to one hundred and eighty-seven thousand and five hundred bags, which was or would be under his control prior to January 1, 1889; and defendant further agreed to accept for said bags or burlaps the average price the plaintiff might obtain for all grain-bags or burlaps it might sell between the date of said contract and January 1, 1889. And, in case plaintiff should fail to sell said one hundred and eighty-seven thousand five hundred bags, defendant agreed to accept the sale of a *pro rata* amount of grain, bags or burlaps as 187,500 is to the entire number of grain bags and burlaps which plaintiff should sell from this date until the 1st day of January, 1889; and defendant agreed to deliver to said company, or on their order, whatever number of grain-bags or burlaps, up to 187,500, the said company should call on him to deliver between this date and the 1st day of January, 1889, on payment to him, when such bags were delivered, (less one per cent. commission,) of seven and one-half cents for each bag or burlap delivered; and in case defendant should receive more money or deliver more bags or burlaps than his *pro rata* of the whole number sold by plaintiff between this date and the 1st day of January, 1889, the defendant would refund the excess of money received, and accept other bags in lieu thereof; and defendant agreed not to sell or offer for sale said 187,500 bags or burlaps to any one other than to the plaintiff or upon its order; and defendant further agreed to pay plaintiff one per cent. on all sales of said bags, or any part thereof; and defendant further agreed to pay plaintiff three cents for each bag or burlap which he refused or neglected to deliver on demand as liquidated damages; and the said plaintiff agreed to sell and draw on defendant from time to time, as sales were made, as near as in its judgment it could determine, a *pro rata* amount of said 187,500 bags or burlaps as 187,500 is to the entire number of bags that are placed in its hands for sale between this date and January 1, 1889." The complaint further alleges that plaintiff, in pursuance of the covenants in said agreement, demanded of said defendant prior to January 1, 1889, said 187,500 bags, and defendant at that time had said bags in his possession, but neglected and refused to deliver them to plaintiff.

The answer of defendant practically admits the allegations of the complaint, and sets out certain matters in avoidance, as a special defense, to the effect that plaintiff, through its board of directors, about the 16th day of May, 1888, devised a scheme to control the sale and supply of all or the greater portion of the grain-bags and burlaps which were then within the state of California, or to arrive prior to January 1, 1889, for the purpose of increasing the price of bags and burlaps, and of limiting the number of dealers from whom such bags could be obtained, and compelling the farmers of this state to purchase said bags from plaintiff at a price in excess of their real value; that the demand in this state for such bags and burlaps, for the purpose of sacking the grain, amounts annually to between 32,000,000 and 35,000,000 bags; that plaintiff calculated that the quantity of grain-bags and burlaps which were then within this state, and which were to arrive prior to January 1, 1889, amounted to 42,000,000 bags, and that, if plaintiff could make contracts with the holders and owners of said bags whereby it could secure the exclusive right of making sales thereof, thereby competition for the sale of said bags among said owners and dealers would be removed, and the plaintiff would be enabled to fix a larger price therefor, and compel the parties who required said bags, to remove the grain raised on the Pacific coast, to purchase the same from plaintiff, and pay therefor the price which plaintiff might demand; that in pursuance of said scheme plaintiff entered into contracts with other holders and owners of grain-bags and burlaps, in all respects similar to the contract made with defendant; that the entire quantity of said grain-bags and burlaps, covered by all the contracts of plaintiff, aggregated 30,000,000 bags, or thereabouts; that all of said contracts, including the contract with defendant, are contrary to public policy, and void. The foregoing matters, in addition to others not necessary to note at this time, are set out in detail by defendant.

At the trial plaintiff introduced the contract in evidence, and rested. Defendant made a motion for a nonsuit, which motion was granted. This is an appeal from that judgment. Appellant insists that his motion to strike out the affirmative matter in the answer should have been granted, and also that the court erred in not granting his motion for judgment upon the pleadings. The affirmative defense of the answer is defectively pleaded, and should not be allowed to stand if attacked by demurrer. It fails to allege that the contract under consideration in this cause was entered into as a part of, and in pursuance of, the scheme or plan set out; and if the contract relied upon by plaintiff to recover formed no part of the general "plan" to make a "corner" of the bag and burlap market of the state, then such plan was outside of the questions involved in this litigation, constituted no defense to this suit, and should have been stricken out as surplusage. But it is quite apparent from the pleadings, taken as a whole, that the defendant intended by this defense to claim that the contract embraced in the complaint formed part of this "scheme" or "plan," and was therefore void, as being against public policy.

A defective pleading cannot be stricken out by reason of its defects upon the ground of surplusage. In this case a demurrer would have been the proper means to have tested the sufficiency of the answer, and the motion to strike out was properly denied. Without passing upon the question as to whether any of the allegations of the complaint were denied by the answer, we think the affirmative defense relied upon by defendant was sufficient to defeat the motion of plaintiff for judgment upon the pleadings, when considered in the light of the construction just placed upon it. While it is clear that public policy favors the utmost freedom of contracts within the limits of the law, and requires that business transactions should not be fettered by unnecessary restrictions, yet agreements in restraint of competition, that threaten the public good, entered into with the object and view of controlling, and, if necessary, suppressing, the supply, and thereby enhancing the price of articles of actual necessity, that embrace in their evil effects all the territory and practically all the people of this great state, become a grave menace to the best interests of the commonwealth, and therefore are opposed to sound public policy. The entire number of bags in the state on the 16th day of May, 1888, and which would arrive prior to January 1, 1889, amounted to 42,000,000. The annual demand for bags was 32,000,000. The plaintiff entered into this "scheme" or "plan" to obtain the control of these 42,000,000 bags, and in pursuance of said plan by contract, did actually secure the control of 30,000,000 of these bags from the owners and holders thereof. The plaintiff did not purchase the bags; at the same time, by the rigor of its contract, it prevented the owners from selling them. It is clear this "scheme" or "plan" was devised, and these contracts entered into, for the purpose of removing all competition, and thereby compelling the farmers to purchase bags from plaintiff at a price in excess of their real value. Plaintiff controlled three-fourths of all the bags which were in the state, or which would arrive within the ensuing six months. It held the bag market in its hands, for competition was gone, and the price demanded must be paid. These agreements were not entered into for the purpose of aggregating capital, nor for greater facilities in the conducting of their business, nor for the protection of themselves by a reasonable restraint upon active competitors, but for the purpose of regulating, controlling, and withholding the supply of bags, and thereby to take an unjust advantage of the farmers' necessities, by disposing of the fruits of its unlawful labors at an unreasonable advance in price.

The supreme court of the state of Ohio, in speaking upon this question, said: "The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." Salt Co. v. Guthrie, 35 Ohio St. 672. In considering the question as to what is a reasonable restraint of trade, Chief Justice Tindal in Horner v. Graves, 7 Bing, 743, used the following language: "We do not see how a better test can be applied to the question * * * than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public; * * * whatever is injurious to the interests of the public is void on the ground of public policy." Craft v. McConoughy, 79 Ill. 346; Arnot v. Coal Co., 68 N. Y. 558. It is difficult to distinguish upon principle the case of Lumber Co. v. Hayes, 76 Cal. 387, 18 Pac. Rep. 391, from the case at bar. "Plaintiff, being a manufacturer of lumber, entered into contracts with various manufacturers of lumber to purchase so many thousand feet from each during the year 1881, and said parties agreed not to manufacture during said time any other lumber to be sold in the four counties where plaintiff was doing business. The sole object and consideration in entering into these contracts was for the purpose of increasing the price of lumber, limiting the supply, and giving the plaintiff control of the lumber market within the territory specified." Chief Justice Searls, in holding one of the contracts void, said: "With the results naturally flowing from the laws of demand and supply, the courts have nothing to do; but when agreements are resorted to, for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts cannot be successfully invoked, and their execution will be left to the volition of the parties thereto."

After plaintiff had introduced the contract in evidence and rested, defendant was granted a nonsuit upon two grounds: (1) That no proof of actual damage was offered, and the clause of the contract fixing liquidated damages is void, under sections 1670 and 1671 of the Civil Code. (2) That the contract is void, as being in restraint of trade and against public policy. Section 1670 of the Civil Code provides: "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." Section 1671: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage." The allegation of the complaint that "it was understood and agreed between plaintiff and defendant at the time of making the contract that, owing to the nature of the case, it would be impracticable and extremely difficult to fix the actual damage," added no merit to the pleading, and its denial in the answer was unnecessary labor. Whether a contract is such that, "from the nature of the case," it would be impracticable or extremely difficult to fix the actual damage sustained by a breach thereof, is a question of fact, which must be determined in each particular case; and for the purpose of determining this question the court must examine the attendant and surrounding circumstances under which the contract was entered into, as well as the terms of the contract itself. Parties cannot by their arbitrary agreement preclude such examination by the court, or avoid the provisions of the statute. Brick Co. v. Moore, 75 Cal. 205, 16 Pac. Rep. 890; Eva v. McMahon, 77 Cal. 472, 19 Pac. Rep. 872. In the present case we think that, when the plaintiff rested, the "nature of the case," as presented by the terms of the contract, and its breach as admitted by the answer, was such that the court could decide as a fact that it was neither extremely difficult nor impracticable to fix the actual damage sustained by the plaintiff by reason of the defendant's breach of the contract. The refusal of the defendant to deliver the bags may have deprived the plaintiff of its commissions for selling, and under certain circumstances it may have suffered other damage; but we can imagine no case where any damage could have resulted to the plaintiff by reason of a breach of this contract, and which the plaintiff would have been entitled to recover in a court of law, where it could be said that it was impracticable or extremely difficult to fix the actual damage. Is the contract void as being in restraint of trade and against public policy? This question, when the motion for a nonsuit was made, was to be determined by an examination of the terms of the contract itself. We have already decided that it was so corrupted by the bad company with which it associated, as set forth in the answer of defendant, as to be beyond the pale of the law at that time; but at an earlier age, when it appears in the complaint, no stain or blemish is found to discolor it. The plaintiff contracted to sell the bags and burlaps of defendant at a certain commission. Defendant agreed to accept for them the average price it received for all bags it sold, plaintiff had the exclusive sale of the bags, and was bound to sell a certain portion of them. Standing alone, a total stranger to the "scheme" or "plan" set out in the answer, this contract must be considered good, for no illegal object appears; no transgression of the law is apparent; no public interest is injuriously affected. It follows from the foregoing views that the judgment should be affirmed. It is so ordered.

We concur: BEATTY, C. J.; HARRISON, J.

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90 Cal. 181

ONTARIO LAND & IMP. CO. v. BEDFORD *et al.* (No. 13,692.)

(*Supreme Court of California.* July 10, 1891.)

MORTGAGE—RELEASE—FORECLOSURE SALE.

1. A mortgage of property that had been platted into lots and blocks provided that the mortgagor should be entitled to a partial release of the mortgage on payment of a certain sum for each lot released. The blocks contained 32 lots each, but a few of the blocks had not been subdivided into lots. *Held*, that such unsubdivided blocks were not "lots," within the meaning of the release provision of the mortgage.

2. Code Civil Proc. Cal. § 694, which provides that at execution sale the judgment debtor may direct in what order the property shall be sold applies also to foreclosure sales where the decree does not specify any order of sale.

In bank. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Chas. J. Perkins and *H. C. Rolfe*, for appellants. *Waters & Gird*, for respondent.

DE HAVEN, J. There are appeals in this case from a judgment in favor of plaintiff, foreclosing a mortgage, from an order refusing defendants' motion for a new trial, and also from an order of the court denying the motion of defendants to set aside a sale of the mortgaged premises made under an execution in the action. The mortgage covers separate parcels of land in what is known as "Ontario Colony," and contains a provision by which the mortgagees agree to "release from the lien of this mortgage those parts, portions, or subdivisions of said mortgaged premises designated on said plat of said town of Magnolia, as fronting on Euclid avenue, upon the payment to said parties of the sum of two hundred dollars for each of said lots. All lots fronting on First, Second, and Third streets, north of D street, upon the payment to them of one hundred and twenty dollars for each of said lots; all lots fronting on First, Second, and Third streets, north of D street, upon the payment to them of one hundred and forty dollars for each of said lots; all lots fronting on Fourth street, upon payment to them of ninety dollars for each of said lots; and all lots fronting on Fifth and Sixth streets, and Camper's avenue, upon the payment to them of eighty dollars for each of said lots." The map referred to shows that the town of Magnolia is laid off into streets and blocks; the latter, with the exception of blocks 33 and 25, being subdivided into lots. The lots are of different sizes; some of the blocks being divided into a greater number of lots than others. Appellants claim that the unsubdivided blocks 33 and 25 are "lots," within the meaning of that part of the mortgage above quoted, and so subject to release, in accordance with its terms.

1. The word "lot" may undoubtedly be so used in a conveyance as to mean the entire premises conveyed, whether such premises consist of a farm or even a block in a city. But the ordinary meaning of this word, when used with reference to town or city property, is a subdivision of a block according to the map or survey of such town or city; and there is nothing upon the face of this mortgage to indicate that it was used in any different sense by the parties thereto. The map of the town of Magnolia is expressly referred to, and, for the purpose of construing the mortgage, must be deemed a part of it. This map shows that there are town lots fronting upon all the streets named in that part of the mortgage relating to releases, and, as these answer or satisfy the description given to the parcels subject to release, the mortgage must be construed as referring to them; and the amount to be paid for the release of each lot refers to a town lot, as designated on the map, and not to an entire block. To hold that block 33 is a lot would enable the defendants to secure its release upon payment of the same sum as is provided for the release of the one thirty-second part of the adjoining block 34; and, while it would have been competent for the parties to have made such an agreement, the intention to do so is not to be inferred from the use of a word which, in ordinary acceptation, as applied to town property such as this, conveys a different meaning.

2. The judgment in this case did not mention the particular manner or order in which the several parcels of the mortgaged property should be sold. The record shows that the attorneys for the defendants directed the officer making the sale to sell the lots separately, and also the order in which they should be sold. These directions were disregarded, and the defendants subsequently moved the court to set aside the sale because of the failure of the officer to follow such instructions. The motion was denied. This ruling of the court was erroneous. The process under which the judgment in this class of cases is enforced is provided for in section 684 of the Code of Civil Procedure, and the subsequent section 694,[1] which is a part of the same chapter dealing with the general subject of the execution of judgments, is applicable to sales of real property under judgment of foreclosure; and when, as in this case, the judgment is silent as to the manner or order in which the separate parcels shall be sold, the judgment debtor

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[1] Code Civil Proc. Cal. § 694, provides that at execution sales "the judgment debtor, if present, may also direct the order in which property real or personal shall be sold, * * * and the sheriff must follow such directions."

has the right to require that separate lots or parcels shall be sold separately, and may also direct the order in which they shall be sold. The practice act in force prior to the adoption of the Code of Civil Procedure contained a chapter relating to the execution of judgments in civil cases substantially the same as the one upon the same subject in the Code of Civil Procedure; and in the case of Leviston v. Swan, 33 Cal. 480, it was held that a decree of foreclosure need not contain any special directions as to the mode or place of sale, because such matters are regulated by law, and that, by virtue of process to enforce such a judgment, the sheriff is required "to sell the mortgaged property in the mode and manner, and at the place, designated in the practice act for the sale of real estate under judicial process, and make a return of his proceedings, as in the case of an execution upon a money judgment." Judgment and order denying motion for new trial affirmed. The order refusing to set aside the sale of the property directed by the judgment to be sold is reversed.

We concur: MCFARLAND, J.; PATERSON, J.; HARRISON, J.; GAROUTTE, J.

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90 Cal. 49

REDINGTON v. CORNWELL. (No. 13,008.)

(*Supreme Court of California.* June 30, 1891.)

CORPORATIONS — PAYMENT OF DEBTS BY STOCKHOLDERS — SUBROGATION — PLEADING — AMENDMENTS—LIMITATIONS.

1. Civil Code Cal. § 5322, provides, among other things, that each stockholder of a corporation is individually and personally liable only for such proportion of any corporate debt as the amount of his stock bears to the whole subscribed capital stock. *Held* that, where one stockholder and director pays more than his proportionate share of such debt, the payment is not voluntary, and he is entitled, as against a co-director who knew of and acquiesced in such payment, to contribution, and to be subrogated to the rights of the creditor, since he has a beneficial interest in the property of the corporation, which is answerable for the debt, and from which the other stockholders' proportion must be paid, if not paid by them individually.

2. Where, in such action, the stockholder asks to be subrogated to the rights and remedies of the creditor, the period of limitation is that defined by Code Civil Proc. Cal. § 359, providing that actions against a stockholder of a corporation to enforce a liability created by law must be brought within three years after the creation of the liability.

3. Although an amended complaint is filed after the cause of action is barred, it is not demurrable on this ground when it does not show upon its face when the original was filed, or that the cause of action is different from that set up in the original.

4. The original complaint is not superseded by an amendment which alleges substantially the same cause of action, and it remains a "pleading," within the meaning of Code Civil Proc. § 670, subd. 2, which makes the pleadings part of the judgment roll, and it may also be brought up by bill of exceptions, under Code Civil Proc. §§ 647, 648, providing that "documents on file in the action" may be incorporated therein.

5. Where the original complaint declares on two notes, alleging that they were given "for value received," and were assigned by indorsement, and also alleges facts from which an equitable assignment would result, an amended complaint which omits the allegation of indorsement, and alleges that the debt was for money loaned, and for a balance due on account, sets up substantially the same cause of action; the averment as to value received being equivalent to the more specific allegations of the items of money loaned and due on account.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

Action in equity by John H. Redington against George N. Cornwell. The amended complaint alleged that plaintiff, who was a stockholder in a corporation, had paid the whole of a certain debt owed by it, and asked to be subrogated to the rights and remedies of the creditor, and for contribution from another stockholder. Civil Code Cal. § 5322, provides, among other things, that each stockholder of a corporation is individually and personally liable only for such proportion of any corporate debt as the amount of his stock bears to the whole subscribed capital stock. Code Civil Proc. Cal. § 359, provides that actions against a stockholder of a corporation to enforce a liability created by law must be brought within three years after the creation of the liability. It was claimed by defendant that under these statutes the payment by plaintiff of more than his proportion was voluntary, and that he had no right of contribution or subrogation, and also that the action was barred. A demurrer to the amended complaint was sustained, and plaintiff appeals.

Olney, Chickering & Thomas, for appellant. *F. E. Johnston*, for respondent.

VANCLIEF, C. This appeal is from a final judgment in favor of the defendant, rendered on demurrer to plaintiff's third amended complaint in two counts, and presents for decision the general question, should the demurrer have been sustained? The facts alleged in the first count of the complaint are substantially as follows: During a period of time embracing all the transactions alleged, the plaintiff and defendant were stockholders and directors of the Redington Quicksilver Company, a California corporation, and the plaintiff was president of the board of directors. During the same period the subscribed capital stock of the corporation consisted of 1,260 shares, of which the defendant owned 461 shares. From September 1, 1879, until June 1, 1882, the corporation had "a mutual, open, and current account" with Redington & Co., a copartnership. At divers times during that period the copartnership received from the corporation consignments of quicksilver, which it sold and disposed of for the corporation, and collected the proceeds thereof, advanced and loaned money to the corporation, and paid out money for its use, and also received partial payments from the corporation on the account. In this account the corporation was debited with all moneys loaned and advanced to it, and with all sums paid out and expended for its use by the copartnership, and was credited with all proceeds of sales of quicksilver, and with all payments made on the account. On June 1, 1882, the copartnership and the corporation had an accounting, by which it was found that there was a balance of $64,126.24 due from the latter to the former, for which the corporation then made its promissory note, of which the following is a copy: "$64,126.24. San Francisco, June 1st, 1882. On demand, for value received, the Redington Quicksilver Company hereby promises to pay to Mess. Redington & Company, or order, at its office in San Francisco, sixty-four thousand one hundred and twenty-six 24-100 dollars, with interest thereon at the rate of eight (8) per cent. per annum until paid. Interest payable monthly, and, if not so paid, to become a part of the principal, and bear a like interest. [Signed] THE REDINGTON QUICKSILVER COMPANY, JOHN H. REDINGTON, President. [Corporate Seal.] GEORGE PENLINGTON, Secretary." After formally alleging the above facts, the complaint proceeds as follows: "(6) That thereafter, to-wit, on or about the 7th day of June, 1882, said firm of Redington & Co. pressed for and demanded of the said corporation the collection and payment of the balance of the indebtedness aforesaid and of said promissory note; that at the time of said demand said corporation was wholly without funds wherewith to pay the same; that thereupon, to-wit, on or about the said last-named day, at said city and county of San Francisco, this plaintiff, in good faith, and for the honor, use, and benefit of the said the Redington Quicksilver Co., advanced and paid the said sum of $64,126.24 to said firm of Redington & Co. in full satisfaction and discharge of the said balance, and of the said indebtedness evidenced by the said promissory note; that thereby all of the indebtedness of said corporation then subsisting to said Redington & Co., and all claims and demands of said firm upon said corporate note, were fully paid and extinguished; that said Redington & Co. thereupon surrendered and delivered said promissory note to this plaintiff. (7) That no payments have been made by said corporation, or on its behalf, or at all upon said account, or the said balance thereof, or upon said indebtedness evidenced by said promissory note, or upon or on account of said sum so advanced by said plaintiff, except the sum of $24,126 24, which was repaid to plaintiff thereon, on or about the 31st day of May, 1884, and that on said 31st day of May, 1884, there remained and was, and that there now is, due and wholly unpaid from said the Redington Quicksilver Co. to this plaintiff of the said balance, and of the said indebtedness, and of said sum advanced by plaintiff as aforesaid, the sum of $40,000, with interest thereon from said last-named day, together with interest upon the sum of $24,126.24 from the 7th day of June, 1882, up to said 31st day of May, 1884. (8) That at all the times and dates aforesaid the said defendant was one of the directors of the said the Redington Quicksilver Co.; that, as such director, he acted for said corporation in and about the execution of said promissory note, and also in incurring the indebtedness evidenced thereby, and in making the payments that have been made on account of the same as aforesaid; that said defendant, as such director, and also individually, had at all times and dates aforesaid full notice and knowledge of the facts hereinabove alleged, and of each and every one thereof; that he has at all the times, and with notice and knowledge as aforesaid, acquiesced in, confirmed, and ratified all and singular the acts of said corporation, and of said firm of Redington & Co., and of this plaintiff hereinabove mentioned and averred. * * * (10) That by reason of the premises defendant is, and at all the times since the said 31st day of May, 1884, has been, liable and holden to plaintiff for 461-1260 of the said sum of $40,000, and of the interest remaining due to plaintiff from said corporation as aforesaid, to-wit, the sum of $14,635, together with interest thereon from the said 31st day of May, 1884, at the legal rate, together with 461-1260 of the interest at the legal rate upon the said sum of $24,126.24 from the 7th day of June, 1882, to the 31st day of May, 1884. (11) That, though frequently requested so to do, the said defendant has hitherto wholly failed, neglected, and refused to pay to plaintiff the said last-mentioned sum, or the said interest, or an part thereof. (12) That upon receiving from defendant payment of his proportionate part of the balance and indebtedness aforesaid due from said corporation to this plaintiff, and of the moneys so as aforesaid advanced and paid by plaintiff, and of said interest, this plaintiff is ready and willing, and now here and hereby offers, to discharge and satisfy, to the extent of such payment, the said obligation of the said corporation, or of its stockholders to this plaintiff, and otherwise to abide by and perform the judgment of this court touching the same." The second count is upon another promissory note of the corporation to the same copartnership firm for the sum of $14,800.43 dated December 31, 1883, for a balance of the account running to the date of this second note. In all other respects the second count is like the first. The grounds of the demurrer are (1) that neither count states facts sufficient to constitute a cause of action; and (2) that both counts appear to be barred by the first subdivision of section 338 of the Code of Civil Procedure.

1. It is contended by counsel for respondent that the payment of the debt of the corporation by the plaintiff, in excess of that part for which he was individually liable as a stockholder, was purely voluntary, and extinguished the debt as to all other stockholders; and, therefore, that plaintiff cannot be subrogated to the rights or remedies of Redington & Co. against the stockholders. It is true that the doctrine of subrogation "is not to be applied in favor of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay," nor where "it would work injustice to the rights of others." Sheld. Subr. § 1. It is also true that the plaintiff was not directly liable to pay defendant's proportion of the debts of the corporation, but, as a stockholder, he had a common, well-de-

fined beneficial interest, with all other stockholders, in the fund (the property of the corporation) from which defendant's proportion of the debts must have been paid if not paid by defendant; and that fund was answerable for the debt. Ditch Co. v. Zellerbach, 37 Cal. 591; San Diego v. Railroad Co., 44 Cal. 116. There can be no doubt that the plaintiff was entitled to contribution from the defendant to the extent of defendant's proportion of the debt paid. Cook, Stocks, § 27, and authorities there cited; Larrabee v. Baldwin, 35 Cal. 156. From which it follows that his payment was not voluntary since contribution no more than subrogation, is allowed in favor of a mere volunteer. But in this case the plaintiff, in addition to contribution, asks to be subrogated to the rights and remedies of Redington & Co. against the defendant "for the purpose of compelling contribution." Sheld. Subr. § 45; Lamb v. Montague, 112 Mass. 353. Should he be thus subrogated, he will be entitled to the same remedy that Redington & Co. were entitled to, as to which the statute of limitations is three years, (Green v. Beckman, 59 Cal. 545; Moore v. Boyd, 74 Cal. 167, 15 Pac. Rep. 670;) whereas, if he simply sought contribution upon an implied *assumpsit*, his remedy would be barred in two years, (Chipman v. Morrill, 20 Cal. 131.) This seems to be all he can gain by subrogation, as it does not appear that Redington & Co. held any securities for the debt except the promissory note of the corporation, which added nothing to their remedy against the stockholders, so far as the statutes of limitation are concerned. Larrabee v. Baldwin, 35 Cal. 168; Stilphen v. Ware, 45 Cal. 110; Hyman v. Coleman, 82 Cal. 650, 23 Pac. Rep. 62. In Mosier's Appeal, 56 Pa. St. 76, Thompson, C. J., said: "I regard the doctrine [of subrogation] as applicable in all cases where a payment has been made under a legitimate and fair effort to protect the ascertained interests of the party paying, and where intervening rights are not thereby jeopardized or defeated. Such payments, whatever their effect might be at law in extinguishing the indebtedness to which they apply, will not be so regarded in equity, if contrary to equity to regard them so." See, also, McCormick v. Irwin, 35 Pa. St. 111; Heart v. Bryan, 2 Dev. Eq. 147; Wall v. Mason, 102 Mass. 316; Robinson v. Leavitt, 7 N. H. 99. The case of Guy v. Du Uprey, 16 Cal. 198, recognizes the principle that a payment is not voluntary when made by a party who is interested in having the payment made. In the first section of Sheldon on Subrogation, the author, by way of definition, gives the following, which, so far as it goes, seems to be well sustained by the authorities cited: "It is the subtitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. The substitute is put in all respects in the place of the party to whose rights he is subrogated. It is derived from the civil law, from which it has been adopted by courts of equity. In this country, under the initial guidance of Chancellor Kent, its principles have been more widely developed, and its doctrines more generally applied, than in England. It is treated as the creature of equity, and is so administered as to secure real and essential justice without regard to form, and is independent of any contractural relations between the parties to be affected by it. It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter; but it is not to be applied in favor of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay; and it is not allowed where it would work any injustice to the rights of others."

The complaint is unnecessarily verbose, and perhaps uncertain and ambiguous as to some material matters; but I think it shows that plaintiff was interested in having the debt to Redington & Co. paid, and that he made the payment "under a legitimate and fair effort to protect" his own interest in the fund which was liable for the whole debt; and, therefore, that the payment was not voluntary in that legal sense which would preclude his right to contribution from the defendant, or his right to be subrogated to the remedies of Redington & Co. as a necessary means to enforce such contribution. Counsel for respondent insists, however, that the complaint shows that the debt of the corporation to Redington & Co. was extinguished, and that it necessarily follows that the debt of the stockholders was also extinguished. After sufficiently alleging the payment of the indebtedness on the account and the note, the complaint adds, as a conclusion from those facts, "that thereby all of the indebtedness of said corporation then subsisting to said Redington & Co., and all claims and demands of said firm upon said corporate note, were fully paid and extinguished." Even if the averment had been that the debt of all the stockholders was extinguished by the payment, it would have been only an erroneous conclusion from the facts stated, and evidently contrary to the intention of the pleader, whose sole object, plainly expressed, was to recover a stockholder's proportion of the debt. The word "extinguished" was probably used as synonymous with "paid and satisfied." But it is not alleged that the debt of the defendant or other stockholders was "thereby extinguished." As to what will so extinguish the debt that the party paying cannot be subrogated to the rights and remedies of the creditor, see Mosier's Appeal, 56 Pa. St. 76, and Lamb v. Montague, 112 Mass. 353.

2. It is contended that both causes of action appear to have been barred by section 338 of the Code of Civil Procedure at the time the third amended complaint was filed. But it does not appear on the face of the third amended complaint when the original complaint was filed, nor that the third amended complaint states a cause of action substantially different from those stated in the original complaint;

and therefore it does not appear on the face of the third amended complaint that either of the causes of action therein stated were barred. Ord v. De la Guerra, 18 Cal. 75; Farris v. Merritt, 63 Cal. 118; Kraner v. Halsey, 82 Cal. 209, 22 Pac. Rep. 1137. For aught that appears on the face of the third amended complaint, the original complaint may have been filed on the 8th day of June, 1882, and within the period prescribed by section 338 of the Code of Civil Procedure, and may have stated, or imperfectly stated, a cause of action substantially the same as that stated in the first count of the complaint demurred to.

The original complaint, however, which was filed October 7, 1884, has been brought up as a part of the judgment roll, and also by a bill of exceptions; but the respondent contends that it is improperly here, that it does not belong to the judgment roll, and that, as there was no trial of any issue of fact, there was no proper occasion for a bill of exceptions. By the second division of section 670 of the Code of Civil Procedure, which is applicable to this case, "the pleadings" are made a part of the judgment roll. But counsel for respondent contends that the original complaint has been wholly, and for all purposes, superseded by the third amended complaint, and, therefore, that it is not to be considered a pleading in the case, and consequently no part of the judgment roll. It has been said in a number of cases that an amended pleading supersedes the original, but I think a careful examination of those cases will show that it was only intended to decide that the amended pleading superseded the original for certain specified purposes, and only to the extent of the amendment. Beyond this, whatever may have been said is mere *dictum*. But in none of the cases has it been even said that the original is not a part of the judgment roll; nor has it been decided that an original complaint is superseded for the purposes of showing when the action was commenced, and whether or not a new or different cause of action was introduced by the amendment. For the purpose of determining these questions, and perhaps others that may arise which often become material on appeal, the amended complaint can by no possibility supersede the original. Unless otherwise required by the court, an amendment to a complaint, whether it consists of a mere additional averment, or effects a change in the original, may be filed by itself, without being incorporated in the original by engrossment of the complaint as amended, (Code Civil Proc. 432,) in which case it could hardly have been contemplated that the original should not become a part of the judgment roll. It is certainly always included as such by the clerk in making up the roll.

Is not the original complaint, though defective or imperfect, a pleading in the case? The trial court certainly was authorized to consider it as a part of the record of the pleadings in this case, for the purposes of ascertaining when the action was commenced, and determining whether a new cause of action was stated in the third amended complaint; otherwise, that court could not have disposed of the questions of law raised by the demurrer as to the effect of the statute of limitations, since there was no opportunity to introduce evidence on the trial of pure questions of law which must be tried on the pleadings alone. If the trial court was authorized to consider the original complaint as one of the pleadings of record without the introduction of it in evidence, I think it should be regarded as a part of the judgment roll. If, however, the original complaint is not a part of the judgment roll I think it is properly brought up by the bill of exceptions. By section 647 of the Code of Civil Procedure an order sustaining a demurrer is deemed excepted to, and in drafting his bill of exceptions the appellant was entitled to incorporate therein "documents on file in the action," and such other available matter as was necessary to explain it. Code Civil Proc. § 648. The original complaint was a document on file in the action, and it is necessary to explain the exception to the order sustaining the demurrer, and is, therefore, properly incorporated in the bill of exceptions. The objection that a bill of exceptions is allowable only upon the trial of an issue of fact is answered by the case of Tregambo v. Mining Co., 57 Cal. 501, and by numerous other authorities. The word "trial," in section 650, Code Civil Proc., means a trial of an issue of law as well as the trial of an issue of fact. And. Law Dict., and numerous authorities there referred to.

I think the third amended complaint does not state a cause of action substantially different from those stated in the original complaint. The original complaint is upon the same two promissory notes set out in the third amended complaint, alleging that they were made for value received by the corporation, and that for value received the corporation assigned the same to plaintiff by indorsement, and delivered the same to the plaintiff. It does not state that the value received for the making of the notes was money loaned to and paid for the corporation at divers times between September 1, 1879, and June 1, 1882, nor that it was the balance of a "mutual, open, and current account," running from September 1, 1879, to June 1, 1882, as stated in the third amended complaint; but the substance of these more special, yet indefinite, statements is included in the general averment of the original complaint that the notes were made "for value received." Had the original complaint merely added to the phrase, "for value received," the words, "to-wit, moneys loaned to and paid for the corporation at divers times between September 1, 1879, and June 1, 1882," it would have been quite as specific as to what was the consideration of the notes, as is the third amended complaint. The amendment, in this respect, only made the general averment in the original complaint, that the corporation received value for the notes a little more specific, still leaving it indefinite as to the dates and amounts of the several loans and payments. The averment as to the mutual open account in the third amended com plaint is of doubtful sufficiency to extend the period of limitation, even against the corporation. As to the stockholders it can have no effect whatever, even though sufficiently alleged. The corporation had no more power to extend the period of limitation, as against the stockholders, by a mutual open account, than by making its promissory note. The liability of the stockholders is created and exists by statute. It arises when a debt is contracted by the corporation. It is limited to three years from the time it arises; and it is well settled in this state that the corporation has no power to extend that limitation without direct authority from the stockholders. The original complaint alleges an assignment of the notes by indorsement and delivery, and also states facts from which an equitable assignment and subrogation would result in the absence of a legal assignment. The amended complaint omits the legal assignment by indorsement, this being the only difference. The effect of each mode of assignment against the defendant would be the same. I think each count of the third amended complaint, subject to some degree of uncertainty and perhaps ambiguity, states a cause of action not substantially different from those defectively stated in the original complaint; and that so much of the alleged indebtedness as accrued after the 7th day of October, 1881, does not appear to have been barred by the statute of limitations at the time of the commencement of the action. Unless the payments made by the corporation were otherwise specially applied by either party, they should be applied to the items of indebtedness in the order in which they were contracted, as to time. I think the judgment should be reversed, and the cause remanded, with direction to the court below to overrule the demurrer.

We concur: Belcher, C. C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with direction to the court below to overrule the demurrer.

(90 Cal. 131)

Excelsior Water & Min. Co. v. Pierce.

(No. 12,973.)

(*Supreme Court of California.* July 1, 1891.)

Corporations — Wrongful Payment of Dividends — Directors' Liability — Investments and Profits.

1. Civil Code Cal. § 309, provides that "the directors of a corporation must not make dividends except from the surplus profits arising from the business thereof," and for a violation thereof the directors are personally liable "to the corporation and the creditors, in the event of its dissolution, to the full amount of the capital stock so divided." *Held*, that the directors of a hydraulic mining corporation, which became indebted by acquiring incumbered property, and making improvements on the mine, are not liable to the corporation for dividends declared and paid out of the net profits of the mine before paying the whole of such debt, when a sinking fund has been provided, sufficient to extinguish the debt before the mine shall be exhausted.

2. It was not a violation of the above statute to borrow money temporarily with which to pay dividends, when the corporation had used the current profits to make improvements.

3. Where investments of the corporation have resulted in loss because of an injunction restraining the company from washing dirt into a stream to the injury of riparian owners, which action could not reasonably have been anticipated, such loss must be treated as a loss of capital, and the directors are not liable because such expenditure was not converted *ex post facto* into a working expense.

In bank. Appeal from superior court, Santa Clara county; T. K. Wilson, Judge.

D. M. Delmas, (*W. S. Goodfellow*, of counsel,) for appellant. *Olney, Chickering & Thomas*, for respondent.

Beatty, C. J. This is an action by a California corporation against one of its former directors to recover the amount of certain dividends declared and paid to its stockholders with the concurrence of the defendant while a director. It is alleged by the plaintiff that such dividends were not paid out of the surplus profits of its business, and the action is based upon the provisions of section 309 of the Civil Code, which reads as follows: "The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase the capital stock, except as hereinafter specially provided. For a violation of the provisions of this section the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen) are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced, or debt contracted; and no statute of limitations is a bar to any suit against such directors for any sums for which they are made liable by this section. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution or the expiration of its term of existence." The complaint counts upon 19 separate dividends, aggregating about $266,000, but, it appearing that the defendant had ceased to be a director before the last dividend was paid, plaintiff limits its claim to the first 18. As to these there is but one question to be decided here: Were they or were they not paid out of the surplus profits of the plaintiff's business? To this issue the attention of the superior court seems to have been confined, and in reviewing its decision it will not be necessary for us to consider any question relating to the special defense interposed by defendant to some of the separate counts upon particular dividends. Aside from this special defense, the only matter put in issue by the pleadings of the parties was that above stated; and, the superior court having found that all the dividends were in fact paid out of surplus profits, its judgment was given in favor of the defendant upon that ground alone. The plaintiff appeals from the judgment and from an order denying its motion for a new trial.

The record upon which the decision of the superior court is to be reviewed is exceedingly voluminous, and consists in great part of tabulated statements and accounts intended to show the gross earnings, the current and other expenses, of the plaintiff, the amount and nature of its assets and indebtedness, and, in short, the exact condition of its affairs at the date of each of the 18 dividends in question. We are, however, spared the labor of deducing for ourselves the results of these involved and conflicting statements by reason of the fact that counsel for both parties have agreed to accept the results stated by the learned judge of the superior court in an opinion filed by him in connection with his decision of the cause, and which has been included in the transcript of the record. It appears therefrom that the plaintiff was incorporated in March, 1877, with a nominal or share capital of $5,000,000, divided into 50,000 shares of $100 each. The object of the incorporation was to carry on hydraulic mining, etc., and the defendant was, from the beginning down to September, 1879, a stockholder and director in the company. In April, 1877, plaintiff acquired all the property of the Excelsior Water Company, consisting of mining ground, farm, ditches, flumes, store, and merchandise, stock in other mining companies, bills, notes, bullion in flumes, etc., giving in exchange 36,732 shares of stock; and shortly afterwards it obtained a like conveyance and transfer of all the property of the Pactolus Mining Company in exchange for 3,000 shares of its stock. These, with a few others, amounting in all to 39,809 shares, were the only shares ever issued by plaintiff. The Excelsior Water Company and Pactolus Mining Company were largely indebted at the time they transferred their property to plaintiff, and this indebtedness was assumed by plaintiff as a part of the purchase price of the property. Its net amount, over and above the solvent credits transferred by the two companies, was $173,710.80, which was paid during the directorship of the defendant. During the same time the sum of $233,723.60 was expended by plaintiff in the purchase of other mining property, the construction of ditches, tunnels, permanent improvements on farm, machinery on mine, procuring United States patents for mining ground, and in assessments on stock in other companies. During the same time the plaintiff was carrying on its mining and other multifarious business, and it received from sale of bullion and water, and as profits of its store and farm and other investments, the gross sum of $1,095,719, while its outlay for operating its mines, salaries, taxes, interest, and other strictly current expenses was $638,303, leaving a balance of earnings of $457,416. The amount of the 18 dividends declared and paid during this time was only $241,629, or $215,724 less than the net earnings. But the plaintiff contends that the surplus profits were only about $98,000, and that about $143,000 over and above the surplus profits were divided, while the defendant claims that much less than the surplus profits was divided. This difference between counsel for plaintiff on the one side and the superior court and counsel for the defendant on the other arises out of a difference of theory as to what constitutes surplus profits of a mining corporation. Counsel for plaintiff contends that the payment of the debts which plaintiff assumed as part of the price of the property acquired from the Excelsior Water Company and the Pactolus Mining Company, as well as most of the items of expenditure for construction of tunnels, levees, ditches, etc., should be rated as current expenses, and charged against its gross earnings, in order to ascertain the actual surplus profits of its business; while counsel for defendant contends, on the contrary, that the payments of the principal of its indebtedness, and its investments in what are called "betterments of its property" should not be charged to current expenses of the business. As to the payment of the debt assumed by the plaintiff when it commenced business, or that incurred in making improvements, we do not understand its counsel to contend that it was necessary to pay them off before any dividends could be declared, but merely that whenever any part of its gross earnings was applied to the payment of a debt it was unlawful thereafter to replace such sum with the proceeds of a loan, and thereupon declare a dividend. The fact is not disclosed by the opinion of the judge of the superior court, but it seems to have been proved, that in several instances money was borrowed by the plaintiff in order to any dividends, and it seems to have happened in this way: The debts assumed by the plaintiff became due from time to time, and the permanent improvements on its property were made from time to time, so that large payments on both accounts were constantly occurring. Instead of borrowing money to make such payments at the time of making them, any money that happened to be on hand in the company's treasury was used as far as it would go, and afterwards replaced by the proceeds of bonds, overdrafts, or notes of the company, which, to the extent necessary, were used to pay the regular dividends. It is in this course of proceeding that counsel claims that defendant was clearly guilty of a violation of section 309 of the Civil Code, irrespective of any difference of views as to what are and what are not current expenses justly chargeable against the gross receipts of a mining corporation, in order to determine its net or surplus earnings or profits. To determine the question presented by this aspect of the case it will be necessary, in the first place, to lay down some general propositions which we think are clearly established by the authorities to which we shall refer.

The term "capital stock" has a double meaning as applied to corporations. In one sense it is the sum mentioned in the articles of incorporation as the amount of the capital stock; in other words, it is the share capital or nominal capital, and does not necessarily represent a corresponding amount of actual capital. In case of mining corporations it is always arbitrary, and generally extravagant in amount. The capital stock referred to in the statute, however, (Civil Code, § 309,) is the actual property of the corporation contributed by the shareholders of the nominal capital. In this case the nominal or share capital of the plaintiff was $5,000,000. Its actual capital was its mining and other property (less the debt with which it was incumbered) received in exchange for the shares which it issued, and this actual capital was what it was forbidden to divide. This inhibition, however, did not extend to the net proceeds of its mining operations; for a mining corporation, like any other corporation organized for the purpose of utilizing a wasting property—a property that can be used only by consuming it—as a mine, a lease, or a patent, is not deemed to have divided its capital merely because it has distributed the net proceeds of its mining operations, although the necessary result is that so much has been subtracted from the substance of its estate. Mor. Priv. Corp. § 442; Lee *v.* Asphalte Co., 41 Ch. Div. 24. It may distribute its net earnings, although the value of its mine is thereby diminished. But it may not sell the mine, or any part of it, and distribute the proceeds. In this sense, and in this sense only, provisions of law similar to those of section 309 of our Civil Code have been held to apply to mining corporations. If the mine belonging to a mining corporation when it commences operations is free from debt, and provided with all the necessary openings and appliances for its convenient working, the problem of ascertaining the amount of its surplus profits from time to time would be very simple, and would consist in merely deducting the gross outlay from the gross receipts; and the balance, less a reasonable reserve to meet contingencies, would be the legitimate subject of a dividend. But when the mining property has been taken subject to a debt, or when, as a preliminary operation, it becomes necessary to incur a debt in running an expensive tunnel, or sinking an expensive shaft, the problem becomes complicated. Must the whole of such debts be paid out of the first earnings before making a dividend, or must only a part be paid, and, if so, what part? We do not think it would be necessary to pay, in the first place, the whole of such debts, but it would be necessary to pay accruing interest, and to provide a sinking fund sufficient to extinguish the principal before the mine was exhausted. There can be no doubt, we think, that this is a correct theory; but in case of a property of such uncertain, fluctuating, and precarious value as a mine, it would undoubtedly be extremely difficult in most cases to practically apply it. Fortunately, however, the right of the creditors to insist upon payment of their demands as they fell due, and the prudence of capitalists to whom the company would be compelled to resort for loans with which to extend the payment of its maturing indebtedness, would always furnish a sure corrective for any disposition of the directors of a corporation to provide an inadequate fund for the extinguishment of its indebtedness, and it may be safely assumed that in the case supposed, unless the debts of the corporation were paid at a rate satisfactory to its creditors, they would put a stop to the payment of dividends by the means within their power. At all events, we are clear that the directors of a mining corporation which has become indebted either by acquiring its property incumbered with debt, or by making permanent improvements for the thorough and systematic working of its mines and other property, are not guilty of an infraction of section 309 of the Civil Code merely because they declare and pay dividends out of the net proceeds of their mine without first paying the whole of such debts. On the contrary, if they have fairly and honestly applied towards the payment and extinguishment of the debts of the company a share of the net earnings satisfactory to its creditors and reasonably proportioned to the amount of its indebtedness, the extent and permanence of its mine, or the rate at which it is being exhausted, they may properly and safely pay out the remainder in dividends, because such remainder may in such cases be justly regarded and treated as surplus profits of the business.

Now in this case it appears that out of the net earnings, amounting to $457,000, (I use round numbers for the sake of brevity,) only $241,000 were paid in dividends, while $216,000, or nearly one-half, was applied in payment of the debts of the corporation, originally assumed in the acquisition of its capital stock, and afterwards incurred in making permanent improvements thereon. It further appears that a large and valuable part of plaintiff's capital consists of property other than its mining ground, which will remain after the mine is exhausted; and there is evidence in the record, though there is no finding to that effect, that the mine itself has been but slightly encroached upon. It does not appear that any creditor has been defrauded, or his claim even endangered; and, in short, there is nothing to show that the capital of plaintiff has been impaired. True, its debt has increased, but not in an amount equal to the value of its betterments. The fact, however, remains, that money was borrowed to pay some of the dividends, and the question remains whether such a course admits of justification. We think there are circumstances which do justify it. A mining company is working its mines at a profit, but discovers that they can be worked to better advantage by constructing a new tunnel; that is to say, it will be wise economy to incur an expense of say a hundred thousand dollars to construct such a tunnel; that it will in fact add more than that sum to the value of the property. Clearly, we think, the corporation would be justified in incurring a debt to that amount to carry out the object, and that it could go on declaring dividends after providing for the payment of the accruing interest, and for the gradual extinction of the principal of such debt. But suppose, instead of borrowing in advance to meet payments on the tunnel, it makes some of the payments out of the current profits of its mining operations,—profits justly applicable, at its option, to the payment of dividends, but not presently needed to meet a declared dividend. Afterwards it borrows money,—no more than it might have borrowed originally on account of the tunnel,—and out of the money so borrowed replenishes the fund applicable to dividends. In such a case the result is precisely the same as if the money had been borrowed sooner, and the identical money borrowed paid out on the tunnel. Nothing has been accomplished beyond what the directors had a right to do, and surely the mode in which it has been done can make no difference. In fact the transaction may be regarded as a temporary borrowing from the dividend fund of a sum necessary to meet an immediate demand, with the advantage to the corporation of keeping its money employed, and saving it the payment of interest.

If the general results stated by the superior judge in his opinion and accepted by counsel are correct, the defendant in this case did nothing more than borrow from the fund applicable to the payment of dividends in the manner outlined above; or if it was the earlier, rather than the later, dividends that were paid with borrowed money, then such borrowed money was finally repaid out of the dividend fund; for, taking the whole period covered by the declaration of the 18 dividends, it appears that no more than the legitimate surplus profits were divided. We say that this fact appears, but we do not lose sight of the fact that counsel for appellant insists upon his contention that $143,000 in excess of surplus profits was divided, and it is proper that we should state more specifically the ground of our contrary opinion. To make up this sum of $143,000, counsel for plaintiff in his estimate of net earnings or surplus profits includes in his current expense account a number of large items, which we think are improperly there; or, to speak more accurately, there is evidence to sustain the finding of the superior court (implied in its general finding) that they are improperly there. We need specify only two of these items, viz.: Assessments Deer Creek tunnel, $113,295.55; machinery and Blue Gravel branch tunnel, $43,962.65; making a total of $157,258.20; which more than overbalances the $143,000 which plaintiff claims to have been paid out of capital or borrowed money. Plaintiff was a stockholder in the Deer Creek Company, and paid its assessments for the construction of its tunnel run for the purpose of working its mines. Clearly this was an investment of capital, and not a current expense. The other item mentioned stands on similar grounds, and so do a number of others, aggregating a large amount, which we have not mentioned. It is argued by plaintiff that a number of these investments turned out to be unprofitable in the end, and reference is made to the fact disclosed by the evidence in his case, and otherwise notorious, that all these hydraulic mines have been shut up by injunction, sued out by the riparian proprietors on the streams into which they were washing their earth. This is undoubtedly a serious misfortune to the present stockholders in the various companies, including the plaintiff; but the defendant is not responsible for the losses they may have suffered in consequence of the injunctions, nor is the wisdom or the prudence of his investments to be measured by a result which at the time few persons anticipated. When the expenditures were made they were no doubt considered judicious, and, if the event has proved the contrary, the result must be treated as a loss of capital, and the expenditures must not be converted *ex post facto* into a current working expense.

It is proper, in conclusion, to refer to some of the authorities which support the positions herein assumed. For a definition of net earnings used in the sense of surplus profits, we refer to Railroad Co. v. U. S., 99 U. S. 420, note to Goodwin v. Hardy, 99 Amer. Dec. 762. The case in 99 U. S., and Park v. Locomotive Works, 40 N. J. Eq. 114, 3 Atl. Rep. 162, and Minot v. Paine, 99 Mass. 101, are also authority for the proposition that the apportionment of net earnings to the payment of cash dividends, stock dividends, increase of capital, reserve or contingent fund, or to provide for future obligations, is largely one of policy, intrusted to the discretion of the directors, which, when honestly and intelligently exercised, will not be lightly overruled. See, also, Stringer's Case, L. R. 4 Ch. App. 490, and Williams v. Telegraph Co., 93 N. Y. 187. The case of Minot v. Paine, supra, is cited by counsel for plaintiff to sustain his proposition that money of a corporation, when once expended in the purchase of new capital, or in improvements, can never be reclaimed for the purpose of paying dividends. We do not think it sustains the proposition. It goes only to the extent of holding that a trustee of shares for the purpose of paying the income to A. during life, and the principal to B. on the death of A., holds additional shares issued as a stock dividend subject to the same disposition. It rests upon the ground that such is the only safe rule for a trustee, rather than upon the justice of the rule, which is very questionable. But, conceding its correctness upon the point decided, it does not hold that surplus capital cannot be used for making cash dividends; but, on the contrary, expressly holds that, while it can never be regarded as income of the stockholders until converted into a dividend, it may nevertheless be income to the corporation, and as such the subject of a dividend in the discretion of the directors. We find no error in the record. Judgment and order affirmed.

We concur: McFarland, J.; Sharpstein, J.; Paterson, J.

The other justices of the court, not having heard the argument, did not participate in the decision.

90 Cal. 43

Jacobs v. Walker. (No. 13,049.)

(*Supreme Court of California.* June 30, 1891.)

School Lands—Application to Purchase—Findings—Agricultural Lands.

1. In a contest for school land, a finding that defendant made an application and affidavit, as required by the California statute, on the 23d day of February, 1883, and that the affidavit was true, and on the 3d day of June, 1883, a certificate of purchase was issued accordingly, and that on the 18th day of April, 1884, plaintiff made an application and affidavit as required, which was not true, is sufficient to sustain a judgment that plaintiff is not entitled to patent.

2. Under Const. Cal. art. 17, § 3, which provides that "lands belonging to this state which are suitable for cultivation shall be granted only to actual settlers," the fact that land was heavily timbered, and more valuable for timber than agricultural purposes, did not render it "unsuitable for cultivation," although it would not produce ordinary agricultural crops in average quantities, and patent will not issue where there has not been an actual settlement.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

T. L. Carothers, for appellant. *J. A. Cooper*, for respondent.

Belcher, C. C. This is an action to determine a contest between the plaintiff and defendant as to which of them is entitled to purchase certain school lands. The court below gave judgment for the defendant, and the plaintiff appeals therefrom on the judgment roll. The court found the facts of the case to be, in substance, as follows: On the 23d day of February, 1883, the defendant filed in the office of the state suveyor general his affidavit and application to purchase the N. E. ¼ and the S. ½ of the N. W. ¼ of a certain thirty-sixth section of land in Mendocino county. He was at the time qualified to purchase school lands, and his affidavit was in the form then prescribed by section 3495 of the Political Code, and all the facts set forth therein were true. On the 3d day of May, 1883, the application was duly approved by the surveyor general; and thereafter, on the 16th day of June following, defendant paid 20 per cent. of the purchase money and the first year's interest on the balance, and received from the register of the land-office a certificate of purchase for the land, in the usual form. On the 23d day of February, 1884, the plaintiff went upon the land in dispute, and began to build a cabin thereon for himself, and ever since has been and now is an actual settler on the land. At the time of his settlement there was no one in the adverse possession of the land, or any part thereof; but about the 27th of the same month one Thomas Dingwall went upon a portion of the land, and commenced erecting a cabin thereon. He completed the cabin, and moved into it, with his family, prior to the 18th of April, 1884, and continued to live in it with his family till about the middle of June following. Dingwall claimed the land, and offered to sell out his claim to plaintiff, and plaintiff knew of his possession, and that his family were in the cabin prior to April 18th. While Dingwall was on the land, he was engaged a part of the time getting out redwood timber for the defendant. On the 18th day of April, 1884, plaintiff made an affidavit and application to purchase the whole of the N. ½ of the said section 36, and on the 6th of May following filed the same in the office of the surveyor general. He was also qualified to purchase school lands, and his affidavit was in proper form, and all the facts therein set forth were true, except the statement that there was no adverse occupation of the land, which at the time of making and filing the affidavit was untrue.

The land in controversy "is situate on the top and sides of a high ridge, and is covered heavily in most places with redwood timber and brush, and is now chiefly valuable for its timber. The surface is broken, cut up with deep ravines in places, and steep, while in places there are a few acres level enough that it could be plowed if it were cleaned of timber. The soil is poor and rocky in places. There are two or three of the 40's in dispute that, if the timber was moved therefrom, the greater part thereof would be suitable for cultivation, but would not produce ordinary agricultural crops in average quantities, and is more valuable for timber than for agriculture." The conclusion drawn from the facts was that the plaintiff take nothing by his action, and that the defendant was entitled to a patent for the land applied for by him, upon his surrendering his certificate of purchase, and paying the balance due for purchase money and interest. That the judgment was properly entered against the plaintiff appears to be clear. He stated in his affidavit that there was no occupation of the land applied for by him adverse to any that he had, and this statement was found by the court to be untrue, so far as regards the land in controversy. It is contended that this finding was not justified by the probative facts found as to Dingwall's occupation, but we think it was. Dingwall built a cabin on the land, and was living in it with his family. He claimed the land, and offered to sell his claim to the plaintiff; and the plaintiff knew of his residence and claim when he made his application. But, even if these probative facts were not sufficient to justify the finding, still the evidence is not before us, and we cannot say that that did not justify it. It results that, under the well-settled rule in such cases, the plaintiff acquired by his application no rights to the land in contest which can be enforced in the courts. McKenzie v. Brandon, 71 Cal. 209, 12 Pac. Rep. 428; Mosely v. Torrence, 71 Cal. 318, 12 Pac. Rep. 430; Plummer v. Woodruff, 72 Cal. 29, 11 Pac. Rep. 871, and 13 Pac. Rep. 51; Harbin v. Burghart, 76 Cal. 119, 18 Pac. Rep. 127.

It is further contended that judgment should at least have been entered in favor of the plaintiff for the 80 acres applied for by him, and not included in the application of defendant. But there was no contest as to that 80-acre tract, and the court had therefore no jurisdiction to determine the plaintiff's rights to it. The judgment was necessarily limited to the land in contest, and could determine nothing in regard to land not in contest.

The only remaining question is as to the rights of defendant. The rule is settled that, when one seeks to purchase land from the state, he must state in his affidavit, and state truly, all the facts required to be stated therein; and, when a case is brought into court for the determination of conflicting claims to the land, each party must set forth in his pleadings, and show by his proofs, that he has strictly complied with the law, and by such compliance has become entitled to make the purchase. If he fails to do this, judgment will be entered against him. Gilson v. Robinson, 68 Cal. 543, 10 Pac. Rep. 193; McKenzie v. Brandon, 71 Cal. 211, 12 Pac. Rep. 428; Harbin v. Burghart, 76 Cal. 119, 18 Pac. Rep. 127. The constitution provides that "lands belonging to this state which are suitable for cultivation shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law." Article 17, § 3. The statute in 1883 (Pol. Code, § 3495) provided that an applicant to purchase any portion of a sixteenth or thirty-sixth section must state in his affidavit, among other things, "that he is an actual settler thereon," without regard to the character of the land. This section was amended in 1885, so as to read: "The affidavit must also state whether the land is or is not suitable for cultivation; and, if it is, that the applicant is an actual settler thereon." The defendant stated in his affidavit that he was an actual settler on the land applied for, and the court found that the affidavit complied with the law, and all the facts set forth were true. The affidavit was therefore sufficient at the time it was made, and it was not rendered insufficient by the subsequent change in the statute. He alleged in his answer that he was an actual settler on the land when he filed his application, and when the certificate of purchase was issued to him, but as to this averment there was no finding. He also alleged that the land was not suitable for cultivation, and the only finding as to the cultivatable character of the land was that above quoted. Now, as there was no finding that defendant was an actual settler on the land when he obtained his certificate of purchase, it must be presumed that he was not. It follows, if one-half or more of any legal subdivision was suitable for cultivation, that as to such subdivision the certificate was improperly issued, and the defendant acquired no rights thereto under it.

The question, then, is, was the land or some portion of it suitable for cultivation? The finding is of somewhat doubtful import, but, as we construe it, we think the question must be answered in the affirmative. The language used is: "There are two or three of the forties in dispute that, if the timber was moved therefrom, the greater part thereof would be suitable for cultivation, but would not produce ordinary agricultural crops in average quantities." The fact that the land in most places was heavily covered with redwood timber and brush did not render it unsuitable for cultivation, within the meaning of the constitution. Manley v. Cunningham, 72 Cal. 236, 13 Pac. Rep. 622. Nor did the fact that it would not, when cleared, produce ordinary agricultural crops, in average quantities, render it so. To make an average, some lands must necessarily produce less than the average, while others produce more; and it would seem absurd to say that all lands producing less than the average must, for that reason, be held unsuitable for cultivation. Nor do we think the fact that the land was more valuable for timber than for agriculture decisive of the question. Land may be very valuable for the timber upon it, and also be valuable for agricultural purposes after it is cleared; and this may be true of the land in question. It follows that, if any of the 40's were suitable for cultivation, within the meaning of the constitution, they should not have been included in the judgment for defendant. We advise, therefore, that the judgment, in so far as it is against the plaintiff, be affirmed; and that, in so far as it is in favor of the defendant, it be reversed; and the cause remanded to the court below for a new trial.

We concur: TEMPLE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment, in so far as it is against the plaintiff, is affirmed; and, in so far as it is in favor of the defendant, it is reversed; and the cause remanded to the court below for a new trial.

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90 Cal. 101

AGASSIZ *et al.* v. SUPERIOR COURT. (No. 14,050.)

(*Supreme Court of California.* June 30, 1891.)

PROHIBITION — ATTACHMENT AGAINST NON-RESIDENT—REMEDY BY APPEAL.

Where, in an action against non-residents to enforce payment of subscription to the capital stock of a corporation, an attachment was issued against land in this state belonging to defendant, a writ of prohibition will not lie to restrain plaintiff from proceeding in the cause upon the ground that it is not a cause wherein an attachment would lie, since there is a plain, speedy, and adequate remedy, in the ordinary course of law, by appeal.

In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Edward J. Pringle, for petitioners. *Pillsbury & Blanding*, for respondent.

MCFARLAND, J. This is an application for a writ of prohibition, commanding the respondent to refrain from entering default or judgment against petitioners in a certain action in which Charles Kohler, assignee in insolvency of the California Land & Timber Company, a corporation, is plaintiff, and these petitioners and others are defendants. It appears from the petition that the petitioners are stockholders in said corporation above named, which was organized under the laws of California, for the purpose of doing business here, and are also, individually, the owners of certain lands in this state; but that they are citizens and residents of Massachusetts, and absent from California, and have been served only by publication of summons. One purpose of the said action of Kohler, assignee, against said corporation, was to collect from the defendants (petitioners here) certain moneys alleged to be due from petitioners to said corporation upon subscriptions to the capital stock thereof; and, upon the proper statutory affidavits being made, a writ of attachment was issued by virtue of which certain lands of petitioner were attached, —the said lands being in this state. Petitioners specially appeared in said action for the purpose of moving to discharge said attachment. They made such motion, and it was denied by the court. Whereupon they commenced the present proceeding in this court, and ask that respondent be prohibited from proceeding further in said action against petitioners, because, as they say, respondent has no jurisdiction so to do, for the reason that petitioners are non-residents. They concede that there would be such jurisdiction if the writ of attachment was properly issued and levied; but they contend that, no matter how sufficient the affidavits for attachment may have been, the complaint itself shows the action to be one in which no attachment could be legally obtained. On the surface said action seems to have been "an action upon a contract, express or implied, against a defendant not residing in this state," within the meaning of subdivision 2 of section 537 of the Code of Civil Procedure, and therefore one in which an attachment would lie; but we do not propose to examine or determine that question, because, in our opinion, prohibition is not a remedy which petitioners in this instance can invoke. Petitioners had the right to appeal from the order refusing to dissolve the attachment, and would have an appeal from any final judgment in the case; and such appeal, being a "plain, speedy, and adequate remedy in the ordinary course of law," within the meaning of section 1103 of the Code of Civil Procedure, prohibition does not lie. A remedy does not fail to be speedy and adequate because, by pursuing it through the "ordinary course of law," more time would probably be consumed than in the proceeding here sought to be used. And it makes no difference that in this instance a question of jurisdiction incidentally depends upon the validity of an attachment. If that were so, then, in every ordinary civil action, whenever a defendant chose to raise a point of jurisdiction, either of the person or of the subject-matter, he could, by prohibition, stop the ordinary progress of the action towards a judgment, until this court had passed upon the intermediate question; and thus this tribunal would, in innumerable cases, be converted from an appellate to a *nisi prius* court. Petitioners complain of the hardship which they would suffer if obliged to pursue ordinary remedies, but their complaint really is that further special privileges and advantages are not added to those which, as non-residents, they already possess. Owing to our particular system of government, and certain judicial decisions, residents of other states, although doing business and owning property in California, are not compelled, in most instances, to submit themselves to the jurisdiction of our courts when our citizens seek to enforce rights against them, although they may seek the aid of our courts when desirous of enforcing their own rights. But with respect to the question before us they are in no different position from that of a resident defendant who chose, in the ordinary course of a civil action, to raise a question about the validity of an attachment, or the jurisdiction of the court. In either case, the remedy is by appeal, and whatever hardship that remedy might impose would be common to both. The substantially correct rule is stated in High's Extraordinary Legal Remedies as follows: "Like all other extraordinary remedies, prohibition is to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress; and it is a principle of universal application, and one which lies at the very foundation of the law of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another and complete remedy at law." Section 770. And, further, the same author says: "Thus, where the defendant, in an action instituted in an inferior court, pleads to the jurisdiction of such court, and his plea is overruled, no sufficient cause is presented for granting a prohibition, since ample remedy may be had by an appeal from the final judgment in the cause. Nor will the writ go to restrain an inferior court from proceeding with certain attachments, upon the ground of the insufficiency of the affidavit on which the attachments were issued, since the court itself may afford relief, or the party aggrieved may resort to an appeal." Section 771. Moreover, the point was directly decided by this court, and applied even to a criminal case, in Strouse v. Police Court, 85 Cal. 49, 24 Pac. Rep. 747. In that case the petitioner for the writ had plead-ed to the jurisdiction of the police court; but the court here, PATERSON, J., delivering the opinion, said: "If the petitioner should be convicted in the police court, he will have a plain, speedy, and adequate remedy at law by an appeal to the superior court. Application for writ denied." See, also, Murphy v. Superior Court, 84 Cal. 598, 24 Pac. Rep. 310; Levy v. Wilson, 69 Cal. 105, 10 Pac. Rep. 272; State v. Cory, 35 Minn. 178, 28 N. W. Rep. 217. The demurrer to the application is sustained, and the proceeding dismissed.

We concur: BEATTY, C. J.; PATERSON, J.; HARRISON, J.; DE HAVEN, J.; SHARPSTEIN, J.; GAROUTTE, J.

90 Cal. 150

MILLER, (McCOY, Intervenor,) v. BYRD.

(No. 13,879.)

(*Supreme Court of California.* July 2, 1891.)

SWAMP LAND—PURCHASE BY COUNTY TREASURER.

Since, under the laws of California, the duties of the county treasurer in respect of swamp lands are merely to receive payment of the purchase money, whose amount and the conditions of whose payment are fixed by statute, and report the same to the register of the land-office, he is not disqualified to apply for and purchase such land himself.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Brown & Daggett, for appellant. *N. O. Bradley* and *Lambertson & Taylor*, for respondent.

BELCHER, C. C. The plaintiff, E. O. Miller, brought this action against five defendants, to determine a contest as to which one of the parties thereto was entitled to purchase from the state a certain tract of swamp and overflowed land in Tulare county. The court below found that all of the applications to purchase the land were null and void, and accordingly gave judgment that neither of the parties to the action was entitled to purchase the land, or any part thereof. From this judgment the defendant Byrd alone appeals, and the case is brought here on the judgment roll.

The only question presented for consideration and decision is as to the rights of the appellant. The facts, as shown by the pleadings and findings, may be briefly stated as follows: During the year 1873 the appellant was the duly elected, qualified, and acting treasurer of the county of Tulare. He desired to purchase the land in controversy, and, for the purpose of doing so, on the 3d day of January, 1873, made an affidavit in the form prescribed by section 3443 of the Political Code; and all the facts and matters therein stated were true. On the same day the affidavit was filed in the office of the surveyor of the county, and within 30 days thereafter the surveyor made a survey of the land, and completed the survey, plat, and field-notes thereof, and recorded them in a book kept in his office, and forwarded duplicate copies thereof, together with a copy of the application, to the surveyor general of the state for approval. These papers were received by the surveyor general, and filed in his office, on the 25th of January, 1873, and on the same day he duly approved the survey and application. On the 15th day of March, 1873, the appellant paid to the county treasurer of Tulare county, in gold coin of the United States, 20 per cent. of the purchase price of the land, and interest on the balance thereof at the rate of 10 per cent. per annum from January 25, 1873, to January 1, 1874, together with $3 for the certificate of purchase. The county treasurer reported to the register of the state land-office the fact of the payment of these sums, and thereafter, on the 8th of April, 1873, the register issued to and in the name of the appellant a certificate of purchase for the land, signed by him and attested by his official seal. At that time no other application to purchase the land, or any part thereof, had been made. When appellant made his application, on the 3d of January, the land had been segregated as swamp and overflowed land, under authority of the United States, for more than six months. At the time of the trial the land was suitable for cultivation. It will be observed that the court found all the facts necessary to show that the land in controversy was subject to sale by the state, and that the appellant was qualified to purchase the land; and his proceedings to accomplish that end were regular and effective, unless the fact that he was county treasurer at the time debarred him of the right. It seems clear, therefore, that in making its decision that appellant's application was null and void the court below must have acted on the theory that, because appellant was county treasurer, he was an agent of the state for the sale of swamp lands in his county, and hence was disqualified to purchase the land in question. In Edwards v. Estell, 48 Cal. 194, it was held that a county surveyor, in receiving an application to purchase swamp lands, and making a survey of them, was an agent of the state for the sale of such lands, and therefore could not himself become the purchaser; and incidentally it was said that a county treasurer, in receiving the purchase money for swamp lands, was an agent of the state for the sale of the lands.

It is a settled rule that one acting in a fiduciary capacity cannot deal with himself as an individual, for the reason that an opportunity would thereby be presented for the commission of frauds. Under the provisions of the Code in 1873 the rule thus declared was clearly applicable to a county surveyor. He received the application to purchase, surveyed the land applied for, if a survey had not already been made, and then forwarded the survey and application to the surveyor general for approval. It would have been possible for him, after an application had been presented and a survey requested, to have made another application for himself, and to have forwarded his own application with the survey to the surveyor general first; or he might, in making a survey for himself, have included more acres within the lines surveyed and marked out than appeared and were reported; thus committing a fraud upon the first applicant or the state. But does the rule apply to a county treasurer? He had no duties to perform until after all the preliminary steps to effect the purchase had been taken and approved by the surveyor general. Then he was simply to receive from the purchaser, if offered within 50 days after the approval, 20 per cent. of the purchase money, with interest on the balance till the 1st of January following, and $3 for a certificate of purchase, and to report these payments to the register of the land-office. The money was to be placed to the credit of the "Swamp Land Fund" of the county. The statute fixed the price of the land, the rate of interest to be paid, and the terms and conditions of payment. The treasurer had, therefore, no opportunity to commit frauds upon the state unless he did so by misappropriating or stealing the money. But such a fraud might have been committed as well by misappropriating any other money paid into the treasury. If the theory suggested be true, it would seem to follow that, if appellant had applied to purchase the land, and his application had been approved, before he became county treasurer, he could not have completed the purchase by the payment of the money after he became county treasurer, because he would then have been the agent of the state to sell the land and receive the purchase money; or, if he had applied to purchase the land, and his application had been approved, and he had made the first payment of principal and interest, and a certificate of purchase had been issued to him, and thereafter he had become county treasurer, he could not have completed the purchase by paying the interest and balance due the state, because he would have been compelled to make such payment to himself, and, being the agent of the state for the sale of the land, his agency would have disqualified him in the premises; and, as a consequence, he would have forfeited his rights under the certificate of purchase if the state had proceeded against him on account of his non-payment. But this would be giving the law an absurd construction, and one never contemplated or intended by the law-makers. We see no practical difference between the duties of a county treasurer in the sale of swamp lands and those of registers and receivers in the sale of government lands at private entry. It is, however, well settled that registers and receivers may purchase government lands at private entry at the price fixed by the government. Lester, Land Laws, pp. 337, 338. The practice has been sanctioned by the land department of the general government, and it has not been suggested that the practice has violated any rule of public policy, or that the government or any citizen has been defrauded by means thereof. In our opinion, therefore, the decision as to the validity of appellant's application to purchase the land in question was erroneous.

It is further suggested in the brief filed by the intervenor that appellant was not entitled to have judgment entered in his favor, because it appeared that the land had become suitable for cultivation, and it did not appear that he was or had ever been an actual settler thereon. We see no force in this suggestion. When appellant made his application and obtained his certificate of purchase the land was not suitable for cultivation, and there was no provision of the constitution or statutes at that time that state lands suitable for cultivation could only be sold to actual settlers thereon. The certificate of purchase as *prima facie* evidence of legal title in the holder, (Pol. Code, § 3514; Code Civil Proc. § 1925;) and it must be presumed that the new constitution did not, and was not intended to, impair the obligation of contracts already made. The validity of the certificate must therefore be determined by the law in force at the time it was issued, and it cannot be affected by law subsequently passed. The case of Dillon v. Saloude, 68 Cal. 267, 9 Pac. Rep. 162, is not in conflict with what has been said. That case simply held that where one had only made application to purchase land suitable for cultivation before the adoption of the constitution in 1879, he could not, after its adoption, complete the purchase unless he was an actual settler on the land. It results, in our opinion, that the judgment against defendant Byrd should be reversed, and the cause remanded, with directions to the court below to enter judgment in his favor on the findings.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment against defendant Byrd is reversed, and the cause remanded, with directions to the court below to enter judgment in his favor on the findings.

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90 Cal. 1

BRADY v. BURKE *et al.* (No. 13,207.)

(*Supreme Court of California.* June 29, 1891.)

STREET ASSESSMENTS—PRIORITY OF LIENS—FORECLOSURE—PARTIES—APPEAL—TIME OF TAKING—BILL OF EXCEPTIONS.

1. Where findings and an order for judgment are filed, but the judgment is not formally entered, an affirmance on appeal does not divest the trial court of jurisdiction to afterwards enter it, since an appeal, before formal entry, is premature and unauthorized, under Code Civil Proc. Cal. § 939, providing that an appeal from a final judgment may be taken within one year after entry thereof.

2. A judgment foreclosing a prior lien for street assessments conveys a superior title to one foreclosing a junior lien, although the latter judgment was first entered; and, although the junior lienholder had no notice of the pendency of foreclosure proceedings, the purchaser of such superior title may show, in an action to determine adverse claims, that the junior liens were invalid.

3. The purchaser, under foreclosure of such subsequent assessment, has no equitable right to require a sale of the property for the satisfaction of liens in the order of their priority, where the liens under which he claims have expired.

4. One who, without notice, takes title under foreclosure of a street assessment pending a suit to foreclose junior assessment liens, is a necessary party to the latter suit, since he holds the legal title, and, if not so made, he is not bound by the decree.

5. Where the bill of exceptions does not set out the evidence, but merely states that it was sufficient to justify certain findings, insufficient of themselves to establish the validity of a street assessment, it will be assumed that the evidence was sufficient to establish such validity, and the omission of the necessary findings, without which the assessment would be invalid, is not ground for reversal.

Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

J. M. Wood and *J. C. Bates*, for appellants. *Sawyer & Burnett*, for respondent.

DE HAVEN, J. This is an action under section 738 of the Code of Civil Procedure to determine adverse claims to two lots in the city of San Francisco. All of the parties claim under a common source of title. The plaintiff, who is the respondent her claims title to both lots upon sales made under judgments foreclosing certain street assessments, recorded November 14, 1870, and deeds executed by the sheriff on October 3, 1885, in pursuance of such sales. The defendants claim an interest in the lots in controversy, based upon various street assessments against said lots made and recorded subsequently to the commencement of the foreclosure suits under which plaintiff claims, and prior to the rendition of final judgment therein. Defendant Diggins claims the legal title to lot 5 by virtue of a sheriff's deed, under a judgment foreclosing one of these assessments, and the defendant Wood the legal title to lot 6 by virtue of two deeds, based upon judgments foreclosing two of said assessments. These deeds were executed during the pendency of the foreclosure proceedings under which plaintiff claims. These defendants also claim to hold the legal title in trust for certain of their co-defendants, to the extent of their interest, under street assessment liens. It is argued here by the appellants that the plaintiff acquired no title to lot 6 by the execution sale under which he claims; that the court erred in allowing plaintiff to show that the assessments resulting in the judgments upon which deeds of defendants depend, were invalid; and that, in any event, the defendants are entitled to have the lots sold, and the proceeds applied to the satisfaction of the several liens of all the parties in the order of their priority.

1. The ground upon which defendants attack the deed under which plaintiff claims title to lot 6 is this: Findings and an order for judgment were filed in plaintiff's action against Louisa Page, the owner of this lot, on March 21, 1878, but no judgment was ever entered until January 7, 1882. On March 20, 1878, plaintiff's attorney in said action served upon defendant therein notice of the rendition of judgment, and in November, 1878, said defendant appealed from said judgment to this court, and the judgment was affirmed. There is among the papers in said action a formal decree entitled in that action, dated March 19, 1878, and signed by R. F. Morrison, then judge of the district court in which the action was pending. This formal decree was never entered as the judgment therein, and on January 7, 1882, in the same action, a judgment and decree, signed by O. P. EVANS, a judge of the superior court of San Francisco, was entered. On appeal to this court from such judgment, taken by the defendant therein, it was affirmed. 5 Pac. Rep. 103. Upon the return of the *remittitur* execution was issued upon this judgment, and it is upon the sale thereunder that plaintiff claims title to lot 6. The appellants contend that the judgment so entered on January 7, 1882, was void under the rule announced in Mulford v. Estudillo, 32 Cal. 139. We do not think that the case cited is in point. It may be conceded that, after a final judgment of the trial court has been affirmed on appeal to this court, the court from which such appeal was taken would be without jurisdiction to retry the case, and render another judgment, and that, consequently, such subsequent judgment would be void. The reason which supports this rule is that by a valid appeal the case is removed from the jurisdiction of the lower court, and final judgment in the case is rendered in the appellate court. This, of course, terminates the litigation. But such a rule has no application here, because this court never acquired jurisdiction of the first appeal. Under section 939 of the Code of Civil Procedure, which was in force at the date of the first appeal in the case of Brady v. Page, no appeal could be taken to this court until after the entry of the judgment in the trial court, and it has been uniformly held here that an appeal taken before such entry is premature. It has also been held that the trial court can at any time before its judgment is entered change its conclusions of law, and order a different judgment. Condee v. Barton, 62 Cal. 5. Until the judgment is entered, such court retains complete jurisdiction of the case, of which it cannot be divested by any unauthorized appeal to this court. If the attention of this court had been called to the fact that it had before it an appeal from a judgment which had never been entered, and which was still within the control of the lower court, the appeal would have been dismissed. But, whether this was done or not, the appeal was ineffectual, and this court was in fact without jurisdiction to entertain it. The appeal was futile, and the case remained in the lower court undisturbed. Home for Care of Inebriates v. Kaplan, 84 Cal. 488, 24 Pac. Rep. 119. It follows that the superior court had jurisdiction to enter the judgment of January 7, 1882, and that the execution sale thereunder, under which plaintiff purchased, was not void.

2. The judgments under which plaintiff claims were conclusive as against the owners of the lots in controversy, as in each of said actions the owner of the lot upon which the lien was foreclosed was a party defendant, and therefore the execution sales transferred the legal title of such owners to the plaintiff; and, although the sheriff's deeds made to defendants Wood and Diggins antedated those of plaintiff, and are based upon judgments rendered prior to those under which plaintiff claims, yet, as the liens under which plaintiff's title has its origin are older than the liens to which the deeds of defendant relate, plaintiff has the superior legal title. Littlefield v. Nichols, 42 Cal. 374. The most that defendants can claim is that, as they were without actual or constructive notice of the pendency of plaintiff's foreclosure suits, he took such legal title incumbered with all valid liens thereon held by them at the date of his judgment. Assuming that defendants were without this notice, which is the most favorable view for appellants, the court did not err in allowing the plaintiff to show that the liens foreclosed in the actions, which resulted in the sheriff's deeds to defendants, were invalid. The plaintiff was not a party to said actions. He was not in privity with the defendants therein, within the meaning of the rule which makes those in privity with parties to an action bound by the judgment therein, because his title relates back to the date of the original liens

foreclosed by the judgments under which he claims, which liens were prior in point of time to the origin of defendants' alleged title under their deeds. Shay v. McNamara, 54 Cal. 169; Chester v. Association, 64 Cal. 42; Horn v. Jones, 28 Cal. 203; Campbell v. Hall, 16 N. Y. 575. In this latter case will be found a very full and satisfactory discussion of the rule which makes those in privity with parties to a judgment also concluded by it. As to two of the deeds relied upon by defendants, it is found that the work for which the assessment underlying said deeds was made was not completed within the time fixed by the contract, and that the order of the board of supervisors granting an extension was not made until after the expiration of the time allowed by the contract for its completion. This being so, it has been repeatedly held that the contractor never acquired any valid lien upon the property. Beveridge v. Livingston, 54 Cal. 54; Raisch v. City and County of San Francisco, 80 Cal. 1, 22 Pac. Rep. 22; Fanning v. Schammel, 68 Cal. 428, 9 Pac. Rep. 427. As to the other deed to defendant Wood, the court finds that the board of supervisors failed to publish for the length of time required by law the resolution of intention to do the street-work, which resulted in the subsequent assessment, foreclosure, and deed. This failure to publish rendered the assessment void. Richardson v. Tobin, 45 Cal. 32. Upon the facts found by the court, the alleged liens, upon which defendants' deeds depend for their validity, were void, and defendants acquired no interest in said lots as against plaintiff by said deeds.

3. The point, however, most earnestly insisted on by appellants, is that the court should at least have directed the lots to be sold, and the proceeds applied in satisfaction of all liens which were originally valid, in the order of their priority. The argument seems to be that, as plaintiff is asking for relief from a court of equity, the court may require him to do equity. All of the liens asserted by defendants are creations of the statute, and most of them have long expired by the lapse of time given for their enforcement by the statute in which they have their origin. As to some, no steps whatever have been taken to enforce them, while others were foreclosed more than six months before the commencement of this action, and no execution issued on the judgments of foreclosure, and by the express language of the statute the lien obtained by recording the assessment expires at the end of six months after the final determination of the action foreclosing it. Upon this state of facts, to say that in equity the liens still exist, and to refuse plaintiff a judgment to the effect that they do not exist, would be for the court to give the statute, which authorized their creation, an effect in direct conflict with its terms. The maxim that he who asks equity must do equity cannot be made rightfully to support such a conclusion. We have examined the cases cited by appellants on this point, and we do not think that any of them support their position. Liens of this class are purely statutory, and only exist for the term given by the statute. In their creation and enforcement they are at every step adverse to and against the consent of the owner of the property affected thereby, and he may, without violating any rule of equity, insist that the claimant shall find his right to enforce them in the statute which authorized their creation.

4. Two of the judgments foreclosing the asserted liens were rendered October 12, 1886, after the commencement of this action, and less than six months prior to the filing of the answer herein. The plaintiff was not a party to either of them, and it does not appear that he had any notice, actual or constructive, of their pendency, and is therefore not bound by them. On the day of their rendition the defendant was not the owner of the lots upon which the liens were decreed to exist, and plaintiff's deeds, showing title in him, were duly recorded. It is true that at the time of the commencement of these actions the plaintiff was not a necessary party, but he became so when he acquired the legal title, and should then, by proper proceedings, have been made a party thereto. The statute which authorized the enforcement of the liens contemplates that the legal owner, at the time of the rendition of the judgment, shall be a party, unless he is a purchaser *pendente lite*, affected with notice of the action. It follows that these judgments are ineffectual for any purpose, as against the title of plaintiff.

5. In regard to the pending suits for the foreclosure of the liens asserted by defendants, if it should be assumed that the defendants may yet make the plaintiff a party thereto, it is sufficient to say that the findings do not disclose that any of these alleged liens are valid. The substance of the findings on this point is that the superintendent of streets made, recorded, and issued an assessment, with a warrant and diagram thereto annexed, for the cost of the street-work named, under a contract which had been before that awarded to the contractor by the board of supervisors. All that is said in the findings may be true, and still the proceedings prior to the making and recording of the warrant, assessment, and diagram have been invalid. The board of supervisors may not have had any jurisdiction to award either of the contracts upon which the assessments were made. It was incumbent upon the defendants, asserting such liens, to show the facts establishing their validity.

As no objection was made to the answer, and the case seems to have been tried upon the theory that it was sufficient, it must be deemed here as sufficiently alleging the validity of these liens. But the court should have found the facts in regard to their creation. The bill of exceptions does disclose that evidence was introduced on this point, but there is nothing therein to indicate how the facts should have been found from such evidence. It is simply stated that the evidence was sufficient to justify certain findings named, but these findings do not assert that any of the steps required by the statute to be taken prior to the awarding of the contracts were taken. The omission of these necessary findings is not, therefore, a ground for the reversal of the judgment. Himmelman v. Henry, 84 Cal. 104, 23 Pac. Rep. 1098; Winslow v. Gohransen, (Cal.) 26 Pac. Rep. 504. The opinion of HARRISON, J., in the latter case, applying the rule of Himmelman v. Henry, supra, in which opinion it was assumed that evidence had been given in relation to a matter upon which the findings were silent, is satisfactory, and leaves nothing to be added by way of argument in support of our conclusion that the judgment ought not to be reversed because of this defect in the findings. Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

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90 Cal. 105

GARNIER *et al.* v. PORTER. (No. 14,171.)

(*Supreme Court of California.* July 1, 1891.)

SETTING OUT PRAIRIE FIRES—NEGLIGENCE—TREBLE DAMAGES—CRIMINAL ACT.

One who burns stubble on his own land to prepare it for the plow does not commit an unlawful act within the meaning of Penal Code Cal. § 384, providing that every person who willfully or negligently sets on fire any woods, prairies, or grasses on any lands is guilty of a misdemeanor; and, where due care and diligence are exercised in building the fire, and in endeavoring to control it after it has spread to adjoining land, there is no liability for the treble damages imposed by Pol. Code Cal. § 3344 upon one who negligently sets fire to his own woods, or who negligently permits it to extend beyond his own lands.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Camile Garnier and Leon Garnier against George K. Porter for damages for setting out a fire. A jury was waived, and the cause tried to the court, which found for the defendant. Plaintiffs appeal. Affirmed.

Glassell, Smith & Patton, *Smith, Howard & Smith*, and *Smith, Winder & Smith*, for appellants. *Graves, O'Melveny & Shankland* and *Chapman & Hendrick*, for respondent.

TEMPLE, C. Appeal from judgment and order refusing plaintiffs a new trial. This action is for damages for the destruction of the hay, grasses, and pasture on 2,880 acres of land. It is charged that defendant "willfully and negligently kindled a fire on his land, and set fire to grasses growing thereon in the vicinity of the plaintiffs' land, and so negligently watched and tended the said fire that it spread over the immediate space and came to and spread over the plaintiffs' land, and consumed the hay, grass, and pasture," etc. Plaintiffs claim that they were damaged in the sum of $40,000, and that by reason of section 3344 of the Political Code they are entitled to judgment for treble that sum. The answer contained a general denial. A jury having been waived, the action was tried by the court, which found for the defendant, specifically negativing all the material allegations of the complaint, and also finding that "said fire did not come upon the lands so occupied by the plaintiffs, or any portion thereof, by reason of any negligence on the part of the defendant whatever." We think the findings sufficient, and there is undoubtedly evidence to sustain them. But the plaintiffs contend that the act of defendant in setting fire to the stubble on his own lands, although an ordinary agricultural process, was unlawful, and therefore the defendant is liable for the natural consequences, irrespective of the question of negligence. This is supposed to be the effect of section 384 of the Penal Code, which is as follows: "Every person who willfully or negligently sets on fire, or causes or procures to be set on fire, any woods, prairies, grasses, or grain, on any lands, is guilty of a misdemeanor." The section is similar to section 142 of the act concerning crimes and punishments, passed April 16, 1850. That contained, however, a proviso excepting fires set by any one near his own farm for the necessary preservation thereof, after giving notice to his neighbors. St. 1850, p. 247. In 1872 an act was passed making it a misdemeanor to set fire to any wooded country or forest belonging to the state or the United States. Section 3344 of the Political Code provides that any one negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own lands, is liable in treble damages to the party injured. These citations show that from the very beginning similar penal statutes have existed in this state; and yet it has always been the policy of the state to encourage settlement of the country, the clearing of lands, and reducing them to a condition in which they would be suitable for cultivation. We all know that fire has always been one of the most common and efficient agencies in clearing and subduing wild lands; and in this state burning stubble has been from the first an ordinary agricultural process in annually preparing lands for the plow. It is not to be believed that it was intended by these penal laws to prohibit common farming operations. When the law was first enacted the lands of this state were generally uninclosed and unoccupied save for grazing purposes. Frequent fires spread over the country, destroying timber, grass, and other property. Nor are such fires very uncommon now. Unquestionably the law was designed to prevent such calamities as far as possible. To construe the statute literally, so as to interfere with ordinary farming processes, would evidently be giving it an effect not intended. Nor is such construction necessary. If one sets fire to the weeds or brush on his own land, so as to prepare it for the plow, intending to limit and control the fire, and actually does so, he has not set fire to the prairies within the meaning of this statute. If, under such circumstances, the fire gets out of his control, he has set fire to the prairie, but not willfully, although it may be negligently. It is premised that such fire is set for a lawful purpose, and there can be no doubt that agriculture constitutes such lawful purpose. If, on the other hand, a hunter, or one designing to camp upon the land of another, were to set such fire, he would perhaps be civilly liable for the natural consequences of his act, although using the greatest diligence to control the fire he had set. And there is much in the statutes cited, besides this general presumption, which favors this conclusion. The act of 1872 (St. 1871-72, p. 96) implies that one may lawfully set a forest fire on his lands, and makes it a misdemeanor to allow such fire, though "made for a lawful purpose," to spread. Section 3344 of the Political Code, in pursuance of which plaintiffs claim the right to treble damages, seems to imply that the act of setting the fire was not criminal; for it makes the liability depend upon negligence in setting the fire, or in permitting its spread. In this case the defendant, when the fire got away from him and spread over the lands of the plaintiffs, was engaged in back firing, as the custom of the farmers in that vicinity is, preparatory to burning the stubble upon his own lands in order that it might be plowed, and the evidence is that such burning was necessary to fit the land for that purpose; that in fact it could not be plowed by the ordinary means without such preparation of the land. And there was evidence which tended to show due care in setting the fire, and due diligence in endeavoring to control it after it had spread from his own land. We think the judgment and order should be affirmed.

We concur: Belcher, C. C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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89 Cal. 636

Hunt v. Maldonado. (No. 14,350.)

(*Supreme Court of California.* June 27, 1891.)

Guardians—Liability for Attorney's Fees.

A guardian is primarily liable for a debt incurred in the performance of his duties upon his contract with an attorney for professional services, and no action can be maintained thereon against the ward.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Dooner & Burdett, for appellant. *J. M. Damron*, for respondent.

Temple, C. Appeal on judgment roll from judgment on demurrer. The demurrer was properly sustained. The action is to recover an attorney's fee for services rendered to the guardian of a minor in pursuance of a written contract. The action is against the minor. If the guardian made a valid contract with the attorney, he may be held liable, and, if he pays it, and the probate court shall deem the expenditure reasonable and necessary to protect the interests of the ward, it may be allowed from the ward's estate. But it is an expense incurred by the guardian in the performance of his duties for which he is primarily liable. If an attorney's fee could ever be in the nature of a necessary for which the ward could contract, the complaint shows that the service here was not of that character. We notice that the transcript fails to show that the ward appeared by guardian, as required by section 372, Code Civil Proc. The judgment should be affirmed.

We concur: Belcher, C. C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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90 Cal. 75

Cosgrove v. Fisk. (No. 13,364.)

(*Supreme Court of California.* June 30, 1891.)

Misjoinder of Actions—Pleading—Averments of Fraud.

1. Under Code Civil Proc. Cal. § 427, providing that only those causes of action can be joined in the same complaint which all belong to one only of the classes therein enumerated, claims for breach of covenants of warranty of lands, for costs expended in another suit between the parties, and for fraud, malice, and oppression, cannot be joined, since they do not all belong to any one of the enumerated classes.

2. A complaint alleging a cause of action based on fraud, which does not aver the facts constituting fraud, is demurrable.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Ida M. Cosgrove against Asa Fisk. Demurrer sustained, and complaint dismissed. Affirmed. Code Civil Proc. Cal. § 427, provides that the plaintiff may unite several causes of action in the same complaint, where they all arise out of (1) contracts, express or implied; (2) claims to recover specific real property, with or without damage, for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; (3) claims to recover specific personal property, with or without damages, for the withholding thereof; (4) claims against a trustee by virtue of a contract, or by operation of law; (5) injuries to character; (6) injuries to person; (7) injuries to property. The causes of action so united must all belong to one only of these classes.

J. C. Bates, for appellant. *Daniel Titus*, for respondent.

Foote, C. The plaintiff, going by the name of Ida M. Carroll, when a certain agreement, marked "Exhibit A," to the amended complaint herein, was entered into, which affected certain of her rights and interests, brought this action against the defendant, Fisk, under her present name of Ida M. Cosgrove. The complaint was demurred to upon several grounds, and the demurrer sustained. Thereupon, the plaintiff declined to amend the complaint, leave having been given her to do so, judgment was made and entered that she take nothing by her action, and that the same be dismissed. From that this appeal is taken.

The complaint contains but one count, and has united therein and mingled together a cause of action based upon the incurring by the plaintiff of $60 costs, etc., in having to bring suit against the defendant to force him to comply with his agreement in writing to reconvey certain lands and premises to the plaintiff, which she had before that conveyed to him, which sum of money, claimed to be reasonably due the plaintiff by the defendant, it is alleged he refuses to pay; with a cause of action based upon the alleged fraud, malice, and oppression of the defendant, which omits to state the facts showing such fraud; and a cause of action arising from the breach of the defendant's covenant contained in an instrument (Exhibit B) made by him to the plaintiff, which covenant, it is claimed, binds him that the property he has conveyed is free and clear of all incumbrances and liens made, done, or suffered by him. It will readily be perceived, from an examination of the pleading objected to, that it mingles together several distinct causes of action, not all belonging to any one of the classes mentioned in section 427 of the Code of Civil Procedure, which rendered the complaint obnoxious to the demurrer, that several causes of action were improperly united. Section 430, Code Civil Proc. subd. 5; Canal Co. v. Kidd, 43 Cal. 184; White v. Cox, 46 Cal. 170; Watson v. Railroad Co., 41 Cal. 17.

Furthermore, the cause of action, based upon the alleged fraud of the defendant, failed to aver the facts showing the fraud, and comes within the fourth ground of the demurrer, which is well taken. Payne v. Elliott, 54 Cal. 340; Pehrson v. Hewitt, 79 Cal. 598, 21 Pac. Rep. 950. For these reasons we advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(89 Cal. 638)

KUBLI *et al.* v. HAWKETT *et al.* (No. 13,-197.)

(*Supreme Court of California.* June 29, 1891.)

PRACTICE IN CIVIL CASES—DISMISSAL—LACHES—APPEALABLE ORDER.

1. It is not an abuse of discretion to dismiss a cause for want of prosecution where a demurrer to the complaint had been on file for nearly three years and a half without being called up for determination by the plaintiff, and the evidence as to a stipulation for delay is conflicting, and by the neglect of plaintiffs' counsel the attention of the court was not called to an order, previously entered by consent, continuing the cause for trial at a time to be agreed between counsel.

2. The supreme court will not entertain an appeal from an order refusing to vacate a judgment which is itself appealable.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action by Casper Kubli and others against A. W. Hawkett, E. C. Robinson, and J. Robinson. Judgment dismissing the action as to the two defendants Robinson. Plaintiffs appeal therefrom, and from an order refusing to vacate such judgment. The appeal from the order dismissed. Judgment affirmed.

Geo. M. Shaw, for appellants. *Edw C. Robinson* and *W. R. Davis*, for respondents.

FOOTE, C. The appeals here are from a judgment dismissing the action as to two of the defendants, E. C. Robinson and J. Robinson, for the want of prosecution thereof, and from an order refusing to set aside and vacate that judgment.

It has been decided by the appellate court that it will not take jurisdiction of an appeal from an order refusing to set aside a judgment or order which is itself appealable. Railroad Co. v. McGrath, 74 Cal. 51, 15 Pac. Rep. 360; Larkin v. Larkin, 76 Cal. 323, 18 Pac. Rep. 396; Goyhinech v. Goyhinech, 80 Cal. 409, 410, 22 Pac. Rep. 175. The judgment of dismissal in this action was appealable, hence the appeal from the order just mentioned must be dismissed.

From the record it appears that the action was instituted against the defendants here and one Hawkett on the 3d of November, 1883. On the 8th of July, 1885, the default of Hawkett was duly made and entered. After admission of service of summons the two defendants here concerned filed demurrers to the complaint on the 18th of July, 1885. On the 10th of December, 1888, a motion was made by them to dismiss the action, which, upon being heard upon affidavits on both sides, was granted, and a judgment of dismissal of the action made and entered. It was set up in the affidavits for the appellants that the delay in speeding the cause to a hearing upon the issue made by the demurrers to the complaint arose from an agreement by stipulation between the parties, made at the instance of one of the defendants, which delay at his instance this defendant denied in his affidavit, as also that any such stipulation existed. Upon this state of facts the trial court dismissed the action. It appears, however, that a minute order had been made in the action, which appeared upon the minutes of the court in volume 4, at page 587 thereof, as follows: "Upon motion and consent of respective counsel it is ordered that the above cause be continued and set for a time to be agreed upon by counsel, or upon five days' notice of either." But this order was never called to the attention of the court on the hearing of the motion to dismiss the action, but was made the basis of the motion to set aside the judgment of dismissal. The court below, as is readily perceived, decided the motion to dismiss, and ordered judgment upon the facts as then presented, and did not have the benefit of this order being called to its attention, which, by an inspection of the records of the court, might easily have been done by the attorney for the appellants here, especially since the affidavit of R. A. Redman had asserted the existence of a stipulation that such action as the minute order contemplated had been entered into by him with one of the appellants, an attorney of record in the case also. The point to be decided, then, is whether the trial court was guilty of an abuse of discretion in dismissing the action, upon the facts as then presented. The affidavits were conflicting in some respects, and the facts that could have been shown by the presentation of this minute order were not before it. The appellants' attorney could have found the order, and presented it. He knew that Redman's affidavit set up the existence of such a stipulation as would perhaps excuse the delay in speeding the cause to hearing. Should the appellants now be successful in maintaining the abuse of discretion of the trial court when they or their representative failed to inform the court of the existence of this order? As it seems to us, the neglect of the appellants was the cause of the court not being fully informed in the premises, and their contention should not prevail. But it is said that it was not the duty of the appellants to have urged the hearing of the demurrer; that this should have been done by the respondents, who filed it; and hence that the court was wrong in assuming that the laches of the appellants justified a dismissal of the action. The appellants brought the action. It would seem that upon them rested the burden of prosecuting it to a finality, and that, as a step in that direction, from the facts then appearing to the court, they should have taken measures to have the demurrers determined, so that the action could progress. Simmons v. Keller, 50 Cal. 39. So that we perceive no abuse of the discretion vested in the court as to this part of the transaction. Grigsby v. Napa Co., 36 Cal. 589. Again, it is argued, notwithstanding the admission that the decisions of the appellate court are to the contrary, that the trial court possesses no power to dismiss an action for the want of prosecution. As this has been declared to be within the power of the superior court, we do not concur in appellant's view. See Pardy v. Montgomery, 77 Cal. 327, 19 Pac. Rep. 530; Cowell v. Stuart, 69 Cal. 525-527, 11 Pac. Rep. 57. For these reasons we advise that the appeal from the order refusing to set aside the judgment be dismissed, and the judgment affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal from the order refusing to set aside the judgment is dismissed, and the judgment affirmed.

(90 Cal. 84)

CARRIE v. CLOVERDALE BANKING & COMMERCIAL CO. (No. 13,201.)

(*Supreme Court of California.* June 30, 1891.)

PARTNERSHIP—ABSENCE OF PARTNER—UNAUTHORIZED SALE—INSOLVENCY—PREFERENCES.

1. Under Civil Code Cal. § 2430, providing that a partner has no authority to do any act which would make it impossible to carry on the business unless his copartner has abandoned the business to him, or is incapable of acting, the fact that one partner is temporarily absent from the state does not render him incapable of acting, nor of itself constitute an abandonment of the business, and a sale by his copartner of a flock of sheep which constituted the entire property of the firm does not pass his interest therein.

2. In an action by the assignee in insolvency of the firm against the purchaser, such sale is valid as to the interest of the partner making it, when it was made in payment of a firm debt, and not fraudulent as to creditors.

3. A complaint, in an action by the assignee of an insolvent firm against a purchaser, alleging that a sale of firm property by one partner was void for preferences under Insolvent Act Cal. 1880, § 55, may be amended by adding a count alleging that it was also void, as having been made in excess of the authority of the partner.

Appeal from superior court, Sonoma county; JOHN G. PRESSLEY, Judge.

Action in trover by Carrie, as assignee of the insolvent firm of Scott & Staley, against the Cloverdale Banking & Commercial Company. Trial to the court. Judgment for plaintiff for the full amount claimed, and defendant appeals. Reversed. The complaint alleged that the sale by one of the partners to defendant of the entire property of the firm was in violation of Insolvent Act Cal. 1880, § 55, providing, among other things, that if a person, being insolvent or in contemplation of insolvency, within one month before the filing of a petition against him, with a view to give a preference to any creditor, makes any transfer of any part of his property to one having reason to believe such person to be insolvent, such transfer is void, and the assignee may recover the property, or its value, as assets of the insolvent. An amendment to the complaint alleged in another count that the sale had been made by one of the partners during the temporary absence from the state of the other, who had not abandoned the business to his copartner, and that the sale, covering all of the property, was invalid, under Civil Code Cal. § 2430, providing, among other things, that a partner, as such, has no authority to do any act which would make it impossible to carry on the ordinary business of the partnership, or to dispose of the whole of the property at once, unless it consists of merchandise, unless his copartners have wholly abandoned the business to him, or are incapable of acting. The court found that the sale was not void under section 55 of the insolvent act, and that the sale was in satisfaction of the firm indebtedness, and was not fraudulent as to creditors.

McGee & Barham, for appellant. *A. B. Wade* and *W. E. McConnell*, for respondent.

DE HAVEN, J. This is an action brought by the plaintiff, as assignee in insolvency of the firm of Scott & Staley, to recover the value of certain sheep, alleged in one count of the complaint to have been sold to defendant by said firm, in violation of section 55 of the insolvent act of this state. The second count of the complaint charges the sale of said sheep to have been made by only one of the partners, Staley, and that, as the sheep constituted the entire stock owned by the partnership, the sale made it impossible thereafter to carry on the ordinary business of said firm, and that the business of said firm had not been abandoned to the partner making this sale, nor was the surviving partner incapable of acting, and further alleges a conversion of the sheep by the defendant. This second cause of action was not in the original complaint, but was added by way of amendment during the trial. The court, in its finding of facts, negatived the first cause of action stated in the complaint, and found the above facts alleged in the second count. It also found the full value of the sheep to be $5,157, and gave judgment against the defendant for that sum.

1. The court did not err in permitting the complaint to be amended by adding thereto the second cause of action, and thus to attack the contract under which defendant claims, upon the grounds therein alleged as well as upon those stated in the original complaint. In both the original and amended complaints the plaintiff bases his right to maintain the action upon the alleged invalidity of the said contract of sale, and it was certainly proper for the court to allow the complaint to be so amended as to state all of the grounds upon which it is claimed that such contract is invalid.

2. The fact that Scott was temporarily absent from the state at the time of the sale did not render him incapable of acting, within the meaning of section 2430 of the Civil Code, nor of itself constitute an abandonment of the business of the firm to his copartner, and the sale of the sheep made to defendant by Staley was therefore in excess of his authority as a member of the firm of Scott & Staley, (Civil Code, § 2430,) and did not pass Scott's interest in the sheep.

3. The court below, in rendering judgment in favor of the plaintiff for the full value of the sheep, proceeded upon the theory that this sale was absolutely void, and that the defendant acquired no rights thereunder which it can assert against the plaintiff. We cannot concur in this view. The sale, though ineffectual to pass the title of Scott, was binding upon Staley, and transferred his interest in the sheep, and neither he nor the firm of Scott & Staley, represented by plaintiff, can maintain an action for their conversion upon the ground that Staley had exceeded his authority in making the sale. This is the rule which is laid down by the best-considered cases, in passing upon the rights of a copartnership growing out of an unauthorized sale of partnership property by one of its members in payment of his private indebtedness. Homer v. Wood, 11 Cush. 68; Farley v. Lovell, 103 Mass. 387; Craig v. Hulschizer, 34 N. J. Law, 364. Such an act of a partner is neither more nor less in excess of his authority as such than was the sale by Staley in this instance, and we see no reason why the remedy for the unauthorized act should not in this, as well as in that class of cases, be confined to the non-consenting partner. This must be so, because he is the only person wronged, and he only to the extent of the value of his interest in the property sold. A sale of partnership property made by one partner, under the circumstances found by the court in this case, is valid as against every person, except such non-consenting partner, or one who has succeeded to his right of action therefor. The creditors of the firm of Scott & Staley have no ground for complaint which can be asserted through plaintiff as the successor of Scott, or as assignee of Scott & Staley, the court having found that the sale was made in satisfaction of an indebtedness of the firm, and that such sale was not fraudulent, nor made for the purpose of giving the defendant a fraudulent preference. The judgment in favor of plaintiff for the full value of the whole property cannot, therefore, be justified upon the claim that Scott's right, as a partner, to have the property applied to the payment of the firm debts was violated by such sale, and we know of no ground upon which the judgment can be sustained upon the facts as alleged and found. It cannot be assumed, without either allegation or proof, that Scott owned more than an undivided half of the sheep, or that upon a settlement of the accounts between himself and partner it would appear that he had a lien upon the other half, for a balance due him as a partner, and therefore a special interest therein to that extent. The sale was, as to Scott, a conversion of his interest in said property, and he had a right to so treat it as against the defendant claiming title to the whole property under it; or, in a proper action, he could have enforced against the whole property transferred, or its value in the hands of defendant, a lien for any balance which might be found due him from his copartner upon a settlement of the partnership accounts, and, these being vested rights of action relating to property, passed to the plaintiff as assignee of the insolvent firm of Scott & Staley.

Plaintiff does not ask for an accounting between the partners, for the purpose of ascertaining the interest of each in the property sold after the satisfaction of any partnership liens to which in equity it is subject, but has elected to sue for a conversion; and, we think, the amount of damages he is entitled to recover, in this form of action, is measured by the value of the undivided half of the sheep sold, without any reference to the state of the partnership accounts between Scott & Staley. This is the rule that was applied in the case of Walsh v. Adams, 3 Denio, 125. That was an action of trover, brought by one partner against a sheriff, who, on an execution against another member of the firm, had seized and sold the whole of certain property belonging to the partnership. It was contended for the defendant in that case that the plaintiff was only entitled to recover what the value of his interest in the property would appear to be on an accounting with his copartner. The trial court refused to so instruct the jury, and the supreme court of New York, on appeal, JEWETT, J., delivering the opinion of the court, affirmed this action, and said: "As to the question of damages, I entertain no doubt but that the general rule must control the question in this case. Under the rule the plaintiff was entitled to recover the value of his undivided share in the property converted by the defendant, irrespective of the question whether the partnership was or was not solvent, and without regard to the state of the partnership accounts." We find no error in the record for which a new trial should be ordered, and will therefore remand the case, with directions to enter the proper judgment upon the facts as found. Judgment and order reversed, with directions to the court below to enter judgment on the findings in favor of plaintiff for one-half of the value of the sheep as found, and interest on that amount from the date of the conversion, and for the costs of the trial in the court below.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

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90 Cal. 22

FIRST BAPTIST CHURCH OF SAN JOSÉ v. BRANHAM, Sheriff, *et al.* (No. 13,376.)

(*Supreme Court of California.* June 30, 1891.)

ACTIONS BY CORPORATION DE FACTO—REAL PARTY IN INTEREST.

1. The trustees of a corporation *de facto* can sue in its corporate name until its existence is questioned by a direct proceeding on information of the attorney general.

2. A corporation, to the trustees of which property is conveyed for its use and benefit, has sufficient interest to protect the same by suit in its own name.

Department 1. Appeal from superior court, Santa Clara County; F. E. SPENCER, Judge.

Laine & Hatch, for appellants. *J. B. Lamar*, for respondent.

GAROUTTE, J. The plaintiff, claiming to be the owner and in the possession of certain church property, consisting of real estate, the church building situate thereon, and personal property used therein and belonging thereto, brought this action to restrain the defendants from, interfering with said property, and to quiet its title thereto against said defendants other than the said Branham, sheriff of Santa Clara county. The defendants deny that the plaintiff is a corporation, and also deny that the plaintiff is seised and possessed of the property. Judgment in the trial court went for the plaintiff, and this is an appeal from an order denying defendants' motion for a new trial. The motion of respondent to dismiss the appeal is denied.

Appellant relies upon two propositions to sustain his position: *First*, that the plaintiff has no legal existence as a corporation; *second*, that it is not seised and possessed of the property involved in this litigation. As far as the present proceeding is concerned, it is immaterial whether the plaintiff is a corporation *de jure* or not. It is at least a corporation *de facto*, and as such its trustees can maintain suits in its corporate name until its existence is called in question by a direct proceeding upon information of the attorney general of the state. In People v. La Rue, 67 Cal. 530, 8 Pac. Rep. 84, the court says: "A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world except the paramount authority under which it acts, and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious." Association v. Chester, 55 Cal. 99; 4 Amer. & Eng. Enc. Law, p. 197; Tayl. Corp. §§ 145-153. It seems the plaintiff, under sanction of the court, has mortgaged this property for $4,000, which debt is still due and unpaid. Unquestionably the plaintiff could be sued in its corporate name to foreclose this mortgage, and it is equally clear that it can maintain this suit in its corporate name to protect the property secured by the mortgage. As to the second proposition contended for by appellant,—that the plaintiff was not and is not seised and possessed of the property in dispute,—the trial court found that "plaintiff, ever since its incorporation, had been seised and possessed of said property, and that said property is under the management and control of a board of five trustees, and is used for the purposes of said corporation. That the defendants do not constitute the 'First Baptist Church of San José,' but are members thereof." Upon September 1, 1858, Marshall D. Young, by deed of grant, bargain, and sale, conveyed this realty to Bird, Gish, Easly, and Pierce, their heirs and assigns. At this time these last-named parties were the trustees of the First Baptist Church of San José. In January, 1866, the plaintiff was incorporated, elected five trustees, and upon each succeeding January elected their successors. In September, 1869, Bird, Gish, and Easly, not as trustees, but as individuals, quitclaimed all their interest in the property to the trustees of plaintiff, naming them, and their successors in office. Shortly afterwards Pierce quitclaimed in the same manner. By the deed from Young the title to this property vested in these four parties, their heirs and assigns, not as trustees of plaintiff, but personally and individually; and their quitclaim deeds clearly divested them of all title they held. It was not necessary that their deed should be the joint act of all. They were not trustees of the church at this time. Neither was the property deeded to them in the capacity of trustees in the first instance. Counsel for appellants say that "if the deeds conveying this property had run to the trustees of the church without naming them, it is probable that the church, as a corporation, would have been the party to sue." It is highly improbable that the present trustees of the plaintiff were the grantees in the aforesaid quitclaim deeds, and appellant's concession works against him upon this contention. While the dry, naked, legal title to the property may not be in plaintiff, yet its trustees hold it in trust for the uses of plaintiff, and their ownership and possession is the ownership and possession of the plaintiff. We cannot understand how it is material to the interests of defendants in the action whether the plaintiff or its trustees is technically seised of the legal title to this realty. The plaintiff has certainly sufficient interest to bring this action. Let the order be affirmed.

We concur: BEATTY, C. J.; HARRISON, J.

90 Cal. 37

SCHMIDT *et al.* v. MARKET ST. & W. G. R. CO. (No. 13,337.)

(*Supreme Court of California.* June 30, 1891.)

STREET ASSESSMENTS—COLLECTION—NOTICE OF IMPROVEMENT—PLEADING.

1. Under the authority of Civil Code Cal. § 497, a city granted to defendant railroad company authority to lay tracks in its streets by an ordinance which provided that when any street over which its road should pass should be ordered improved by the city, defendant should be held for the payment of its proportion of the cost, to be collected in the manner provided for the collection of other street assessments. *Held*, that defendant, in accepting the ordinance, agreed to pay its proportion of the cost of improving any street occupied by its tracks, whether the improvement should be ordered under its then existing charter or under legislative authority subsequently granted, and that the same could be collected in any manner subsequently provided by the city.

2. Notice of a proposed street improvement, containing the whole of the resolution for the improvement, and stating its date, and the fact of its passage, is sufficient.

3. Mere defects in the mode of alleging a cause of action will not impair the validity of a judgment rendered after a trial on the merits, unless taken advantage of by special demurrer.

Department 1. Appeal from superior court, Santa Clara county; JOHN REYNOLDS, Judge.

T. H. Laine and *Laine & Hatch*, for appellant. *C. T. Bird*, for respondents.

HARRISON, J. Section 497 of the Civil Code provides that "authority to lay railroad tracks through the streets and public highways of any incorporated city or town may be obtained for a term of years not exceeding fifty from the trustees, council, or other body to whom is intrusted the government of the city or town, under such restrictions and limitations, and upon such terms and payment of license tax, as the city or town authority may provide." The ordinance of the city of San José, passed March 7, 1876, under which the defendant obtained the right to construct and maintain a street railroad in said city, contained the following condition: "Whenever any part of any street over which this road shall run shall be ordered improved or reimproved, and the work of improving such street shall be let by contract, the part of said street occupied by said track or tracks, and two feet on either side thereof, shall be let together with the rest of the street or streets; and the grantee herein named, or its successors and assigns, shall be held for the payment of the cost of said improvement, which cost shall be assessed in the proper proportion of the width of the track and two feet on either side thereof, to the whole width of the street or streets so improved, and collected in the manner provided for the collection of other street assessments, and shall become a lien upon the road-bed, rolling stock, and franchise of said road." On the 19th of May, 1887, in pursuance of proceedings therefor taken in accordance with the provisions of the act of March 18, 1885, entitled "An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers, within municipalities," (St. 1885, p. 147,) the plaintiffs entered into a contract with the commissioner of streets of the city of San José for certain improvements upon a portion of Market street over which the defendant had constructed its road, and, after the completion of the work, received an assessment for the expenses incurred for said work, together with a warrant for its collection. By said assessment the defendant, and the road-bed and space between the rails, and two feet on each outer side of the railroad track upon said portion of Market street, was assessed in the sum of $957.50, as its proportion of the cost of the improvement of said street. This action was brought to recover the amount of the assessment, and is defended upon the ground that by the aforesaid act of March 18, 1885, no liability whatever can be created against the defendant for work done under its provisions. Section 7 of the act of March 18, 1885, provides that "the expenses incurred for any work authorized by section 2 of this act, which shall not include such portion of any street as is required by law to be kept in order or repaired by any person or company having railroad tracks thereon, shall be assessed upon the lots and lands fronting thereon." No mode is provided in the act for collecting from a street-railroad corporation whose road occupies a portion of the street any portion of the expense of improving the street. It may also be observed that the original act under which the city of San José was reincorporated (St. 1874, p. 395) is equally devoid of such provision. The amendatory section referred to by counsel for appellant (St. 1876, p. 627) has reference only to the special condition therein expressed, that the street or any portion thereof is "dangerous, or in a condition to cause great public inconvenience;" and does not apply to the general provision for improvements of streets. It was doubtless in view of this fact that, when the common council of San José, under the authority given it by section 497, Civil Code, granted the defendant its franchise, it attached thereto as one of the "terms," which by said section it was authorized to impose, a condition that the defendant would bind itself to pay the cost of any improvement of that portion of the street occupied by it. The acceptance by the defendant of its franchise under this condition was equivalent to an express agreement for the payment by it of its proportion of the cost of whatever improvement of the street the city should at any time order. This liability was not limited to such improvement as the city should order under its charter as it then existed, nor was the collection of the amount confined to the mode then provided for the collection of other street assessments. The language of the condition is general in its terms, and embraces all work of improving the street, under whatever statute it may be ordered, and every mode which may be provided for the collection of other assessments. The contention by the appellant that, by the terms of the condition contained in the ordinance it can be held liable for the payment of the assessment only to the city of San José, cannot be sustained. By accepting this franchise with the terms and conditions which were made a part thereof the defendant agreed that it would be "held" for the payment of its proportion of the cost of this improvement, and that the amount of this assessment might be collected in the manner provided for the collection of other street assessments, and should become a lien upon the road-bed, rolling stock, and franchise of said road. The only reasonable construction to be given to its agreement is that it would be "held" to the person entitled to make the collection. The manner of collecting other street assessments provided by the act of 1885, under which this improvement was made, is by a suit brought by the contractor in his own name, (St. 1885, § 12, p. 157;) and this mode was pursued in the present case.

The objections made by the appellant to the sufficiency of the proceedings taken by the city officers for the improvement of the street cannot be sustained. The notice of street work which was published by the superintendent contained the whole of the resolution for the improvement, and stated the date and fact of its passage. Inasmuch as there were no "further particulars" in the resolution, it would have been idle to make a formal reference thereto in the notice, and an omission to make such reference cannot be considered a defect. The other objections refer to the absence of certain averments from the complaint, and should have been presented by special demurrer. Mere defects in the mode of alleging a cause of action will not impair the validity of a judgment rendered after a trial upon its merits. The judgment is affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.

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90 Cal. 41

PEOPLE v. BARRY. (No. 20,757.)

(*Supreme Court of California.* June 30, 1891.)

ROBBERY—ASSAULT—EVIDENCE—INSTRUCTIONS.

On a trial for assault with intent to commit robbery, the prosecuting witness testified that he was assaulted on the street by defendant and two others, who, after taking from him a dog which he held by a chain, attempted to take money from his pocket; that an officer came and took hold of defendant, who at the time had his arm around witness' neck, the other assailants having fled. Defendant testified that he saw witness assaulted, and in trying to help him became entangled in the dog-chain. *Held*, that a verdict of guilty was right, and that an instruction to find guilty of simple assault was properly refused, as inapplicable.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

J. D. Sullivan, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

FITZGERALD, C. The defendant was accused, by information, of an assault with intent to commit robbery, and two previous convictions of petit larceny. Upon arraignment he pleaded not guilty to the charge, and admitted the prior convictions. He was then tried and found guilty as charged, and sentenced to imprisonment in the state-prison for the period of six years. The evidence upon which he was convicted is substantially as follows: On the night of March 2, 1890, between the hours of 7 and 8 o'clock, as the prosecuting witness, George Engert, was walking along Harrison street, in the city of San Francisco, he was violently seized by the defendant and two others, by whom he was severely beaten and choked. One of the parties making the assault forcibly took from his possession a dog which he held by a chain, while the other two, one of whom was the defendant, attempted, by means of force and violence, and against his will, to take from his possession the sum of two dollars in money, which he at the time had in one of the pockets of his pants; that during the struggle the police officer whose attention was attracted to the place by Engert's cries for help came upon the scene, and took hold of the defendant, who at the time had his right arm around the neck of Engert; the others, on the approach of the officer, made good their escape by flight. The defendant, who was a witness in his own behalf, testified as follows: "I was coming down Harrison street on the night in question. I did not rob this man or attempt to rob him. I saw two men have hold of him and his cries made me go to him. He appeared to be fighting the other men. I tried to help him, and as I got close the dog-chain got around my legs, and I was trying to disengage myself when the policeman came up." The only error complained of, which we deem it necessary to notice, relates to the refusal of the court to instruct the jury, upon the request of the defendant, "that under the charge they might find him guilty of simple assault." We are of the opinion that this request was properly refused, for the reason that the evidence upon which he was convicted tended to show that he was guilty of the crime charged, or of no offense at all. The instruction asked was not applicable to the facts of the case, and, as the verdict is manifestly right on the evidence, we advise that the judgment and order be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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90 Cal. 68

CUMMINGS v. ROSS *et al.* (No. 13,304.)

(*Supreme Court of California.* June 30, 1891.)

APPEAL—SPECIFICATIONS OF ERROR—CONTRACTS—PAROL EVIDENCE—SETTING ASIDE JUDGMENT.

1. Under Code Civil Proc. Cal. § 659, subd. 3, providing that, where the motion for a new trial is on the ground of the insufficiency of the evidence to sustain the verdict or other decision, the statement shall specify the particulars in which the evidence is alleged to be insuffi-

cient, specifications of error, in a suit in equity, in that the evidence is insufficient to sustain the judgment, which are not directed at any one of the numerous findings of fact on the various issues involved, but at all of them, at a verdict of the jury on a particular issue, adopted by the court, and the court's finding thereon, and at the judgment, are insufficient.

2. In a suit on a certain contract it is competent for plaintiff to show that he signed a written contract, introduced in evidence by defendant, through the misrepresentation of defendant, and supposing he was signing one which had been before drawn up in lead-pencil, the contract sued on being the latter, and its execution being denied by defendant in his answer.

3. A judgment in a suit in equity, entered through inadvertence by the clerk on a special advisory verdict, while other issues of fact remain to be determined by the court, may be set aside, and a new judgment entered after adoption of the special verdict by the court and its findings on the other issues.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Code Civil Proc. Cal. § 659, subd. 3, provides that, when a motion for a new trial is made on the ground that the evidence is insufficient to sustain the verdict or other decision, the statement on which the motion is made shall specify the particulars in which the evidence is alleged to be insufficient.

George Lezinsky, for appellants. *Langhorne & Miller*, for respondent.

FOOTE, C. This action is to foreclose a mechanic's lien, and the complaint sets forth two counts,—the first for the recovery of $163.72 unpaid under a contract for $525, and the second for recovery on a *quantum meruit* of a balance of $213.83 unpaid of the sum of $567.55. Attorney's fees for $100, and costs are also claimed. The defendant Ross, in his answer, among other things, admitted the contract for $525, and claimed to have paid all he owed thereunder, and alleged another contract to have been made between the parties for $325, which included all of the work done and performed as to the second cause of action stated; and further alleged that the whole sum due the plaintiff by defendant upon any ground was the sum of $109.50, of which tender of payment had been made to, and refused by, the plaintiff. The question as to what amount was due for all the work done was by consent of both parties, upon a suggestion of the court, submitted to a jury, who upon that special issue found for the plaintiff in the sum of $289.15. By inadvertence the clerk entered up a judgment upon this verdict, when the other issues as to the existence of a mechanic's lien, amount of attorney's fees due, counter-claim set up by defendant, etc., remained undetermined by the court. Upon this being brought to its attention within a reasonable time the judgment was set aside, and evidence had as to the other matters involved. Thereupon the court adopted the advisory verdict of the jury, upon the specific matter therein involved, and made findings as to the other issues, upon which a decree and judgment was duly given, made, and entered, enforcing the lien, etc. From that and an order denying a new trial this appeal is taken.

The first point made for a reversal of the judgment and order is that the evidence is insufficient "to sustain the judgment." The reason given in the appellants' points and authorities being (at page 4) that each cause of action was based upon work performed in constructing a different story of the building; that the evidence did not show the extent of extra work done upon each story; and, as the defendant claims no extra work under the contract was to be allowed as to the work performed on one of the stories, the judgment cannot stand. The particulars in which the evidence was stated in the first specification of the insufficiency of the evidence to sustain "the verdict, findings, and judgment," does not contain anything which points to the question raised, and hence it was not fairly called to the attention of the trial court, and was therefore not to be considered. It nowhere appears therein that the evidence was alleged to be insufficient to show that any specific part of the work was unperformed, or that the value of any specific part thereof remained unproved. It is thus stated: "The evidence is insufficient to sustain the verdict, findings, or judgment for the reason that there is no testimony proving what was the value of said work, or that the same was ever performed as alleged in the amended complaint." This could only have reference to the whole work claimed to have been performed under both counts of the complaint,—that performed by virtue of the contract; that under a *quantum meruit;* and that claimed for extra work under both contracts. The only other respect in which the evidence is specified to be insufficient is thus stated: "The evidence shows that the entire amount due to the plaintiff was not more than the sum of $850, and that all of such sum had been paid." This certainly does not intelligibly assert that the evidence was insufficient to show upon which story of the building the extra work was proved to have been done. The party moving for a new trial for insufficiency of evidence must specify in the statement the particulars wherein the evidence is alleged to be insufficient, in order that the trial court and counsel may have their attention directed to the particulars relied on by the moving party, to the end that the evidence bearing on the specifications of error might be inserted in the statement and considered by the court. Eddelbuttel v. Durrell, 55 Cal. 279; Code Civil Proc. § 659, subd. 3. Besides, the specifications as to the insufficiency of the evidence to sustain the decision are not directed at any particular one of the numerous findings of fact upon the various issues involved here, but at all of them, at the verdict which was adopted by the court, and a finding made thereon, (the case being one in equity,) and at the judgment. This renders the specifications, as set out in the statement and relied on to show error, insufficient, under the rule declared by the appellate court of this state. Coveny v. Hale, 49 Cal. 555; Hayne, New Trial & App. § 150.

It is further contended that the court below erred in allowing the plaintiff to show that a certain written contract, introduced by defendant, was signed by the plaintiff through the misrepresentation of the defendant, and that the plaintiff had never intended to sign that contract, but supposed he was signing one which had before that been drawn up in lead pencil. The action was brought on a contract such as the lead-pencil draft contained; and the defendant, in the answer, denied the performance of the contract as sued on. When he introduced the written contract to show the real nature of the transaction, as he claimed, it was competent for the plaintiff, in support of the issue made, to show that in point of fact he had made no such contract as defendant had brought forward in evidence. One cannot be made to stand on a contract he never intended to make. If the defendant had sued the plaintiff, and sought to charge him on such a contract, it would certainly be competent, in defense, to show that the instrument was fraudulent. The evidence admitted was in effect to accomplish just such a purpose. The verdict rendered by the jury was, upon a special issue advisory to the court, submitted by consent of all the parties, and it was not error on the part of the court to instruct the jury as it did.

The setting aside of the judgment upon the verdict in an equity case, which judgment had been inadvertently entered by the clerk without judicial sanction, and when other issues of fact remained yet to be determined by the court, and the trial of those issues upon the evidence introduced, the adoption of the advisory verdict and finding thereon, and the other issues, was proper; and, as no error appears in the record, we advise that the judgment and order be affirmed.

We concur: Belcher, C. C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(90 Cal. 72)

Gill v. Driver *et al.* (No. 13,204.)

(*Supreme Court of California.* June 30, 1891.)

Appeal—Findings of Fact.

When ultimate facts are found which support the judgment appealed from, they cannot be overcome by the finding of probative facts tending to establish that the ultimate facts were found against the evidence.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

T. L. Carothers, for appellant. *J. A. Cooper*, for respondents.

Belcher, C. C. This is an action to recover the possession of certain personal property or its value, alleged to be $1,000, and damages for its detention. The complaint is in the usual form in such cases. The defendants, by their answer, deny all the averments of the complaint, and allege that at the time of the commencement of the action, and at all times since, they were and have been the owners and entitled to the possession of the property described in the complaint; that the value of the property was $1,000; and, while the defendants were the owners and entitled to the possession thereof, the plaintiff, under and by virtue of the proceedings in this case, unlawfully, and without their consent, took the property from their possession, and has ever since detained the same, to their damage in the sum of $10 per day. The case was tried by the court, and judgment given for the defendants, from which the plaintiff appeals, without any statement or bill of exceptions. The court found certain probative facts, and then found as follows: "(6) That plaintiff was not at the time of the commencement of this action the owner, nor entitled to the possession of the property described in the complaint, but that defendants were the owners thereof, and entitled to the possession of the same. (7) That defendants never took the said property from the possession of plaintiff at any time, but that plaintiff did at the time of the commencement of this action take the said propetry from the possession of the defendants without their consent, under a writ of replevin, and plaintiff ever since has withheld, and now withholds, the possession of said property from defendants. (8) That the value of the use of said property during the time plaintiff has so withheld it from defendants is the sum of $25, and defendants have been damaged by reason of the taking in the sum of $25, besides the value of the said property. (9) That the value of the property described in the complaint is the sum of $1,000. (10) That defendants never unlawfully took or withheld said property from plaintiff, or damaged him in any manner." The conclusions of law were that the defendants were entitled to judgment for a return of the property, and, if a return could not be had, for the value thereof, and $25 damages; and judgment was so entered. Only two points are made for a reversal of the judgment. They are—*First*, that the probative facts were wholly without the issues raised by the pleadings, and hence could not support the judgment; and, *second*, that if within the issues, they were insufficient to support the judgment. Conceding, without deciding, that these points are well taken, still they do not aid the appellant. Ultimate facts were found which do support the judgment; and they are not questioned, nor could they be, without bringing up the evidence in a statement or bill of exceptions. The rule has long been settled that, "when the ultimate fact is found, no finding of probative facts which may tend to establish that the ultimate fact was found against the evidence, can overcome the finding of the ultimate fact." Smith v. Acker, 52 Cal. 217; Pio Pico v. Cuyas, 47 Cal. 174. We think the judgment should be affirmed, and so advise.

We concur: Fitzgerald, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

89 Cal. 643

GOLDEN STATE & MINERS' IRON-WORKS v. ANGELL *et al.* (No. 13,208.)

(*Supreme Court of California.* June 29, 1891.)

CONTRACTS—EVIDENCE—CONSIDERATION—FRAUDULENT TRANSFERS—RIGHTS OF CREDITORS.

1. One A., who was superintendent and a stockholder of plaintiff, a manufacturing corporation, and who had in mind certain improvements in dredging-machines, agreed on behalf of plaintiff with W. to make the latter a machine, and to give him and plaintiff each a half interest in patents if they could be obtained on the improvements, in consideration that W. should pay for making the machine, and to this agreement plaintiff assented. Plaintiff and W. each paid half the expense of procuring the patents, which were issued to A., who never claimed any interest in them, though he did not assign them to plaintiff. *Held*, that there was sufficient evidence of a contract between A. and plaintiff, by which the latter was to own half the patents.

2. There was sufficient consideration for said contract in the fact that A. was a stockholder in plaintiff corporation, and that plaintiff paid half the costs of procuring the patents.

3. In an action by plaintiff against a receiver appointed at the instance of a creditor of A., and given possession of the patents to establish its title to a half interest therein, the creditor cannot object that there was no consideration for the contract between A. and plaintiff to give the latter one-half the patents when procured.

4. Nor can the creditor object that no formal action was taken on the contract by plaintiff's board of directors.

5. Nor can he object that the contract, being made before the patents were procured, was about property that was uncertain, and not *in esse*, and was unfair and unjust.

6. Nor can the creditor in such action object that the contract was in fraud of A.'s creditors, when such fraudulent intent is not alleged in his answer.

Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

S. W. & E. B. Holladay, for appellants. *Gray & Haven*, (*David Bixler*, of counsel,) for respondent.

MCFARLAND, J. In July, 1880, the defendant A. F. Collins obtained a money judgment against the defendant Horace B. Angell and one Cyrus Palmer, and in September of that year an execution which had issued on the judgment was returned wholly unsatisfied. In May, 1884, the said Collins and the defendant Elizabeth A. Risdon, to whom an interest in the judgment had been assigned, instituted proceedings supplementary to execution against said Angell, which resulted in an order of the superior court made May 23, 1884, commanding him to assign to one Forbes, a receiver appointed for that purpose, all the right, title, and interest which he, the said Angell, had in four letters patent for improvements in dredging-machines, to be sold in satisfaction of said judgment. A further order was made permitting all persons or corporations claiming an interest in said letters patent to commence and prosecute any action against said receiver to determine and enforce such interest. Whereupon the plaintiff herein, a corporation, commenced this present action, averring in its complaint that it is the real owner of one undivided half of said letters patent, and praying that it be decreed to be such owner; that said defendants Collins and Risdon be enjoined from proceeding further against the same; that said receiver be ordered to make an assignment of the same to plaintiff; and for other relief, etc. The court rendered judgment for plaintiff substantially as prayed for; and from the judgment and an order denying a new trial the defendants Collins and Risdon appeal.

The main history of the case, as shown by the findings and evidence, is briefly this: In May, 1880, the plaintiff was, and for many years before then had been, engaged in manufacturing various kinds of machines; and the defendant Angell was then its superintendent, and was also a director and owner of stock in the corporation. Williams & Bixler were then owners of large bodies of swamp land which they were endeavoring to reclaim and protect by levees; and, a large break having occurred about that time on the line of their works, one of their employes was told by said Angell that he thought his company (plaintiff here) could construct a dredging-machine, with certain improvements, by which levees could be constructed more cheaply than by any other method. Afterwards interviews were had upon the subject between Angell and Gen. Williams, of the firm of Williams & Bixler. At Williams' request, Angell sketched out on paper his proposed improvements, and set the draughtsman of the plaintiff to work on a drawing. When the drawing was finished Williams was somewhat pleased with it, but when an estimate of the cost was made he thought it would cost too much for an experiment. Williams & Bixler were to advance the money to pay for the construction of the machine. Angell then stated to him that he thought "there were some valuable patentable improvements there that might be worth something, and, in case there should be, that in consideration he would put the money in to build the machine and try it; that he would be entitled to one-half, and the Golden State & Miners' Iron-Works the other half, of such improvements, whatever there was that could be secured by patent." On his return to the iron-works of plaintiff he told Palmer, the president of the company, the statement he had made to Williams, and Palmer said it was "perfectly satisfactory." This report was made by Angell, as superintendent, to Palmer, as president, of plaintiff. After considering the matter a day or two, Williams & Bixler gave Angell an order employing plaintiff to go on and complete the machine according to the drawings. The machine was built by plaintiff, for which Williams & Bixler paid plaintiff $17,000. It was put into operation by Williams & Bixler at their expense, and proved a success, and was called the "Hercules Dredger." Afterwards "Gen. Williams and Mr. Palmer, the president of the plaintiff, decided it was time to secure by patent these improvements;" and Angell gave to W. Knox, the secretary of plaintiff, a rough idea of what he (Angell) thought was patentable, and requested Knox to examine the patent-office reports, and learn if they had been covered by previous patents; it not being certain at the time which, or how many, of the improvements were new. After thorough investigation, it was learned that some of the improvements were new; and rough specifications were given of them to Dewey & Co., patent solicitors, who prepared the papers necessary for applications for patents. Angell signed the applications as required by law; but the entire expense of procuring the patents was paid one-half by plaintiff, and one-half by Williams & Bixler; and, with the full knowledge and consent of Angell, they were to have the patents. Angell did not pay anything whatever towards procuring them, and the money was not paid for Angell, but by and for plaintiff and Williams & Bixler. Angell claimed no interest in the patents whatever, and when they were received he turned them over to Palmer, president of the plaintiff. In this way three patents were procured, viz.: No. 246,362, issued August 30, 1881; No. 268,977, issued December 12, 1882; and No. 278,482, May 29, 1883. Afterwards, under similar arrangements, plaintiff was employed to make certain alterations and improvements on another dredger called the "Atlas;" and another patent, No. 293,932, issued February 19, 1884, was procured. All these patents were issued to Angell, except No. 268,977, which was issued one-half to Angell and one-half to Williams & Bixler. Angell in his testimony says: "I have never in any way claimed or asserted any interest in these patents, or the improvements described therein. * * * I took the situation in this way: Here was a certain job of work to be done, for which the foundry and machine works, when represented, would probably be able to procure the job and make some money, and I was there in their employ, and I considered it a duty to do all I could towards fulfilling the wants of these parties, customers of that concern, and I started in to get up something to accomplish that particular object." The court finds that no assignment of the patents was made by Angell to plaintiff, but that he held the same in trust for plaintiff. On November 13, 1884, said Angell made application to the superior court to be discharged from his debts as an insolvent debtor; and on March 13, 1885, a decree so discharging him was entered. He was actually insolvent at the time the foregoing transactions took place, but he testified that he did not then know of his insolvency, and considered his financial condition good.

We have alluded to some extent to the evidence in the case, because the main point made by appellants, and reiterated at nearly every stage of their argument, is that there is no proof of any contract between Angell and plaintiff by which the latter was to own one-half of the patents. But we think that there was ample proof of such contract. Angell expressly stated to the president of plaintiff that the latter was to have one-half of the patents, and his conduct afterwards was a continuous and complete ratification of that statement. He allowed plaintiff to expend its own money for its own benefit in obtaining the patents, and expressly disclaimed any interest therein for himself. Certainly there was no want of assent on his part.

It is contended that there was no consideration for the contract; but Angell was interested, not only as superintendent, but also as a stockholder in plaintiff to procure the contract with Williams & Bixler; and the "prejudice suffered" by plaintiff in paying for the patents was a sufficient consideration. Civil Code, § 1605. Moreover, it is difficult to see how appellants are interested in that question. And the same may be said of the point that there was no formal action taken on the matter by the board of directors of plaintiff; neither the corporation nor any of its stockholders are making any objection. Something is said in the briefs about defrauding creditors; but, in the first place, there is no evidence of any intent to do so, and, in the second place, there is no averment in the answer that the transfer of the improvements and the right to patents therefor to plaintiff and Williams & Bixler were made with intent to defraud creditors. As to the other points made, as that the contract was about property that was uncertain and not *in esse*, that it was unfair and unjust, etc., while we think that they are not well taken on their merits, it is sufficient to say that they refer to matters in which third parties, whether creditors or not, are not concerned. If plaintiff, through carelessness, had not neglected to have Angell make a formal assignment of the patents as they were received, which Angell was always willing to do, all trouble in the premises would have been avoided. The inchoate right which Angell had to apply for patents for certain improvements to dredging-machines which he thought he had discovered, "schemes which he had in his head," was nothing that could have been reached by a creditor. Curt. Pat. §§ 174, 175. It was merely a privilege dependent for its exercise upon his own volition. We do not know of any process by which he could have been compelled by a creditor to procure a patent. This right he transferred to plaintiff and Williams & Bixler under the circumstances above stated. He chose to perform his contract, and to allow them to procure the patents in his name by the expenditure of their own money; and we think that the court below was right in holding that one-half of the patents thus procured was in justice and equity the property of plaintiff. The judgment and order denying a new trial are affirmed.

We concur: SHARPSTEIN, J.; DE HAVEN, J.

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89 Cal. 597

NEWMAN v. DUANE. (No. 13,282.)

(*Supreme Court of California.* June 26, 1891.)

TRIAL BY JURY—ACTION TO RECOVER REAL PROPERTY.

In an action for the possession of land defendant is entitled to a trial by jury, under Code Civil Proc. Cal. § 592, giving the right to a jury trial "in actions for the recovery of specific real or personal property," and plaintiff cannot deprive him of this right by framing his complaint so as to make the action an equity case, under

Code Civil Proc. Cal. § 738, providing that an action may be brought by any person against another who claims an interest or estate in real property adverse to him, for the purpose of determining such adverse claim.

Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Code Civil Proc. Cal. § 738, provides that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

Moses G. Cobb, for appellant. *Olney, Chickering & Thomas*, for respondent.

MCFARLAND, J. The plaintiff, in his complaint, merely alleges that he is owner in fee "and in possession" of certain described land; and that defendant, without any right whatever, claims an interest or estate in said land, adverse to plaintiff. The complaint, as to the real issues between the parties, is quite child-like and bland, and does not contain any intimation that defendant was in the actual possession of the land, and that what plaintiff mainly wanted was to put defendant out. The prayer does not suggest that plaintiff would like to have a writ of restitution. But the answer denies all the allegations of the complaint, and sets up that defendant has been in possession of the land for more than fifteen years; and the court finds that he had been thus in possession for at least four years before the commencement of the action. Judgment was rendered for plaintiff, which, among other things, decrees that "plaintiff do have a writ of possession of said premises as against the defendant and all persons claiming under him." From the judgment, and from an order denying a new trial, defendant appeals.

Before the commencement of the trial defendant duly demanded a trial by jury; "but the court refused to grant him the same, on the ground that the case was an equity case, in which he, said defendant, was not entitled to a jury trial as a matter of right." Defendant duly excepted and the first point made by appellant is that the court erred in refusing his demand for a jury. We think that the appellant was clearly entitled to a jury; not only upon the principles discussed and determined in Donahue v. Meister, (Cal.) 25 Pac. Rep. 1096, but in accordance with the specific language of section 592 of the Code of Civil Procedure, which expressly gives the right to a jury trial "in actions for the recovery of specific real or personal property." In the case at bar, where the defendant was in possession, claiming adversely to plaintiff, the obviously proper action to have been brought was what we call an "action of ejectment,"—that is, an action "for the recovery of specific real property,"—in which case the defendant would have been clearly entitled to a jury. Plaintiff has endeavored to accomplish the same result—that is, the restitution of possession—in the form of a statutory action under section 738 of the Code of Civil Procedure. Assuming that said section contemplates a case where the plaintiff is out of possession and the defendant in possession, still it is evident that the plaintiff herein, by simply framing his complaint in a particular way, could not deprive the defendant of a jury trial of the issues raised by his answer. For the error committed in refusing the appellant a jury the judgment must be reversed, and it is unnecessary to notice the other points made by the appellant. Judgment and order reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; DE HAVEN, J.

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89 Cal. 632

HEALD *v.* HENDY. (No. 13,094.)

(*Supreme Court of California.* June 27, 1891.)

PRINCIPAL AND AGENT—ACTION ON ACCOUNT—INTEREST.

1. In an action to recover for provisions furnished to a third person on defendant's account it appeared that defendant owned a mine, and that the provisions were furnished to a boarding-house keeper, where the miners boarded, under an agreement between plaintiff and defendant's superintendents at the mine that defendant would pay for them. The superintendents had purchased provisions from other persons for the use of the boarding-house, and defendant had paid for them to plaintiff's knowledge. *Held*, that the superintendents had authority to make the agreement for defendant as his ostensible agents, under Civil Code Cal. § 2300, providing that "an agency is ostensible when the principal, intentionally or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."

2. When it is necessary to the operation of a mine that provisions be furnished to the keeper of a boarding-house at which the miners live, the superintendent of the mine has authority to order the provisions to be furnished, and to bind the operator of the mine to pay for them, but not to bind him to pay for articles not necessary for the use of the boarding-house.

3. Civil Code Cal. § 3287, providing that "every person who is entitled to recover damages certain or capable of being made certain by calculation, and the right to recover which is vested in him on a particular day, is entitled also to recover interest thereon, from that day, except during such time as the debtor is prevented by law or by the act of the creditor from paying the debt," does not apply to an action for the price of goods delivered on account.

4. Civil Code Cal. § 1917, authorizing the recovery of interest on "moneys lent or due on any settlement of accounts," does not authorize the recovery of interest on an account for goods sold and delivered, until the account has been settled, and the balance due ascertained.

Department 1. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Civil Code Cal. § 3287, provides that every person who is entitled to recover damages certain or capable of being made certain by calculation, and the right to recover which is vested in him on a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law or by the act of the creditor from paying the debt.

Wm. H. H. Hart, (*Aylett R. Cotton*, of counsel,) for appellant. *G. G. Blanchard, Philip Teare, A. C. Adams, Irwin & Irwin*, and *A. C. Adams*, for respondent.

GAROUTTE, J. This is an action to recover $2,370.48 on account of goods, wares, and merchandise sold and delivered by plaintiff to defendant at his special instance and request, and also for money paid and expended for the use of defendant, in the sum of $827.47 on a balance of account. Plaintiff asks judgment for the amounts and interest upon the items of the account from the time they became due. Defendant admits a certain amount of the indebtedness and denies the balance. At the trial judgment went against him, and he appeals from the judgment and the order denying his motion for a new trial.

The plaintiff is the owner of a store at Nashville, Eldorado county. Defendant resides at the city of San Francisco, and owns a mine near plaintiff's store. The goods, wares, and merchandise upon account of which this action was brought were furnished by plaintiff to one Stein-Kœnig, who kept a boarding-house at this mine for the purpose of boarding the men therein employed. The evidence was quite contradictory in many respects, and in those particulars must be held to support the judgment. Stein-Kœnig, it appears, had neither capital nor credit; and, in order that he might continue in business, so that the miners would have a place to board, Templeton and George W. Hendy, the respective superintendents of the mine, told the plaintiff to furnish him all goods necessary for the use of the boarding-house, and the defendant would pay for the same. As near as can be ascertained from the brief of the respondent's counsel, they rely upon an ostensible agency in these superintendents, and also upon a special authorization direct from the defendant to the superintendents to incur this indebtedness. The evidence of Stein-Kœnig and Templeton tends quite strongly to indicate a special authority from defendant, and the evidence also seems to be amply sufficient to support a finding of ostensible agency. "An agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him." Section 2300 Civil Code. The evidence shows beyond any doubt that the superintendents of the mine were purchasing meat, flour, milk, etc., from various parties for the use of the boarding-house, which articles were paid for by the defendant, and with the knowledge of plaintiff. From these facts it is safe to say that the defendant intentionally or by want of ordinary care caused the plaintiff to believe that these mining superintendents were his agents in the purchase of these articles from plaintiff. The record discloses the fact that it was absolutely necessary that provisions should be furnished this boarding-house, in order that the mine might continue in operation; and it would seem that, aside from any express authority from the defendant to purchase these articles, and regardless of the question of ostensible agency, the respective superintendents of the mine, by virtue of their positions alone, had the power to bind the defendant for the payment of these goods. Jones v. Clark, 42 Cal. 180; Stuart v. Adams, (Cal.) 26 Pac. Rep. 970. Viewing the case from any of the foregoing standpoints, we are unable to affirm the judgment to the extent of $81.74, that being the value of articles delivered clearly not for the necessary use of the boarding-house. The plaintiff is not entitled to interest under the first count of his complaint. Section 3287 of the Civil Code has no application to this character of actions. Section 1917 of the Civil Code limits the recovery of interest to "moneys lent or due on any settlement of accounts, from the day on which the balance is ascertained." These accounts were never settled and a balance ascertained. The Statutes of 1869-70, p. 699, was similar to section 1917 of the Civil Code; and in a case analogous to this it was said: "The court below erred in rendering a judgment for interest on the account sued upon." Bank v. Northam, 51 Cal. 387. See, also, Brady v. Wilcoxson, 44 Cal. 245.

Let the judgment be reversed and the caused remanded, with directions to the trial court to modify the judgment by striking therefrom the sum of $81.74, and also the amount of interest computed upon the sum found due under the first count of the plaintiff's complaint.

We concur: PATERSON, J.; HARRISON, J.

PER CURIAM. It is ordered that the opinion filed herein on the 27th day of June, 1891, be amended (and the same is hereby amended) by striking therefrom the last paragraph thereof, and inserting in lieu thereof the following: "Let the cause be remanded, with direction to the trial court to modify the judgment by striking therefrom the sum of $81.74, and also the amount of interest computed upon the sum found due under the first count of the plaintiff's complaint; the judgment, thus modified, to stand affirmed as of its date."

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90 Cal. 169

In re MISAMORE'S ESTATE. (No. 14,024.)

(*Supreme Court of California.* July 3, 1891.)

ADMINISTRATORS—SETTLEMENT OF ACCOUNT—LIABILITY FOR RENTS AND PROFITS—LACHES.

1. The probate court can make an administrator responsible for rents and profits of his decedent's land, where he occupies and uses it as his own.

2. Where an administrator has taken possession of property as part of the estate, the time before the settlement of his account is not to be considered in determining whether the heirs have been guilty of laches in not asserting their claim thereto.

Commissioners' decision. In bank. Appeal from superior court, Yuba county; PHILIP W. KEYSER, Judge.

Forbes & Dinsmore, for appellants. *Wm. G. Murphy* and *E. A. Davis*, for respondent.

FOOTE, C. This is an appeal from an order settling and allowing the final account of an administrator. The contestants and appellants are the children and heirs at law of the decedent. The principal matter at issue is the responsibility of the administrator for rents, issues, and profits derived from the possession and occupation of a certain tract of land, a possessory claim left by his decedent. The contestants claim that the administrator should be charged "with this land, and with the reasonable value of the rents, issues, and profits thereof; and during the periods when he has farmed it himself, and made a profit in excess of the reasonable value of the rents, issues, and profits, then with the profit made by him out of the land." In opposition to this, the administrator claimed, and endeavored to show, that the decedent had no title to the land; that it was a mere possessory or "squatter's claim;" that he only took possession to take off the growing crop of the year 1866, that in which his decedent died; that he surrendered the land under title paramount to other parties, and that he afterwards bought it from the true owners, and never held possession, except adversely to his decedent's estate, save during the year 1866; that he became the owner by paramount adverse legal title, and has always held it as such since 1873, and never held possession as administrator since 1867.

As to the point made that the probate court cannot make an administrator responsible for rents and profits of decedent's land, it is settled that it can do so, where he occupies and uses it as his own. Walls v. Walker, 37 Cal. 431.

So far as the finding of laches on the part of the contestants is concerned, we do not see how it is supported by the evidence. The administrator, as trustee, presents his final account, the estate being open and unsettled, for allowance; and as to all property and matters over which he has control, and about which he acts in that capacity, he asks that they may be settled in this proceeding. To say then that as to these matters which pertain to his final account as trustee, and for which he seeks judicial sanction, the contestants shall not be heard, because the administrator has chosen to neglect the final settlement of the estate, hardly comports with the doctrine of courts of equity in such cases. It might be, as to the span of horses, claimed to be exempt, that, under a certain state of facts, the administrator would not be responsible for them to the contestants in this action. But the state of facts, viz., that there was an order of the court setting them aside as exempt, and thus taking them out of the estate, does not appear satisfactorily to have existed. Hence, as the administrator took them as estate property, the contestants are not prevented by laches from having him to account for them. With reference to the other principal matter,—that is, the alleged responsibility of the administrator for the rents, issues, and profits of his decedent's land,—it may be said that, if the evidence and findings showed that no damage resulted to the estate from his surrender of the land, or that his surrender was to a paramount adverse title asserted by another, then he would not be responsible for rents, issues, or profits. But neither the evidence nor the findings sufficiently show such a state of facts. It becomes unnecessary to make special mention of any of the other points made, but, for the reasons stated, we are of opinion that the judgment and order should be reversed.

We concur: TEMPLE, C.; VANCLIEF, C

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

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90 Cal. 163

NUTTALL v. LOVEJOY *et al.* (No. 13,666.)

(*Supreme Court of California.* July 2, 1891.)

SWAMP LANDS—APPLICATION TO PURCHASE—INCONSISTENT FINDINGS—NEW TRIAL.

1. No right to swamp and overflowed land, granted by the United States to the several states by Act Cong. Sept. 28, 1850, could attach by reason of an application to purchase, made before the land was segregated and set apart to the state.

2. In an action to establish title to swamp and overflowed land, in which the adaptability of the land to cultivation was a material issue, the court found that the land was subject to periodical overflow, and not suitable for cultivation, but further found that it was in cultivation, and other facts inconsistent with the finding that it was unfit for cultivation. *Held* that, as the suitability of the land for cultivation was not determined, and was a material issue, a decision based on the finding of the ultimate fact that it was unfit for cultivation was a decision against the law, and a new trial was properly granted.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

N. O. Bradley, *G. E. Lawrence*, and *W. A. Gray*, for appellants. *Lamberson & Taylor*, for respondent.

PATERSON, J. A contest arose in the office of the surveyor general as to which one of the parties hereto had the better right to purchase the land in controversy, and on March 28, 1888, an order was made referring the contest to the superior court of the county of Tulare for a final determination of the conflicting claims. That court found that the land in controversy was on September 28, 1850, and ever since has been, swamp and overflowed land, and as such became the property of the state by virtue of the act of congress passed September 28, 1850; that the land was segregated and set apart to the state of California on October 14, 1884, and on December 1st following a certified copy of the township plat, duly approved, was filed with the register of the state land-office: that on December 31, 1883, the defendant Lovejoy filed an affidavit and application in due form for the purchase of the land in the office of the surveyor general, which application was approved by said surveyor general on October 15, 1885; that on December 9, 1885, the register of the state land-office issued and delivered to defendant Lovejoy a certificate of purchase in due form, and said certificate has never been annulled or canceled; that the defendant Hall filed his application in due form to purchase the land September 9, 1887; that the plaintiff, Nuttall, filed his affidavit and application in due form to purchase the land on January 12, 1888. The defendant Stevenson made no appearance at the trial, and judgment went against him by default. The court rendered judgment in favor of the defendant Hall; and the plaintiff, Nuttall, and the defendant Lovejoy both moved the court for a new trial. The plaintiff's motion was granted, and the motion of the defendant Lovejoy was denied. The defendant Lovejoy appealed from the judgment and from the order denying her motion for a new trial, and the defendant Hall appealed from the order granting plaintiff a new trial, but did not appeal from the judgment.

The defendant Lovejoy's application to purchase having been filed before segregation by the United States to the state, no right attached by reason of such application, nor by reason of the subsequent approval and certificate of purchase issued to her. Buchanan v. Nagle, (Cal.) 26 Pac. Rep. 512. The court, therefore, properly decided against her claim, and, as no errors of law occurred at the trial, her motion for a new trial was properly denied. Her appeal from the judgment is also without merit. She alleged in her answer that the lands were unfit for cultivation. The defendant Hall alleged the same thing. She is the only party who has appealed from the judgment. If the findings show that the land is unfit for cultivation, she cannot complain; it is a finding in her favor. If they show that the lands are unfit for cultivation, it is a finding outside of the issues between her and the defendant Hall, who has not appealed from the judgment. Estate of Doyle, 73 Cal. 564, 15 Pac. Rep. 125; Bulwer Con. Min. Co. v. Standard Con. Min. Co., 83 Cal. 589, 23 Pac. Rep. 1102. In any event, a finding as to the character of the land could in no way affect the right of the defendant Lovejoy, because, as stated above, no right could attach by reason of an application filed before the lands were segregated.

We think the court did not err in granting the plaintiff's motion for a new trial. The plaintiff alleged that he was an actual settler on the land, and that said land was suitable for cultivation. The findings of the court on the issue as to the character of the land are uncertain and contradictory. The court found that at all time stated the land had been, "and yet is, subject to periodical overflow, and is not suitable for cultivation;" but afterwards found that the land was formerly a portion of the bed of Tulare lake, and "was first uncovered by the receding waters of said lake in the summer of 1883, and the waters of said lake rose again and covered said land in the spring of 1884; that ever since the fall of 1884 said waters have been gradually receding, and in the fall of 1887 said land was again wholly uncovered, and since said time such waters have so receded that at the time of this trial they were at least four miles from any portion of said lands; * * * that the said land is level, and of good quality, of sandy loam, and can be readily plowed, seeded, and cultivated by the ordinary processes of tillage; that the plaintiff Nuttall, plowed a few acres of said land in March, 1888, and sowed the same with barley and alfalfa; that the land was so dry at that time that for lack of moisture but a small portion of the seed then sowed by him germinated, and that portion which did so germinate soon died for lack of moisture, there having been no rain, after said seeds were sown, sufficient to wet up the ground where they were sown; that more than one-half of said seed remained in the ground where sown until the rains came in the month of November, 1888, when such seeds germinated, and the alfalfa and barley plants coming therefrom are now growing on said land; that the country surrounding said lake was formerly used as a vast pasture for the raising of stock, but of recent years it has been entered upon by persons who have broken it up and plowed and farmed the land, and constructed numerous irrigating ditches for the purpose of taking water from the several streams hereinbefore named, and conducting it upon their said lands for the purposes of irrigation, and by such means a great quantity of the waters of said streams is being each year taken therefrom for said purpose and conducted upon said lands; that in the year 1862, said year being an exceptionally wet season, the waters of said lake suddenly raised to a great height; and again in the year 1867, said year being an exceptionally wet season, the waters of said lake again suddenly raised to a great height, and, should a season again occur such as either the season of 1862 or the season of 1867, the land mentioned in finding 1 would be entirely covered by the waters of said lake; and the numerous ditches leading out of said rivers and creeks, and the large body of land used for agricultural purposes, and irrigated by waters drawn from said streams, would not prevent the sudden rise of said lake and the overflow of said land by the waters thereof." While the finding of the court that the land is unsuitable for cultivation is the finding of an ultimate fact, it is inconsistent with the other facts found and quoted above; and for this reason the court below properly set aside the findings and granted a new trial.

It is claimed that the plaintiff was not entitled to a new trial on the ground that the decision is "against law," and in support of his contention appellant Hall cites cases holding that a new trial cannot be granted upon the ground that the conclusions of law are not supported by the findings of fact. This may be conceded. The question here is not whether the court below erred in its conclusions of law, but whether the findings fail to dispose of some material issue. As between the plaintiff and the defendant Hall, the question as to the character of the land—whether it was suitable or unsuitable for cultivation—was a material issue. That issue has not been disposed of, because the findings are so inconsistent and contradictory that it is impossible to tell therefrom whether the land is or is not suitable for cultivation. Where the findings do not determine all the issues raised by the pleadings with respect to which evidence was introduced, the decision is against law, and a new trial may be granted on that ground. Knight v.

Roche, 56 Cal. 15; Hayne, New Trials & App. § 99. The judgment and the orders are affirmed.

We concur: McFARLAND, J.; HARRISON, J.; SHARPSTEIN, J.; DE HAVEN, J.

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90 Cal. 157

BARNHART v. FULKERTH *et al.* (No. 13,682.)

(*Supreme Court of California.* July 2, 1891.)

ESTOPPEL—PLEADING—REPLEVIN.

In an action of replevin against a sheriff, the defendant justified under an execution against a third person, and pleaded that before levying on the goods in plaintiff's possession plaintiff stated to him, in answer to his inquiries, that the goods belonged to the execution debtor, and that plaintiff held possession as pledgee. The answer further stated "that the levy was made in sole reliance upon the statement of plaintiff." *Held*, that the answer sufficiently pleaded an estoppel, under Code Civil Proc. Cal. § 1962, subd. 3, which provides that, "whenever a party has deliberately led another to believe a particular thing true, and to act upon such belief, he cannot be permitted to falsify it."

Commissioners' decision. In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

Wright & Hazen, for appellant. *W. E. Turner*, for respondents.

FITZGERALD, C. This is an action brought by plaintiff against the defendants to recover the possession of 4,255 bags of wheat, alleged to have been wrongfully and unlawfully taken by the defendants from the possession of plaintiff, or for the sum of $8,260, the alleged value thereof, in case delivery cannot be had, and for the further sum of $2,000 as damages for the detention thereof. The answer specifically denies the material allegations of the complaint, and justifies under writs of attachment and execution. Plaintiff demurred generally to the answer, and separately, upon the same ground, to that part of it setting up matter by way of an affirmative defense. The demurrer was overruled, and the case tried by the court, without a jury, and judgment rendered in favor of plaintiff in the sum of $2,540, and costs. This appeal is taken by plaintiff, on the judgment roll alone, from that part of the judgment which denies to him a portion of the relief claimed and demanded by him in this action. The case has been here before on appeal, and is reported in 73 Cal. 526, 15 Pac. Rep. 89. All the questions necessary to the decision of the case were then decided, and are now the law of the case, with the single exception of the matter by way of estoppel *in pais*, pleaded for the first time in the answer as amended, after the case was reversed on the former appeal, but which was sought to be proved and was relied upon as a defense at the previous trial. As to whether the matter set up by way of estoppel was necessary to be pleaded, we are not called upon, in view of the amended answer, to decide. But this court on the former appeal so considered and disposed of the questions of estoppel raised by the evidence in the case, and relied on as matters of defense, against the objections made and urged by plaintiff, upon the ground that such defense was not available because it was not set up in the answer. The facts necessary for a proper understanding of the case, as now presented for decision, are substantially as follows: In November, 1878, H. O. Matthews and his wife commenced an action in the district court of Stanislaus county, against one J. T. Davis, to recover on his promissory note made in their favor for $3,500. After the filing of the complaint a writ of attachment was issued at their instance against the property of Davis, and placed in the hands of the defendant Fulkerth, the sheriff of the county, who executed the same by levying upon and taking into his possession, as the property of Davis, the wheat in controversy. This wheat was, at the time of the levy, in the possession of the plaintiff, Barnhart, as pledgee, to whom it had been previously delivered, by transfer and indorsement of the warehouse receipt by Davis, as collateral security for the payment of the sum of $2,500 and interest, theretofore loaned by him to Davis. Immediately upon the service by the sheriff of a copy of the attachment and the notice in writing, usual in such cases, upon the plaintiff, Barnhart, he, Barnhart, in answer thereto and in response to inquiries made at the time by the sheriff and the attorney of Matthews and wife, claimed and represented to them that he held possession of the wheat as pledgee of Davis; that Davis was the owner thereof; and that all he wanted was his money. The object of this inquiry, as the plaintiff knew, and in response to which he made the foregoing statement, was for the purpose of ascertaining whether Davis was the owner of the wheat in question, and whether it was subject to be levied upon as such. The sheriff then immediately tendered to plaintiff, in manner and form as required by law, the sum of $2,600, which sum was in excess of the amount due. This, after admitting its sufficiency, Barnhart refused to accept. The sheriff then deposited the money with the county treasurer to the order of plaintiff, and notified him to that effect, but plaintiff gave him notice that he would not accept it. The sheriff and the attorney of Matthews and wife having no knowledge differing from the representations and information given by the plaintiff in relation to the ownership of the wheat in question, and believing and relying solely thereon, as plaintiff knew they would, the sheriff then, in obedience to the instructions of the attorney of Matthews and wife, given after the money tendered was deposited with the county treasurer to plaintiff's order, and immediately preceding the levy, executed the writ of attachment by levying upon and taking into his possession, as the property of Davis, the wheat in controversy, which he afterwards placed in the possession of his co defendant, Perley, for the safe-keeping and protection thereof. After this action was commenced, and during the detention of the property in question by the sheriff under the writ of attachment, Matthews and wife recovered judgment against Davis for the amount claimed, with interest and costs, and thereupon execution was duly issued and levied by the defendant Fulkerth, as sheriff, upon this wheat, as the property of Davis, and he sold 250 tons of it, leaving 25 tons which he released from execution, notifying plaintiff at the time thereof. After the sale, defendant Fulkerth again tendered to plaintiff the full amount due from Davis, which he refused to accept. The defendant Fulkerth then withdrew the deposit from the county treasurer, and placed it in a solvent bank, but in his own name, where he has ever since kept it, with the full knowledge of the plaintiff, and being at all times ready and willing to pay it over, with interest up to the date of the tender. It further appears that the plaintiff applied for and received from Davis other security which was amply sufficient to pay Davis' indebtedness to him, and that the wheat which is the subject of this action was not the property of Davis at the time he delivered the possession of it to plaintiff.

These are substantially the facts as shown by the findings, and, as none of the evidence taken at the trial was brought up by the record, they must be presumed to be supported by the evidence. The questions in relation to the ownership of the grain and the sufficiency of the tender were settled adversely to plaintiff by the decision of this court on the former appeal, so that they are not now proper subjects for discussion. This case is therefore narrowed down to the question whether the plaintiff is estopped from denying the truth of the statements intentionally and deliberately made by him to the defendant Fulkerth and the attorney of the attaching creditors, which he led them to believe were true, and upon which belief they acted solely in making the levy referred to. It is contended by appellant that the demurrer should have been sustained on the ground that the matter of estoppel relied on as a defense is not sufficiently pleaded in the answer; and, further, that neither the pleadings nor findings are sufficient to support the judgment based upon an estoppel. Section 1962, subd. 3, Code Civil Proc., provides: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." Conceding, but not deciding, that this estoppel is not embraced within that class of estoppels *in pais* necessary to be pleaded, we are of opinion that the answer is in all respects sufficient, and that the matter pleaded by way of estoppel meets fully the requirements of the above section of the Code of Civil Procedure. We think the demurrer was properly overruled. Mr. Justice THORNTON, who delivered the former opinion in this case, uses the following language with reference to the question of estoppel involved here: "We do not think this estoppel made out, for the reason that it does not appear that the levy was made in sole reliance upon the statements made by Barnhart." The answer avers, among other things, by way of estoppel, and the court so finds, "that the levy was made in sole reliance upon the statement of the plaintiff, Barnhart." As the estoppel herein was sufficiently pleaded, and the findings follow and support the allegations of the pleadings, we are of the opinion that the plaintiff is estopped from denying the truth of the statements out of which this action arose, and which were made by him at the time and under the circumstances referred to; also from setting up title to the property in question in any one but Davis; and, further, that the judgment based thereon, and upon which this appeal is taken, should be affirmed, and we so advise.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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90 Cal. 174

PEOPLE v. BROOKS. (No. 20,772.)

(*Supreme Court of California.* July 6, 1891.)

CRIMINAL LAW—NEW TRIAL—DISCRETION OF TRIAL COURT.

A motion for a new trial in a criminal case is largely addressed to the discretion of the trial court; and a motion granted upon the ground that the verdict is not sustained by the evidence will not be reversed, except where there is no evidence which conflicts with that upon which the verdict rests.

In bank. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

W. H. H. Hart, Atty. Gen., and *Frank P. Kelly*, Dist. Atty., for the People. *C. C. Stephens* and *J. A. Donnell*, for respondent.

PER CURIAM. A motion for a new trial in a criminal cause is very largely addressed to the discretion of the court before which the trial was had; and, when one of the grounds upon which it is asked is that the verdict is contrary to the evidence given in the cause, the action of that court in granting the motion will not be reversed by this court, unless the record clearly shows that there was no evidence which conflicted with that upon which the verdict rested. In the present case the action of the court in granting the motion is fully sustained by the matters contained in the bill of exceptions, both upon the foregoing ground, and also upon the ground of newly-discovered evidence contained in the affidavits offered upon the motion on the part of the defendant. The order is affirmed.

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90 Cal. 175

YOUNG v. AGUIRRE. (No. 14,036.)

(*Supreme Court of California.* July 10, 1891.)

APPEAL—SUFFICIENCY OF EVIDENCE.

Where the evidence is sufficient to support the verdict the judgment will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Action by W. H. Young against M. G. Aguirre to recover possession of personal property. Verdict and judgment for plaintiff, and new trial denied. Defendant appeals. Affirmed.

John Haynes and *Jesse F. Waterman*, for appellant. *H. H. Appel*, for respondent.

VANCLIEF, C. The action is for the recovery of the possession of personal property alleged to have been wrongfully taken from the plaintiff by the defendant. The defendant, being sheriff, justifies the taking of the property by virtue of a writ of attachment against one Cooke, alleging that the property belonged to Cooke, and was subject to the attachment. Trial by jury, verdict and judgment for plaintiff. Defendant appeals from the judgment and from an order denying his motion for a new trial. The plaintiff claims the property by purchase from Cooke, made 40 days prior to the attachment. The appellant makes two points: (1) That the evidence does not justify the verdict of the jury, in that it fails to show that the alleged transfer of the property from Cooke to plaintiff was accompanied by an immediate delivery, and followed by an actual and continued change of possession; and (2) that the verdict is against law, for the reason that the jury must have disregarded an instruction of the court as follows: "If you find that there was no actual, open, unequivocal change of possession, carrying with it the usual marks and indications of ownership, manifested by such outward signs as would render it evident to the world that the possession of Cooke had wholly ceased, and that the claims of the vendee were absolute, then you shall find for the defendant." The two points are substantially the same, and present only the single question: Does the evidence justify a finding that the transfer was accompanied by an immediate delivery, and followed by an actual and continued change of possession? This question should be answered affirmatively, and appellant's claim to the contrary is not sufficiently plausible to justify a statement of the evidence here. I think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

90 Cal. 172

NOTMAN v. GREEN. (No. 14,164.)

(*Supreme Court of California.* July 5, 1891.)

ACTION ON NOTE—PLEADING.

In an action on a note, a complaint which says nothing on the subject of failure to pay, except that "no part of the principal sum mentioned in said note still remains due and unpaid," is insufficient to sustain a judgment.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

A. B. Hotchkiss, for appellant. *E. E. Powers*, (*Max Lowenthal*, of counsel,) for respondent.

GAROUTTE, J. This is an action upon a promissory note, and to foreclose a mortgage upon real estate given to secure the same. Defendant filed a general demurrer, which was overruled, whereupon he failed to answer, and judgment was finally rendered against him, and the realty sold under execution. He appeals from the judgment, and insists that the complaint is fatally defective, in this: that there is no allegation of non-payment of the note. The only allegation in the complaint referring to this matter is as follows: "That all the interest on the said principal sum mentioned in said promissory note, and in the said mortgage, has been paid up to February 26, 1888, and no part of the principal sum mentioned in said promissory note and mortgage, together with the interest thereon at the rate of ten per cent. per annum from the 26th day of February, 1888, compounded quarterly, still remains due and unpaid from said defendant to said plaintiff." We may safely assume that this allegation of the pleader does not express his intention and desires at the time. He insists that the defect of the allegation consists in a clerical error in the accidental insertion of the words "no part of." It is not our province to speculate how the allegation happened to be framed as it is. It is sufficient to say it is not an allegation of non-payment of the note, and therefore the complaint is fatally defective. Scroufe v. Clay, 71 Cal. 123, 11 Pac. Rep. 882; Richards v. Insurance Co., 80 Cal. 506, 22 Pac. Rep. 939. Appellant sits quietly by; allows his demurrer to be overruled for lack of presentation of the defects of the complaint to the court; permits the court to hear evidence and enter its judgment; allows respondent to sell the premises, which are inadequate to pay the judgment, at his own cost and expense; and then appeals from a judgment based upon a complaint clearly insufficient, and which would have been ordered amended by the court upon the slightest notice of the defects. It would afford us pleasure if we were acquainted with some principle of law that would justify us in affirming this judgment, but we know of none. Let the judgment be reversed, and the cause remanded.

We concur: HARRISON, J.; PATERSON, J.

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89 Cal. 606

MOWRY v. RAABE *et al.* (No. 13,097.)

(*Supreme Court of California.* June 26, 1891.)

LIBEL—EVIDENCE—DAMAGES—NEW TRIAL.

1. In an action for libel the evidence showed that plaintiff was a butcher; that defendants, who constituted the "Butchers' Protective Union," printed and circulated dodgers which read: "Don't sow the seeds of disease, and spread pestilence and death, by buying Chinese pork and lard; [plaintiff] sells Chinese pork and lard." There was also evidence that plaintiff had bought some pork from the Chinese, and that the Chinese often sold diseased pork, but the defendants' own witness testified that the pork sold by plaintiff was wholesome. *Held*, that plaintiff was entitled to judgment, since, in order to justify, the defendants must prove that the Chinese pork sold by plaintiff was unsound.

2. In such action, a verdict for $300 damages is not excessive.

3. It was claimed by the defendants that one object of the "Butchers' Protective Union" was to prevent the sale of unsound pork by Chinese. *Held*, that plaintiff might show why he refused to join the union.

4. It is proper to refuse to allow one of the defendants to testify that he had no malice against plaintiff when he published the libel, since the publication of matter false and libelous is, as matter of law, malicious.

5. To grant a new trial on account of newly-discovered evidence, where no diligence is shown, and the alleged new evidence is merely cumulative, and the fact of its being newly-discovered is denied, is an abuse of judicial discretion.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

J. H. Miller, for appellant. *Lloyd & Wood* and *J. D. Sullivan*, for respondents.

TEMPLE, C. This appeal is from an order granting defendants a new trial. Plaintiff was a retail butcher, doing business at the corner of Grove and Laguna streets, San Francisco. The defendants constitute the "Butchers' Protective Union." In July, 1886, they printed and circulated a great number of circulars or dodgers, which read as follows: "Protect yourself and family. Don't sow the seeds of disease, and spread pestilence and death, by buying Chinese pork and lard. Geo. B. Mowry, of the new Hayes Valley Market, corner Grove and Laguna streets, sells Chinese pork and lard. This is a fact, and can be vouched for by the committee of the Butchers' Protective Union. Buy your meats only where you see the union sign." It was alleged in the complaint that by this circular defendants intended to and did charge that plaintiff was engaged in selling his customers Chinese pork and lard, which contained the seeds of disease, and spread pestilence and death. The defendants admitted the publication, but denied that it was malicious, and averred that it was true. On the trial they offered evidence tending to prove that plaintiff purchased some pork from Chinese, which he sold to his customers, and also that the Chinese often sold diseased pork; but none which proved, or tended to prove, that the pork plaintiff sold was diseased, or would spread the seeds of disease and death. On the contrary, defendants' own witness testified that the particular pork sold by the plaintiff was sound, wholesome food. The learned judge held, and we think correctly, that the justification required defendants to prove not only that the pork sold by plaintiff was obtained from the Chinese, and was therefore what was known as "Chinese pork," but also that it was unsound. They offered no evidence which tended to establish that fact. The publication was therefore false and malicious. From the nature of the charge, it was calculated to injure the plaintiff. The grounds upon which the new trial was granted do not appear. We have therefore carefully reviewed the grounds upon which the motion was based, as shown in the statement, and have come to the conclusion that there is nothing in any of them which would justify the order for a new trial.

The verdict was for $300. There is clearly nothing in the amount of this verdict which can shock the moral sense of any one on the ground that it is excessive.

Nor was there anything improper in allowing plaintiff to explain why he refused to join the Butchers' Protective Union, even admitting that it was immaterial to the issue. It was claimed that one object of the union was to prevent the sale of unsound pork by Chinese, and a prejudice would probably have existed against plaintiff at the start, unless he could explain that he had other reasons than a desire to deal in such commodities. The defendants could not have been injured by it. Nor do we think there was error in refusing to allow Raabe, one of the defendants, when testifying in his own behalf, to answer the question: "Did you have any malice against the plaintiff at the time of the publication of the alleged libel?" The publication of matter false and libelous is, as matter of law, malicious. If the publication be admitted, as in this case, there is no way to rebut the implication of malice, except by proof of the truth of the charge. The defendant may, however, show, if he can, in mitigation, that he was not actuated by ill-will or a feeling of personal spite, and his own testimony directly to the point is competent evidence, tending to establish that fact. But no amount of testimony of this character can disprove that malice which constitutes a necessary ingredient of the cause of action. It is true the question is capable of being understood as referring only to ill will, which is sometimes called actual malice; but on its face it was an attempt to disprove malice, and thereby show that plaintiff had no cause of action, and had it been allowed defendants would perhaps have claimed, in submitting the case to the jury, that this necessary ingredient of plaintiff's cause of action did not exist. It was not an abuse of discretion on the part of the trial court to sustain the objection to the question in this form, thereby compelling defendants, if they desired to pursue the matter further, to propound such questions as could not have been misunderstood.

The affidavits which, it is claimed, show newly-discovered evidence, do not justify the order granting a new trial. (1) No diligence is shown. It is true this is a matter specially within the discretion of the trial court, but not to the extent of requiring no showing as to diligence, and here there was practically none. (2) The counter-affidavit discloses facts which show conclusively that defendants were fully aware of the facts of the newly-discovered evidence long before the trial; their own affidavits do not negative this. (3) The newly-discovered evidence is entirely cumulative. In fact the gist of it all was admitted by plaintiff in his own testimony. It only goes further in showing in detail disgusting practices of the Chinese, calculated simply to intensify class prejudices already existing, and to extend the odium to plaintiff. (4) The proposed new evidence does not meet the exigencies of the case. In fact, unless it goes further, and shows that the Chinese sold no sound pork, it would be irrelevant and immaterial. The other alleged errors there is plainly nothing in, and there was no conflict of evidence upon any material point. We think the order granting a new trial an abuse of discretion, and advise its reversal.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order granting a new trial is reversed.

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90 Cal. 77

In re GET YOUNG. (No. 13,301.)

(*Supreme Court of California.* June 30, 1891.)

APPEAL—WHEN LIES—ORDER.

No appeal lies from an order refusing to revoke a former order, which was itself appealable.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Lyman I. Mowry, (*A. C. Niles*, of counsel,) for appellants. *A. Ruef*, for respondent.

FOOTE, C. This is an appeal from an order refusing to revoke an order granting letters of guardianship of a minor. The order made by the probate court appointing the guardian, was one which it was within the jurisdiction of that tribunal to make, and it was itself appealable. Section 963, Code Civil Proc., subd. 3. Hence the appellate court will not entertain jurisdiction of the appeal now here. Goyhinech v. Goyhinech, 80 Cal. 409, 22 Pac. Rep. 175; Larkin v. Larkin, 76 Cal. 323, 18 Pac. Rep. 396; Railroad Co. v. McGrath, 74 Cal. 49, 15 Pac. Rep. 360; Tripp v. Railroad Co., 69 Cal. 631, 11 Pac. Rep. 219. The matter does not come within the rule as to void judgments, laid down in People v. Greene, 74 Cal. 400, 16 Pac. Rep. 197. We therefore advise that the appeal be dismissed.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal is dismissed.

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89 Cal. 599

DEARDORFF v. GUARANTY MUT. ACC. ASS'N. (No. 13,122.)

(*Supreme Court of California.* June 26, 1891.)

MUTUAL BENEFIT INSURANCE.

In an action on a mutual benefit certificate by which the society agrees that in case of the member's death it will pay his wife "the amount realized from one assessment upon all the members, not exceeding the sum of $5,000," the plaintiff cannot recover where there is no proof that any assessment was made or demanded, or what was the number of members, or what one assessment would realize.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

I. B. L. Brandt, for appellant. *Whittemore & Sears*, for respondent.

TEMPLE, C. Appeal from judgment and order denying defendant a new trial. This action is upon a life insurance policy issued by the defendant, which is a mutual insurance society upon the assessment plan. In this case the policy or certificate declares that the society accepts J. R. Deardorff "as a full-rate member of said association, subject to all the requirements and entitled to all the benefits, thereof. The principal sum, not exceeding five thousand dollars, realized upon an assessment in accordance with the by-laws, to be paid Mary E. Deardorff, (wife,) if surviving, * * * within sixty days after satisfactory proof that said member at any time," etc., "said association shall, upon the surrender of this certificate, pay the amount realized from one said assessment upon all the members, at the time of the accident, of said association, to the member above named, not, however, exceeding the sum of five thousand dollars," etc. The complaint contains no allegation of an assessment, or of a demand that an assessment be made, and a refusal by the corporation, nor any averment as to the number of members, or what an assessment would amount to under the by-laws referred to, nor are there any *data* given in any form by which the court can arrive at such conclusion, nor does it appear that an assessment has been collected, or that the corporation has any money. There is, in fact, a total omission of any allegation upon the subject. The complaint is not, however, defective in this respect, for it avers an absolute insurance in the sum of $5,000. The true nature of the policy is set up in the answer, in which the certificate or policy of insurance is set out at large; and its genuineness is admitted. Nor was there any attempt at the trial to prove an assessment or a demand that one be made, or a refusal, or the number of members, or to what one assessment would amount. It is manifest that the judgment for the plaintiff must be reversed. The general rules of pleading apply to cases of this character; and the plaintiff, as in other cases, must show by proper averment his true cause of action, and the relief to which he is entitled. Many other points are raised by the appellant, but there is no appearance here on the part of respondent, and the questions may not arise upon another trial. We advise that the judgment and order be reversed, with leave to plaintiff to amend her complaint, if she shall be so advised.

We concur: FITZGERALD, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, with leave to plaintiff to amend her complaint, if she shall be so advised.

(90 Cal. 10)

NILES *v.* EDWARDS. (No. 13,050.)[1]

(*Supreme Court of California.* June 29, 1891.)

CONVERSION BY PLEDGEE—STOCK.

Plaintiff, being the owner of a stock certificate indorsed in blank, lent it to A. for the purpose of being pledged as security for the purchase of other stock. A. pledged it for that purpose with defendant, to whom he was already indebted; and defendant, after buying the other stock for A., and selling it again at a profit, sold plaintiff's stock to satisfy A.'s previous debt, after being notified that plaintiff owned the stock. *Held*, that defendant was guilty of converting the stock.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

O'Brien, Morrison & Daingerfield, for appellant. *Hall & Rodgers*, for respondent.

TEMPLE, C. Appeal from the judgment on the judgment roll. Judgment, on the findings, was for defendant. The plaintiff, who takes this appeal, claims that the findings do not support the judgment, but, on the contrary, show that plaintiff was entitled to recover. It appears from them that defendant was a stockbroker and a member of the stock and exchange board. Plaintiff was the owner of 100 shares of stock in the Ophir Mining Company. This certificate, like many others, as the practice was, had been issued to a trustee, who had indorsed it in blank, in which form it passed from hand to hand without further assignment. Plaintiff delivered this certificate to one Armstrong, to enable him to pledge it as security for the purchase of 50 shares of stock in the Gould & Curry Mining Company. For that purpose Armstrong deposited the certificate with defendant, who accordingly purchased the Gould & Curry stock, and afterwards sold it on Armstrong's account at a profit. Armstrong was indebted to defendant at the time this stock was deposited with him, on a previous account. Defendant had no notice at that time of plaintiff's ownership, but was notified of such fact about two months afterwards. It is not specifically found that the stock was pledged for the pre-existing debt, but only that Armstrong was indebted to defendant, and deposited the certificate, and thereupon he purchased the Gould & Curry stock. The Gould & Curry stock was sold March 1, 1886, and November 17, 1886, plaintiff demanded from defendant the stock, and offered to pay any proper charges against it, which demand defendant refused to comply with, and also notified plaintiff that a tender was unnecessary, as he would not deliver the stock. The findings are somewhat defective here, but we take it for granted that, in offering to pay all proper charges, plaintiff did not propose to pay the indebtedness of Armstrong, but simply assessments and outlays made by defend-

[1] New trial ordered on rehearing, 27 Pac. Rep. 296.

ant upon the stock. The sale of the Gould & Curry stock more than repaid the new loan. Defendant held the stock until July, 1887, when he sold it, applying the proceeds to the indebtedness of Armstrong to himself. The findings show the market value of the stock and the amount of damages to which plaintiff is entitled, if it be held that there was a conversion by the defendant; and upon that subject we entertain no doubt. The plaintiff is clearly entitled to judgment. The apparent ownership of Armstrong is not shown to have resulted in injury to the defendant. On the contrary, he is better off by the transaction than he would have been by the amount of the profit realized on the Gould & Curry stock. There is no claim that he was induced to forego any remedy he may have had against Armstrong by reason of the pledge, or that he was any worse off in any way with reference to such indebtedness. After the moneys were repaid which were advanced on the stock, we think defendant did not hold the pledge in good faith and for value, in the sense of section 2991, Civil Code. There is a finding that defendant did not at any time convert the stock. This is evidently a conclusion of the court from the special facts found. If there had been no other finding, this would probably be regarded as the ultimate fact, but in the connection in which it is here found it is simply a conclusion of law, and must be so held. We think the judgment should be reversed, and the court below directed to enter judgment for plaintiff on the findings.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to enter judgment for the plaintiff on the findings.

(95 Cal. 160)

TYLER v. MAYRE *et al.* (No. 13,043.)[1]

(*Supreme Court of California.* June 30, 1891.)

TRUST—ATTORNEYS—LIMITATIONS—WITNESSES.

1. The owner of a note, who had brought suit on it against the maker, assigned the note, together with all the avails of the suit, to a trustee for the purpose of securing certain persons who had become sureties for him upon a bond, "first deducting and paying out of any money that may be realized all charges for costs and attorney's fees." *Held*, that such assignment created a trust in favor of the assignor's attorney for his fees and disbursements for costs in the suit on the note.

2. Upon the death of such trustee the trust devolves upon his administrator, whose liability to the attorney may be enforced by suit.

3. The attorney's right of action to enforce such trust is not within the purview of Code Civil Proc. Cal. § 1493, which limits the time for presenting against the estates of decedents claims arising upon contract.

4. In an action against the administrator of a trustee and the administrator of the trustor to enforce the execution of the trust by the former, Code Civil Proc. Cal. § 1880, which makes parties in actions upon claims against decedents incompetent as witnesses as against the representatives of the decedent, does not render the plaintiff an incompetent witness to prove the contract between himself and the trustor, by virtue of which he became the *cestui que trust.*

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; NOBLE HAMILTON, Judge.

Whittemore & Sears, for appellant. *W. H. H. Hart, Aylett R. Cotton, J. B. Reinstein*, and *A. J. Le Breton*, for respondents.

VANCLIEF, C. On November 24, 1873, one Jane E. Chase, being the owner and holder of a promissory note made by Briggs, Evoy, and Cobb, employed plaintiff, as her attorney at law, to bring suit on said note, which he did, and on the 3d of December, 1873, recovered final judgment thereon against the estate of Evoy (then deceased) for $6,175. On May 21, 1878, Jane E. Chase executed to the defendant William Irvine the following instrument: "Know all men by these presents, that Jane E. Chase, of Martinez, Contra Costa county, California, party of the first part, for the consideration and purpose hereinafter set forth, hath sold, assigned, transferred, and set over, and doth hereby sell, assign, transfer, and set over, unto William Irvine, of the city and county of San Francisco and state aforesaid, party of the second part, all and singular the following claims, indebtedness, and obligations, to-wit: The certain promissory note, in writing, made and executed to me by M. G. Cobbs, G. G. Briggs, and John Evoy, for the principal sum of twenty-five hundred dollars, gold coin, with interest at the rate of one and one-half per cent. per month, payable in thirty days from the date thereof, and dated August 21, 1871, now in suit in the third district court in and for the county of Alameda, wherein the said party of the first part is plaintiff, and Mary J. Evoy, administratrix of the estate of John Evoy, deceased, and others are defendants, together with all the avails of said action that may be paid, collected, or realized on or on account of the said note, and in the said action, and also the following insurance claim of the party of the first part, viz: Claim against the Hartford Fire Insurance Co. for twenty-five hundred dollars, claim against the Lamar Insurance Co. for nineteen hundred and fifty dollars, and claim against the Rhode Island Association of nineteen hundred and fifty dollars, all which insurance claims are now in suit in the district court of the 10th judicial district in and for the city and county of San Francisco; together with all and singular the avails and moneys that may be paid, collected, recovered, or received for or on account of said several claims: provided, always, that this assignment, sale, and transfer of said several claims and demands is made by said party of the first part to said party of the second part in trust, and to and for the following uses, intents, and purposes, to-wit: To secure Geo. W. Tyler and H. K. W. Clark, their, and each of their, heirs, executors, and administrators for their respective obligations and liabilities incurred by them, and either of them, as the bondsmen of the party of the first part as administratrix of the estate of M. S. Chase, deceased, made and delivered on her appointment as such administratrix, and also to secure any other substitutes of said bondsmen, or either of them, to be hereinafter substituted as her bondsmen in the matter of her administration of said estate, first deducting and paying out of any moneys that may be realized out of said claims all charges for costs and attorney's fees and charges, to provide for the payment of which this assignment and transfer is also made; hereby constituting and appointing the said party of the second part my true and lawful attorney, in my place and stead, to demand, collect, receive, and recover the said several demands, indebtedness, and claims, with full power and authority to compound for and settle and give acquittances for the same, as fully, in all respects, as I could do in my own proper person, but for this assignment and power." On August 28, 1881, Jane E. Chase died, and in July, 1882, defendant Clara J. Slater was appointed administratrix of her estate; the said Clara and the defendant Rhodes being her only heirs at law. On November 12, 1882, William Irvine died, and on December 4, 1882, the defendant Mayre was appointed administrator of his estate.

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[1] Rehearing granted.

The purpose of this action is to recover from the estate of Irvine, through the administrator thereof, a portion of the money realized, or to be realized, from the judgment against Evoy, sufficient to pay plaintiff's fee (alleged to be $1,500) as attorney for Chase in the action in which that judgment was recovered; and also $70, alleged to have been expended by plaintiff as costs in the prosecution of that action; the plaintiff contending that the assignment of the note by Chase to Irvine was in trust to pay from the money realized from the note, among other things, first, the attorney's fees and charges due plaintiff for his services in said action on the note, which action was still pending (on appeal) at the time of the assignment of the note. Before the commencement of this action, by agreement of the parties interested, $1,000 of the money realized from the judgment on the note were deposited in the Bank of Martinez (the corporation defendant) to abide the judgment in this action. The prayer of the complaint is (1) that the court appoint some competent person to carry out said trust; (2) that it be adjudged "that there is due plaintiff from * * * the estate of Jane E. Chase, deceased, the sum of $1,570, payable out of the amount due on said judgment; (3) that the Bank of Martinez pay to said trustee the said sum of $1,000; and (4) that said trustee proceed to collect from the administratrix of John Evoy the amount due on said judgment, and pay the plaintiff out of the money so collected the sum of $1,570;" and for such other relief, etc. The separate answer of Mayre, administrator of Irvine, admits all the allegations of the complaint, and alleges that he has no interest in the subject-matter of this suit, because, he says, the estate of Evoy, with the consent of the administratrix of the estate of Chase, has paid to the estate of Irvine, "all the money due to said Irvine's estate," and therefore he "consents to any judgment herein that to the court may seem meet. The same is not to be taken against the said Mayre for any relief of costs." The separate answer of Shaw, administrator of the estate of Evoy, denies all the allegations of the complaint, and avers that, in obedience to an order of court made in the matter of the estate of Evoy, he paid upon the claim of the estate of Jane E. Chase the sum of $6,765. The joint answer of Slater, administratrix of Chase, and the Bank of Martinez denies that the assignment of Chase to Irvine was made in trust to secure payment of plaintiff's fees as attorney for Chase or for plaintiff's benefit, except as indemnity to him for having become a surety on the bond of Chase as administratrix of the estate of M. S. Chase, deceased; denies that the services of plaintiff were reasonably worth $1,500, or any sum whatever; denies the necessity for the appointment of any trustee to succeed Irvine; avers, in proper form, that the claim of plaintiff set up in his complaint, and upon which the action is based, is barred by section 1493 of the Code of Civil Procedure, and also by section 1500 of the same Code. The court found that the plaintiff performed the services charged for in his complaint under a special agreement with Jane E. Chase to the effect that she was to pay him therefor only $300, which was to be paid only "out of any moneys that might be collected upon final judgment recovered by plaintiff in that suit," viz., the suit in which the services were rendered; but also found that plaintiff's causes of action against the estate of Jane E. Chase were barred by section 1493 of the Code of Civil Procedure. As matter of law, the court construed the written assignment of the note by Chase to Irvine as not being in trust for plaintiff's benefit, and as not giving him any lien upon or interest in that note or the money to be collected in the suit thereon, as security for his fees or expenditures in the prosecution of such suit, or otherwise. As a necessary result of these findings, the court gave judgment for the defendants; from which, and an order denying his motion for a new trial, the plaintiff appeals.

1. As contended by appellant, I think the court misconstrued the assignment from Chase to Irvine. That the assignment was in trust for certain purposes, and accepted as such by Irvine, there should be no doubt, (Civil Code, §§ 2221 and 2222,) though Irvine, the trustee, was also one of the beneficiaries, (Perry, Trusts, §§ 59, 297.) That one of the purposes of the trust was to pay the plaintiff and other attorneys of Chase their proper fees and charges for services and expenditures in the actions in which they were employed is expressed with sufficient certainty in the instrument itself. Before applying the money to be realized from the note and other claims assigned to any other purpose of the trust, the trustee is directed to deduct and pay "out of any moneys that may be realized out of said claims all charges for costs and attorney's fees and charges, to provide for the payment of which this assignment and transfer is also made." It appears that suits upon all the demands assigned were pending at the time of the assignment, and

that plaintiff was the attorney for the assignor in the suit upon the note of Evoy, and rendered the services alleged by him, and was entitled to proper fees therefor, though it is found that a special agreement between him and Chase limited his fees to $300, to be paid only from the money recovered on the note.

2. The trust in this case devolved upon the administrator of Irvine, (Perry, Trusts, §§ 143, 144,) and the facts stated in the complaint constitute an equitable cause of action directly against Irvine's administrator. "The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission." Civil Code, § 2251; Bettis v. Townsend, 61 Cal. 333. And, even though the relation between Chase and Irvine should be held not to be that of trustor and trustee, the agreement between Chase and Irvine, upon a sufficient executed consideration, that the latter should pay plaintiff for his services to Chase, may be enforced by plaintiff directly against Irvine in an action at law. Civil Code, § 1559; McLaren v. Hutchinson, 22 Cal. 188; Pom. Rem. § 139; Whart. Cont. § 785 et seq., and notes. To plaintiff's alleged cause of action against Irvine's administrator, section 1493[1] of the Code of Civil Procedure has no proper application; nor was it or any other statute of limitation pleaded by the administrator of Irvine, whose answer admits all the allegations of the complaint, and consents to any judgment deemed proper by the court, except a judgment against him for costs; and therefore plaintiff's cause of action against the administrator of Irvine is not affected by the finding that his cause of action against the administratrix of Chase was barred by section 1493 of the Code of Civil Procedure. No question is raised as to the propriety of having joined the administratrix of Chase as a party defendant. Perhaps she was properly joined for the reason that she may be entitled to a resulting interest in the trust fund after all the purposes of the trust shall be satisfied; and, in view of one branch of the prayer of the complaint, it may have been prudent and proper for her to plead section 1493 of the Code of Civil Procedure as a bar to any relief sought against the estate of Chase. But the relief to which plaintiff is entitled against any one of the defendants is not limited by his prayer for relief against other defendants. He is entitled to any relief justified by the facts alleged in his complaint, if such facts are proved or admitted.

3. J. B. Reinstein was called as a witness by the defendants to prove the contents of a lost paper writing relating to the compensation plaintiff was to receive for his services in the case of Chase v. Evoy and others, and testified as follows: "That paper I saw was an agreement between Jane E. Chase and Geo. W. Tyler, signed by both, in which the sum of $250 or $300 was mentioned, to be paid to Tyler out of the proceeds of any judgment he might secure in that case for his services in that suit, and in connection with the promissory note on which that suit was founded. I cannot remember the whole or exact contents of the paper, but that much I do remember." "The plaintiff, in rebuttal, offered to prove, by his own oath, that the paper spoken of by witness Reinstein was an agreement between him and Jane E. Chase, providing for the payment for his services in preparing and presenting the claim against the estate of John Evoy, and in bringing said suit, and in procuring a judgment in the district court; and, when the note and suit was assigned by Jane E. Chase to Wm. Irvine in trust, plaintiff went to Jane E. Chase's room, at her request, and there met Mr. Wm. Irvine, and the whole matter was talked over between the three; that plaintiff was told of the assignment to Irvine in trust, and that he was to look to him thereafter for his pay for his services and expenses in said suit, which he agreed to do; that the first contract was talked about, and it was conceded by J. E. Chase, William Irvine, and himself that the agreement provided only for the preparation and presentation of the claim against the estate of John Evoy, deceased, and the bringing of suit and the trial of the case in the district court; that it was then and there agreed between plaintiff, Jane E. Chase, and William Irvine that plaintiff should continue to prosecute the case as attorney for plaintiff, and, if he finally succeeded in getting a judgment, he should be paid out of the proceeds of said judgment, when collected, a reasonable fee." This proffered testimony was objected to "as incompetent, under section 1880, Code Civil Proc.,[2] because it is not competent for plaintiff to testify, as against the administratrix, to any matters of fact occurring before the death of Jane E. Chase." The court sustained the objection, and excluded the testimony. Conceding that this testimony would have been incompetent to prove a cause of action against the administratrix of Chase, I think it was admissible in this action to establish and enforce a trust against the administrator of Irvine, even though it incidentally involved proof of a contract between plaintiff and Chase, made during the life of the latter. Myers v. Reinstein, 67 Cal. 89, 7 Pac. Rep. 192; Knight v. Russ, 77 Cal. 410, 19 Pac. Rep. 698; Perry, Trusts, § 86.

4. As already remarked, the trust devolved upon the administrator of Irvine; but, even if the trusteeship had been vacant, there would have been no necessity for the appointment of a successor to Irvine, as it appears that all parties controlling and interested in the trust fund are before the court. Perry, Trusts, § 873. I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FITZGERALD, C.

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[1] Code Civil Proc. Cal. § 1493, limits the time for presenting claims against estates where such claims arise upon contract.

[2] Code Civil Proc. Cal. § 1880, declares that parties are incompetent as witnesses, as against an executor or administrator, in an action upon a claim against the decedent.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

90 Cal. 337

YORBA v. DOBNER. (No. 14,148.)

(*Supreme Court of California.* July 23, 1891.)

COST BILL—VERIFICATION—ORDER TO STRIKE OUT—WHETHER APPEALABLE.

1. Code Civil Proc. Cal. § 1033, requiring a cost bill to be "verified by the oath of the party,

or his attorney or agent, or by the clerk of his attorney," is sufficiently complied with when the affidavit is made by one who is familiar with the facts, and assisted at the trial, although not an attorney of record.

2. An order striking out a cost bill subsequent to the rendition and entry of the judgment is appealable, and can be reviewed without an appeal from the judgment.

Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Brousseau, Hatch & Thomas, for appellant. *Victor Montgomery*, for respondent.

Paterson, J. This is an appeal from an order striking out the defendant's memorandum of costs on the ground that it was not "verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney," as required by the provisions of section 1033, Code Civil Proc. The judgment was entered in the court below on July 24, 1890, and the order striking out the cost bill was made on August 21, 1890. The order is therefore appealable, and can be reviewed without an appeal from the judgment. Empire Gold Min. Co. v. Bonanza Gold Min. Co., 67 Cal. 406, 7 Pac. Rep. 810. The motion to dismiss the appeal is denied. We think the court erred in its ruling. The memorandum was verified by Mr. West, a member of the bar of Orange county. Mr. West was not an attorney of record, but he assisted in the trial of the cause, and participated in the examination of witnesses and in the argument to the jury. Being the local attorney, he doubtless knew more about the costs and disbursements than the attorneys of record, who resided in the city of Los Angeles. The statute does not say that the attorney verifying the memorandum must be the attorney of record, and there is no reason for such a requirement. The object of the statute is to allow either the party or some representative who may be more familiar with the facts to verify the items of the bill. Formerly the statute required that the memorandum should be verified by the oath of the party. The court held that it could be done by his attorney, the legislature having intended no doubt to permit any one having knowledge of the facts to verify the account. Burnham v. Hays, 3 Cal. 119. That is certainly what was intended by the legislature in the enactment of the statute now in force. The order is reversed, with directions to hear the motion to tax costs on any other grounds named therein, but to overrule the objection we have considered.

We concur: Harrison, J.; Garoutte, J.

(90 Cal. 323)

BRISON v. BRISON. (No. 14,031.)[1]

(*Supreme Court of California*. July 22, 1891.)

Constructive Trusts—Fraud—Undue Influence—Findings—New Trial—Review on Appeal.

1. On the trial of an action by a husband to compel his wife to convey certain property to him he testified that, several years before, being about to be absent for several years, and wishing to provide for her in case of his death, he had conveyed to her, instead of making a will, certain lands, induced by his confidence in her; that she promised to reconvey same to him in the event of his return; and that he intended that she should receive a beneficial interest therein in case he should die before returning. The lawyer who drew the deed swore that he stated to her the reasons why her husband was about to make the deed, and that she promised to reconvey to him on his return. *Held* sufficient to support a finding that plaintiff was induced to make such deed by his confidence in his wife, and that he made it with the distinct understanding that in the event of his return she would reconvey the property to him, and that she was to receive a beneficial interest therein only in case he died before returning.

2. Under Civil Code Cal. § 1575, which defines undue influence as the use, by one in whom a confidence is reposed by another, of such confidence to obtain an unfair advantage over him, the subsequent refusal of the wife to reconvey said property was a betrayal of her husband's confidence, and constituted a constructive fraud.

3. The finding of the trial court is presumed to be correct on appeal, and the burden of proof is upon the appellant to show error therein; and, if the language of a finding is susceptible of two constructions, the appellate court will give to it that construction which is supported by the evidence, rather than one not so supported.

4. Where the complaint alleged both actual and constructive fraud, and the court makes a finding of constructive fraud, failure to make any finding as to actual fraud is immaterial, since such finding, if made in favor of either party, could in no way affect the verdict.

5. Under Code Civil Proc. §§ 656, 657, defining a new trial as "a re-examination of an issue of fact in the same court after a trial and decision," and authorizing a new trial in certain cases in order to vacate "the former verdict or other decision," the supreme court, upon an appeal from an order denying a new trial, can consider only the sufficiency of the evidence to support the findings, and not the sufficiency of the findings to support the judgment.

In bank. Appeal from superior court, Sacramento county; Philip W. Keyser, Judge.

Action to compel the conveyance of certain lands by one Brison against his wife. Judgment for plaintiff. Defendant appeals from an order denying a new trial. Affirmed.

A. L. Hart, for appellant. *A. P. Catlin* and *Add. C. Hinkson*, for respondent.

Harrison, J. Upon the former appeal in this case (75 Cal. 525, 17 Pac. Rep. 689) it was held that the facts alleged in the complaint entitled the plaintiff to the relief sought, as well upon the ground of constructive fraud on the part of the defendant, arising out of the violation of the confidential relations between her and the plaintiff, as upon the ground of the actual fraud alleged, and that the demurrer to the complaint should have been overruled. After the cause had been remanded to the court below, the defendant answered the complaint, denying all the allegations of actual fraud, and alleging that the conveyance to her by the plaintiff was made with the intent to vest her with the absolute title to the property. Upon the trial of the cause judgment was rendered in favor of the plaintiff, and, the defendant's motion for a new trial having been denied, an appeal has been taken from that order, but no appeal has been taken from the judgment.

1. Upon an appeal from an order denying a new trial this court cannot consider

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[1] Rehearing denied.

the sufficiency of either the complaint or of the findings to support the judgment. "A new trial is a re-examination of an issue of fact in the same court after a trial and decision," (Code Civil Proc. § 656,) and is authorized for the purpose of vacating the former verdict or other decision, (section 657.) The "decision" which may be thus vacated is that which was given upon the original trial of the question of fact, (section 632,) and upon which the judgment is to be entered. The provision that the judgment is to be entered "upon" the decision (section 633) implies that it is subsequent to and dependent on the decision. The judgment itself can be reviewed only by a direct appeal, (Id. § 936,) taken after its entry, (section 939.) The proceedings for a new trial are, however, entirely independent of the entry of the judgment, and may be instituted either before or after its entry, and even while an appeal from the judgment is pending; and the motion may be granted even after the judgment has been affirmed on appeal. If granted, the decision is vacated, and necessarily the judgment dependent thereon falls with it. Spanagel v. Dellinger, 34 Cal. 476. "Under our system, from the entry of the verdict or filing of the findings of the court, the motion for new trial is a kind of episode, or, in a certain sense, collateral proceeding; a proceeding not in the direct line of the judgment, for the judgment may be at once entered, and even executed, while a motion for a new trial is pending in an independent line of proceeding, which ends in an order reviewable on an independent appeal. The motion may be heard and decided, and an appeal taken on its own independent record, while the proceedings on and subsequent to the judgment may be still regularly going on, and even an independent appeal taken in that line." Spanagel v. Dellinger, 38 Cal. 284. "The question whether the judgment is authorized by the pleadings or findings cannot be agitated on the motion for a new trial, for it is not involved in a re-examination of the issues of fact. The Code has provided other and sufficient modes for the determination of both branches of that question, and it is very clear that the question whether the issues of fact were correctly found does not depend in any manner on the question whether a pleading states sufficient facts to entitle a party to the relief granted by the judgment, or whether the issues as found sustain the judgment." Martin v. Matfield, 49 Cal. 45; In re Doyle's Estate, 73 Cal. 571, 15 Pac. Rep. 125. It follows that, as upon this appeal we can only review the action of the court below, we cannot consider whether the findings are sufficient to sustain the judgment, and that our examination of the evidence is limited to a consideration of its sufficiency to sustain the findings of fact.

2. When upon the trial of a cause the court renders its decision without making findings upon all the material issues presented by the pleadings, it is held that such decision can be reviewed upon a motion for a new trial. Knight v. Roche, 56 Cal. 15. In such a case there has been a mistrial, and the decision, having been rendered before the case has been fully tried, is considered to have been a decision "against law." It will be observed, however, that this rule is applicable only in a case where the issues upon which there is no finding are "material;" that is, where a finding upon such issues would have the effect to countervail or destroy the effect of the other findings. If a finding upon such issues would not have this effect, the issues cannot be regarded as material, and the failure to make a finding thereon would not be prejudicial. McCourtney v. Fortune, 57 Cal. 619. If the findings which are made are of such a character as to dispose of issues which are sufficient to uphold the judgment, it is not a mistrial or against law to fail or omit to make findings upon other issues, which, if made, would not invalidate the judgment. If the issue presented by the answer is such that a finding upon it in favor of the defendant would not defeat the plaintiff's right of action, a failure to make such finding is immaterial. Fontaine v. Railroad Co., 54 Cal. 654. If the complaint, as in the present instance, sets forth two or more grounds for relief, either of which is sufficient to support a judgment in favor of the plaintiff, a finding upon one of such issues is sufficient, and a failure to find upon the other does not constitute a mistrial, or render the decision "against law." In view of these principles, the failure of the court to make a finding upon the issue of actual fraud is not a ground for vacating its decision unless a finding upon that issue in favor of the defendant would have the effect to modify or overcome its other findings. Inasmuch as it was held upon the former appeal in this case that the plaintiff was entitled to the relief sought by him upon the ground of constructive fraud arising out of the breach by the defendant of the confidential relations existing between them, even if no actual fraud had been alleged, the failure to make a finding upon the issue of actual fraud is immaterial. If such finding had been made in favor of the defendant, it would not have impaired the effect of the finding upon the issue of constructive fraud, and, if made against her, it would have only given additional support to the judgment.

3. The plaintiff alleged in the complaint "that he had at all times confidence in his said wife, the defendant, and her devotion and fidelity to him, until he returned home" in September, 1886; and that he "was induced to and did make" the deed to her, "having confidence in his said wife, the defendant, and in her said representation and promise, [to reconvey to him upon request,] and relying upon the same." The only denial of these allegations by the defendant is the denial that the plaintiff was induced to make the said deed to her "by reason of any confidence in any representation or promise of this defendant, or relying upon the same." The relation of husband and wife between the parties is admitted, and also that the plaintiff had at all times confidence in his wife, and in her devotion and fidelity to him, and that he made the deed to her relying upon that confidence. Upon these allegations this

court said, (75 Cal. 529, 17 Pac. Rep. 691:) "The relation of the parties to each other, therefore, was confidential in fact as well as in the law. The plaintiff was induced to make the deed by the confidence which he had in his wife, and the belief thereby engendered that she would perform her promise. But for that he would not have made it. The betrayal of such confidence is constructively fraudulent, and gives rise to a constructive trust. This is independent of any element of actual fraud." At the trial the plaintiff testified that in May, 1881, he was about to go to Arizona, to be absent from California for several years, and, being solicitous that in case of his death his wife might enjoy this property, went to consult an attorney in reference to the matter, and in consequence of a suggestion by the attorney he determined to make the deed in question, instead of a will. "I started away from the State House Hotel on K street for the purpose of seeing a lawyer. While I was getting my boots blacked on J street, Mr. Addison C. Hinkson came along. I hailed him, and told him that I was going to Arizona, and the chances were that I might get killed, and I wanted to leave my family safe, and desired him to make my will. He studied a little while, and said, 'You had better, under those circumstances, make a deed, if you have implicit confidence that your wife will deed it back to you.' I said: 'My God, if I could not have confidence in my wife, who in the world would I have confidence in?' I said: 'Certainly, I have the utmost confidence in her. When can you attend to the matter?' He said, 'Right off.' I said, 'I will go and get my wife, and come over.' I had never spoken to her up to this time, or to any human being, about making a will, or about making a deed. I went over and got her, and on the way down told her the whole circumstances. She said to me that I had better not do it, and I said that I would. Mr. Hinkson stated the whole matter to her, and she said that she did not want me to do it, but said that she would deed it back to me. Mr. Hinkson sat down and wrote the deed, and I gave him a description of the premises. I then signed the deed, and she went back to the State House, and I went to the recorder's office and filed the deed. When I was on the way down with the defendant to Mr. Hinkson's office she said she did not want me to deed it to her, and she promised to deed it back to me. She made the same promises in the office of Mr. Hinkson, in his presence. Mr. Hinkson stated the matter exactly, and advised the making of a deed instead of a will. It was through Mr. Hinkson that I made the deed instead of the will. I had intended to make a will." On cross-examination the plaintiff testified: "The idea of making a will just struck my mind, and I started over to see a lawyer, and called Hinkson to me. I told him I was coming to see him about making a will, as I thought I might be killed. He said: 'If you have implicit confidence in your wife, deed it to her;' and I said: 'I have implicit confidence in her.' When I saw Mr. Hinkson I told him the reason I wanted him to make a will, so that in case of my death the public administrator would not get hold of my property, and squander it; and he then said: 'If you would make a deed they could not get hold of it, and things would go right along, and nobody would touch the property. But,' he said, 'they might get hold of the will.' I intended to pass the estate to her, so that in case of my death there would be no administration, and it would be her property, and nobody could take it from her. I intended the property to be hers in case of my death. I did that on Mr. Hinkson's advice, and then, after I met him, I went over and told my wife what I intended to do. I had made up my mind to do so before I saw her. I did not wait to get any promise from her. If she had told me she would not give me back the deed when I came back I would not have given it to her at all. I would not have deeded it to her but for her promise. I had made up my mind that if she would agree to give it back to me I would give it to her. I had confidence in her word, and I thought she would do it. She did agree to do it. She told me she would on the way, and told me in Hinkson's office. When we got to the office Mr. Hinkson went over the same thing, and she repeated it to me in the office. He told her what he had said to me, and she said then that she would. He told her that I had told him that I was going to make a will, and he had advised me it was better to make a deed, if she would deed it back again, and he stated the reasons. She spoke, and said certainly she would; but she did not want me to deed it to her at all, and said I had better not do it."

Mr. Hinkson, in his testimony, stated: "I said to Mrs. Brison that her husband had said to me that he desired to make a will, and will his property; that he was going to Arizona, and, that being a rough country down there, he did not know what might happen to him, and wanted to arrange it so that his wife could have his property in the event of his death; and I asked him the question, why might he not make her a deed to the property, and he asked me if I could do that, and I said: 'Yes, you can do that if you have implicit confidence in your wife that she will deed the property back to you when you return, and so desire it.' I told her that Mr. Brison had answered me that he had unlimited confidence in her, and was satisfied she would deed it back to him if he returned, and so desired it reconveyed. Mrs. Brison answered me that Mr. Brison knew very well that she would deed it back to him if he asked her to do so. There was some other conversation in which Mr. Brison joined, and Mrs. Brison made the statement: 'Of course, if he wanted her to deed it back to him she would deed it on his return.' Whereupon I drew a deed, and Mr. Brison signed it, and I took the acknowledgment and returned it to Mrs. Brison, and I think she gave it to Mr. Brison to be placed on record."

Upon the evidence on this subject, the court, after finding the intention of the plaintiff to go to Arizona, further found: "Upon coming to said determination, plaintiff at first, in view of the personal risk and dangers of said proposed undertaking, intended and proposed to make a will, and thereby to bequeath and devise all his estate, real and personal, to the defendant; and, for the purpose of having such will prepared, plaintiff consulted an attorney at law, and informed him of his said intention and desire, and thereupon said attorney advised him that the expense of probating such will, as well as the trouble of administering upon his estate, to his wife, the defendant, could be saved by making a deed absolute in form to her, if he had confidence in her, and believed that she would reconvey the property to him on his return from Arizona, if he should return home alive. Thereupon the plaintiff proposed to his said wife, the defendant, to make a deed absolute in form to her for said lands upon condition that she would reconvey the same to him if he should return home, and request the same; that thereupon, in the presence of said attorney, the said defendant represented to and promised the plaintiff that if he would make and deliver to her a deed absolute in form for said land she would, upon his return, if he returned from Arizona, or upon his request, convey the land back to him; and the said plaintiff then and there, having confidence in his said wife, the defendant, and in her said representation and promises, and relying upon the same, and to save the expense of probating such proposed will and of administration upon his estate in the event of his death while absent, was induced to and did make a deed absolute in form of said land to the defendant, instead of making said will, upon the conditions, and with this distinct understanding between them, that if he should return from Arizona, the defendant would convey back to him the said land."

It is alleged on behalf of the appellant that this finding is not justified by the evidence, inasmuch as it is in effect a finding that the conveyance was made in pursuance of an agreement therefor, resulting from negotiations between the parties wherein the plaintiff was induced to execute the deed by reason of some act of persuasion on the part of the defendant, whereas the evidence established that the conveyance was a voluntary act on the part of the husband, coupled with a mere promise on the part of the wife that she would reconvey to him on his return from Arizona. It may be conceded, as is claimed by the appellant, that the evidence of a verbal agreement between husband and wife that will create a constructive trust should be clear, satisfactory, and conclusive; but it must also be conceded that whether the evidence in any case is of this character must be determined by the trial court, and that this court must accept the determination of the trial court thereon as conclusive. In determining whether a finding is justified by the evidence it is necessary to take into consideration all of the evidence, rather than certain disconnected portions thereof. The finding of the trial court when brought here on appeal is to be deemed correct, rather than erroneous; and it is incumbent on the appellant to point out the error and show the particulars wherein it is not supported by the evidence; otherwise it will be upheld by this court. If the language of a finding is susceptible of different constructions, one of which is supported by the evidence, and the other not, this court will give to the language that construction which finds such support, rather than a construction which would have the effect to defeat the finding.

It clearly appears from the evidence herein that it was not the purpose of the plaintiff, by the conveyance which he then executed, to make the defendant the absolute owner of the property conveyed to her, but that his sole purpose was to place it temporarily in her name, to be held in trust for him until his return from Arizona; and that only in case of his death before such return was she to have the beneficial enjoyment of it. His statement: "I intended to pass the estate to her, so that in case of my death there would be no administration, and it would be her property, and nobody could take it from her,"—must be read in connection with his statement immediately following: "I intended the property to be hers in case of my death;" and the additional fact must also be considered that the original purpose in his mind was to make a will in her favor, and that this purpose was changed upon the suggestion by his attorney that the object he had in view in carrying out this purpose would be as well effected by making a deed to her, if he had implicit confidence that she would deed it back to him. The confidence which he had in his wife was the inducement which led him to place the property in her name. The clause in the finding that the plaintiff was "induced" to make the deed to his wife does not necessarily imply any act of inducement on her part. The court does not find that she did or said anything with the purpose of inducing him to make the conveyance,—its finding being that the plaintiff "was induced" to make the conveyance by reason of the confidence which he had in her, and in her representation and promises; and that his purpose in making it was to enable her, in case of his death, to come into the immediate enjoyment of the property. The fact that as soon as he made this purpose known to her she advised against it, and said that she did not wish him to do it, but that she would deed it back to him, and that later in the day, when Mr. Hinkson recounted to her the interview between himself and her husband, she answered him that "Mr. Brison knew perfectly well that she would deed it back to him if he asked her to do so," was calculated to deepen the confidence which their relations justified him in reposing in her. This promise on her part to reconvey is not to be considered as the consideration upon which the plaintiff agreed to make the conveyance, but rather as an assurance on her part that the marital confidence which he reposed in her was not misplaced; and the "condition" named in the finding, upon which the conveyance was made, is to be regarded rather as the expectation springing from such confidence, than a limitation upon the estate which the defendant was to receive by the conveyance.

While these acts, if the plaintiff had been dealing with a stranger, might not create an enforcible trust, yet with his wife they did, and her subsequent refusal to reconvey was not merely the breach of an agreement, but was the betrayal of a confidence, and the violation of a trust, constituting a constructive fraud, which a court of equity will remedy. The influence which the law presumes to have been exercised by one spouse over the other is not an influence caused by any act of persuasion or importunity but is that influence which is superinduced by the relation between them, and generated in the mind of the one by the confiding trust which he has in the devotion and fidelity of the other. Such influence the law presumes to have been undue, whenever this confidence is subsequently violated or abused. Civil Code, § 1575, subd. 1. Reading the evidence in the light of the relations existing between the plaintiff and the defendant, and of the confidence which the plaintiff at all times had in his wife, and in her devotion and fidelity to him, until her refusal to reconvey the property to him, we think that the finding of the court is fully justified, and its order denying a new trial is affirmed.

We concur: McFarland, J.; De Haven, J.; Sharpstein, J.; Paterson, J.; Garoutte, J.

Beatty, C. J., being disqualified, did not participate in the foregoing opinion.

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90 Cal. 147

Jones v. Eddy *et al.* (No. 14,020.)

(*Supreme Court of California.* July 2, 1891.)

Pleading—Conjunctive Denial.

An allegation that defendants "assumed and agreed" to pay a debt, amounts merely to an assertion that they "agreed" to pay it, and hence a denial that they "assumed and agreed" is sufficient, though stated in the conjunctive.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Action by G. G. Jones against Jemima Eddy, R. Verch, and A. J. Sanborn, to foreclose a mortgage. Judgment for plaintiff. Defendants Verch and Sanborn appeal. Reversed.

The complaint alleged that "on the 29th day of October, 1887, defendants R. Verch and A. J. Sanborn jointly purchased the interest of said Jemima Eddy in said premises, and as a part of the consideration therefor assumed and agreed to pay said notes and mortgage according to the terms thereof, which assumption and agreement was made with said Jemima Eddy as a part of such transaction." The answer of defendants Verch and Sanborn denies "that as a part of the consideration of the purchase of said premises they assumed and agreed to pay the notes and mortgage described in said complaint; they deny that any assumption of said mortgage was made with said Jemima Eddy, as a part of said transaction; they deny that they assumed and agreed to pay said notes and mortgage as a part of said transaction, or as a part of the consideration of her deed in conveying the said property to these defendants." The court found from the pleadings upon this issue: "And said court further finds from the pleadings herein that at said time last mentioned said defendants R. Verch and A. J. Sanborn assumed and agreed to pay said notes and mortgage according to the terms thereof, which asumption and agreement was made with said Jemima Eddy; and said assumption and agreement was to the benefit of George Scoville and Olive Scoville, and on said 27th day of October, 1887."

Thomas J. Carran, for appellants. *Allen & Miller*, for respondent.

Foote, C. This action was to foreclose a mortgage upon certain real property. The case comes here on appeal from the judgment rendered as prayed for, for the sale of the mortgaged premises, and, in case of a deficiency arising from said sale, for the deficiency balance as against the defendants. Mrs. Eddy, one of the defendants, does not appeal. The mortgage was made to secure certain promissory notes executed and delivered in favor of George and Olive Scoville, who have assigned the same to the plaintiff, Jones. Verch and Sanborn, who are the appellants here, were the purchasers from Mrs. Eddy of her interest in the mortgaged premises. Among other things, the court, in its fourth finding of fact, found from the pleadings that when Verch and Sanborn bought her interest they "assumed and agreed to pay said notes and mortgage according to the terms thereof, which assumption and agreement was made with said Jemima Eddy, and said assumption and agreement was to the benefit of George Scoville and Olive Scoville; and on said 27th day of October, 1887, said interest of Jemima Eddy in said premises was by her deed bearing date on that day, and since recorded in Book 321 of Deeds, page 287, of said Los Angeles county records, conveyed by said Jemima Eddy, together with P. G. Eddy, her husband, to defendants R. Verch and A. J. Sanborn, jointly, who are now in possession of said premises, except lot 12, hereinafter mentioned, since released from the operation of said mortgage." The appellants claim that they ought not to be held liable for a deficiency over and above what the mortgaged premises may bring at foreclosure sale. There would be no difficulty in affirming the judgment here, if finding 4 was justified by the pleadings. Pellier v. Gillespie, 67 Cal. 583, 8 Pac. Rep. 185. The appellants say that such finding, most of which we have heretofore quoted herein, is not sustained by the actual condition of the pleadings. They claim that the denial in the amended answer and cross-complaint, at paragraph 2, folio 73, of the transcript, is sufficient as against that of the complaint in paragraph 3, folios 11 and 12; and that, such being the case, finding 4 is not justified. If the averments in the answer were in the conjunctive, evasive, and raised no issue, they would come under the rule laid down in Doll v. Good, 38 Cal. 290, and the trial court would have decided correctly in finding the allegation of the complaint to be true. But that tribunal has come to this conclusion by holding that, where it is said in the complaint the defendants "assumed and agreed" to pay the mortgage debt, they undertook to do two separate and distinct things essential to make them responsible to pay the mortgage debt, if the property resting under the mortgage lien was insufficient for that purpose. We cannot see that there is any difference whatever in this instance in saying that they "undertook and agreed" to pay the debt from saying that they "assumed and agreed" to pay it. There is only one proposition contained in the words "assumed and agreed," as here employed. The assumption to pay the debt is, as used here, the same thing as agreeing or undertaking to pay it; and the use of both words "assume and agree" is, as employed, no more the statement of two distinct propositions than if it had been stated that they "agreed and agreed" to pay the debt. For these reasons we think the finding is wrong, and that the judgment is erroneous, so far as the defendant's liability for a deficiency is concerned, and we advise that it be reversed.

We concur: TEMPLE, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

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90 Cal. 238

EASTMAN v. COOK *et al.* (No. 14,238.)

(*Supreme Court of California.* July 17, 1891.)

APPEAL—REVIEW—REFUSING NEW TRIAL.

Where the evidence is sufficient to justify the findings and decision of the court below, and there are no errors of law apparent on the record entitling plaintiffs to a new trial, the judgment and order overruling a motion for a new trial will be affirmed.

Department 2. Appeal from superior court, Solano county; A. J. BUCKLES, Judge.

F. E. Johnson and *John M. Gregory*, for appellants. *G. Frank Smith* and *Geo. A. Lamont*, for respondent.

SHARPSTEIN, J. On the 19th day of January, 1876, Cyrus A. Eastman, then being the owner of a tract of land in Solano county, conveyed the same to defendant George Cook. The purchase price was the sum of $3,200, of which $200 was paid at the date of the conveyance, and for the residue Cook gave his promisory note, payable five years after date, and to secure the payment thereof executed a mortgage on the premises. On May 27, 1876, Cook conveyed the premises to one John White. That deed was recorded on June 7, 1876. On November 10, 1877, John White conveyed the premises to defendant Fanny White, his then wife, and the deed was recorded on the 29th of December, 1877. On the 19th day of December, 1883, defendant Fanny White conveyed the premises to defendant Charlotte Harriet Cook, wife of defendant George Cook. That deed was never recorded. On the 22d day of September, 1887, defendant Fanny White executed another deed of the same premises to defendant Charlotte Harriet Cook, which was recorded February 1, 1888. On the 14th of January, 1885, Cook made another note to said Cyrus A. Eastman, for $3,000, payable five years after date; and to secure the payment thereof executed a mortgage on said premises, which was recorded on January 30, 1885. At the same time the former mortgage of January 19, 1876, on the premises was released and discharged. This action is brought for the foreclosure of the mortgage of January 14, 1885; and to have it adjudged that the conveyances from George Cook to John White, and from John White to Fanny White, and from Fanny White to Charlotte Harriet Cook, were made at the request of George Cook, and in trust for him. The court found that they were, and made and entered a decree of foreclosure and sale, as prayed in plaintiff's complaint. The defendants George Cook and Charlotte Harriet Cook moved for a new trial upon "(1) insufficiency of the evidence to justify the findings and decision of the court, and the findings are and the decision is against law; (2) errors in law occurring at the trial, and excepted to by the said defendants making this application." The motion was made on a statement of the case. The motion was denied, and this appeal is from the judgment and the order denying said motion. The question of the sufficiency of the evidence to justify the findings and decision of the court can be determined only after a careful perusal and consideration of all the evidence in the case. For that reason we must decline to discuss the evidence in detail. After a careful consideration of all the evidence, we are satisfied that it is sufficient to justify the findings and decision. There are no errors of law apparent on the record which entitle appellants to a new trial. Judgment and order affirmed.

We concur: DE HAVEN, J.; MCFARLAND, J.

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90 Cal. 240

PEYRE v. MUTUAL RELIEF SOC. OF FRENCH ZOUAVES. (No. 13,065.)

(*Supreme Court of California.* July 17, 1891.)

BENEVOLENT SOCIETIES—EXPULSION OF MEMBERS—JURISDICTION—DAMAGES FOR EXPULSION.

1. Where a member of a private corporation, formed by the voluntary association of its members, not for pecuniary profit, but to aid and sustain sick members, the by-laws of which provide for expulsion of members for misconduct, submits his case, when charged with misconduct, to the jurisdiction of the judiciary committee of the corporation, and, on being adjudged guilty, appeals to the whole body of its members, under the by-laws, he acknowledges the jurisdiction of the society.

2. In such case, if any irregularities occur in the procedure, they must be corrected by the society to which the member has submitted his case.

3. A member of a private corporation formed by the voluntary association of its members, not for pecuniary profit, but for benevolent purposes, cannot recover damages from the corporation, upon being improperly and unlawfully expelled from membership.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Louis F. Dunand and *Lindley & Eickhoff*, for appellant. *A. Comte, Jr.*, and *Van Ness & Roche*, for respondent.

Foote, C. The plaintiff sued the defendant, a corporation of which he was a member, for damages. The complaint was demurred to as showing no cause of action. The demurrer was sustained, and, the plaintiff refusing to amend, final judgment went in favor of the defendant, from which the plaintiff prosecutes this appeal. The corporation appears, from the complaint, to be a benevolent association, "for a purpose where pecuniary profit is not their object." It has no capital stock, nor any property except $5,000 in cash, a fund made up of sums received from time to time of its members, from fees, fines, and assessments, which fund is under the control of the association, "to be used by it for benevolent purposes, to-wit, in and about pecuniarily aiding and sustaining those of its members who become sick or distressed." It is not alleged that the plaintiff is either sick or distressed. One of the articles of the constitution or instrument of association of the corporation is: "Art. 53. A member who violates one of his or any of his obligations towards the society; who is found guilty of intemperance whilst he receives benefits; who lends himself to habits tending to call forth either upon himself or the society contempt or reproach,—shall be for the said facts and reasons responsible to the society, and upon proof shall, according to the decision of the society, be condemned to pay a fine, suspended, expelled, or released of his trust, if holding a position of trust," etc. By virtue of this article the plaintiff was suspended from membership in this benevolent association for the period of five years, and on this account he seeks to recover, in this action, damages against the corporation, in the sum of $10,000, alleged to have resulted from the sentence of suspension rendered against him. The offense charged against him by one of the members of the association, although called "forgery" in a communication to the society signed by the member making the charge, appears to have been that of false impersonation, in a matter between the association and the French authorities, where the plaintiff, in assuming to conduct its business as a member of the society, had falsely represented himself to the French minister of foreign affairs as the "captain in command of the company of French Zouaves." This charge, it seems, the society determined to be true, and that it was such misconduct as warranted the association in holding it a breach by the plaintiff of his obligation against the society, and punished him by suspension. The defendant being a private corporation, formed by the voluntary association of its members, not for pecuniary profit, but for benevolent purposes, had the right to provide in its by-laws for the suspension of a member for misconduct. Civil Code, § 599, subd. 4. The plaintiff not only submitted himself and his case to the jurisdiction of the judiciary committee of the society, which was appointed under the "rules of conduct" of the corporation, but when the association, as a body, had acted on the report of that committee, and had by a vote of 36 ayes to 20 noes adjudged him guilty as charged, he, in accordance with those "rules of conduct," took an appeal under the fifty-seventh article of the constitution of the society, that the cause might be reheard by the whole body of the members of the corporation. This appeal came on to be heard before the members of the corporation, and was rejected, and notice thereof was given to the plaintiff. It is plain that the jurisdiction was complete on the part of the members of the corporation to hear and determine the matter in hand. The procedure seems to have been substantially that prescribed by the constitution and "rules of conduct," and, if any irregularity took place, it was for the tribunal to which the plaintiff submitted himself to correct it. But if we were to admit that on the statements in the complaint the defendant was improperly and unlawfully suspended, and that he ought to be reinstated as a member of the association, and that this can be done by a writ of mandate upon a proper showing, still there is no ground for an action of damages shown in the complaint. The plaintiff claims that his admission into the society was by virtue of a contract, which contention is without any force. He was admitted into the association because the members thereof chose to have him become a member, and when they, in accordance with their constitution and "rules of conduct," determined that he had violated his obligation to the society in the commission of the misconduct charged against him, they virtually declared that they wished their association with him to end for five years, and carried their will into effect. This is no ground for damages, even if the facts upon which this determination was predicated do not justify it; for, if the plaintiff's view were to prevail, then the 20 members of the corporation who were the friends of the plaintiff, and voted against his suspension, would become as responsible for any alleged damage as those who had voted to suspend him. We know of no case where any such manifest injustice has been declared to be lawful, and we are satisfied that none can be found. We are of opinion that the demurrer was properly sustained, and that the judgment should be affirmed, and so advise.

We concur: Belcher, C. C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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90 Cal. 213

Stovell v. Neal. (No. 14,103.)

(*Supreme Court of California.* July 16, 1891.)

Mechanics' Liens—Estoppel.

Where the contract for erection of a building between the owner and contractor is void for failure to record the same, or other defects, the bond thereto attached, conditioned that the contractor will not permit any valid claim or lien to be placed on the building, is void also; and the fact that a material-man was surety thereon does not estop him from setting up a lien on the building.

Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

J. W. Mitchell and *Graff, Gibbon & Creighton*, for appellant. *Barclay, Wilson & Carpenter*, for respondent.

GAROUTTE, J. This is an action to foreclose a mechanic's lien against defendant, Neal, owner of the building, and one Goetzman, the contractor. Defendant, Neal, appeals from the judgment and order denying her motion for a new trial. The contract between the defendant, Neal, and Goetzman, the contractor, under which Goetzman began the erection of the building, was declared void by the court, owing to the failure of recordation and other defects. Attached to this contract was a bond in the sum of $2,500, signed by the contractor, Goetzman, as principal, and the Shallert-Ganahl Lumber Company and Thomas Stovell, the plaintiff, as sureties, binding themselves in the aforesaid sum to defendant, Neal, and we quote therefrom: "The condition of the above obligation is such that should he, the said H. J. Goetzman, the above-named principal, duly and properly, well and truly, and faithfully comply with and perform all stipulations, acts, and agreements entered into and to be performed by the said H. J. Goetzman, as appears in the foregoing contract, and should he not in any wise permit any valid claim, debt, or lien to be placed upon the building in the erection thereof, or the incurring of any liability on the part of the said Mrs. Juana A. Neal, by reason of the erection, other than the amount to be paid by her to the said H. J. Goetzman for said building, as in said contract described and specified, then the above obligation to be void, otherwise to remain in full force and virtue." Defendant set out this bond in the answer, and relied upon it to constitute an estoppel against plaintiff. The trial court found as a conclusion of law that the said bond was dependent upon the aforesaid contract, and, the contract being void, the bond was void, and therefore constituted no defense to this action. This conclusion of the court is manifestly correct. The contract being void, no cause of action could be based upon it by either party. The bond was attached to the contract, and its conditions based upon it, and when the contract fell, the bond was left without support, and necessarily fell with it. According to the testimony of plaintiff's witnesses, materials to the amount of $43.50 were neither furnished to be used nor used in the construction of defendant's building. Let the cause be remanded, with directions to the trial court to modify its judgment by striking from the amount thereof the sum of $43.50, and in all other respects let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

90 Cal. 215

ACOCK v. HALSEY *et al.* (No. 14,173.)

(*Supreme Court of California.* July 16, 1891.)

DISMISSAL OF ACTION—VACATION OF JUDGMENT—NOTICE—WAIVER.

1. In an action for possession of personal property, which is thereupon taken possession of by plaintiff after giving an undertaking for its redelivery, an answer asking for the return and redelivery of the property to defendants, or in case a redelivery cannot be had, then for the value of the property, and for damages and costs, asks affirmative relief, so that, after such answer is filed, plaintiff cannot dismiss the action.

2. Though the answer in such case is not filed within the time prescribed by law, the filing is not a nullity, and plaintiff's remedy is a motion to strike it from the files.

3. The date of the dismissal of an action is when the judgment of dismissal is entered, and not when the entry is made in the register of actions by the clerk that the action is dismissed by order of plaintiff.

4. Where the attorneys for both parties are present at the hearing of a motion to vacate a judgment, it cannot be objected that no notice of the motion was given.

Department 2. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Johnson & Johnson, for appellant. *A. L. Hart*, for respondents.

SHARPSTEIN, J. This appeal is by the plaintiff from an order setting aside a judgment of dismissal of the above-entitled action on motion of defendants. The record before us discloses the following facts: The action, which is for the recovery of the possession of personal property, was commenced on the 22d day of August, 1889, at which time the plaintiff gave an undertaking for the delivery to him of the property described in the complaint, and thereupon said property was upon proper process taken by the sheriff from the defendants by said plaintiff. On the 4th day of September, 1889, and after the defendants had given an undertaking for the redelivery of said property to them, the plaintiff, without redelivering said property to them, caused to be made by the clerk of the court in which said action was pending the following entry in the register of actions: "Dismissed by order of plaintiff's attorneys this 4th day of September, 1889. Attest: WM. B. HAMILTON, Clerk." On the 10th day of September, 1889, defendants filed an answer to said complaint, and at the same time a notice of motion to have said order of dismissal set aside, and to reinstate said cause upon the records of the court, and for permission to file an answer. On the 21st day of September, 1889, said motion was heard by the court, and an order, of which the following is a copy, made: "Motion to set aside dismissal. T. L. Acock, Plaintiff, vs. Nellie T. Halsey et al., Defendants. Matter coming on for hearing, Johnson & Johnson appearing for plaintiff, and A. L. Hart, for defendants. Matter argued and submitted, and motion denied" Thereafter, on the 25th day of April, 1890, against the objection of plaintiff, said cause was at the instance of defendants set for trial on the 12th of June 1890. Thereupon, on said 25th of April, plaintiff, without leave of the court, or notice to opposing counsel, procured to be entered by the clerk of said court a judgment of dismissal. On the 12th day of June, 1890, the day on which said action had been set for trial, said judgment was first brought to the attention of defendants' counsel and the court; whereupon, both parties being present by counsel, defendants' counsel, without notice, moved the court to set aside and vacate said judgment as being void, and as having been entered by the clerk, without authority of law, after the filing of defendants' answer; and on the 29th day of August, 1890, the court made an order vacating and setting aside said judgment, to which said order plaintiff then and there excepted, and from which this appeal is taken. If the judgment of dismissal was void, the court, on having its attention called to it, could summarily or otherwise vacate it. "An action may be dismissed, or a judgment of nonsuit entered, * * * by the plaintiff himself at any time before trial, upon payments of costs: provided, a counter-claim has not been made, or affirmative relief sought by the cross-complaint of defendant." It appears by the record that before and at the time of the entry of the judgment of dismissal in this case there was an answer of the defendants on file, in which the defendants, among other things, prayed "for the return and redelivery of said property to defendants, if a delivery thereof be had; or, in case a delivery thereof cannot be had, then for the value of said property in the sum of $500; for damages in the sum of $150; for defendants' costs in this action." We think the defendants by their answer clearly seek affirmative relief. But the answer, although filed before the entry of the judgment of dismissal, was not filed until after the entry in the register of actions that the action was "dismissed by order of plaintiff's attorneys." When was the action dismissed? This question is answered in Page v. Superior Court, 76 Cal. 372, 18 Pac. Rep. 385, in which it is held that an action which is directed to be dismissed by the plaintiff in the register of actions is not dismissed until the judgment is entered. Therefore the action in this case was not dismissed until after the answer of defendants, in which they sought affirmative relief, was filed. But the answer was not filed until after the expiration of the time within which the Code provides that an answer may be filed. But it could not be disregarded, or treated as a nullity, so long as it remained on file. The plaintiff's remedy was a motion to strike it from the files. "It was, perhaps, not strictly regular to file the answer after the time for answering had expired, without leave of the court; but, as the default of the defendant had not been entered, we think the filing was not a nullity." Bowers v. Dickerson, 18 Cal. 420. Appellant's counsel contends that no notice in writing of the motion to vacate said judgment was given. It does not appear that any such notice was given; but it appears that appellant's counsel were present at the hearing of the motion, and contested the same, which was a waiver of written notice. The object of giving the notice was fully accomplished without giving it. McLeran v. Shartzer, 5 Cal. 70; Reynolds v. Harris, 14 Cal. 677. Order affirmed.

We concur: DE HAVEN, J.; McFARLAND, J

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90 Cal. 231

MOTT v. EWING *et al.* (No. 13,873.)

(*Supreme Court of California.* July 16, 1891.)

DIVERSION OF WATER-COURSE—INJUNCTION—PRACTICE—FINDINGS OF FACT.

1. It is not necessary that the findings of the court on material issues raised by the pleadings shall follow the pleadings, but if the findings, taken together, are such that the court can say that the ultimate facts necessarily result therefrom, they are sufficient.

2. Though the complaint, in an action to restrain the diversion of a stream from the course in which plaintiff claims he is entitled to have it flow, as prior riparian owner and prior appropriator, alleges that damages to the land will result from the diversion, the court need not find on the issue of damages, since plaintiff is entitled to an injunction, whether such damages result or not.

Commissioners' decision. In bank. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Spencer & Raker and *C. A. Raker*, for appellants. *H. L. Spargur*, *F. W. Ewing*, and *Jenks & Chaflin*, for respondent.

FOOTE, C. This is an action to restrain, by injunction, the diversion from the plaintiff's lands by the defendants of the waters of a certain natural stream, the flow of which over and across her lands as a riparian proprietor, as also the beneficial use thereof for irrigation purposes as a prior appropriator, are claimed by the plaintiff through superior right. The defendants separately demurred to the complaint. Their demurrers were overruled. They then answered at great length. A trial being had, judgment was rendered for the plaintiff, from which this appeal is taken on the judgment roll. There are two main grounds upon which the defendants rely for a reversal of the judgment, as appears by their reply brief: (1) That the court has failed to find upon all the material issues raised by the pleadings; (2) that the findings, as made, do not support the judgment.

Under the first head, they assert that the amended complaint alleges, among other things: "And that plaintiff's rights as such riparian owner were acquired long prior, and are superior, to any right or claim of right of the defendants, or either of them, to the waters of said stream; that if said defendants continue, as by them and each of them threatened and intended, to obstruct and divert the waters of Powley creek, and to deprive plaintiff of the use thereof, the damage to plaintiff will be great, continuing, and irreparable, and pecuniary compensation therefor will not afford adequate relief for plaintiff's loss, damage, and injury, and that, if said defendants do so continue in such diversion of said waters from said ditch as by said defendants threatened and intended, the same will result in the destruction of the fertility and value of said lands, and in great, continuing, and irreparable damage to plaintiff, and pecuniary compensation therefor will not afford adequate relief for plaintiff's loss, damage, and injury." They say that as these allegations were specially denied in the answer, and were "the gist of the plaintiff's cause of action for injunction," it "being in equity for an injunction only," there should have been findings upon the issues as raised, and that there were no such findings. It has been said by the appellate court: "It is not necessary that the facts found should follow the pleadings which they support. If the truth or falsity of each material allegation not admitted can be demonstrated from the findings, the requirements of the Code are met." Clary v. Hazlitt, 67 Cal. 289, 7 Pac. Rep. 701. "The findings of a court cannot be altogether detached from each other, and considered piecemeal. If a particular finding be doubtful or obscure, reference may be had to the context for the purpose of ascertaining the true meaning." Millard v. Hathaway, 27 Cal. 140, 141; Kimball v. Lohmas, 31 Cal. 156; Polack v. McGrath, 38 Cal. 669; Water Co. v. Richardson, 72 Cal. 604, 14 Pac. Rep. 379. "Where probative facts are found, and the court can declare that the ultimate facts necessarily result from the facts which are found, the finding is sufficient." Water Co. v. Richardson, supra. It is found "that the plaintiff and her grantors have continuously used the water of said stream for irrigation and for domestic purposes and the watering of stock ever since said year 1864, except when prevented by defendants as hereinafter found; that in the spring of the year 1867 plaintiff's grantor entered upon said stream at the point described in the complaint, and diverted from said stream a quantity of the waters thereof equal to 78 inches, measured under a four-inch pressure, and conducted the same by means of a ditch by him constructed to connect said stream with a natural ravine or sag, to and upon that portion of plaintiff's lands described as the S. E. ¼ of S. W. ¼ of section 13, and N. E. ¼ of N. W. ¼ of section 24; and thereafter, until he transferred said land to plaintiff, in 1884, he continued to so divert and use said quantity of water by said means; and the plaintiff, except when prevented by the defendants, as hereinafter found, has continued to so divert and use the same." And it appears from other findings that one of the defendants through whose land the stream flows, as an upper riparian proprietor, never possessed or occupied her land until 1873, and that the other defendant is not a riparian proprietor of the stream at all, and did not own or occupy his land until 1877, and that neither of these defendants ever continuously or uninterruptedly, for any period of time last past, used any portion of the waters of this natural stream upon their lands, and that they never constructed any ditch to divert water connecting with the natural channel of the stream, but did construct a ditch through which they diverted water from the natural ravine appropriated long before that time by plaintiff's grantor, and that this diversion and attempted appropriation was not commenced until April 25, 1888. It would certainly appear from these facts found that necessarily the riparian rights of the plaintiff were acquired long prior to those of the defendants, as well as her rights as an appropriator, and were both superior to any of the defendants; therefore a sufficient finding to meet the allegations of the complaint on that head was made.

There are no damages given by the judgment for an injunction. As to the matter of finding upon the question of the nature and amount of the damages and injury, as set up in the complaint, it may be said that if the facts found show that, if not prevented, the continuous trespass of the defendants might by time ripen into a right adverse to the plaintiff, this is sufficient to entitle her, as a lower riparian proprietor, to an injunction. Lux v. Haggin, 69 Cal. 278, 10 Pac. Rep. 674; Moore v. Water-Works, 68 Cal. 151, 8 Pac. Rep. 816. When the diversion, as in this case, is by one against the superior right of another, and to the extent of depriving her of all the water to which she is thus entitled, it is not necessary to prove damages to entitle her to an injunction. Conklin v. Improvement Co., 87 Cal. 296, 25 Pac. Rep. 399. If not necessary to prove damages, it is unnecessary to find them. The continuous wrongful diversion of the water, which, if not stopped, might ripen into a right, was the thing from which injury not capable of being accurately ascertained might in the future result, and it was this which was sought to be and was enjoined, as it appeared from the findings to be threatened and likely to result. The plaintiff had the right to the use and enjoyment of her property, and that is sufficient to have this right protected against invasion by another. Moore v. Water-Works, 68 Cal. 150, 8 Pac. Rep. 816. We think the findings show this right, and the invasion of it, and that is sufficient to support the judgment to prevent such continued invasion. The right of one of the defendants to eight inches of the water is amply found and protected. We perceive no merit in any of the other points made, after careful examination, and do not think they require special mention. As no prejudicial error appears, we advise that the judgment be affirmed.

We concur: FITZGERALD, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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90 Cal. 257

In re GATES. (No. 14,342.)

(*Supreme Court of California.* July 17, 1891.)

BILL OF EXCEPTIONS—AMENDMENT BY PREVAILING PARTY.

Under Code Civil Proc. Cal. § 652, providing that, "if the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same," the supreme court has no authority to review the disallowance of amendments proposed by the prevailing party to a bill of exceptions taken by the losing party.

In bank. Appeal from superior court, Stanislaus county; W. O. Minor, Judge.

Application to the supreme court by Samuel Gates for leave to prove amendments to a bill of exceptions taken by the plaintiff in the case of Brusie against Gates, in which the plaintiff, Brusie, was nonsuited. Application denied.

W. E. Turner, for petitioner. *Stonesifer & Minor* and *Langhorne & Miller*, for respondents.

Harrison, J. In the action of Brusie vs. Gates et al. a trial was had in the county of Stanislaus, wherein, at the close of the plaintiff's case a judgment of nonsuit was rendered. Thereafter the plaintiff prepared the draft of a bill of exceptions, to which the defendant proposed certain amendments. Upon the presentation of the proposed bill and amendments to the judge for settlement certain amendments were disallowed, and the bill was settled and allowed February 16, 1891. The defendant has presented to this court his petition, setting forth the foregoing facts, together with the amendments that had been prepared by him and disallowed, and the reason why in his judgment they should have been allowed, and praying "that he be allowed to prove the truth of the matters set forth in his application, and the materiality of the said amendments." The amendments which the defendant sought to have incorporated into the bill consist chiefly of exceptions taken on his behalf to the rulings of the court, either in excluding evidence offered by himself, or in admitting evidence offered on behalf of the plaintiff, and which in his petition he avers "should be allowed and made part of said bill to explain the exceptions taken by plaintiff, and incorporated therein." Section 652, Code Civil Proc., provides that, "if the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same." "The party desiring the bill settled" is the one who has taken the exception and presented the bill to the judge for settlement. In the case of a bill of "exceptions taken at a trial" he is the one who, after the decision in the cause, prepares the draft of a bill, and serves it upon the adverse party, as is provided by section 650, Id. After the decision has been rendered in a cause, there would seem to be no occasion for any but the losing party to desire a bill of exceptions settled. The provision that "such draft must contain all the exceptions taken upon which the party relies," implies that it is only that party who relies upon some "objection upon a matter of law to a decision made by the court" (section 646) as a ground for reversing such decision that would "desire" the bill settled. There is nothing in the statute, however, which prevents the prevailing party from having the exceptions taken by him at the trial settled in a bill; but in such case he becomes an actor, and must prepare a draft of his bill, and serve it upon the adverse party. Inasmuch, however, as in any review of the decision of the court any evidence which had been excluded could not be considered, or any evidence which had been admitted disregarded, it follows that any exception taken by the prevailing party, either to the exclusion of evidence offered by himself or to the admission of evidence against his objection, would be "useless and redundant matter," and should not be allowed by the judge as an "amendment" to a bill proposed by the losing party. The amendments which may be proposed to the draft of a bill relate to the "evidence or other matter," which section 648 authorizes to be stated in the bill for the purpose of explaining the "objection" taken, and do not include exceptions taken by the party proposing the amendments, or any evidence or other matter necessary to explain the same. Whether the matter which is proposed by way of amendments to a bill of exceptions shall be allowed is to be determined by the judge who tried or heard the case, and his action thereon must be regarded as final. The statute has provided no mode for reviewing his action in this respect, even if it were practicable or desirable that any review should be had. His familiarity with the trial, and knowledge of what then took place, better qualify him than any other tribunal for determining how much of the evidence or other matter is necessary to explain the objection. This court cannot, in advance of a hearing upon the appeal, determine whether any particular piece of evidence or other matter proposed as an amendment is necessary to explain the objection. A proper determination of that question would require an investigation of the whole case, including the pleadings and other evidence that had been admitted, as well as the state of the trial at the time when the objection was made. In Hyde v. Boyle, 86 Cal. 352, 24 Pac. Rep. 1059, we said: "The duty and power of settling statements and bills of exception rest generally and properly in the judge of the trial court. This court can interfere with such statement or bill only in the cases provided by statute, and the only case thus provided is found in said section 652;" and again, upon a kindred motion in the same case, (26 Pac. Rep. 1092:) "The settlement of a bill of exceptions is one of the duties imposed upon a judge by virtue of his office, and is to be performed by him under the sanction of his judicial oath. It is not to be presumed that he will, in any instance, so far violate his official obligation as either willfully or knowingly to insert in the bill any matter that is not properly there, or exclude therefrom any matter that should be inserted. This court is not the tribunal to determine whether he has in any instance violated his duty in this respect, or from which a litigant is to seek redress for any such violation." Section 652 limits the authority of this court to interfere in the settlement of a bill to the single instance in which the judge "refuses to allow an exception;" and we have no inclination, even if we had the power, to extend this authority beyond the limits prescribed by the statute. The petition is denied.

We concur: McFarland, J.; De Haven, J.; Paterson, J.; Sharpstein, J.

Beatty, C. J., deeming himself disqualified, took no part in the decision.

(90 Cal. 276)

Dyer v. Placer County. (No. 14,283.)

(*Supreme Court of California.* July 18, 1891.)

Public Offense—Evading Payment of Railroad Fare—New Trial—Irregularity of Notice.

1. Act Cal. April 1, 1878, § 9, provides that "every person who shall fraudulently evade, or attempt to evade, the payment of his fare for traveling on any railroad shall be fined," etc. *Held* a violation of said act constitutes a public offense, within the meaning of Pen. Code, § 15, which provides that a "public offense is an act committed in violation of a law commending or forbidding it, and to which is annexed * * * a fine."

2. Where a notice of motion for a new trial states that it will be made upon "a statement of the case," and the motion is heard without objection upon what was termed a "bill of exceptions," it is an irregularity which does not affect the substantial rights of the parties

Department 2. Appeal from the superior court, Placer county; B. F. Myers, Judge.

Action by Dyer against Placer county to recover for the care of prisoners. Judgment for defendant. Plaintiff appeals. Reversed.

L. L. Chamberlain and *Ben P. Tabor*, for appellant. *A. P. Tuttle* and *A. K. Robinson*, for respondent.

Sharpstein, J. The plaintiff in his complaint alleges that he is a constable in and for the fourth township of the county of Placer, and that as such constable he performed and rendered official services for the defendant by serving and executing warrants and other legal writs and processes, transporting prisoners to and from the courts and county jail in said county, feeding prisoners while awaiting trial, conveying sick and indigent persons to the county hospital, aggregating in value the sum of $518.93; that on the 8th day of October, 1890, he presented his claim therefor in an itemized bill, duly verified, to the board of supervisors of said county, for allowance, and said board failed and refused to allow the said claim, or any part thereof, except the sum of $370.93. By the itemized account it appears that the items disallowed by the board were for services rendered in arresting, transporting, and feeding prisoners charged with fraudulently evading the payment of railroad fares. The authority for prosecuting persons charged with such delinquencies is found in section 9 of an act entitled "An act to create the office of commissioner of transportation," etc., approved April 1, 1878. Section 9 of the act reads as follows: "Every person who shall fraudulently evade, or attempt to evade, the payment of his fare for traveling on any railroad, shall be fined not less than five nor more than twenty dollars." That section is not repealed by the act entitled "An act to organize and define the powers of the board of railroad commissioners," approved April 15, 1880.

The bill of exceptions, among other things, contains the following: "It was consented to by the court, and agreed by the parties, that the sole question for the court to decide was whether under section 9 of said act, viz., 'Every person who shall fraudulently evade, or attempt to evade, payment of his fare for traveling on any railroad, shall be fined not less than five nor more than twenty dollars,' a violation thereof was or was not a public offense, and whether plaintiff, as such constable, should or should not execute warrants of arrest placed in his hands charging violations of said section 9 of said act." The court below held that a violation of said section 9 did not constitute a public offense, and rendered its judgment for the amount allowed by said board of supervisors, and no more. From that judgment this appeal is taken. We think a violation of said section 9 constitutes a public offense, within the definition of section 15 of the Penal Code, which reads as follows: "A crime or public offense is an act committed or omitted in violation of law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: * * * *third*, fine." To hold that a law which makes it a finable offense to fraudulently evade the payment of railroad fare does not make such evasion a public offense, would we think, be going but skin deep into its meaning. *Qui hæret in litera, hæret in cortice.*

In his notice of motion for a new trial appellant stated that it would be "made upon a statement of the case." The motion was heard without objection, and denied upon what is denominated a "bill of exceptions." We think this did not in any way affect the substantial rights of the parties, and that it is an irregularity which must be disregarded. Judgment and order reversed, and cause remanded for a new trial.

We concur: De Haven, J.; McFarland, J.

(90 Cal. 220)

Barry v. Coughlin *et al.* (No. 13,401.)[1]

(*Supreme Court of California.* July 16, 1891.)

Appeal—Findings—Evidence.

When the finding is sustained by evidence, it will not be disturbed on appeal.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Action by Barry against Coughlin and others to forcelose a mechanic's lien. Judgment for defendants. Plaintiff appeals. Affirmed.

A. Morgenthal, for appellant. *J. D. Sullivan*, for respondents.

Sharpstein, J. Action for the foreclosure of a mechanic's lien. The plaintiff was employed to work on a building of defendant Coughlin's by the defendant Grace, who had contracted with defendant Coughlin to make certain repairs on said building. The defendants Coughlin, and Caldon answered the plaintiff's complaint by alleging that the claim and demand of the plaintiff has been fully paid and discharged. Defendant Grace does not answer. The only issue raised by the pleadings is that of payment, and upon that issue the parties went to trial. The court found in favor of the defendants, and entered judgment accordingly. Appellant moved for a new trial, on the ground that the decision is not justified by the evidence. There was some evidence tending to prove payment, and we cannot disturb the finding of the court on that issue, although, if sitting as a trial court, we might have found otherwise. Judgment and order affirmed.

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[1] Rehearing denied.

We concur: McFarland, J.; De Haven, J.

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90 Cal. 221

Spargur *et ux.* v. **Heard** *et al.* (No. 13,820.)

(*Supreme Court of California.* July 16, 1891.)

Water-Rights—Appropriation—Riparian Owners—Pleading—Findings.

1. In an action to establish a water-right, a finding that plaintiff's grantor appropriated 20 inches of water in 1874, and in 1878 conveyed to plaintiff, and that for six years next succeeding such appropriation the use of said water by plaintiff and her grantor was with the full knowledge of defendants' grantors, continuous, open, and notorious under a claim of right, shows that plaintiff had acquired a prescriptive right to the use of 20 inches of water, and it is immaterial how long defendants and their grantors had owned their riparian lands in fee.

2. Where plaintiff has acquired a right to take water from a creek at a point above defendants' land, and defendants have wrongfully obstructed the flow into her ditch, and threaten to continue to do so, it is proper to grant a perpetual injunction without proof of damages, notwithstanding that defendants are riparian owners on the creek.

3. A denial that defendants threaten or will continue to do the acts complained of, "except as of right they are lawfully entitled thereto," is not a denial *in toto* of an allegation that defendants threaten and intend, and, unless prevented by injunction, will continue, to divert and obstruct the water of a stream.

4. A complaint in an action to establish a water-right, which alleged that plaintiff and her grantors had owned, possessed, and occupied the lands described for 15 years, and that she was then the owner, is sufficient to show title to the land.

5. Where it did not appear that taxes had been levied and assessed against the ditch and water-right it was not error to fail to make a finding upon that question.

6. It is not error to join the husband as coplaintiff in a suit to establish a water-right belonging to the wife.

Commissioners' decision. In bank. Appeal from superior court, Modoc county; G. F. Harris, Judge.

Action by Henry L. Spargur and wife against K. G. Heard, Jr., and others to establish and obtain a perpetual injunction. Judgment for plaintiffs. Defendants appeal. Affirmed.

Spencer & Raker, *Frank M. Sawyer*, and *Clarence A. Raker*, for appellants. *H. L. Spargur*, *D. W. Jenks*, and *J. H. Stewart*, for respondents.

Belcher, C. C. This action was brought to obtain a perpetual injunction restraining the diversion of water, and for damages. The court below granted the injunction, but without damages. The appeal is from the judgment, and rests on the judgment roll.

1. It is claimed by appellants that their demurrer should have been sustained, but we think it was properly overruled. The complaint stated a cause of action, and it was not ambiguous, unintelligible, and uncertain. The plaintiffs were husband and wife, but a husband may be joined as plaintiff with his wife in an action which concerns her separate property. Calderwood v. Peyser, 31 Cal. 333; Corcoran v. Doll, 32 Cal. 83. Plaintiffs alleged that Mrs. Spargur and her grantors had owned, possessed, and occupied the lands described for the periods named, and that she was then the owner thereof; and they deraigned her title to the ditch and water-right from the first appropriator. This was sufficient.

2. It is contended that the court did not find upon all the material issues raised by the pleadings. Under this head it is urged that there was no finding upon the issue tendered by plaintiffs' averment "that the defendants threaten and intend, and, unless prevented by the injunction of this court, they will continue, to divert and obstruct the waters of said stream, and prevent the same from reaching the lands of said plaintiff, and wholly deprive her of the use of said water. That the damage to said plaintiff for each day she is deprived of the use of said water is $5," etc. It is said that this averment was denied *in toto*; but the only denial as to the first part of it was that defendants threaten or intend or will continue to do the acts complained of, "except as of right they are lawfully entitled thereto." This was clearly not a denial *in toto*, and yet the court found "that defendants, and each of them, threaten and intend, and, unless restrained, will continue, to divert the waters from said plaintiff's ditch, and thereby prevent any portion of the waters of said stream from flowing through said ditch to plaintiffs' said lands." The court was not required to go further and find as to the alleged resulting damages, for the reason that it was not necessary to allege or prove such damages. Moore v. Water-Works, 68 Cal. 146, 8 Pac. Rep. 816. The finding was therefore fully sufficient. It is also urged that there was no finding as to the bar of the statute of limitations pleaded by defendants. But the court did find "that plaintiffs' cause of action is not barred by section 318 of the Code of Civil Procedure, nor by section 343 of said Code, nor by section 319 of said Code, nor any of them." The sections named are the only ones pleaded, and the claim that the finding should be disregarded, because it is placed among the conclusions of law, is without merit. Burton v. Burton, 79 Cal. 490.[1] It is further urged that there was no sufficient finding as to the affirmative defense set up by the defendants, to the effect that they and their grantors had been the owners in fee-simple absolute of the land claimed by them since about the year 1869, and that Rutherford creek—the stream from which plaintiffs claim the right to take the water—naturally flows across their land, and that their right to the full flow and

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[1] 21 Pac. Rep. 847

use of the waters of the creek upon their said land is older and superior to any right of the plaintiffs thereto, or to any portion thereof. It is said the court found only that defendants' lands were agricultural in character, and that the said stream in its natural channel flowed across the same, and naturally irrigated portions thereof, but did not find how long they and their grantors had been the owners in fee-simple of the said land. But the court also found that in the fall of 1873 and the spring of 1874, one Wood constructed a ditch leading from Rutherford creek to certain lands situated near the creek, and which he then occupied and claimed, and thereby appropriated and diverted to his lands 20 inches of the water of the creek, measured under a 4-inch pressure, and thereafter continuously used the same for irrigating his lands during the irrigating season of each year, and for domestic purposes and the watering of stock during the whole of each year, until September, 1878, when he conveyed his lands, with the ditch and water-right, and privileges appurtenant thereto, to the plaintiff Mrs. Spargur; that she thereupon took possession of the land, ditch, and water-right, and has ever since continuously claimed and used the water so appropriated for the same purposes as her grantor had used it, except when prevented from doing so by defendants and their grantors; and "that for six years next succeeding said appropriation such use of said water by plaintiff and her grantor was, with the full knowledge of defendants' grantors, continuous, uninterrupted, peaceable, open, and notorious, under a claim of right adverse and in hostility to all, and particularly to defendants and their grantors." These findings clearly show that Mrs. Spargur had acquired a prescriptive right to divert and use the 20 inches of water which she claimed, (Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645;) and, this being so, it was immaterial how long defendants and their grantors had owned their land in fee, and no finding as to that matter was required. It is further urged that there was no finding that plaintiff and her grantor had paid all taxes levied and assessed against the said ditch and water-right; but it does not appear that any such taxes had been levied or assessed, and therefore no finding upon this question was necessary. Heilbron v. Ditch Co., 75 Cal. 117, 17 Pac. Rep. 65; Coonradt v. Hill, 79 Cal. 587, 21 Pac. Rep. 1099.

3. It is contended that the findings were not sufficient to justify the issuance of a perpetual injunction against defendants, for the reason that they were riparian owners on the creek, and the court only found that plaintiff had been damaged in the nominal sum of one dollar. The answer is that it appears that the defendants' lands were situated on the creek below the head of plaintiff's ditch; that plaintiff had acquired a right to appropriate from the creek the amount of water claimed by her, and that the defendants had wrongfully obstructed the flow of the water into her ditch, and threatened to continue to do so. Under such circumstances plaintiff was entitled to an injunction, without proof of damages. Moore v. Water-Works, 68 Cal. 146, 8 Pac. Rep 816; Conkling v. Improvement Co., 87 Cal 296, 25 Pac. Rep. 399.

Some other points are made for a reversal of the judgment, but they do not require special notice. In our opinion the proper judgment was entered, and we advise that it be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

BEATTY, C. J. I concur in the judgment.

(90 Cal. 186)

PEOPLE *ex rel.* BOARD OF STATE HARBOR COMMISSIONERS v. FAIRFIELD *et al.* (No. 13,466.)

(*Supreme Court of California.* July 13, 1891.)

EVIDENCE—OFFICIAL BOOKS — SHOWING GENERAL INACCURACY.

Where, in an action upon the official bond of a wharfinger, the books kept by the secretary of the board of state harbor commissioners are introduced to prove that certain sums of money received by him had not been paid to the board, it is error to exclude evidence that the secretary had received large amounts from other persons in payment of harbor dues, which were not accounted for in the books, to impeach the accuracy of the books, although Code Civil Proc. Cal. § 1920, makes official books or records "*prima facie* evidence of the facts stated therein."

Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by the people on relation of the board of state harbor commissioners against Fairfield, Hendry, and Ray, upon an official bond given by Fairfield as wharfinger, and signed by the others as sureties. Judgment for plaintiffs. Defendants appeal. Reversed.

W. H. H. Hart and *Aylett R. Cotton*, for appellants. *F. S. Stratton*, (*T. C. Coogan*, of counsel,) for respondent.

MCFARLAND, J. This is an action upon the official bond of defendant Fairfield, upon which the defendants and appellants Hendry and Ray were sureties. Before the trial Fairfield died, and by the consent of parties the action was as to him dismissed as of a date prior to his death. Judgment was rendered against Hendry and Ray for $1,911.05, from which, and from an order denying a new trial, they appeal.

1. There are some 25 points made by appellants, which we do not deem necessary to notice in detail. It is sufficient to say that the court below did not commit any error except with respect to the matters hereinafter mentioned.

2. The plaintiffs introduced evidence to the point that Fairfield, while holding the office of wharfinger, for which said official bond was given, received certain sums of money in his official capacity at various times within the period stated in the complaint; and, for the purpose of showing that he had not paid said money to the board of state harbor commissioners as his official duty required, they introduced

certain books which the secretary of said board is required to keep by section 2522 of the Political Code. These books are made by statutory law "*prima facie* evidence of the facts therein stated," (Code Civil Proc. §§ 1920, 1926;) and they were introduced by plaintiffs to prove that Fairfield did not pay any of said moneys to the board, because said books did not contain any account of such payment, which they should have contained if such payment had been made. It is quite evident that plaintiffs were called upon to prove something more than the mere fact of the receipt of the moneys by Fairfield; for the presumption would have been that he performed his official duty, and disposed of the money as such duty directed. The defendants, for the purpose of overcoming the *prima facie* character of evidence afforded by said books, offered to prove that one Gray, who was secretary of the board during the time when Fairfield was wharfinger, had incorrectly, falsely, and fraudulently kept said books. In this connection they offered to prove false entries and fraudulent omissions in the books with respect to business done with the board by persons other than Fairfield. For instance, they offered to show numerous bank-checks for large amounts which had been received by Gray from various persons in payment of harbor dues, and indorsed by him, of which there was no account whatever in the books. This class of evidence was ruled out by the court upon the ground that "it does not connect itself in any way with the deficit charged against the defendant by the evidence introduced on the part of the plaintiff," and because it "did not relate to any items upon which the plaintiffs seek to recover in this action." In this ruling the court committed error for which the judgment must be reversed.

A *prima facie* case may be rebutted from any stand point within the boundary of legitimate evidence. A merchant's or shop-keeper's books, after some slight preliminary proof of their correctness, are *prima facie* evidence of the sale and delivery of goods. Under our Codes, these books of the secretary of the harbor commissioners are made *prima facie* evidence of certain facts, without any preliminary proof. But the same rule applies in both cases, that is to say: The books are to be taken, in the first instance, as competent evidence of the truth of certain statements therein contained, because they are presumed to have been correctly and honestly kept, and to be truthful and creditable, until the contrary be shown. But the contrary may be shown by proof that they have not been fairly and honestly kept, and that their character is such as to render them unreliable and valueless as evidence. And this may be done by proving false and fraudulent charges and entries against persons other than the party to the suit on trial. If such proof were confined to items of the particular account against the defendant in the action it would be of little value; for if the defendant could, by independent evidence, disprove the entries made against him, he would have little cause to assail the general character of the books. A case strictly in point is that of Funk v. Ely, 45 Pa. St. 444. There Ely had introduced his books, and the trial court had ruled out all evidence touching their character, except such as related to the items of Funk's account. The court in considering this ruling say: "The only error we see upon the record is in excluding from the jury all evidence tending to impeach Ely's books, except such as related to the account against Funk. Such a rule of evidence amounts to nothing in its practical application. If a defendant can disprove his particular account, he has no occasion to assail the general character of plaintiff's books. It is only when he has no other means of meeting a false charge that he assails the general character of plaintiff's books. * * * It is the general character which is thus brought into issue, and general character is formed by numerous particulars." Having stated that, if it appears on the face of the book that it should not be admitted in evidence, the court may reject it, the opinion proceeds as follows: "If this does not clearly appear, it is to be submitted to the jury to judge of; and then it is competent for the adverse party to show its general character by pointing to charges and entries affecting other parties, and by calling witnesses to prove such entries false and fraudulent. That this investigation may not run into excessive departure from the issue on trial, the court should limit it to the time, or near the time, covered by the account in suit, or should suffer no more examination of collateral cases than would bear directly on the general character of the book. * * * The jury may form some opinion from such examination how far it is entitled to weight in the scales which they are holding. While they should make all due allowance for mistakes, for ignorance and unskillfulness in book-keeping, and for peculiarities in the plaintiff's business, they should insist on the general honesty and accuracy of the book made in secret by one party against the other, and now offered as a guide to the conscience of the jury." It would be a harsh rule, indeed, that would prevent the defendants in the case at bar—who are mere sureties entitled to stand on their strict rights—from showing that the omissions by which they are sought to be concluded are in a book full of omissions which are false and fraudulent. Of course, when they shall have introduced all their evidence on that point, it will be for the jury, or the court sitting as a jury, to determine how far such evidence has weakened the credibility of the books; but that such evidence is admissible we have no doubt. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: De Haven, J.; Sharpstein, J

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90 Cal. 212

People v. Stewart. (No. 20,783.)

(*Supreme Court of California.* July 15, 1891.)

Rape—Evidence.

Where, on a trial for assault with intent to rape, complainant, a girl of 12 years of age, testifies to facts which, if true, prove the crime, and her statements as to most of the accompanying circumstances are corroborated by other witnesses, and defendant admits that he was present, but denies the assault, a conviction will not be disturbed.

Commissioners' decision. In bank. Appeal from superior court, Colusa county; E. A. BRIDGFORD, Judge.

Appeal of G. W. Stewart from a conviction of assault with intent to rape. Affirmed.

T. J. Hart, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

BELCHER, C. C. The defendant was convicted of the crime of assault with intent to commit rape, and has appealed from the judgment and an order refusing him a new trial. The only points made for a reversal of the judgment are that the court erred in its instructions to the jury, and that the evidence was insufficient to justify the verdict. No particular errors are pointed out, and, after carefully reading the instructions, we have been unable to discover that any error was committed. Taking the instructions as a whole, they seem to state the law applicable to the case fully, fairly, and clearly. The complainant was a girl 12 years of age. She was a witness, and testified to facts which, if true, necessarily lead to the conclusion that the offense charged was committed; and her testimony as to most of the accompanying circumstances was corroborated by other witnesses. The defendant testified in his own behalf, and, while admitting that he was with the complainant at the time and place named by her, denied that any assault was committed. A conviction of such an offense may be had upon the uncontradicted evidence of the prosecutrix, the weight to be accorded the evidence being a question for the jury. People v. Mayes, 66 Cal. 597, 6 Pac. Rep. 691. Under the circumstances shown here, we do not think the judgment can be reversed for insufficiency of evidence, and we therefore advise that the judgment and order be affirmed.

We concur: FITZGERALD, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(90 Cal. 190)

FAIRCHILD v. MULLAN *et al.* (No. 13,210.)[1]

(*Supreme Court of California.* July 14, 1891.)

VENDOR AND VENDEE—BOND FOR DEED — SUBSEQUENT DECLARATION OF TRUST — TENANTS IN COMMON.

Where a vendor gave a bond for a deed and received part of the purchase price, the fact that he afterwards entered into an agreement with the vendee and others, declaring that the vendee held the same in trust for the use of all the parties, did not make the vendee a tenant in common with the vendor, as he only took an equitable estate by the bond, which might be foreclosed on failure to comply with its terms.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by Harriet M. Fairchild, executrix of A. A. Ritchie, deceased, against John Mullan, Henry F. Williams, P. M. Randall, and Joseph M. Nougues, to quiet title. Judgment for plaintiff. Defendants Mullan and Randall appeal. Affirmed.

Joseph M. Nougues and *Mich. Mullany*, for appellants. *J. F. Wendell*, for respondent.

TEMPLE, C. The defendants Mullan and Randall take this appeal from the judgment and an order refusing them a new trial. The action is brought by the executrix of A. A. Ritchie, deceased, to quiet title to a tract of land in Lake county, and to have it adjudged that the defendants have no right to purchase under a contract made with Ritchie, October 19, 1877. Defendants Nougues and Williams filed a disclaimer. The judgment quiets the title absolutely against all of the defendants except Mullan, and permits him to complete the purchase within 90 days, by paying certain moneys, and, failing so to do, cuts off all claim on his part. On the 19th day of October, 1877, Ritchie executed to Mullan a bond, by which he agreed to convey to Mullan the land on or before May 5, 1882, for $40,000. It recites the payment of $10,000, but it appears that only $3,000 was actually paid at the time. The next day, October 20, 1877, Mullan, Nougues, Randall, and Williams entered into a written agreement, which begins as follows: "Whereas, on the 19th day of October, 1877, A. A. Ritchie, of Lake county, California, did in a bond obligate himself to deed and convey to John Mullan, of San Francisco, Cal., his certain property situate in the county of Lake and state of California, and which property is specifically set forth and particularly described in said bond, and to which reference is herein made, and said bond is hereby made a part of this instrument: Therefore, the object of this agreement is to witness and to declare that said property is by said John Mullan held in trust and for the parties hereinafter named, and in the manner and for the purposes hereinafter stated, and not otherwise, to-wit: One-fifth part thereof for A. A. Ritchie, of Lake county, California, and one-fifth part thereof for Henry F. Williams, one-fifth part thereof for Joseph M. Nougues, one-fifth part thereof for P. M. Randall, and one-fifth part thereof for John Mullan, all of San Francisco, California, so that each of said five named parties shall be mutually interested in each and all and every part and parcel of the afore named and described property; it being mutually understood and agreed, however, between the parties thereto, that the interest of each of said parties in and to the aforesaid property shall be and is in direct proportion to the amount of money paid and to be paid by each of the aforesaid parties to A. A. Ritchie on account of the purchase money in making and securing the purchase of said property, and not otherwise." The writing proceeds to specify what sums shall be paid by each, and when. A. A. Ritchie was to pay $8,000, May 5, 1888. Ritchie was to retain possession, and for one year the use was to pay the interest and taxes on the sum which remained due after the payments specifically provided to be paid before the final payment, to-wit, $22,000, which was to be paid October 19, 1882. It further specifies as follows: "It is further mutually understood and agreed that it is the intention of the parties hereto in due time to organize a corporation under the laws of the state of California for the purpose of introducing water into the city of San Francisco from the Putah Creek water-shed, and from other sources of water supply in the state of California; that it is the ultimate intention and purposes of said parties to use the property so purchased and as described in said bond as one of the reservoir sites in the development of said water project; and that it is for such ultimate use and purpose that said property has been negotiated and purchased and paid for, and in the manner and for the benefit of the parties hereto, and wherefore this agreement has been made and entered into by these parties at the city of San Francisco, this 20th of day of October, 1877." It was provided that Mullan should pay for Randall, but, if Randall failed to repay by May 5, 1882, his interest should pass to Mullan for the benefit of himself and the other parties, if they proportionately reimbursed Mullan the amounts paid for Randall. It does not appear that Randall ever paid anything, or that Mullan was reimbursed for moneys paid on his account. Nougues and Williams assigned their interest to Mullan, August 15, 1878. At the time of Ritchie's death, November, 3, 1879, he had been paid, at the date of the contract, October 19, 1877, $3,000; December 1, 1877, $2,000; April 11, 1878, $2,500; and Ritchie had a note from Mullan for $2,500,—thus making up the $10,000 payment which is acknowledged in the bond. Mullan had expended, on account of the proposed water company, $3,188.53. After Ritchie's death Mullan presented a claim against his estate for one-fifth of this sum. Five hundred and ninety-one dollars was allowed by the executrix, and credited on the note, November 1, 1881. Mullan advanced to her $1,000, which she needed to pay interest upon a mortgage given by Ritchie upon the land. At this time Mullan contracted with the executrix to purchase Ritchie's interest in the property for $8,000, to pay the balance due on his note and the bond by November 1, 1883. He made no further payments, and this suit was commenced February 3, 1884.

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[1] Rehearing denied.

Appellant contends that by the terms of the agreement made on the 20th day of October, 1877, he became an owner as tenant in common with Ritchie in proportion to the amount paid by him upon the purchase of the property. Whether this is a correct construction of that agreement is really the only question in the case. By the terms of the bond to Mullan, Ritchie held the legal title as security for the purchase money still unpaid. By the contract of the next day he became jointly interested with the defendants in their enterprise, and that instrument was evidently intended to define the interest of each in the joint undertaking and the joint property. There is nothing indicating an intent on the part of Ritchie to affect his security for his debt, or to change the terms of the purchase. The natural and obvious construction would be that the contract was intended to define the interest of the parties *inter sese* as purchasers, and, indeed, the instrument expressly so declares. "Therefore, the object of this agreement is to witness and declare that said property is by the said John Mullan held in trust for the parties hereinafter named, and in the manner and for the purpose hereinafter stated, and not otherwise;" and then follows the language under consideration. It is quite obvious that the property to be held as specified was the estate in John Mullan, or to be acquired by him under the bond, which is made part of the agreement. Mullan having failed to complete his purchase, the proceeding to foreclose his rights under the contract is strictly in accordance with the practice in equity, and has been expressly sanctioned in this court. Keller v. Lewis, 53 Cal. 118. By the terms of the contract Randall has ceased to have any interest in it. If he has rendered service to the associates, it would constitute no claim against Ritchie to be set off against this bond. No such services were shown, nor was any claim against the estate on account of such service presented to the executrix. We think the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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90 Cal. 201

TOMKIN v. HARRIS, Judge of Superior Court. (No. 14,235.)

(*Supreme Court of California.* July 15, 1891.)

MANDAMUS TO JUDGE — PLACING CAUSE ON CALENDAR.

On petition for *mandamus* to compel a judge to place a cause on the calender, it appeared that such case had been begun six years before for the dissolution of a partnership and the division of partnership lands. A certain third party claiming an interest in such lands was made a defendant. Both defendants, having filed general denials, died, and their interests in the property passed into other hands, and their administrators closed up their estates without having been substituted as defendants. Six years after its commencement, the case not having been brought to trial, certain *amici curiæ* moved to dismiss for lack of prosecution, showing that they wished to purchase and procure good titles to the lands clouded by such action. *Held*, that it was within the discretion of the circuit court to entertain such motion, and while having it under advisement *mandamus* will not lie, at the instance of a substituted defendant, to compel such court, by placing the cause on the calendar, to decide such motion within any specified time.

Application for *mandamus*.

J. C. Black and *B. L. Ryder*, for petitioner. *Walker C. Graves*, for respondent.

MCFARLAND, J. This is an original proceeding here in *mandamus* by which petitioner seeks to have the respondent commanded to place on the calendar a certain action pending in his court entitled "Thaddeus Harper v. Thomas Hildreth et al.," and to set said action for trial on a day certain, or to appoint a referee therein, and to proceed with the trial of said action. An alternative writ was issued; and, upon the filing of respondent's answer, the case was argued and submitted on the petition and answer. There is no doubt that a superior court may be compelled by *mandamus* to proceed, in regular course, to the trial of a cause, when without any legal reason it flatly refuses to do so. But the writ can be used for this purpose only when the action of the lower court is a plain refusal to perform a clear duty which the law specially enjoins; and the party invoking its aid must show a case where the duty of the court to do the thing asked is pure and simple, and unmixed with discretionary power or the exercise of judgment. Such a case the petitioner in the case at bar has not shown. It appears that the said action of Harper vs. Hildreth et al. was commenced in the court of respondent in June, 1884. The purpose of the action was to dissolve a partnership between Harper and Hildreth, which had been engaged in raising cattle and other live-stock, and in buying, selling, and improving lands, and for an accounting; Harper alleging that Hildreth was largely indebted to him on account of said partnership. It was averred in the complaint that said Harper and Hildreth, as partners, were the owners of more than 13,000 acres of land in Fresno county; and Kate L. McLaughlin, as executrix and devisee of Charles McLaughlin, deceased, was made a party defendant to the action as claiming an interest in said lands. No answer appears to have been filed in the case until May 14, 1885, when Hildreth filed an answer admitting the partnership, but denying any indebtedness to Harper, and alleging that, upon an accounting, Harper would be indebted to him (Hildreth) in the sum of $33,000, for which amount he prayed judgment against the plaintiff, Harper. Nothing further seems to have been done, or asked to be done, in the case before June 29, 1886, when the defendant Hildreth died in Santa Clara county. He left a will, in which his widow, Laura L. Hildreth, was named as executrix; and on January 20, 1887, she was substituted as defendant in the case. It appears that at some time, not stated, a referee was appointed, but he died without making any report. Afterwards, in October, 1887, the said Laura was discharged of her trust of executrix by the superior court of Santa Clara county. Afterwards one Dunphy was appointed administrator, but he was also discharged as administrator by the superior court of Santa Clara county in April, 1890, without ever having been substituted as a party to the action. In the mean time the defendant Kate L. McLaughlin had died, and no one had been substituted in her place as defendant. The action slept along until April, 1890, when Horace Hawes and W. C. Graves, in the character of *amici curiæ*, upon notice to plaintiff, moved the court to dismiss the action for want of prosecution. In support of their motion they showed by affidavit that both of the defendants were dead; that their estates had been administered upon and the administrations closed; and that no claim for the matters set up in the complaint had been presented to either estate. Plaintiff appeared by counsel, and opposed the motion, and showed by affidavit, among other things, that the said defendant Kate L. McLaughlin, during her lifetime, and after the commencement of the action, entered into a written contract with W. W. Davis and D. P. Edwards, by which she agreed to convey to them all her title to the lands described in the complaint, upon their compliance with certain conditions; that in like manner the original defendant, Thomas Hildreth, had entered into a written agreement to convey all his interest in said lands to said Davis and Edwards; that said Davis had, by a recorded deed, conveyed the undivided half of a part of said lands to J. G. James and J. R. White; and that said Kate L. McLaughlin had afterwards, by a recorded deed, conveyed to said James and White all the interest which, in her own right, or as executrix as aforesaid, she had in any and all of the lands described in the complaint. Thereupon plaintiff's counsel gave notice that on April 22, 1890, he would move the court for an order that said Davis, Edwards, James, White, and others be brought in as parties defendant, and for leave to file an amended and supplemental complaint. By consent of the parties, both of said motions were continued from time to time until the 15th day of August, when they were finally submitted upon briefs, all of which were to be filed within 25 days. Afterwards, on October 15, 1890, and while said motions were still under advisement, the petitioner herein, Alfred R. Tomkins, having procured himself to be appointed administrator of said Thomas Hildreth, deceased, appeared by his attorney, and asked to be substituted as defendant. To this Milton E. Babb, one of the attorneys of record for plaintiff, consented, and on December 17, 1890, an order for such substitution was made. On December 22d the petitioner, by his attorney, J. C. Black, appeared, and asked the court orally to place the cause upon the calendar for trial on a day to be fixed by the court, or to appoint a referee, and to allow the plaintiff and defendant to amend their pleadings as per stipulation on file. This stipulation was signed by said Babb, as attorney for plaintiff, and by said Black and B. G. Ryder, as attorneys for the substituted defendant, Tomkins, and provided that the said parties might amend their pleadings at any time "as they may elect." This motion having been denied, it was renewed in writing on December 23d; and the written motion was consented to in writing by said Babb, as attorney for plaintiff. The motion was denied; the judge saying that whenever any amendment to a pleading should be proposed he would pass upon it, but that he would not make the order for amendments in the general way proposed by Black and consented to by Babb. (We gather from the record that the court suspected collusion between the said two apparently hostile parties.) The court refused to place the case on the calendar at that time, but said that it would "place the case on the calendar if the matters heretofore submitted are determined before that time," and there were issues to be tried. At that time the pleadings in the case had disappeared, and there had been no application to supply them. According to the rules of the court, the civil calendar was called at certain times for the purpose of setting cases for trial, and when the said motion was made cases had already been set up to January 21st. There was another setting of the calendar on January 10th, of which the usual notice in the newspapers was given; but no motion was made at that time to set the said case of Harper v. Hildreth. On January 2, 1891, the court made an order reciting the facts above stated as to the said Davis, Edwards, James, and White, and directing that they be brought in and made parties to the action. Under these circumstances, we do not think that the petitioner presents a clear field for the exercise of the extraordinary remedy of *mandamus*. Waiving all other considerations, we think that the court had the right to entertain the motion of *amici curiæ* to dismiss the action for want of prosecution. The object of the motion, as stated by them, was to purchase and procure good titles to lands which were embraced in and clouded by the action. The suit had been pending for six years, and no effort had been made by either of the parties to bring it to a trial. There was not—and for a long time had not been—any person representing either of the defendants; and the interests of the defendants in the lands affected by the suit had been long since transferred and conveyed to others. Whether or not, under these circumstances, the motion of Hawes and Graves—though not parties to the action—should be entertained was a question which we think addressed itself to the judicial discretion of the court. It had the right to entertain the motion if it chose to do so. Parties have no right to perpetually incumber the records of a court with suits which they never intend to prosecute. And having entertained the motion, and taken it under advisement, the court cannot be compelled, by *mandamus*, to decide it within any specified time. For these and other reasons apparent on the face of the record, the peremptory writ must be denied. It is not to be presumed that the respondent will indulge in any unnecessary delay in disposing of the preliminary questions before him. The application of petitioner is denied, and the proceeding dismissed.

We concur: De Haven, J.; Garoutte, J.; Harrison, J.; Sharpstein, J.

(90 Cal. 207)

In re Siering. (No. 14,341.)[1]

(*Supreme Court of California.* July 15, 1891.)

Appeal—Matters not on Record.

Matters which occurred in the court below, subsequent to the entry of judgment, should appear on the record, and cannot be shown by affidavit in the first instance in the appellate court.

In bank. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

M. J. Platshek and *R. Percy Wright*, for appellant. *Marcus Rosenthal*, for respondent.

Paterson, J. There is nothing in the transcript to show that the appellants ever filed any claim against the insolvent debtors. The judgment recites that all the creditors of the insolvents who had filed claims and the assignee appeared at the hearing of the contest, and mutually agreed upon an adjustment and settlement of all matters of difference between them. If the appellants afterwards, by filing claims, acquired the right to move to set aside the judgment or to appeal therefrom, the record should show the facts. What occurred in the court below subsequent to the entry of the judgment should appear in the record. It cannot be shown by affidavit in the first instance in this court. The appeal is dismissed.

We concur: Beatty, C. J.; McFarland, J.; Harrison, J.; Garoutte, J.; Sharpstein, J.; De Haven, J.

(90 Cal. 195)

People v. Bawden. (No. 20,744.)

(*Supreme Court of California.* July 14, 1891.)

Homicide—Instructions—Insanity—Burden of Proof—Waiver of Objections.

1. On indictment for murder, an instruction to find defendant guilty of murder in the first degree if the jury find that he willfully, deliberately, and with premeditation "murdered" deceased at the time and place named, is not erroneous because it leaves out the element of malice aforethought, if the court in other instructions charged that malice aforethought was necessary to constitute murder in the first degree.

2. On indictment for murder, an instruction that, if the jury find defendant guilty of murder in the first degree, and also find some extenuating circumstance, it is within their discretion to relieve him from the death penalty, and fix his punishment at imprisonment for life; but that, if no extenuating circumstances are shown, they should allow the death penalty to be imposed,—is not erroneous. Pen. Code Cal. § 190, does not give the jury the entire power of fixing the punishment, uninfluenced by the court.

3. On indictment for murder the burden is on defendant to prove insanity by a preponderance of the evidence, and an instruction that the jury must acquit if on the whole evidence they have a reasonable doubt of defendant's sanity is properly refused.

4. After judgment of conviction of murder defendant cannot avail himself of the fact that there was no preliminary examination and commitment by a magistrate before filing the information, either by motion for a new trial or in arrest of judgment.

5. Under Pen. Code Cal. §§ 990, 995, 996, defendant, upon arraignment, may move to set aside the information upon the ground that before the filing thereof he had not been legally committed by a magistrate; and if the motion be not then made, he is precluded from afterwards taking the objection.

In bank. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Ernest Sevier and *J. N. Gillett*, for appellant. *A. J. Monroe*, *T. H. Selvage*, and *W. H. H. Hart*, for the People.

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[1] Rehearing denied.

McFarland, J. The appellant was convicted of murder in the first degree, and was sentenced to suffer the death penalty; and he appeals from the judgment, from an order denying a new trial, from an order denying his motion in arrest of judgment, and also from an order denying his motion "to dismiss the information, and all subsequent proceedings."

1. The first contention of appellant is that the court erred in giving the following instruction: "If you find from the evidence, and beyond a reasonable doubt, that at the time and place mentioned in the information the defendant did then and there willfully, deliberately, and with premeditation murder one Lillie M. Price, then your verdict should be murder in the first degree." The main criticism of this instruction is that it "leaves out the element of malice aforethought." But in this instruction the court was not giving a definition of murder. That it had done very fully in previous instructions, and had told the jury that murder was "the unlawful killing of a human being with malice aforethought," and had given the statutory definitions of malice. In the instruction under review it was, therefore, not necessary to repeat the definition of murder. It is true that a court should be very careful in framing an instruction which concludes with the words, "then your verdict should be murder in the first degree;" but in this instance the court merely said that such result should follow if the defendant murdered the deceased willfully, deliberately, and with premeditation. In this language no error can be detected. The Code provides that such kind of murder is murder of the first degree. In the cases cited by appellant (People v. Gibson, 17 Cal. 283; People v. Woody, 45 Cal. 289; People v. Ah Lee, 60 Cal. 85) the jury had been instructed that from the mere killing of the deceased the law presumed murder in the first degree. In People v. Hunt, 59 Cal. 433, the court had given an instruction to the effect that, if the deceased died from a wound inflicted by defendant with malice aforethought, the jury should convict him of murder. The appellant contended that the instruction should have informed the jury of which degree of murder the defendant should be convicted; and this court, of course, held that no such proposition should have been included in that instruction. None of the other cases cited are in point.

2. Appellant contends for a reversal on account of the instructions given by the court numbered 23, 24, and 25. By these instructions the jury were told, substantially, that, if they found the defendant guilty of murder in the first degree, and also found some extenuating fact or circumstance, it was within their discretion to relieve him from the extreme penalty of death by fixing the punishment at imprisonment for life; but that, if the evidence did not show such extenuating circumstance, then they should allow the death penalty to be imposed. If the question here presented were a new one, there would be strong reasons for holding that by section 190 of the Penal Code the legislature intended to give to the jury the entire power of fixing the punishment in such a case, uninfluenced by the court; and that there is no warrant in the Code for any distinction in this regard between one kind of murder in the first degree and another. But these instructions are literal copies of instructions given and approved by this court in People v. Brick, 68 Cal. 190, 8 Pac. Rep. 858. The same rule was also substantially stated in People v. Jones, 63 Cal. 168, and in People v. Murback, 64 Cal. 369, the language of the instructions approved was almost identical with that used by the court in the case at bar, although it may be said that in the Murback Case the opinion of the court was hardly in consonance with the instructions approved. The same rule seems to have been approved in People v. Olsen, 80 Cal. 128, 22 Pac. Rep. 125. Similar instructions have no doubt been given in other cases now on their way here by appeal; for it is to be observed that whenever a doubtful instruction has been approved by this court, it has generally been seized upon and injected into future cases. Great confusion would therefore occur if we should enter into a new examination of this question, and should come to a conclusion opposite to that heretofore reached. Moreover, as was said by the court on another subject in People v. Myers, 20 Cal. 520: "We do not think this question has practically so much importance as is sometimes attributed to it;" for a juror exercising the responsibility of choosing between the imprisonment of a defendant and his death will act upon his own discretion, and not upon that of another. Therefore we decline to reopen the question; and hold that the instructions, under the authorities, were not erroneous. It is to be hoped, however, that trial courts will not make further excursions into this doubtful domain.

3. The court gave some instructions on the subject of insanity, and refused others on the same subject, asked by appellant; and it is contended that the court erred in its rulings on that subject. It is unnecessary to consider these instructions in detail. They present this difference between the views of the court and those of appellant, viz.: The court instructed that the burden was on defendant of establishing insanity by a preponderance of evidence, while the appellant unsuccessfully requested the court to instruct that, if the jury upon the whole evidence had a reasonable doubt of his sanity, they should acquit. The rule as stated by the court has always been held to be the law in this state; and in the recent case of People v. Travers we held that such rule was not disturbed by People v. Bushton, (80 Cal. 160, 22 Pac. Rep. 127, 549,) and subsequent cases. See People v. Travers, (Cal.) 26 Pac. Rep. 88, and cases there cited. There was, therefore, no error in the rulings of the court on these instructions.

4. Appellant seeks to avail himself of the alleged fact that there was no preliminary examination and commitment of defendant by a magistrate before the filing of an information, (1) by a motion for a new trial; (2) by a motion in arrest of judg-

ment; and (3) by a motion to set aside the verdict and dismiss the proceedings for want of jurisdiction. As to the first, it is sufficient to say that the matter here presented is not one of the grounds of a motion for a new trial. Pen. Code, § 1181.[1] As to the second, it is also true that it is not a ground for a motion in arrest of judgment under section 1185, Pen. Code. If the point sought to be presented goes to the jurisdiction of the superior court, it could probably be made after verdict by appellant's third motion under section 1012. But it is stated in the bill of exceptions that it is "admitted by counsel for defendant upon and for the purpose of said motion that said Charles H. Bawden, before the filing of the information against him, had a regular and legal preliminary examination before a committing magistrate, and was regularly committed, except as to defendant's mental condition during such examination, as set out and claimed in the affidavits in support of said motion hereinbefore set out, all of which affidavits are denied by the people." The bill contains several affidavits used on the motion, some on behalf of appellant, and some on behalf of the people. Among others is the affidavit of the committing magistrate, from which it appears that the complaint against defendant was made February 10, 1890; that on March 10th defendant was brought before the magistrate, and informed of his right to have counsel; that defendant asked to have a continuance until March 17th, and his request was granted; and that on said March 17th the preliminary examination was had. Some of the affidavits tend to show that at the examination defendant was in a state of great nervous excitement and mental derangement, and oblivious to what occurred; others of the affidavits tend to show that this was not the fact, but that he was merely simulating or "putting on" an appearance of mental derangement. These matters do not raise a question of jurisdiction. The preliminary examination and commitment, and the information based thereon, being regular on their face, gave full jurisdiction to the court to try the case. It was an "information after examination and commitment by a magistrate" within the provision of the state constitution. Ex parte McConnell, 83 Cal. 558, 23 Pac. Rep. 1119. Moreover, a defendant, upon arraignment, may move to set aside the information upon the ground "that before the filing thereof the defendant had not been legally committed by a magistrate;" and if the motion be not then made, the defendant is precluded from afterwards taking the objection. Pen. Code, §§ 990, 995, 996; Ex parte McConnell, supra; Ex parte Moan, 65 Cal. 218, 3 Pac. Rep. 644. See, also, Hamilton v. People, 29 Mich. 173; People v. Coffman, 59 Mich. 1, 26 N. W. Rep. 207. The foregoing are the main points discussed by appellant, and there are no others necessary to be noticed. We see no error in the record. The judgment and orders appealed from are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; SHARPSTEIN, J.; HARRISON, J.; PATERSON, J.

DE HAVEN, J. I concur in the judgment. I think the instruction referred to in the opinion of Mr. Justice MCFARLAND, in which the jury were told what their verdict should be in case they found the defendant guilty of murder in the first degree, and without any extenuating circumstances, was correct. Such an instruction does not in any degree interfere with the discretion which is given the jury in this class of cases. This would be my view if the question were a new one; but, as similar instructions have been many times approved by this court after it has given the matter the careful consideration which cases involving the life of a person must always receive, I think the correctness of such a direction to a jury ought not to be considered an open question. The law on this point ought to be deemed settled. As to the other questions discussed in the opinion I fully concur.

90 Cal. 262

MALCOLMSON v. HARRIS, Judge. (No. 14,-320.)

(*Supreme Court of California.* July 17, 1891.)

MOTION FOR NEW TRIAL—STATEMENT OF EVIDENCE.

When a cause has been tried without the presence of an official reporter, and when no notes of the evidence and proceedings have been filed or reduced to writing, the losing party can move for a new trial on the minutes of the court, relying on the recollection of the judge as to the evidence and proceedings, and can thereafter secure a statement of the case, including the evidence, under Code Civil Proc. Cal. §§ 658–661, providing that when a motion for a new trial, on the ground of insufficiency of the evidence, is made on the minutes of the court, a statement to be subsequently prepared forms a part of the record.

In bank. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Edward Lynch, for petitioner. *Church & Cory*, for respondent.

BEATTY, C. J. This is a petition for a writ of mandate to compel the judge of the superior court of Fresno county to settle a statement on motion for a new trial. The case has been submitted upon a general demurrer to the petition, the substance of which is that in an action in which Pauline Fincher was plaintiff and petitioner a defendant, a judgment was entered in said court in favor of the plaintiff; that thereafter, in due time, the petitioner gave notice of his intention to move for a new trial, upon the grounds, among others, that the evidence was insufficient to justify the decision, and that it was against law, and stating in said notice that the motion would be based upon the minutes of the court; that afterwards the motion for a new trial was made and overruled, and thereupon a correct statement of the evidence and proceedings at the trial was prepared and served in due time; that the respondent struck out of said statement everything relating to the trial, including the evidence, and refused to settle or act upon the same upon the ground that there were no minutes thereof, that is to say, there were no shorthand notes of the evidence, no reporter having been present at the trial, and no notes of the evidence filed or taken in writing by either the clerk or judge; that petitioner has appealed from said order, and requires a statement of the case to support his appeal.

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[1] Pen. Code, § 1185, prescribes the cases in which a new trial may be granted.

The question presented for decision is, therefore, whether when a cause has been tried without the presence of an official reporter, and when no notes of the evidence and proceedings at the trial by reporter, judge, or clerk have ever been filed or reduced to writing, the losing party can move for a new trial on the minutes of the court, relying on the recollection of the judge as to such evidence and proceedings, and can thereafter secure a statement of the case, including the evidence, for the purposes of an appeal from the order. By section 658 of the Code of Civil Procedure it is provided that when an application for a new trial is based upon the ground, among others, of insufficiency of the evidence to justify the verdict or other decision, or that it is against law, it may be made at the option of the moving party, either upon the minutes of the court or upon a bill of exceptions, or upon a statement of the case. The notice of intention to move for a new trial must be filed within 10 days after verdict or notice of decision, and must designate the grounds of the motion, and whether it will be made upon the minutes of the court, bill of exceptions, or statement. If upon bill of exceptions or statement, the bill or statement must be proposed, amended, settled, engrossed, and filed before the motion is heard, and must contain a specification of the particular deficiencies of the evidence upon which the moving party will rely; but when the motion is to be made on the minutes of the court, the notice itself must specify the particulars in which the evidence is alleged to be insufficient; otherwise the motion will be denied. Code Civil Proc. § 659. If the motion for a new trial is to be heard on the minutes of the court, it must be made at the earliest practicable period after notice, (Id. § 660,) and on appeal from the order granting or refusing the motion, a statement to be subsequently prepared forms a part of the record, (Id. § 661.) By these various provisions a very simple, plain, and expeditious practice is prescribed, by which the trouble, expense, and delay of settling statements or bills of exceptions may be entirely avoided in all that large class of cases in which the order of the trial judge granting or denying a new trial is accepted as final, as it always must be—so far as the ground we are considering is concerned—when there is a substantial conflict of evidence. And even where the losing party wishes to appeal it will generally be easier and more convenient to make a statement after than before the order; for the argument of the motion will generally eliminate many of the points, as its decision will always do away with the necessity of setting out evidence upon points as to which there is an admitted conflict. The wonder is that a practice so convenient, so saving of time, trouble, and expense, is so little resorted to. Possibly the explanation is to be found in the fact that the terms of the statute leave it doubtful whether, in a case like the present, where there are no written notes of the testimony capable of being placed on file, the moving party can have any advantage of the testimony actually adduced at the trial, and necessarily resting alone in the recollection of the judge. If so, it is fortunate that an occasion has arisen for removing any misconstruction on that point, for we have no doubt that a party moving on the minutes of the court may rely on all matters that could be legitimately included in a statement prepared in advance of the motion. It is true that the statute enumerates depositions, documentary evidence, and phonographic report of testimony, as matters to which reference may be had on the hearing of the motion, (section 660;) and there is some force in the argument that such an enumeration should be regarded as exclusive, but there is much more force in the consideration that since the judge has the undoubted right to include testimony actually given, though not reported, in a statement prepared in advance of the hearing, there is no reason why his recollection of the evidence should not be equally resorted to in making a statement after the hearing. The statement, at whatever time prepared, ought to be a correct presentation of so much of the testimony as is material,—derived from the reporter's notes, if there are any, and, if not, from the recollection of the judge, assisted by such notes as he may have taken; and the mere fact that there is no short-hand report of the trial ought not to be held to deprive the losing party of the privilege of moving for a new trial in the speediest and most convenient mode prescribed by the statute, unless its terms are such as to admit of no doubt that such was the intention of the legislature. We think the law demands no such construction. The enumeration of section 660 is not necessarily exclusive, and it is contrary to all considerations of justice and convenience to hold that it was intended to be. That a judge may and must consider on a motion for a new trial, made in advance of a statement, all evidence material to the grounds and specifications of the notice, whether reported or not, is something which the legislature may well have deemed too obvious to call for express enactment; and, if such evidence is to be considered, it must go into the statement. It is ordered that a peremptory writ of mandate be issued, directed to respondent, and commanding him to settle said statement according to the facts, including therein the evidence material to the motion as given at the trial of said action.

We concur: SHARPSTEIN, J.; PATERSON, J.; DE HAVEN, J.; McFARLAND, J.; HARRISON, J.

(90 Cal. 260)

SOMMER v. SMITH. (No. 13,970.)

(*Supreme Court of California.* July 17, 1891.)

VARIANCE BETWEEN PLEADING AND PROOF.

In an action by a principal against his agent to recover the difference between what the agent paid for certain stock and what he said he paid, and was repaid to him by the principal, the complaint alleged that the agent purchased the shares of stock, while the proof showed that he purchased certain agreements of a syndicate to furnish the shares of stock. *Held*, that the variance was immaterial.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Waters & Gird, for appellant. *Willis, Cole & Craig*, for respondent.

TEMPLE, C. Appeal from judgment and order denying defendant a new trial. The question on this appeal is as to the materiality of a variance between the allegations of the complaint and the proof. It is averred that defendant, as plaintiff's agent, purchased certain shares of stock in the Semi-Tropic Land & Water Company of California. The proof is that as such agent he purchased for plaintiff certain agreements of a syndicate to furnish the shares of stock. This seems a plain case of an immaterial variance, under section 469, Code Civil Proc. In its general scope, the proof corresponds with the allegations of the complaint. It was a purchase of shares of stock, but not the immediate purchase of certificates of stock, as would be inferred from the complaint. The object of the suit was to recover the difference between what the agent reported he had purchased the stock for, and which plaintiff had paid the agent, and the price which, as plaintiff afterwards discovered, the agent had actually paid. An examination of the record shows quite conclusively that the defendant was not misled by the variance. A full defense was made as though the complaint had accurately stated the facts. We think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(90 Cal. 289)

HICKS v. THOMAS. (No. 13,761.)[1]

(*Supreme Court of California.* July 18, 1891.)

RESCISSION OF DEED—FRAUD—EVIDENCE—PLEADING—FINDINGS.

1. A complaint in an action to set aside a conveyance showed plaintiff to be an old, unprotected, feeble-minded woman, and alleged that, after having made a verbal contract with defendant for the sale of her property for its reasonable value, he, with intention to cheat and defraud her, falsely represented and insisted that the price agreed to be paid was much smaller, and that he could prove such assertion, and compel her to perform the contract, as he claimed it, and that, if she did not deed it, he would get it on a tax-deed; that he threatened her with violence if she did not execute a deed of the property to her; that relying on and believing such false representations, and because of the threatened violence, she executed the deed. *Held*, that the complaint was not founded on fraudulent representations alone, but upon oppression and undue influence, calculated to overcome the judgment and will of such a person, and was sufficient.

2. The action being based on a charge of fraud in procuring the deed, proof of the verbal contract could not be barred on the ground that negotiations precedent to the deed were merged therein.

3. It is not necessary that a complaint, founded on fraudulent repesentations, should minutely detail the conversations by which the fraudulent representations are proven.

4. An offer to restore the consideration received for a deed which is sought to be set aside, when averred in the language of the statute, is sufficient on general demurrer.

5. The finding of facts inconsistent with and contradictory of the representations made is sufficient, without a specific finding that the representations were false.

6. The representations having been accompanied by threats and duress, it is not necessary to find that plaintiff believed them, though the general finding that the deed was procured by fraud implies this fact.

7. That plaintiff was injured appears from the finding that the price paid was grossly inadequate.

Commissioners' decision. In bank. Appeal from superior court, Shasta county; AARON BELL, Judge.

John F. Ellison, for appellant. *Clay W. Taylor* and *J. Chadbourne*, for respondent.

TEMPLE, C. Defendant appeals from judgment and order refusing a new trial. The action is to set aside a conveyance of real estate, and a bill of sale of personal property, on the ground of fraud and duress. The complaint shows that plaintiff is a widow upwards of 68 years old, of feeble understanding and limited business experience, and at the time of the execution of the instruments she was living alone, remote from friends or relatives, in ill health, and in a state of great mental depression and despondency; that at the urgent solicitation of the defendant she verbally contracted to sell to him her property, consisting of a tract of land and the stock on it, for $3,500. After this verbal agreement was made, defendant, intending to cheat and defraud her, falsely represented, insisted, and asseverated that the verbal contract was not that he should pay $3,500 for all the property, but $1,000 for the land only; that he could prove such assertion, and compel her to perform the contract as he claimed it to be; that he had an unredeemed certificate of sale for taxes, and unless she sold to him he would get a tax-deed, which would be as good or better than a deed from her; that he represented that her creditors would attach her personal property, and to save the same she must convey to him for $220; that at that time, or before, he told her he would make her sign the deed, and if she would not he would throw her out and break her God damned neck; that it would not take long to get rid of her; "that relying upon and believing the said false and fraudulent representations of the defendant, and by means thereof, and pursuant to and because of said threatened personal violence to plaintiff from the defendant, and plaintiff's fear thereof, he then and there, without giving the plaintiff any time for reflection and consultation with others, induced, influenced," etc., her to make a deed to him of the land for $1,000, and a bill of sale of the personal property for $220. She alleges an offer to restore to defendant everything she had received from him, and a demand for a reconveyance. The offer was made October 31, 1888. She discovered the fraud January, 1888, and immediately commenced a suit against defendant for the cancellation of the conveyances, which suit, owing to some defects, had been dismissed. The deed and bill of sale were made December 21, 1887 A general demurrer was interposed to the complaint, which was overruled. If the action were based upon the fraudulent representations alone, the complaint would be insufficient, but it is not based upon such representations alone. Circumstances are stated which show great oppression and undue influence, well calculated to overcome the judgment and will of such a person as the plaintiff. An intelligent, strong man would not be likely to be influenced by such representations and threats, and the plaintiff must have known that his assertions as to the verbal contract were untrue, but they were accompanied by threats that he could prove his assertions, and would compel her to adopt his version of the contract, and if she did not he would get the property from her upon a tax-deed. Representations which are very unreasonable, accompanied by threats, may well be held to have influenced a sick, weak-minded, foolish woman, who was without advisers or friends. The material question in such cases is whether by such fraudulent practices she has in fact been wronged, although, as a general rule, where people are so reckless of their own interests, courts may not interfere to relieve them from their folly. The weakness of the plaintiff constitutes a very important element in her case. It is averred that the property was worth $3,500. The price was therefore grossly inadequate.

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[1] Judgment modified on rehearing, 27 Pac. Rep. 376.

The defendant at the trial reserved many exceptions to the admission of evidence. A large number of these are to evidence of conversations proving the verbal contract, on the ground that all verbal precedent negotiations were merged in the deed. Of course, the action being based upon a charge of fraud in procuring the deed and bill of sale, no such rule obtains. Another objection taken was that the representations were not specifically averred. We think there is nothing in this objection. The acts of fraud must be specifically set out. But this rule does not require or justify a minute detail of all the conversations by which fraudulent representations are proven. It is enough if averred in substance and legal effect as proven. And then it is proper to prove corroborative statements. The offer to restore is averred in the language of the statute. If that requires a specific tender, the allegation would imply one, and would be sufficient, at least in the absence of a special demurrer, which is sometimes in the nature of a motion to require a pleader to make his averment more definite, as the practice is in some states where code pleading prevails. Is the finding sufficient which fails to find specifically, (1) that the representations were false; (2) that plaintiff believed and relied upon them; and (3) that she has been injured? These objections are taken by appellant, and to them may be added that it is not specifically found that she believed that defendant would execute his threats, and signed and delivered the papers under the influence of such fear. All the above facts, however, although not specifically found, do appear from the findings: (1) That the representations were false is shown by facts found which are inconsistent with and contradictory of the representations made. (2) It was not necessary to find that she believed them, because they were accompanied by threats and duress, but the general finding that the deed and bill of sale were procured by fraud implies this fact. (3) That she was injured appears from the fact which is found that the price paid was grossly inadequate. We must not be understood as holding that, under the circumstances of this case, it was necessary to show damage. There is a general finding that the deed and bill of sale were procured by defendant "by duress, menace, undue influence, and fraud." This is not as specific as it ought to have been, but it is a finding of the ultimate facts upon which the judgment depends, and the defendant has not been injured by the failure to find more specifically. We think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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90 Cal. 208

Ex parte VANCE. (No. 20,863.)

(*Supreme Court of California.* July 15, 1891.)

RELEASE FROM JAIL—SATISFACTION OF SENTENCE.

Where one sentenced to pay a fine and to be imprisoned until such fine is paid in the proportion of a day for every dollar of the fine, is released by the sheriff without authority, the time of his absence cannot be considered as spent in jail in satisfaction of the judgment.

In bank. Application for writ of *habeas corpus*.

A. H. Carpenter, for petitioner. *C. S. Denson* and *Wilson & Wilson*, for respondent.

DE HAVEN, J. The return to the writ of *habeas corpus* issued herein shows that the petitioner, D. M. Vance, was on October 18, 1889, adjudged by the superior court of Sacramento county to be guilty of contempt, and to pay a fine therefor of $300, and to be imprisoned in the county jail of Sacramento county until such fine was paid, in the proportion of one day for every dollar of the fine. The petitioner was on that day committed to jail under said judgment, and there remained until October 22, 1889, when he was released by the sheriff, and remained at liberty, free and without confinement, until June 10, 1891, at which date he was rearrested under an order of the superior court made June 9, 1891, directing that its former judgment be enforced. The release of petitioner by the sheriff was not by any order of the court, but upon an undertaking given by petitioner on appeal to the supreme court from said judgment of contempt, and it may be assumed that both the sheriff and the petitioner acted upon the belief that the execution of said judgment was stayed by said appeal and undertaking. The petitioner now claims his release upon various grounds which assail the validity of the original judgment for contempt, and also because "the term of such imprisonment has long expired, and there having been no legal or authorized suspension of said judgment." In regard to the first claim of petitioner it will be sufficient to say that the affidavits charging him with contempt were such as to authorize the order which directed him to show cause why he should not be punished for the contempt therein alleged, and the subsequent proceedings ending in the judgment for contempt were regular, and the judgment itself valid. The remaining ground upon which the petitioner claims his release presents the single question whether his release from jail under the circumstances here stated, and thereafter remaining at large with free and perfect liberty, for a length of time sufficient to have satisfied said judgment if he had remained in jail, operate as a complete execution of the judgment; and it would seem from the mere statement of the proposition that the contention of petitioner on this point cannot be sustained. The sentence of the court was that he pay a fine, and that part of the judgment relating to imprisonment was merely incidental to the judgment of fine, and in the nature of an award of execution directing the particular way in which that judgment should be enforced, in the event of the non-payment of the fine imposed, and it seems clear to us that such judgment can only be satisfied by a compliance with its terms. In this case it is admitted that the judgment of fine has not been paid, and that the defendant has not suffered the alternative of actual imprisonment. The judgment therefore remains in full force. The act of the sheriff in releasing the petitioner was unauthorized, and petitioner's departure from the jail to which he had been lawfully committed, without having been discharged by due course of law, was equally so, and was in effect a technical escape, from which he can derive no advantage. The time of petitioner's absence from jail, in violation of law, cannot be considered as having been spent in jail in satisfaction of the judgment which required his actual imprisonment. This question, although presented here for the first time, is not a new one. In Re Edwards, 43 N. J. Law, 555, the petitioner had been committed to state-prison for the term of 10 years at hard labor. He made his escape, and remained at large for 7 years, and he claimed that, notwithstanding such fact, he was entitled to his discharge at the end of the term of 10 years; but the supreme court, in an elaborate opinion, held otherwise. The same question came before the supreme court of Kansas in the well-considered case of Hollon v. Hopkins, 21 Kan. 638, and was disposed of adversely to the contention of the petitioner here. In that case the petitioner had been sentenced to the state-prison for three years "from the 19th day of September, A. D. 1874." On the next day after sentence he made his escape, and was not recaptured until 1878, and he insisted that the judgment had expired by its own limitation, but the court held that the essential part of the judgment was that petitioner be imprisoned for three years, and that the time fixed by the court for its commencement was not such a material part thereof as to permit an evasion of the judgment by the wrongful act of the prisoner. The court there said: "The only way of satisfying a judgment judicially is by fulfilling its requirements. Of course, if Hollon had died, or been pardoned, the sentence would be at an end. But, as those things have not happened, and as the sentence has not been disturbed by any judicial decision or determination, there is no way of satisfying its requirements, or of exhausting its force, except service by Hollon of the time required in the penitentiary." In State v. Cockerham, 2 Ired. 204, the defendant had been sentenced to be imprisoned for two months "on and after the first day of November next," and did not go into prison according to the sentence, and at a subsequent term of the court it was directed that the sentence should be immediately executed, and it was held that the order was proper, and that the essential part of the judgment was not the time when it should be executed, but the extent of the punishment fixed. So, also, in Dolan's Case, 101 Mass. 219, the same conclusion was reached, the court holding that "expiration of time without imprisonment is in no sense an execution of the sentence." Other cases might be cited to the same effect, and, indeed, our attention has not been called to the decision of any appellate court holding to the contrary. We are satisfied with the law as thus declared. Petitioner remanded.

We concur: HARRISON, J.; SHARPSTEIN, J.; MCFARLAND, J.

(90 Cal. 319)

WILSON v. FOURTEENTH-ST. R. Co. (No. 13,270.)[1]

(*Supreme Court of California.* July 21, 1891.)

PERSONAL INJURIES—ALIGHTING FROM STREET-CAR—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

Where, in an action against a street-car company for personal injuries, the evidence showed that the car steps were defective, and the driver grossly negligent in starting the car before plaintiff had alighted, an instruction that the company, if guilty of gross negligence, was liable, even though plaintiff herself was negligent, could work no injury to defendant, where there was no evidence of plaintiff's negligence.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action by Marilla D. Wilson against the Fourteenth-Street Railroad Company. Judgment for plaintiff. Defendant appeals.

Fox, Kellogg & King, for appellant. *Thos. H. Smith, Edward C. Robinson*,

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[1] Rehearing denied.

Wells Whitmore, and *M. C. Chapman*, for respondent.

FOOTE, C. This is an action for damages caused by the carelessness of the driver of a street-car, drawn by horses, belonging to the defendant corporation; and a defect in the steps of the car, by means of which the plaintiff was thrown from it as she was attempting to alight therefrom, when it had stopped for her to get off. The evidence showed, as we think, beyond any controversy, that the injury, which is very serious, was caused in this manner, viz.: The plaintiff, when the car stopped, placed one foot on the ground, and had the other still resting on the step, when the driver suddenly started the horse-car. The step was jerked from under her foot planted thereon, and she was precipitated violently to the ground, and her hip severely injured. The evidence is ample to show both the carelessness of the corporation in having such a defective step on its car, and the gross negligence of the driver of the car in starting it just as the passenger, the plaintiff, was stepping from it. The only matter about which there is really any serious question in the case is the instruction which reads thus: "If you believe from the evidence that at the time of the accident the plaintiff was guilty of negligence upon her part that contributed to produce the injuries, and you also believe from the evidence that the defendant was guilty of gross negligence, and that such gross negligence caused the injuries complained of, then the court instructs you that the defendant is liable notwithstanding the contributory negligence of the plaintiff." The instruction could work no injury to the defendant, for the reason that there is no evidence tending to show any negligence on the part of the plaintiff. She was proceeding, after due warning to the driver where to stop, and when he had stopped the car, to get off. While so doing, standing upon one foot on a defective step, and attempting to plant the other foot firmly on the ground, having no reason whatever to suppose but that her right to have time to get off would be allowed her, she is suddenly hurled to the earth by the starting of the car, jerking the step from under her foot resting thereon, and seriously injured. A more careless proceeding on the part of the employe of the corporation defendant can hardly be imagined. No prejudicial error is perceived in the record, and we advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(90 Cal. 245)

CURTISS v. ÆTNA LIFE INS. CO. (Nos. 12,939, 13,013.)[1]

(*Supreme Court of California.* July 17, 1891.)

INSURABLE INTEREST — ASSIGNMENT OF POLICY AS COLLATERAL—STATUTE OF LIMITATIONS — STATUTE OF FRAUDS.

1. In an action on a policy for $10,000 taken by a creditor upon the life of his debtor it appeared that shortly before it was issued the debtor had made an unqualified admission of an existing indebtedness of between $5,000 and $6,000 in a written request for further advances. The creditor had promised to make advances up to $10,000, although not bound by written contract to do so. The facts were fully stated in the application, and the insurer continued to receive premiums for several years up to the death of the assured, during which the creditor, on the faith of the policy, made advances, which, with the original debt and interest, exceeded the amount of the policy. *Held*, that the evidence showed an insurable interest in the creditor sufficient to sustain a verdict for $10,000, although at the date of the policy his interest did not amount to that sum.

2. In an action for the insurance by one to whom the creditor had assigned the policy as collateral security for his own debt, it is immaterial, as between the assignee and the insurer, that, after loss, the creditor, prior to his death, had paid the debt, since that question can only arise between the assignee and the heirs or personal representatives of the creditor.

3. Where the complaint alleges that the insured became indebted to the beneficiary more than four years prior to the date of the policy, a defense that the beneficiary had no insurable interest because the debt was barred by the statute of limitations must be raised by plea, and not by demurrer, since the averment of indebtedness is not inconsistent with the fact of an original promise in writing to pay at a date within four years.

4. An averment that the beneficiary agreed to make further advances to the insured, for which the policy was to stand as security, will be presumed, on general demurrer, to imply that the agreement was written, and hence not void under the statute of frauds.

5. Where a creditor takes a policy on his debtor's life for a sum exceeding the debt, a binding agreement to make further advances on demand to the full amount of the policy gives him an additional insurable interest.

6. A proviso in a policy payable to one of his assigns, providing that a claim "by an assignee shall be subject to proof of interest" does not apply to one who holds it as collateral security for a debt, since the assignee is a mere trustee for the debtor, and must account for any surplus proceeds after paying the debt, and it is not necessary for such assignee to allege that he had an insurable interest in the life of insured.

7. Code Civil Proc. Cal. § 339, providing that actions on written contracts executed out of the state are barred in two years, does not apply to an action on an insurance policy which provides that it shall not be operative until countersigned by the general agent of the insurer in California, and which was countersigned in the latter state after being signed in Connecticut by the insurer.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Gilbert L. Curtiss against Ætna Life Insurance Company on a policy of insurance on the life of one Tucker. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Fox & Kellogg, for appellant. *Chas. F. Hanlon*, for respondent.

BEATTY, C. J. These are separate appeals in the same case; the first from the judgment, and the second from an order denying a new trial. The action is by the assignee of a policy of life insurance effected by his assignor upon the life of a third person, and the principal grounds upon which it is defended are want of interest in the insured at the date of the policy, and in plaintiff at the date of the assignment. The points involved in these and other grounds of defense are raised by demurrer to the complaint, motion for nonsuit, and by numerous exceptions to the admission and exclusion of evidence and to the allowance and refusal of instructions to the jury. It is scarcely practicable to notice each separate exception contained in the record and referred to in the briefs, but we shall endeavor not to overlook anything essential to a proper consideration of the merits of the appeals.

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[1] Rehearing denied.

First, then, as to the points raised by the demurrer. It appears from the complaint as amended that the policy was issued April 5, 1871, to Esther C. Curtiss, for the sum of $10,000 on the life of one Tucker; and with respect to her interest in Tucker's life it is alleged "that at the time said application was made the said Esther Cordelia Curtiss had an insurable interest in the life of Alfred W. Tucker, which interest was as follows: The said Tucker, at the time, was indebted to the said Esther C. Curtiss in the full sum of $4,000, for so much money which she had before that time, to-wit, in the year 1866, loaned to the said Tucker in United States gold coin, at his special instance and request, the whole of which, together with the interest thereon from the time of said loan, was due and unpaid on said last-mentioned date, and was also on said last-mentioned date further indebted to the said Esther C. Curtiss in the sum of $500, or thereabouts, for so much money before that time, and since the year 1866, paid, laid out, and expended for and on account of the said Tucker by the said Esther C. Curtiss, at his special instance and request, together with the interest thereon. "And on the day application was made as aforesaid, and immediately prior to the making of the same, the said Esther C. Curtiss, for valuable consideration, agreed with the said Tucker to loan and advance money thereafter at such times as he might demand till the amounts so loaned and advanced, in the aggregate, and the interest thereon, together with other sums so due as aforesaid, and the interest thereon, should amount to the total sum of $10,000. And plaintiff avers, on his information and belief, that afterwards, to-wit, subsequently to the making of said application and the issuance of said policy, and in pursuance of said agreement between the said Esther C. Curtiss and the said Tucker, she (the said Esther C. Curtiss,) at various times loaned and advanced to said Tucker various sums of money, which, together with the interest thereon, and the said sums of $4,000 and $500 and the interest due thereon, amounted in all to the sum of $10,000, and the whole of which was unpaid and due from said Tucker to said Esther C. Curtiss at the time of his death as herein stated, and no part of which has ever been paid. All of which was communicated to and known by the defendant at the time said application was made, and before and at the time of the issuance of the said policy." Appellant contends that these allegations disclose no insurable interest in Mrs. Curtiss within the meaning of section 2763 of the Civil Code. It is to be observed, however, that at the date of the policy the Civil Code had not been enacted, and the question is not whether the policy is obnoxious to the provision referred to, but whether it was rendered invalid by any rule or principle of the common law. There may be no difference between the two; and, indeed, it may be allowed that the Code provision is an indication of what, in the opinion of the legislature, the common-law rule was; but if there is a difference it is by the common law, and not by the Code, that the validity of the policy must be tested.

Bearing this in mind, we proceed to consider the specific objections of counsel for appellant to the statement of Mrs. Curtiss' interest. He claims that it appears from the allegations of the complaint that her right to recover the $4,000 loaned in 1866 and the $500 advanced after 1866 was, at the date of the policy, barred by the statute of limitations, and consequently that Tucker was under no legal obligation to repay any part of these sums or of the interest thereon, and he contends that the alleged agreement to advance other money sufficient with the sums previously advanced to amount to $10,000, was void under the statute of frauds, because, presumably, it was not in writing, and not to be performed within one year. As to the first proposition, the cases seem to hold that a debt, even though not legally collectible, by reason of the bar of the statute, gives an insurable interest. 1 May, Ins. § 108; Bliss, Ins. § 28, and cases cited. But, aside from this, we think it does not appear from the complaint itself that at the date of the policy the obligations of Tucker to Mrs. Curtiss were barred by the statute. The case of Dorland v. Dorland, cited by counsel, (Cal.) 5 Pac. Rep. 77, is not in point. It was merely held in that case as a rule of evidence that, an advance of money being proved, and no time for repayment mentioned, the presumption is that it is payable on demand, and that the statute begins to run immediately. Here, however, the question is as to a rule of pleading, and we do not understand that a complaint showing money to have been loaned at a date sufficiently remote to admit of the running of the statute raises a presumption that it has run. On the contrary, when the allegation is consistent with the opposite conclusion, *i. e.*, that the debt is not barred, the defense must be raised by plea. Kraner v. Halsey, 82 Cal. 210, 22 Pac. Rep. 1137; Doe v. Sanger, 78 Cal. 151, 20 Pac. Rep. 366; Wise v. Hogan, 77 Cal. 187, 19 Pac. Rep. 278, and cases cited. Here the allegation that Tucker became indebted more than four years prior to the date of the policy is entirely consistent with the fact of an original promise in writing to pay at a date within four years, or with a written acknowledgment of the debt subsequently made, and an express or implied promise to pay it.

As to the proposition that the agreement of Mrs. Curtiss to advance other moneys was void, the rule of pleading is also against the contention of appellant.

If the agreement to be valid must have been in writing, then the allegation that it was so agreed is held to imply that it was so agreed in writing. Broder v. Conklin, 77 Cal. 336, 19 Pac. Rep. 513, and cases cited. So far, then, as the complaint is concerned, it clearly shows an indebtedness from Tucker to Mrs. Curtiss at the date of the policy, amounting to $4,500, exclusive of interest, and to that extent there can be no question that it shows her to have had an insurable interest in his life.

But did she have any interest beyond the amount of the then existing indebtedness? In other words, did her agreement to advance Tucker, on his demand, the balance of $10,000 create an additional interest? It has been held that a surety on an official bond has an insurable interest in the life of his principal, although there has been no breach of the bond at the date of the application for the policy; and that he may recover the full amount of the sum insured, although no breach of the bond has ensued. Scott v. Dickson, 108 Pa. St. 6. This conclusion was based upon the ground that the contingent liability of a surety brings him within the common-law principle that the only thing essential to relieve the policy of the character of a gaming or wagering contract is "that it shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the assured has no interest," citing Insurance Co. v. Schaefer, 94 U. S. 457. Upon the same principle it must have been held at common law that a binding contract by Mrs. Curtiss to advance money to Tucker, on his demand, gave her an insurable interest in his life.

We come next to the question whether the complaint was bad because of a failure to allege that plaintiff, at the date of the assignment to him, had an insurable interest in the life of Tucker. The allegation of the complaint is that on the 12th day of January, 1880, said Esther C. Curtiss, for a valuable consideration, to-wit, the sum of $10,000 and upwards, and in accordance with the terms of said policy, assigned, etc., to plaintiff, and a copy of the assignment, attached as an exhibit to the complaint, is referred to and made a part thereof. Referring to the assignment, it appears from its terms to have been made as collateral. There may be some ambiguity or uncertainty about the meaning of this allegation construed with reference to the terms of the assignment as set out in the exhibit, but no such objection was specified in the demurrer, and upon a general demurrer we think the complaint must be held to allege an assignment of the policy as collateral security for the repayment of $10,000 and upwards advanced by plaintiff to the assured. So far as it is affected by the law of this state, as it existed at the date of the assignment, there can be no doubt of the validity of the transfer. By section 2764 of the Civil Code it is provided that "a policy of insurance on life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered." It may be, however, notwithstanding this provision, that the parties to a life policy can make a valid stipulation against an assignment to one who has no insurable interest in the life insured; but, whether they could or not, we have no doubt that such a stipulation in a policy issued as this policy was, before the enactment of the Code, remains of binding force. It is necessary, therefore, to consider the terms of the policy in disposing of this point. By its express terms the amount insured is made payable "to Esther C. Curtiss, her executors, administrators, or assigns, within ninety days after notice and proof of the death of the insured," etc., but it is, in another clause, provided that any claim "made by any assignee shall be subject to proof of interest." Does this proviso apply to an assignee who holds the policy merely as collateral security for the repayment of money advanced to or for the insured? We hold that it does not. The law against assignments to parties without interest (where such is the law) and stipulations against such assignments are based upon the same motives and policy, and neither one nor the other applies to assignments by way of security. The assignee, in such case, is a mere trustee for the insured. What he collects on the policy he collects for him, and must apply it to the payment of the debt secured, accounting for any surplus. So regarded, such assignments do not involve the mischief which the common law or the contract of the parties was designed to prevent, and are consequently not within the meaning of the proviso in this policy. In the case of Warnock v. Davis, 104 U. S. 775, where it was held that an assignment to one who had no insurable interest was invalid in other respects, the assignee was nevertheless allowed the advances for which the policy was security. The principle of that decision sustains our conclusion on this point. It was not necessary, therefore, that the plaintiff should allege any interest in the life of Tucker. If it was necessary that he should allege an indebtedness from the insured to him, we think the fact was sufficiently alleged as against a general demurrer, and, if it was necessary to allege preliminary proof to defendant of such indebtedness, we think that allegation is comprised in the general allegation that "all conditions on the part of E. C. Curtiss and plaintiff have been performed." The demurrer to the complaint was properly overruled, and this conclusion disposes of the appeal from the judgment, which is accordingly affirmed.

With respect to the appeal from the order denying a new trial, it is clear, if our conclusions above stated are correct, that the superior court did not err in overruling defendant's objection to the admission of any testimony in support of the complaint. Nor did the superior court err in overruling the motion for a nonsuit.

Only one of the grounds of this motion remains to be noticed, the others being disposed of by what has already been said. This action was commenced more than two years after the liability of defendant accrued, and if the policy was executed out of this state the right of action was barred by section 339, Code Civil Proc. The complaint alleges that the policy, a copy of which is made part thereof, was executed in California, April 5, 1871. The answer admits the genuineness and due execution of the policy, a copy of which is annexed to the complaint, but denies that it was executed in California, alleging, on the contrary, that it was executed in Connecticut on the 14th of March, 1871, and pleading the bar of the statute. The plaintiff did not introduce the policy in evidence at the trial, and the contention of the defendant is that he, therefore, did not prove a policy executed in California, and consequently that he should have been nonsuited on the plea of the statute of limitations. But even if we admitted that with respect to this plea the burden of proof was on the plaintiff, which we do not, the contention of defendant could not be sustained. The last clause of the policy was in these words: "In witness whereof the said Ætna Life Insurance Company have, by their president and secretary, signed and executed this contract in the city of Hartford this 14th day of March, 1871, but the same shall not be operative until countersigned by M. P. Morse, general agent at San Francisco, Cal.,"—following which came the signature "E. A. Bulkeley, President; T. O. Center, Secretary;" and then the following: "Countersigned at San Francisco this 5th day of April, 1871. M. P. Morse, General Agent." All this appeared by the copy set out in the complaint, the correctness of which was expressly admitted by the answer. It appeared, therefore, on the face of the pleadings that the policy, although partly executed at Hartford on March 14th, was not fully executed or operative until countersigned some time afterwards by the general agent at San Francisco. The plaintiff also testified at the trial that Morse countersigned the policy at San Francisco after it was returned from Connecticut, and this testimony was admitted without objection. The motion for a nonsuit was properly denied.

There are numerous specifications of particulars in which the evidence is insufficient to support the verdict of the jury, as to which we say that it appears very plainly from the testimony that the procuring of the policy in question by Mrs. Curtiss was a perfectly honest and legitimate transaction. She had advanced large sums to Tucker, and there is very satisfactory evidence that shortly before the issuance of the policy Tucker, in applying for an additional advance, had distinctly acknowledged in writing subscribed by him an existing indebtedness of between five and six thousand dollars, and this acknowledgment was not qualified by any promise to pay upon a contingency, as in Curtis v. City of Sacramento, 70 Cal. 414, 11 Pac. Rep. 748, or by any declaration inconsistent with an intention to pay. It does not appear that Mrs. Curtiss was at the date of the policy bound by any contract in writing to advance Tucker the balance of the $10,000, but she had promised advances to a considerable amount, and there is evidence that she made them. It also appears that her written answers to questions contained in or accompanying her application for the policy were filled in by the agent of defendant, after a full and correct statement of all the facts as they existed. This is clearly and distinctly proved by the testimony of the agent who took the application. With this knowledge, which must be imputed to the company, it issued the policy, and continued to receive the premiums during the life-time of Tucker, *i. e.*, for a period of nine years, during which time Mrs. Curtiss, on the faith of the policy, made advances which, with the old debt and interest accruing, must have exceeded $10,000. Under these circumstances we think it does not lie in the mouth of the defendant to charge her with misrepresentation in stating in her application that she had an insurable interest to the full amount of the policy, although, as matter of strict law, her interest at that time may not have amounted to so much. Her interest was, we think, sufficiently proven to sustain the verdict.

As to the alleged failure to prove an insurable interest in plaintiff at the date of the assignment, we have shown that none is required to support an assignment by way of collateral security. It was clearly proved that Mrs. Curtiss was largely indebted to plaintiff at the time of the assignment, at the time of Tucker's death, when the policy became payable, and at the time of her own death. This gave plaintiff a right of action on the policy, and all the questions which defendant attempts to raise about the payment or release of the indebtedness from Mrs. Curtiss to plaintiff, subsequent to the time when the loss became payable, are out of place here. Those are questions which can only arise between plaintiff and the heirs or other representatives of Mrs. Curtiss, they alone being concerned in a proper application or distribution of the proceeds of the policy. After a loss and fixed liability attached it is of no concern whatever to the insurer whether an assignee has or has not an interest in the life insured.

As to the alleged errors of law, many of them are disposed of by what has already been said. Some evidence, admitted against the objection of defendant, was immaterial at the time it was so admitted, but the complaint was subsequently amended before the close of the trial so as to make this evidence material. This cured the error. We find no material error in the instructions upon which the case was submitted to the jury, except that they are in some respects too favorable to the defendant. Judgment and order affirmed.

We concur: McFarland, J.; De Haven, J.; Paterson J.; Sharpstein, J.; Harrison, J.

90 Cal. 266

COHEN v. KNOX *et al.* (No. 13,316.)

(*Supreme Court of California.* July 18, 1891.)

FRAUDULENT CONVEYANCE—KNOWLEDGE OF GRANTEE—QUIETING TITLE—ANTENUPTIAL CONTRACT.

1. A conveyance of land by a father to his daughter to encourage her marriage will not be set aside, although he was insolvent at the time, when she had no knowledge of fraud, and he had no intent to defraud.

2. An execution having been subsequently issued against such land by a judgment creditor of the father, the daughter filed a complaint to prevent a sale thereof, averring that she was the owner of "a portion of W. A. B.'s Oak Tree farm tract, as surveyed for W. A. B. by * * *, as per map," etc.; that such creditor had levied thereon as the property of said B.; and that such sale will cast a cloud upon her title. *Held*, that the defect of not showing that plaintiff obtained title from W. A. B., her father, if it existed, was cured by the averment in defendant's cross-complaint of a conveyance to her by the father, and a trial upon such pleadings; and the fact that a demurrer was interposed is immaterial.

3. The fact that the antenuptial contract was not in writing is immaterial.

Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action by Emma B. Cohen against Charles C. Knox and another to prevent a sale of property levied upon by execution. Judgment for plaintiff. Defendant Knox appeals. Affirmed.

Wm. B. Sharpe and *S. C. Devson*, for appellant. *Scrivner & Boone* and *Garber, Boalt & Bishop*, for respondent.

MCFARLAND, J. In the year 1883 there was a treaty or agreement of marriage pending between the plaintiff, then a young unmarried woman, and Alfred H. Cohen. Cohen was then a young lawyer just beginning the practice of his profession, and having no income or means sufficient to procure a home and support a family, and they were both unwilling to get married until they had a home. These facts coming to the knowledge of Watson A. Bray, the father of plaintiff, he concluded, in order to encourage the consummation of said marriage, to convey to plaintiff a lot of land and build a house thereon as a home for the young couple, provided the father of said Cohen would furnish it. After some conferences between the said Bray and the father of said Cohen, the proposition was accepted by the latter; whereupon Bray, on July 12, 1883, conveyed a lot of land, being the premises described in the complaint herein, to the plaintiff, (then Emma Bray,) and proceeded immediately to build a house thereon, which was completed in the early part of 1884. This was done with the knowledge of Cohen, and he was consulted about it. The house was furnished by said Cohen's father. In February, 1884, plaintiff and Alfred H. Cohen were married, and moved into the house, where they have lived ever since. It is found by the court, and clearly established by the evidence, that the said conveyance of said lot to plaintiff, and the construction of said house thereon, were the consideration which induced said marriage, without which it would not then (if ever) have been consummated. The value of the lot and the cost of the house amounted at the time to about $16,000, and the present value of the property is $18,000. At the time of the conveyance of said lot to plaintiff and the building of said house, the said Bray was the owner of several hundred thousand dollars' worth of property, and supposed himself to be worth a quarter of a million of dollars. The conveyance was not made with any design on his part to hinder or defraud creditors, (whether that fact be material or not;) and it is entirely clear that plaintiff and her husband believed him to be a man of large means, and fully able to make the said provision for her marriage, and that she accepted the same without any intent of hindering or defrauding his creditors. It turned out afterwards, however, that said Bray was, in fact, insolvent at the time said conveyance was made to plaintiff. On said July 12, 1883, the date of said conveyance to plaintiff, said Bray was indebted to the defendant Charles C. Knox in an amount exceeding $60,000; and on August 12, 1885, said Knox recovered judgment against said Bray for $79,218. On April 26, 1887, Knox caused an execution to be issued on said judgment, and delivered the same to the sheriff with instruction to levy it upon said lot conveyed by said Bray to plaintiff as aforesaid, as the property of said Bray. The sheriff made said levy, and was about to sell said lot, when the plaintiff brought this present action to restrain such sale, upon the ground that it would cast a cloud upon her title. The court gave judgment for plaintiff according to her prayer, and from said judgment, and from an order denying a new trial, the defendant Knox appeals.

The main question presented is whether the said conveyance from Bray to his daughter, under the circumstances above stated, was void as against the creditors of Bray. This question has been very ably and elaborately discussed by counsel, and a multitude of authorities have been cited. We will not undertake here to review these authorities, but will merely state the conclusions to which they clearly lead. Where one party conveys land to another for a valuable and adequate consideration, the conveyance will be good against the creditors of the grantor, although the latter intended thereby to defraud his creditors, if the grantee had no knowledge of such intent, and was in no way a participant in the fraudulent purpose. Marriage is the highest and most valuable of considerations; and when a conveyance is made upon such consideration, the grantee, if guiltless of fraud herself, is in, at least, as firm and sure a position as if she had paid in money the full value of the property conveyed. It has even been held that a voluntary conveyance to a daughter, intended as a settlement, and without present reference to her marriage, will become *ex post facto* valid against creditors and purchasers with only implied notice, if upon the credit of the conveyance a person has been induced to marry her. Marriage being in its nature permanent, and being the most important of all civil relations, the law will not lightly allow the inducements which have led to it to be disturbed. And the dowry of a bride, without special proof, is presumed to be an inducement to her marriage. The law does not require a delicate investigation into the *quantum* of influence which her property has had with her suitor. A few of the many authorities which establish the principles above stated are the following: Bump, Fraud. Conv. pp. 305, 306, and cases cited; Wait, Fraud. Conv. § 212, and cases cited; Magniac v. Thomson, 7 Pet. 348; Prewit v. Wilson, 103 U. S. 22; Wood v. Jackson, 8 Wend. 9; Herring v. Wickham, 29 Grat. 633; Huston v. Cantril, 11 Leigh, 146, 155; Sterry v. Arden, 1 Johns. Ch. 260, 271; Brown v. Carter, 5 Ves. 877, 878; Otis v. Spencer, 102 Ill. 622; Dugan v. Gittings, 43 Amer. Dec. 306. The case at bar presents a clear field for the application of these principles. It has none of those peculiarities or complications of facts which often make it difficult to determine what rule of law applies. It is a plain case of a conveyance upon the express consideration of marriage, which was the direct and immediate inducement of the marriage, and made, not only without any knowledge of fraud by the grantee, but without any intent to defraud on the part of the grantor. The court was therefore right in upholding the said conveyance against appellant, claiming as a creditor of Bray.

2. Appellant contends that the judgment should be reversed, because the complaint does not state facts sufficient to constitute a cause of action, and because his demurrer on that ground was erroneously overruled. The point is, as we understand it, that facts constituting a cloud on plaintiff's title are not stated, because it does not appear that plaintiff derived her title from Bray, against whom the execution runs. The complaint shows, among other things, (in brief,) that since July 12, 1883, plaintiff has been the owner and in possession of a certain described lot of land; that said land is "a portion of W. A. Bray's Oak Tree farm tract, as surveyed for W. A. Bray by James T. Stratton, April, 1869, as per map," etc.,—"all of which was and is well known to the defendants herein;" that defendant Knox recovered judgment against Bray, caused an execution to be issued, and levied on said land as the property of Bray, and is about to have the same sold, as in this opinion heretofore stated; and that said sale will cast a cloud upon plaintiff's title, and greatly damage and impair the value thereof. It is not necessary to definitely determine whether this complaint is so totally defective in its statement of a cause of action as to be bad on general demurrer, or whether it merely presents a case of defective averments, assailable only on special demurrer; because defendant, in addition to his answer in which the averments of the complaint are denied, filed a cross-complaint in which he asked for affirmative relief, and in which he averred specifically the very facts which he contends should have been averred in the complaint of plaintiff. In his cross-complaint he avers that on said July 12, 1883, and for a long time prior thereto, the said Bray was the owner in fee and in possession of said land; that on said day he conveyed the same by deed to plaintiff, who is his daughter; that the deed was voluntary and without consideration; that plaintiff holds under said deed, and not otherwise; and that the deed was made to hinder and delay creditors, and particularly defendant. He prays that the deed be declared fraudulent and void, and that he be allowed to proceed with the execution. To this cross-complaint plaintiff filed an answer, in which she admitted said deed from Bray, and that she held under it, but denied that it was voluntary, or without consideration, or fraudulent, and averred the consideration of marriage, and the facts concerning said marriage, as heretofore stated. Upon these pleadings the case went to trial; and it would be a vain thing to reverse the judgment, and allow plaintiff to amend her complaint by averring facts already averred in the cross-complaint, and to again in that form present issues which have already been raised and determined. The appellant made no objection to the introduction by plaintiff of the said deed to her from Bray; and the issue of the validity of said deed, raised by the cross-complaint and answer to it, was the one issue tried; and therefore, if it be conceded that the complaint failed to state sufficient facts, such failure was cured by the statement of the omitted facts in the other pleadings, which present a case of "express aider." And the fact that there was a demurrer does not take it out of the rule. There was a demurrer in Schenck v. Insurance Co., 71 Cal. 28, 11 Pac. Rep. 807; but the court held there that the omission of a material fact in the complaint was cured by its averment in the answer. That case, in principle, cannot be distinguished from the case at bar. See, also, Pom. Rem. § 579. Many cases to the same point are cited by counsel for respondent.

3. We see nothing in the point that an ante-nuptial contract must be in writing. No question arises here as to the enforcement of a verbal contract which ought to have been in writing. There are no other points necessary to be specially noticed. The judgment and order denying a new trial are affirmed.

We concur: **De Haven, J.**; **Sharpstein, J.**

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90 Cal. 279

Dorris v. Sullivan. (No. 13,959.)

(*Supreme Court of California.* July 18, 1891.)

Easement by Verbal Agreement—Partial Performance.

1. Plaintiff purchased the right to build a ditch across certain land from the owner, but before its construction the latter conveyed to defendant. *Held*, in an action to enjoin the latter from using a portion of the water of said ditch, that a verbal agreement between plaintiff and the original owner, whereby the latter was entitled to a perpetual easement in a portion of such water, was within the statute of frauds, and evidence thereof was incompetent.

2. The fact that plaintiff had partly performed such agreement cannot avail defendant as a defense, unless he pleads facts sufficient to entitle him to specific performance thereof.

3. Such owner testified that by the verbal

agreement he was to receive 20 inches of water, and pay $300 therefor; that, as the ditch built by plaintiff brought the water from a nearer stream than that agreed upon, he paid him only $175; but that he claimed and conveyed to defendant a ratable proportion of the water in such ditch. Defendant testified that he understood at the time of the conveyance that the owner could not sell or assign any right to the water without a settlement with plaintiff. No such settlement was ever had, and neither defendant nor the original owner ever offered to pay the balance of the purchase money. The evidence also failed to show any legal assignment to defendant of the original owner's alleged contract with plaintiff. *Held* insufficient to entitle defendant to specific performance.

4. Where, under such circumstances, it does not appear that plaintiff is not able fully to perform the contract on his part, defendant cannot enforce a specific part performance.

5. The instrument under which defendant claimed purported to convey to him all the original owner's right and interest in said ditch, without alluding to any contract by which he claimed such interest. *Held* insufficient to show any legal assignment of the original owner's alleged contract with plaintiff.

Commissioners' decision. In bank. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Action for an injunction and damages by C. G. Dorris against John Sullivan. Judgment for defendant. Plaintiff appeals. Reversed.

Spencer & Raker and *C. A. Raker*, for appellant. *J. D. Goodwin* and *Jenks & Claflin*, for respondent.

VANCLIEF, C. Action to recover damages for the diversion of water by the defendant from plaintiff's water ditch, and to perpetually enjoin the defendant from diverting water from said ditch in the future. Judgment for defendant, and plaintiff appeals from the judgment, and from an order denying a new trial. Plaintiff's ditch was completely constructed in 1887, and ran through the W. ½ of N. E. ¼, and E. ½ of N. W. ¼, of section 7, township 42 N., of range 13 E., owned by F. S. Chapman. Before the construction of the ditch, Chapman, on June 1, 1885, by an instrument in writing, granted to plaintiff, "for value received," the right of way for the ditch through this land. Thereafter, on December 7, 1885, before the ditch was constructed to or upon this land, Chapman conveyed the land and appurtenances to the defendant. On the following day, December 8, 1885, Chapman executed to defendant an instrument in writing, purporting to sell, assign, and convey to defendant all his (Chapman's) "right, title, and interest" in the ditch, (describing it as then being constructed by C. G. Dorris,) "which interest is the right to have twelve inches of water flow through said ditch to and upon said ranch, and there to be used by me for irrigation and domestic purposes as I may require; and I do hereby authorize the said John Sullivan, [defendant,] in his own name, to demand, use, and in all proper and legal manner maintain and exercise, the said right to the use of said water as it flows through and over said ranch belonging to me." The ditch was not extended to the Chapman land until 1887. The answer of the defendant denies that plaintiff owns the right of way through said land, and "denies that defendant, at the commencement of this action, or at any time, unlawfully kept or maintained, or either, any cut or flume in said ditch, or either, or threatens or intends to forcibly or unlawfully, or either, keep or maintain any cut in said ditch in the future, or at any time, or threatens or intends, or either, to deprive plaintiff of the use or benefit, or either, of said water ditch, or of the water thereof, (except so much as belongs to defendant,) or either, or continuously or permanently, or at all. * * * Denies that defendant has no interest in or right to said water ditch, or either, or that defendant has no right to or interest in the waters of said ditch, or either. Denies that defendant has no right to take any portion of the waters flowing therein." The answer contains nothing except the foregoing denials and parenthetical statement, indicating that defendant owns any portion of the ditch, or is entitled to divert any water therefrom. It does not allude to any right to, or interest therein, derived from Chapman.

On the trial, after plaintiff had proved a *prima facie* case against him, the defendant offered in evidence the above instrument of December 8, 1885, executed by Chapman to him, purporting to grant and assign all Chapman's right, title, and interest in and to the ditch, and to the use of the water flowing therein. To this plaintiff's counsel objected, on the grounds that it was not relevant to any issue made by the pleadings, and that it did not appear that Chapman had any title or interest in the ditch or water. The court overruled the objection, and plaintiff's counsel excepted, and the instrument was admitted. As evidence of Chapman's interest in the ditch and water, defendant offered Chapman's deposition as to an oral agreement between Chapman and plaintiff, under which Chapman claimed whatever right he had to the ditch or water. Plaintiff's counsel objected to the deposition on the grounds (1) that the agreement was irrelevant; (2) that the agreement was not in writing; and (3) that it does not relate to the ditch described in the complaint. The court overruled the objections, and plaintiff's counsel excepted. After the deposition was read, plaintiff's counsel moved to strike it out on the grounds last stated; and the court overruled the motion, to which ruling an exception was taken. So far as it relates to the agreement between Chapman and plaintiff, the deposition is as follows: "Question. Did you ever enter into an oral contract with said Dorris for an interest in the waters of the Pitt-River ditch? Answer. I did. Q. State, as near as you can, the time when said agreement was made, and as fully as you can the terms of the same. A. About the month of February, 1885, Mr. Dorris came to my office, and stated he wanted to bring in the water of Parker creek in a ditch to use on land situated on North Fork of Pitt river, on the north side of the river. He stated he wanted assistance to carry the water across Pitt river in a flume. I told Dorris that I wanted water to irrigate my ranch;

about twenty inches, measured under a four-inch pressure; and I asked him how much per inch he would charge me for the same. He [Dorris] stated that he would charge me $15 per inch. I accepted his offer at that price. Dorris then went to work constructing the flume across Pitt river, hired men to work, etc., and I paid the bills of the hired men, provisions, and lumber to the extent of $175 or thereabouts. It was distinctly understood between Dorris and myself that any advances I might make in paying for labor and materials in constructing the ditch should be applied by him [Dorris] in payment for my water. As an additional consideration, which I was to pay Dorris for my twenty inches of water, was the right of way across my land for his ditch." On cross-examination: "Q. State if you ever had any conversation with the plaintiff, C. G. Dorris, with reference to the use of water from Pitt-River ditch, for irrigation on the land formerly claimed by you. * * * If so, state what it was in full, and what you did. A. I did. Q. Did you ever have any agreement with said Dorris about having water from said Pitt-River ditch for irrigation? If so, was said agreement ever reduced to writing? A. I did. No. Q. If you were to have any water from said Pitt-River ditch at any time, state upon what conditions you were to have it. What were you to do, if anything, before you could have water to irrigate the land? State in full. A. I was to pay $15 an inch, measured under a four-inch pressure, to the extent of twenty inches; and also give Dorris right of way across my land for his ditch. Q. Now, tell what you did to fulfill each and all of those conditions. A. I paid $175, and gave him the right of way across my land. Q. Is it not a fact that you refused to have anything to do with the construction of the said ditch, and refused to pay anything towards the completion of such ditch, and used words to this effect: That 'I had all I want of the business, and do not want any water from the ditch, and do not want anything further to do with it, and do not intend to comply with any agreement in the premises,' to the plaintiff, C. G. Dorris, in the town of Alturas, Modoc county, near the Goose Brewery building, on or about the 1st day of June, 1885? A. I did not. No. Q. State if you did not have a similar conversation with John A. Free, of the same place, about the same time, and that you told him about the same, as above set out, as being said to said Dorris. A. No. Free presented an order from Dorris, I think, for hauling lumber. I refused to pay it until I saw Dorris. Q. Did you not refuse to pay an order on you from C. G. Dorris and in favor of said Free, for the reason you had nothing more to do with the matter, and did not intend to go any further in complying with your agreement with said Dorris, with reference to your getting water from said ditch for said land? How much were you to give said Dorris for water from said ditch to irrigate said land? State in full. A. No; I was to give $15 per inch to the extent of twenty inches and right of way across my land. Q. How much did you pay him? And why did you not pay him the agreed price? State in full. A. I paid him about $175. He [Dorris] failed to get the water across the river, and I did not propose to advance the balance until he performed his part. Q. From what stream did the water come that was to be turned into said Pitt-River ditch? A. Parker creek. Q. What disposition, if any, did you make of said land, and to whom, and when? A. I sold to John Sullivan in February, 1886. Q. Had said Pitt-River ditch been completed when you disposed of said land to John Sullivan? If so, how long before? A. It had not. Q. Did you ever turn any water from said ditch on the said land at any time? If yes, how much? A. No. Q. Had there ever been any water turned in said ditch when you disposed of said land to John Sullivan? A. No. Q. How much water was you to get, and what to pay for it, if anything? How much did you pay? State why you did not pay the full amount agreed upon between you and Dorris, if there was any such agreement. A. Dorris never performed his part of the contract. I was to get twenty inches of water, at $15 an inch. I paid about $175. Dorris failed to perform his part of the contract. Q. Did not the plaintiff, Dorris, come to you while you lived in Alturas, and about the last of May or the first of June, 1885, and request you to enter into writings with reference to your getting water to use from said Pitt river for said land, and you refused to sign any writing, and then declared you desired to have nothing further to do with the ditch and use of water on said land, and that you were through? A. No. Q. State whether you were not owing said Dorris at that time something over three hundred dollars on your verbal agreement with him with reference to getting water for said land, and that you failed to pay any of that amount for the reason that you were not going to comply with the agreement, if any. A. I did not owe Dorris anything until such time as he might furnish the water to me. I advanced about $175 to Dorris. The facts are stated in the foregoing answer."

The defendant, among other things, testified: "The reason I didn't get this deed of water the same time I got the deed to land was that Chapman was trying to get a settlement with Dorris that day, and I didn't get it. Chapman said he must have settlement with Dorris that day, and didn't get it. Chapman told me when he gave me the deed to land that he would have to have a settlement with Dorris to find out about the water, and the same before I got the deeds. I can't say whether Chapman ever had any settlement with Dorris before he gave me the deeds or not; both deeds had none that I knew of." Conceding that the testimony of Chapman was sufficiently definite to prove even a verbal contract, such contract must be construed to be a contract for 20 inches of water to be taken from plaintiff's ditch and used by Chapman for irrigating his ranch, perpetually, or as long as water should be conveyed through the ditch. Such a contract, if in writing, would have created a servitude upon, or an easement in, plaintiff's ditch property, (Civil Code, § 801, and by analogy, section 552; Washb. Easem. p. 379;) but such servitude or easement upon plaintiff's real property could not have been granted or created by a verbal contract.

It is claimed, however, that, as the verbal contract was partly performed by Chapman, he was entitled to enforce a specific performance thereof. In the first place, the defendant could not avail himself of this defense at the trial, without having affirmatively pleaded facts sufficient to entitle him to a specific performance, which he failed to do. Arguello v. Bours, 67 Cal. 450, 8 Pac. Rep. 49; Kentfield v. Hayes, 57 Cal. 411; Miller v. Fulton, 47 Cal. 147. In the second place, admitting the testimony of Chapman and defendant to be true, it does not prove facts sufficient to entitle defendant to a specific performance of any contract, even though the facts thus proved had been pleaded. The verbal contract was for 20 inches of water, at $15 per inch, amounting to $300. Chapman testified that he paid only about $175, and then refused to pay more because plaintiff had failed to perform his part of the contract,—failed to build the flume to convey the water from Parker creek across Pitt river, according to his first project, and the understanding when the contract was made; but, as plaintiff afterwards constructed a ditch conveying water from Pitt river to and across his land, Chapman claimed an interest in the ditch and water in proportion to what he had paid, and conveyed this interest to defendant. But it appears by the testimony of the defendant, which must be taken as absolutely true against him, that when Chapman conveyed the land he understood that he could not grant or assign any right to the water without a settlement with plaintiff; and defendant was never informed of any such settlement, nor was there any evidence of such settlement; but, on the contrary, plaintiff testified that no such settlement was ever made. There is no evidence that Chapman or the defendant ever offered or intended to pay the balance of the purchase money. Frixen v. Castro, 58 Cal. 442. Nor does the evidence show any legal assignment of Chapman's alleged contract with plaintiff to the defendant. The instrument of December 8, 1885, only purports to convey Chapman's right and interest in the ditch, entitling him to 12 inches of water, without alluding to any contract by virtue of which he obtained or claimed such interest in the ditch, or such right to the water. By virtue of that instrument, the defendant claims an absolute legal right and title to the water which he has taken and intends to take from plaintiff's ditch in the future, and not a mere equitable right by virtue of an equitable assignment of Chapman's contract for the water. Since it does not appear that plaintiff is not able fully to perform the contract on his part, the defendant is not entitled to enforce a specific part performance by the plaintiff. In order to enforce specific performance at all, the defendant should have tendered full performance on his part, and asked full performance by the plaintiff, unless he made it appear that plaintiff was unable to perform some part of his contract.

It is suggested by respondent's counsel that the contract between plaintiff and Chapman may be regarded as an irrevocable license to Chapman to divert from plaintiff's ditch the quantity of water claimed, which, though granting no interest in the ditch or water flowing in it, by reason of the statute of frauds, would yet be a defense to the alleged trespass of cutting the ditch and diverting water therefrom. In answer to this, for the mere purpose of disposing of this appeal, it is only necessary to say that no license of any kind has been pleaded. Alford v. Barnum, 45 Cal. 483. But, as the cause must be remanded for a new trial, it is proper to say that this action is more than a mere action to recover damages for a past trespass. The complaint alleges, not only that the defendant broke and cut the bank of the ditch and put a box or flume therein, through which he diverted water from the ditch, and has forcibly maintained said cut and flume up to the commencement of the action, but further alleges "that said defendant threatens and intends to so forcibly maintain and keep said cut and flume in said ditch in the future, and thereby to deprive plaintiff of the use and benefit of said water ditch and of the waters thereof, continuously and permanently in future," etc. The prayer of the complaint is that defendant be perpetually enjoined from these threatened and intended future acts. As to this quoted averment of the complaint, the answer simply denies that defendant threatens or intends, unlawfully, to keep or maintain the cut in the ditch in the future, or to deprive the plaintiff of the use or benefit of the ditch, or of the water thereof, "except so much as belongs to defendant," continuously or permanently or at all. This is an admission that defendant threatens and intends to keep and maintain the cut and flume in the bank of plaintiff's ditch, and thereby deprive the plaintiff of the use of the ditch and water to an indefinite extent, "so much as belongs to the defendant." Under these pleadings, the principal issue to be tried relates to the permanent right of the defendant to continue to divert water from plaintiff's ditch in the future, —the right to a permanent easement in plaintiff's real ditch property,—and this was the issue actually tried, and to maintain which, on his part, the defendant was permitted to introduce in evidence the verbal contract between Chapman and the plaintiff. To admit a verbal contract, under the guise and name of a license, to prove a permanent easement in or servitude upon real property, would be to evade and defeat the statute of frauds. Browne, Frauds, §§ 22-30, 133. I think the trial court erred in admitting the deposition of Chapman as to the verbal contract between him and plaintiff, and that for this error the judgment and order should be reversed, and a new trial granted.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial granted.

90 Cal. 427

MURDOCK v. CLARKE *et al.* (No. 13,472.)

(*Supreme Court of California.* Aug. 7, 1891.)

MORTGAGEE IN POSSESSION—ACCOUNTING.

1. A mortgagor, all of whose property was attached by creditors, agreed with the mortgagee, in consideration of his procuring a release of the attachments and of other advances, to place his business and property in the hands of an agent, who should manage it, and apply the proceeds to the payment of the mortgage debt and advances. It was agreed that the agent should be a person satisfactory to the mortgagor, and he was jointly selected by the parties. The mortgagor was to assist in the conduct of the business, which was to be carried on in the same manner as before. *Held*, that the agent was the representative of both parties, and that the mortgagees were not liable to the mortgagor for his mismanagement.

2. In such case, the mortgagees are held to the exercise of reasonable diligence in the management of the property mortgaged, and are not liable as trustees.

3. Where both the agent and the mortgagees kept their own cattle on the mortgaged land, along with the cattle of the mortgagor, the mortgagees were properly charged with a proportion of the running expenses, and with the value of the use of the land.

4. It being the duty of the mortgagor, under the agreement, to deliver all of the property, the mortgagees are not liable for failing to take possession of a saw-mill, in which the mortgagor had an interest.

5. In apportioning the expenses between the mortgagor and mortgagee, it was error to exclude taxes on the personal property from the deductions from the charges made against the mortgagor.

6. It not being necessary, under Code Civil Proc. Cal. § 454, to give an itemized account in the pleadings the findings, need not give the items of the account.

7. One who accepts a bill of sale purporting to transfer a certain number of cattle is not estopped thereby from denying that he actually received that number.

8. A conveyance of land to secure the payment of money, though the grantee is put in possession under an agreement for an accounting for the rents and profits, is only a mortgage, and does not pass the legal title.

9. Where the conclusions of the trial court as to the amount, necessity, or reasonableness of the expenditures rest on the weight of evidence, they are not reviewable on appeal, unless based upon some erroneous rule of law apparent on the record.

In bank. On rehearing. For former opinion, see 26 Pac. Rep. 601.

HARRISON, J. February 4, 1875, Adam Murdock borrowed from the defendant Clarke $8,500, for which he gave him his note, payable in one year after date, with interest at 1¼ per cent. per month, and as security for its payment made a deed to him of a tract of 330 acres of land, known as the "Beaver Creek Ranch," and assigned to him a swamp-land certificate of purchase of certain other lands known as the "Big Valley Ranch." These transfers were by instruments absolute in form, but Murdock continued to remain in possession of the property. Soon after this date, Clarke sold and assigned to his co-defendant, Cox, one-half of said note and security. Thereafter, viz., March 22, 1875, Murdock borrowed from Clarke and Cox the further sum of $5,000, and gave them his promissory note therefor. At this time Murdock's property, including the lands aforesaid, and his cattle and other personal property, were under attachment, and he was anxious to obtain the loan in order to free his property therefrom. The defendants agreed to loan him the money, and make such advancements as might be needed to free the property, provided such arrangement could be made that they would be secure; and it was thereupon mutually agreed that the property should be placed in the possession of one J. B. Stanton, who should have the care and management of it, and should account therefor to the defendants, and that, when the defendants had been paid the amount of their loans and advances, it should be restored to Murdock. It was also a part of the arrangement that Murdock should remain upon the property, and assist Stanton in its management. Under this arrangement, Murdock, on the 10th of April, 1875, executed to the defendants a bill of sale of the property, and also of his interest in a saw-mill and other property connected therewith which he owned jointly with one Quinn. Thereafter the defendants advanced for his use the further sum of $3,176.45, for which he gave them his promissory note, bearing date April 11, 1875, and Stanton was placed in possession of the property, and continued to manage it until his death, in 1886, after which one Snell was placed in charge thereof. Murdock died in December, 1875, and the plaintiff, having been appointed administratrix of his estate in 1876, qualified as such in October, 1878, and soon after brought the present action against the defendants for an accounting. The cause was tried by the court; findings were filed February 18, 1889, upon which a decree was entered July 3, 1889, wherein it found an indebtedness to the defendants of $31,926.37, for which they held the property as security, and adjudged that the plaintiff should pay that sum within 30 days; otherwise that the said property should vest absolutely in the defendants. From this judgment, and an order denying a new trial, the plaintiff has appealed.

1. The court found, in substance, that Stanton was selected and mutually agreed upon by Murdock and the defendants to be the agent of both parties, to take the possession and management of the property assigned to the defendants, and that his subsequent holding and management thereof was in the capacity of such agent for both parties. This question of Stanton's agency was treated by both parties at the trial as an issue in the case, and considerable evidence in reference thereto was offered by each party without objection from the other. Under these circumstances, the plaintiff is not at liberty to urge here that by the answer of the defendants no such issue was before the court below. King v. Davis, 34 Cal. 100. The appellant, however, contends that this finding is not sustained by the evidence, and a very considerable portion of the briefs on behalf of each party is devoted to a discussion of this question. Its importance is recognized, since the determination of the relation which Stanton bore to the respective parties to the transaction very materially determines the principles upon which the account should be taken. If Stanton was the representative of only the defendants, his acts in the management of the property became their acts, and they are accountable for any mismanagement or waste committed by him, as well as for the use which he made of the property for his individual account; whereas, if he was the agent of Murdock as well as of the defendants, the defendants would not be accountable to Murdock or to the plaintiff for any of his acts or conduct.

In view of the importance and bearing which this relation has to the correct decision of the case, we have given to the evidence upon this point very careful consideration, and are satisfied that it fully supports the conclusion reached by the court below. It is very likely that the importance of distinctly defining this relation, as shown by subsequent events, was not appreciated by either of the parties at the time that they were about to agree upon the person who should be selected to take possession of the property, and for that reason the testimony in reference thereto is somewhat meager; but a consideration of the relative situation of the parties, and the object which each had in view, as well as the evidence of their negotiations in reference to such selection, warrants the conclusion that it was their intention that the person to be selected was to be the mutual representative of them all. Murdock was greatly embarrassed with debt. His property was all under attachment, at the instance of some of his other creditors. The defendants held his real estate as security for his indebtedness to them. Unless Murdock could get additional money with which to remove the attachments, he felt that his property would be sacrificed. If he could obtain this money, he thought that in a few months he would be able to settle his whole difficulty. The defendants were willing to accommodate him, if they could be secured, but they knew that the personal property would be no security to them if Murdock was left in possession thereof. A plan was finally agreed upon by which the property should be put in the possession of Stanton, who was to carry on the business in the same way that Murdock had done, and account for its profits to the defendants until their indebtedness was paid. Murdock was to remain on the place, and assist Stanton in the conduct of the business as much as he could in every way. It is a significant circumstance that, when they came to the selection of the person who was to take this possession, it was to be some one who was to be satisfactory to Murdock, and that Stanton was jointly selected as the person who was to manage and control the property. If it had been the intention of the parties that the defendants were to take possession and manage and control the property, there would have been no occasion for them to consult Murdock about the person who should have been put in charge, or to agree that Murdock should remain on the place and assist him. The defendants would in that case have selected their own agent, and the relation of the parties would have been that of pledgeor and pledgee, with the strict responsibility and rights of each. We think that it fully appears from the record that the only purpose in the mind of either Murdock or the defendants was that, while accommodating him with the loan, they should be secured against any loss of the security at the instance of his other creditors, and that it was not the intention of either party that Murdock should lose the control of his business, or that the defendants should assume the responsibility of its management. Murdock himself was anxious to keep the business alive, and it would have been inconsistent with the purpose of both parties to hold that it was either the intention of Murdock to give to the defendants the possession and management of the stock-raising, or of them to assume it. Hence the selection of Stanton was made by their mutual consent, and the duties assumed by him were for the benefit of both. He was to manage the property for the benefit of Murdock, and in the manner in which Murdock had previously carried on the business, so that from the proceeds thereof Murdock's indebtedness to the defendants could be paid; and he was to hold the property, in order that in their security for this indebtedness the defendants might not be prejudiced. His relation to the property, and to the parties, resembled that of a trustee in a deed of trust where the debtor transfers his property to a third person mutually agreed upon between them, to hold and pay the income thereof to his creditor. In such case the person agreed upon is regarded as a trustee for both parties.

These are some of the considerations which could have been addressed to the court below upon the evidence before it, and which we may assume influenced it in making the finding referred to. It is needless to mention the established rule that the sufficiency of the considerations, as well as the evidence upon which they are based, is addressed entirely to that court. It was proper for the plaintiff to call upon that court to re-examine their sufficiency in her application for a new trial, but, after the court had upon such examination declined to set aside its action, this court will not review its determination. The relation which Stanton bore to the property, so far as the liability of the defendants for his acts is concerned, was fixed at the time of his selection, and as between them nothing was afterwards done which changed this relation. The death of Murdock within the year doubtless materially affected the early closing of the trust, but it did not change the position which Stanton bore to the property, or his relation to the defendants. The court having determined that Stanton was the representative of Murdock, as well as of the defendants, in the management of the property, it follows that the respondents are not accountable for any of the acts of Stanton, or for any of the waste or mismanagement which is charged upon him by the plaintiff.

2. The appellant has also excepted to the sufficiency of the evidence to sustain the findings of the court in regard to their expenditures in the management of the property since its assignment to the defendants, and has also objected to the findings themselves upon this point as not being sufficiently explicit, contending that the findings should be in reality an itemized statement of the account, rather than a summary of the transactions. It was not necessary for the findings to give the items of the account. It is not necessary in pleadings to give an itemized account, (Code Civil Proc. § 454,) and a finding which follows the pleading is sufficient. In this, as in other cases, it is sufficient to find the ultimate facts, or secondary facts, from which the ultimate fact necessarily follows.

The objections made by the appellant to the character amount, and necessity of the various expenditures incurred in the care and management of the property are matters that were properly presented to the court below, as well upon the motion for a new trial as upon the original trial of the case. Unless that court has made its determination upon some erroneous rule, or in violation of some established principle of law which is apparent from the record, we cannot review its action in these respects. In all matters in which its conclusion rests upon the weight of evidence, the necessity or amount or reasonableness of the expenditure, such conclusion is not reviewable by this court. If the court had found that a certain amount of expenditure had been made for any specific purpose, and the evidence fails to show that that amount of money has been expended for any purpose, it would be a sufficient reason for us to set aside the finding; but when, as in the present case, the finding is challenged only in general terms, and not specifically, and the objections are addressed to the necessity or reasonableness of the expenditure, rather than to its amount, we must accept the finding as correct. The action of the court below is presumed to be correct, and upon an appeal therefrom it is incumbent upon counsel to point out the error. This, in a case like the present, where an account has extended over many years, can be done only by taking the account as a whole, rather than selecting individual items, and expecting this court to examine the entire record for the purpose of determining whether, in connection with the result as finally ascertained, those items have been properly allowed.

3. In apportioning between the defendants and the plaintiff the expenses of keeping the cattle, the court adopted as a rule that "one-third of said expenses, including the wages of Stanton and Snell, but excluding the expenses of marketing said cattle, and taxes, should be deducted from the charge made against the Murdock estate." The court erred in not holding that one-third of the taxes upon the cattle should be deducted from the charge made against the Murdock estate. This error is so manifest that it is practically conceded by counsel for the respondents in saying that the insertion of the words "and taxes" in the finding was inadvertent. They also state in their brief that in fact the court did, in stating the account, deduct these taxes from the charge against the Murdock estate. We cannot, however, assume that such deduction was made, since in the same finding the amounts found to have been expended by the defendants upon said property are declared to be found "upon the principle of this finding." It is not necessary, however, to reverse the entire case for this error. The court below can take the proofs, upon this point, and, having ascertained the amount of taxes thus chargeable to the defendants, make the appropriate correction in the amount found due to them. If, upon taking such proofs, it shall appear to the court that the deduction has been made in the account already taken and stated, no change will be needed.

4. In finding 14 the court finds that between April, 1875, and January, 1876, the defendants advanced to Murdock the sum of $1,268.80, in addition to the amounts embraced in the three notes. The amount thus found to have been advanced is distinct from the amount found to have been expended in the care and management of the property, and cannot be upheld by an attempt to consolidate the whole amount of the moneys paid by the defendants, but must find support in the evidence pointed directly at the objects for which the court finds that the advances were made. We have examined the record with reference to this finding, and have not been able to find therein, nor have counsel pointed out to us, evidence in support of this finding of payments beyond the sum of $353.10, that are not included in the other findings. The finding is based upon the averment in the answer that the defendants expended the sum of $1,021 "in purchasing cattle belonging to said Adam Murdock at execution sales against him, and in releasing property of the same kind from attachments." There is no evidence in the record showing that any portion of this amount was paid by the defendants; and Cox, in his testimony, states that of this amount the sum of $600 was sent to Stanton for the purpose of releasing the attachments, and should not have been included therein, as it was covered by one of the notes. It was shown that Stanton paid the sum of $872.30 for releasing the attachments, of which he had received the aforesaid sum of $600, leaving the amount of $272.30, for which the defendants are entitled to be reimbursed. It also appears that Stanton paid for the defendants $80.80, for the expenses of organizing a swamp land district. This finding should therefore be corrected by substituting $353.10 for the sum of $1,268.80, named therein.

5. Upon many of the points presented by the appellant, the opinion of Mr. Commissioner HAYNE, rendered upon the former hearing of this appeal, (24 Pac. Rep. 272,) so correctly expresses the law applicable thereto that we incorporate into our opinion, and adopt his views thereon, as follows, viz.:

"(1) It is contended for the appellant that the defendants were trustees, and were therefore bound to account as such, and are held to the same strict responsibility in the management of the property committed to their care. It is true that mortgagees in possession are often spoken of as 'trustees.' But they are only so in a limited sense. Ten Eyck v. Craig, 62 N. Y. 422; Clark v. Sibley, 13 Metc. (Mass.) 213; Cholmondeley v. Clinton, 2 Jac. & W. 184; 1 Hil. Mortg. 391. As remarked by SHAW, C. J., in reasoning to a somewhat different point: 'In some very limited respects, a mortgagee is a trustee; as when he has entered and is in the receipt of the rents and profits, he is liable to account therefor, and in that respect may be denominated a trustee.' King v. Insurance Co., 7 Cush. 7. That they are bound to account for the rents and profits is a matter of course. 2 Story, Eq. Jur. (13th Ed.) § 1016*a;* Raun v. Reynolds, 15 Cal. 471. And we think that the rule as to trustees in general, viz., that their accounts should be clear and accurate, and that all obscurities and doubts should be resolved against them, (2 Perry, Trusts, 4th Ed. § 821,) applies here. But the accounting is not to be extended to imaginary profits. Where no negligence or improper conduct is alleged, a mortgagee in possession is chargeable with what he has actually received, and no more. Benham v. Rowe, 2 Cal. 407. In this case negligence and improper conduct are charged, and various claims are based thereon. It is therefore necessary to consider what was the degree of care required of the defendants. Chancellor Kent, in his Commentaries, stated the rule as follows: 'If the mortgagee obtains possession of the mortgaged premises before foreclosure, he will be accountable for the actual receipts of the net rents and profits, and nothing more, unless they were reduced or lost by his willful default or gross negligence. By taking possession, he imposes upon himself the duty of a provident owner; and he is bound to recover what such an owner would, with reasonable diligence, have received.' 4 Kent, Comm. 166. This statement of the rule has found its way into the decisions of the courts and the treatises of text-writers, (see Hidden v. Jordan, 28 Cal. 309; Moshier v. Norton, 100 Ill. 68,) and a similar passage was quoted from a modern text-writer on the former appeal of this case, (59 Cal. 694;) but it cannot be determined from the opinion whether the court meant to establish a rule or not. But, if the term 'gross negligence' is to be taken in its ordinary sense, viz., as denoting the absence of slight care, (see Shear.

& R. Neg., 4th Ed., § 49,) it is manifest that the passage quoted is somewhat inconsistent; for if the mortgagee, by taking possession, 'imposes upon himself the duty of a provident owner, and is bound to recover what such an owner would, with reasonable diligence, have received,' it is evident that he is bound to something more than slight care, and is responsible for something less than gross negligence. What we think the passage means, when taken as a whole, is that the mortgagee in possession is bound to exercise reasonable care, and is responsible for the want thereof. This was the construction given to similar language by a comparatively recent case in Alabama. The court said: 'On a bill to redeem, a mortgagee in possession will not be held accountable for anything more than the rents actually received, unless there has been willful default or gross negligence, which, in such case, is the measure of reasonable diligence.' Gresham v. Ware, 79 Ala. 199. That reasonable diligence is required is laid down in several cases. Shæffer v. Chambers, 6 N. J. Eq. 548; Strong v. Blanchard, 4 Allen, 543, 544; Scruggs v. Railroad Co., 108 U. S. 375, 2 Sup. Ct. Rep. 780. It seems plain, upon principle, that the mortgagee in possession is bound to something more than slight care. And we think that Chancellor Kent, and the courts and writers who adopted his language, meant to say that reasonable care was required. Applying this rule to the case before us, we think that the evidence shows, without material contradiction, that, while there were some errors of judgment, the general management of the property was what was required. Especially does this appear when it is considered that it was agreed that the ranches were to be run as they had been by the mortgagor. This does not mean that, if the mortgagor was negligent as to any matter, the mortgagees should be so too, but that the management of the mortgagees should be on the same general lines as that of the mortgagor; and, as above stated, we think it was.

"(2) Much argument is based upon the undoubted fact that both Stanton and the defendants kept their own cattle upon the ranches, not separate from the Murdock cattle, but together with them. This was certainly wrong. But it was settled on the former appeal that it made them liable for a proportion of the running expenses, (59 Cal. 695, 696;) and, in addition to this, the court below allowed the value of the use of the land. This, we think, was all that could properly be charged against the defendants on this account. In addition to the cattle, the defendants sent some horses to the property. This was because the horses were needed for ranch work, and they were used for that purpose. This was for the benefit of the property, and nothing can be charged against the defendants by reason thereof. Similar remarks apply to the stallion. He was useful as a work-horse and for breeding the ranch mares. The money made from outside parties during the breeding season belonged to the defendants.

"(3) Part of the property mentioned in the bill of sale was a half interest in a portable saw-mill located upon public land, and owned by Murdock in partnership with one Quinn. No profits were ever made from this mill, and it does not clearly appear what finally became of it. It was moved once while Quinn was in control. Afterwards it was moved again, and it seems that one Harris 'took it.' The court below found that the defendants never had possession, and the evidence leads us to the same conclusion. The defendants incurred no liability to Murdock or his estate, by not taking possession; for it was as much his duty to deliver it to them as theirs to receive it, and there is nothing to show that he tendered it. Even if the defendants be considered as having been in possession, we cannot say that there was a want of reasonable care on their part. Quinn was allowed, with the acquiescence of Murdock, to run it, as he had been previous to the bill of sale. After Murdock's death Quinn was the surviving partner, with authority to settle up the affairs and dispose of the property. He is the person who is accountable to the plaintiff in relation to the matter. The defendants are not bound to litigate with him for the benefit of the estate.

"(4) A point is made in relation to the number of cattle received by the defendants with the ranches. The bill of sale purports to transfer 1,322 head, and it is argued that its acceptance estopped the defendants from denying that they received that number. There is no force in this suggestion. After the bill of sale was signed, it was Murdock's duty to deliver the cattle in accordance therewith. If he did not perform this duty to its full extent, the defendants were certainly at liberty to prove the fact."

We have also reached the same conclusion that was reached by the commissioner regarding the error in the decree, as well as his reasons therefor, viz.:

"There is also a radical error in the decree. The court adjudged, in effect, that the legal title passed to the defendants, and it gave to the plaintiff a certain time in which to redeem, failing which, the property was to vest absolutely in the defendants. But, as it is admitted that the conveyances were intended only to secure the payment of money, they were mere mortgages, and did not pass the legal title. 'It is the settled rule in this state that, if a deed absolute in form was made merely to secure an indebtedness (to the grantee,) it is a mere mortgage, and does not pass the title.' Smith v. Smith, 80 Cal. 325, 21 Pac. Rep. 4, and 22 Pac. Rep. 186, 549. See, also, Hall v. Arnott, 80 Cal. 352, 22 Pac. Rep. 200; Booth v. Hoskins, 75 Cal. 275, 17 Pac. Rep. 225; Raynor v. Drew, 72 Cal. 309, 13 Pac. Rep. 866; Healy v. O'Brien, 66 Cal. 519, 6 Pac. Rep. 386; Taylor v. McLain, 64 Cal. 514, 2 Pac. Rep. 399. And the fact that the mortgagees were put in possession does not change the rule. As was said in Smith v. Smith, above cited, 'such a deed gives a mere lien upon the property, just as if the parties had put their agreement in the form of a mortgage;' and it has been decided that, in this state, the interest of the mortgagee is not enlarged or affected by the fact that he is in possession under the mortgage. Dutton v. Warschauer, 21 Cal. 609. The legal title, therefore, remained in Murdock, and vested in his heirs, and is not in the defendants; and the court below was not authorized to decree that it should vest absolutely in the defendants upon the failure of the plaintiff to pay what was due within a certain time. The defendants, however, have a right to retain possession until the sums due to them have been paid; and, even if they have not, the court has power to impose proper conditions upon the plaintiff. Raynor v. Drew, 72 Cal. 311, 13 Pac. Rep. 866; Booth v. Hoskins, 75 Cal. 271, 17 Pac. Rep. 225; De Cazara v. Orena, 80 Cal. 134, 22 Pac. Rep. 74. And the answer prays that the property be sold and the proceeds applied to the payment of the debt. The decree, therefore, ought to have provided that, in case of the failure of the plaintiff to pay what was due within the specified time, the property should be sold, and the proceeds applied to the payment of whatever is due to the defendants."

The order denying a new trial is affirmed; but the court below is directed to modify the judgment, in conformity with the foregoing opinion, by deducting therefrom the sum of $915.70, with proper allowance for interest, the same being the difference between $353.10 and the sum of $1,268.80, found to have been advanced by the defendants between April 14, 1875, and January 1, 1876, in addition to the amount of the three promissory notes; and to further modify the judgment to such extent that one-third of the amount of taxes paid by the defendants upon the personal property after November 1, 1877, shall be deducted from the expenses incurred in the management of the estate; and, for the purpose of ascertaining this fact, the court is directed to take such testimony relative thereto as may be offered by the respective parties. The judgment is further modified by striking therefrom the following clause, viz.: "And it is further ordered, adjudged, and decreed that, if the plaintiff fails, neglects, or refuses to pay said sum found due the defendants, as aforesaid, on or before the expiration of said 30 days, then, and in that event, said property, real and personal, and all the right, title, and interest of the plaintiff as administratrix of the estate of Adam Murdock, deceased, and all the right, title, and interest which the estate of Adam Clarke, deceased, has or had in or to said property and every part thereof, shall vest absolutely in the defendants, and shall forever thereafter be the property of the defendants, discharged and released from all claims or demands on the part of the plaintiff, or on the part of the estate of said Adam Murdock, deceased." And the court is directed to insert in the judgment, in lieu of the clause so stricken out, a direction to the effect that in case the plaintiff shall fail to make the redemption provided for in said judgment, the said property, held by the defendants as security, shall be sold for the purpose of satisfying the amount of said judgment, with such terms and provisions included in said judgment as are proper for a sale under a decree for the foreclosure of a mortgage; and, as thus modified, the judgment shall stand affirmed.

We concur: McFarland, J.; Garoutte, J.; Paterson, J.; Sharpstein, J.

(90 Cal. 307)

Easton v. Montgomery *et al.* (No. 13,258.)[1]

(*Supreme Court of California.* July 21, 1891.)

Vendor and Vendee — Contract of Sale — Abstract of Title — When Deed to be Delivered — Defective Title — Fraud.

1. A contract for the sale of land which provides "title to prove good or no sale," without specifying the time within which the examination is to be made, implies a reasonable time.

2. Where the agreement does not provide that the vendor shall furnish the abstract, it is incumbent upon the vendee to provide it, to ascertain the condition of the title.

3. Where a title is defective, the vendee is obliged to point out the defect to the vendor, and give a reasonable time to perfect the same, before bringing an action to recover a deposit.

4. In an action by the vendee to recover a deposit upon the ground that the title is defective, he is limited to the defects pointed out.

5. A contract for the sale of land provided that the agents of the vendor "are authorized to return the deposit if the title is defective." *Held*, the fact that the vendor's title was defective at the date of the contract does not give a right of action to recover the deposit without notice of the defect to the vendor.

6. Where one holds a contract for a deed, and pays a part of the purchase price, he may make a valid agreement for the sale of the land, the deed to be delivered by him thereafter.

7. Where the agent acting for the vendee had full knowledge of the condition of the vendor's title before making the contract, the fact that he failed to inform the vendee does not constitute fraud on the part of the vendor.

Department 1. Appeal from superior court, city and county of San Francisco; T. K. Wilson, Judge.

Action by George Easton against Montgomery and others to rescind a contract and recover a deposit. Judgment for plaintiff. Defendants appeal. Reversed.

Olney, Chickering & Thomas, for appellants. *Van Ness & Roche*, for respondent.

Harrison, J. During the month of August, 1887, there was great excitement in the real-estate market in the county of Santa Clara, popularly known as a "boom." This excitement subsided at about the end of that month, and thereafter it became much more difficult to sell real estate in that county. During this period, viz., August 15, 1887, one A. H. Albers, who was the owner of the tract of land described in the instrument hereinafter set forth, made a contract with the defendants, Montgomery and Rea, for the sale of the tract to them for the sum of $29,000, of which they paid him $1,000 as a part payment, and were to pay the remainder on or before January 1, 1888. Montgomery and Rea were real-estate brokers, and were acting in this matter as the agents of the defendant, Chase, and the money which they then paid to Albers as part payment upon said purchase had been previously placed in their hands by

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[1] Rehearing denied.

Chase for the purpose of investing in real estate as a speculation. They took the contract in their own names for the reason that it was uncertain whether Chase would approve the purchase. Chase, however, did approve the purchase as soon as informed thereof, and prior to the 20th day of August. On the 20th day of August, 1887, one Lawrence, as the agent of the plaintiff, and acting in his behalf, entered into negotiations with Montgomery and Rea for the purchase of this tract of land, and, after being informed of the nature of the interest therein held by Chase, agreed with them upon the terms of purchase, and thereafter, upon the same day, in pursuance of said agreement, the plaintiff paid to Montgomery and Rea the sum of $500, and received from them the following instrument: "Received, San Jose, August 20, 1887, from Geo. Easton, by Lawrence, the sum of ($500) five hundred dollars, in gold coin, being a deposit and part payment on account of bargain and sale made to h . . this day, to a certain lot, tract, or parcel of land, lying, situate, and being in the county of Santa Clara, state of California, and bounded and described as follows: Being 187 acres, known as 'Albers' Place,' situate on Albers' road, bounded on the east by Albers' road, and on the south by Storey road; said farm having been sold to said Easton this day for the sum of ($46,750) forty-six thousand seven hundred and fifty dollars, in gold coin, the balance to be paid as follows: Forty-five hundred dollars on or before Monday, August 22d, at one o'clock P. M.; one-third of purchase price within thirty days; and balance on or before two years, at 7 per cent. from date, or this deposit to be forfeited without recourse. Title to prove good or no sale, and this deposit to be returned. The said deposit is to remain in the hands of Montgomery and Rea, the agents making this sale, until the title passes. And they are authorized to return the same to the buyer if the title is defective. C. M. CHASE, by MONTGOMERY & REA, Real-Estate Agents." August 22, 1887, the plaintiff paid the sum of $4,500, named in the instrument to be paid on that day; and on September 19, 1887, he paid the further sum of $666.67, and delivered to Montgomery and Rea a note of Lawrence for $333.33, for which he received from them the following instrument: "San Jose, Sept. 19, 1887. $1,000. Received from Geo. Easton, by Lawrence and Lyons, one thousand dollars, in consideration of which the time for payment on the Rancho Coronado is extended thirty days. The above payment is on account of the purchase price. C. M. CHASE, by MONTGOMERY & REA." Thereafter the plaintiff commenced this action to recover from the defendants the amount of money so paid by him, and for a cancellation of the note of Lawrence. The transcript does not show the date at which action was commenced, but alleges that prior thereto, viz., September 28, 1887, he demanded from the defendants a return of the money and of the note, which was refused.

The instrument above set forth is not an agreement for the purchase of an option, but is a contract for the sale of lands. Benson v. Shotwell, 87 Cal. 49, 25 Pac. Rep. 249. It is more in the nature of a memorandum to satisfy the statute of frauds than a contract embracing all the terms of the agreement between the parties. Being signed by Chase, it satisfies the statute of frauds so far as to be capable of enforcement against him, and its execution by him and delivery to the plaintiff is a sufficient consideration for the support of a promise on the part of the plaintiff to pay the money therein named as the price of the land. Cavanaugh v. Casselman, 26 Pac. Rep. 515. There is no mention in it of the time at which a conveyance of the land is to be made, or within which an examination of the title is to be had. Ordinarily, parties entering into an executory agreement for the purchase and sale of real estate make provision therein in these respects, specifying the time allowed for examination of the title; for furnishing abstract; making report of defects and objections, specifying the time within which the vendor may thereafter make his title good, and the character of the conveyance to be executed by him; but, in the haste attendant upon the excitement of a "boom," these formal provisions are frequently omitted, and the construction of the contract is left to implication or established rules.

It is evident from the provision inserted in the memorandum, "title to prove good or no sale, and this deposit to be returned," that it was contemplated by the parties that an examination of the title was to be made on behalf of the plaintiff, and that upon such examination it might be found defective. As no time was specified within which such examination should be made, a reasonable time therefor was implied. Allen v. Atkinson, 21 Mich. 351. The parties did not agree that the condition of the title should be ascertained from any particular abstract, or from an abstract to be furnished by Chase; and in this respect the case is distinguishable from Smith v. Taylor, 82 Cal. 533, 23 Pac. Rep. 217, and from Boas v. Farrington, 85 Cal. 535, 24 Pac. Rep. 787. The agreement being silent upon this point, it was incumbent upon the plaintiff to provide the abstract, and to satisfy himself as to the condition of the title. Carr v. Roach, 2 Duer, 20; Espy v. Anderson, 14 Pa. St. 312. He was not at liberty, however, to pronounce the title defective without any examination or upon a partial examination. Having assumed to examine the title for the purpose of determining whether it was good, it was incumbent upon him to make a complete examination thereof. He could call upon the defendants for any information with reference thereto, and it then became their duty to furnish such information as they possessed. Benson v. Shotwell, supra. If, upon such examination, it appeared to him that the title was defective, it then became his duty to report to the vendor the particulars wherein such defects were claimed to exist, and in the absence of any time fixed by the agreement within which the vendor should remove these defects, or satisfy his objections, a reasonable time would be allowed therefor. More v. Smedburgh, 8 Paige, 600.

The burden is on the vendee to point out the defects in the title. Dwight v. Cutler, 3 Mich. 566. If the vendor fails within such time to remedy the defects thus pointed out, the purchaser, in any action to recover the purchase money or deposit paid by him, upon the ground that the title is defective, is limited to such defects as were then pointed out. 1 Chit. Cont. 434; Todd v. Hoggart, Moody & M. 128.

It does not appear whether the plaintiff caused any examination of the title to be made, except that Montgomery in his testimony says that in October, long after the demand for the return of the deposit, "we received a letter from Mr. Easton, and another one from his attorney, saying that the title was imperfect." There is no evidence in the record that the particulars in which the title was imperfect were called to the attention of the defendants, or that any demand was ever made upon Chase to remedy these defects prior to making the demand for the return of the deposit, or prior to the commencement of the action.

The plaintiff contends, however, that, inasmuch as at the date of the instrument Chase's title to the land was defective, the clause in the instrument, "and they are authorized to return the same to the buyer if the title is defective," gave him an immediate right of action to recover the deposit, which he can enforce at any time thereafter. This principle contended for by the plaintiff would be equally applicable to a title with any incumbrance or any defect, however slight, or however easily removed. We do not, however, construe this clause as conferring such right. In every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee by his deed of conveyance a title unincumbered and without defect. Burwell v. Jackson, 9 N. Y. 535; Pomeroy v. Drury, 14 Barb. 418; Inness v. Willis, 48 N. Y. Super. Ct. 192; Dwight v. Cutler, 3 Mich. 566; Warv. Abst. 293. The money left with Montgomery & Rea, by the plaintiff, as a deposit, was a part payment on account of the purchase by him of the land, and was not given upon the consideration that Chase then had a good title to the land purchased, but upon the consideration that the plaintiff would receive from him a good title thereto at the time when, by the terms of the agreement, he should be called upon to make a conveyance. The "defective" condition of the title referred to in the last clause of the instrument is "pointed only at incurable defects in the title, and not to such imperfections as are capable of being removed after the agreement is made, and while the title is under investigation." Stowell v. Robinson, 5 Scott, 211. "The object of this clause evidently is to avoid disputes about the title, and while it is being adjusted the purchaser keeps his money for other operations. The same with the vendor; he is enabled to find another purchaser if his first vendee is dissatisfied with the title." Brizzolara v. Mosher, 71 Ill. 41.

It is not necessary, however, that the vendor should be the absolute owner of the property at the time he enters into the agreement of sale. An equitable estate in land, or a right to become the owner of the land, is as much the subject of sale as is the land itself; and whenever one is so situated with reference to a tract of land that he can acquire the title thereto, either by the voluntary act of the parties holding the title, or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof. As was said by Mr. Justice Paterson in Burks v. Davies, 85 Cal. 114, 24 Pac. Rep. 613 "If, though he be not the absolute owner, it is in his power, by the ordinary course of law or equity, to make himself such owner, he will be permitted within a reasonable time to do so." If the agreement is made by him in good faith, and he has at the time such an interest in the land, or is so situated with reference thereto, that he can carry into effect the agreement on his part at the time when he has agreed so to do, it will be upheld. 1 Chit. Cont. (11th Amer. Ed.) 431; Dresel v. Jordan, 104 Mass. 407; Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. Rep. 1056; Smith v. Cansler, 83 Ky. 371; Gaither v. O'Doherty, (Ky.) 12 S. W. Rep. 306; Tapp v. Nock, Id. 713; Ley v. Huber, 3 Watts, 367; Tiernan v. Roland, 15 Pa. St. 429. We cannot lose sight of the proposition that in this country, where values of land fluctuate rapidly, and where transfers are so frequent, it is very common for the purchaser of land to make a transfer before he has acquired the title. It would work great injustice to hold that no one could make a valid contract for the sale of land until he has himself become clothed with the absolute title. Even in the present case it appears that the plaintiff, after the agreement for the purchase was made, placed the property on the market immediately after the first payment was made, and endeavored to sell the same prior to his obtaining the title thereto. He himself testifies: "I was trying all the time to make a trade of the property pending our getting a title to the property."

It has been held that when the vendor has no interest whatever in the lands which he agrees to convey, and his contract of sale is the mere speculation of a volunteer, courts will refuse to enforce the contract at his instance, and will rescind the agreement at the instance of the vendee, upon the ground that the contract was not made in good faith. The correctness of this rule in its application to a case wherein there is no charge of bad faith has, however, been seriously questioned, and was distinctly repudiated in Dresel v. Jordan, supra. It is held, also, that the vendee may maintain an action to rescind the agreement upon the ground that the vendor, at the time of entering into the agreement, knew that he could not make the conveyance, or fraudulently represented himself as the owner of the premises, (Inness v. Willis, supra;) and that if, subsequent to entering into the agreement, the vendor voluntarily puts it out of his power to complete the contract,—as if he should sell the land to another pending the existence of the agreement,—the vendee may treat the contract as rescinded, and bring his action for the deposit, (Burwell v. Jackson, supra.) In either of these cases the ground for the rescission is the fraud of the vendor, either at the time of entering into the contract, or by his subsequent acts.

There is no question, however, in the present case of fraud or misrepresentation on the part of the defendants. Montgomery informed Lawrence, who in making the purchase was acting for the plaintiff, of the exact condition of the title, and the relation which Chase bore to it. Whether Lawrence informed the plaintiff thereof is immaterial. The fact that Lawrence knew all about it before making the agreement removes all charge of fraud or concealment on the part of the defendants. The plaintiff, moreover, does not place his right of recovery upon the ground of fraud, but solely upon the fact that Chase did not have the title to the land at the date of the agreement. Chase, however, although not then holding the absolute title, did have an interest in the land sufficient to sustain an agreement on his part to sell the same. The plaintiff in an action therefor, with proper parties, could at any time have enforced a specific performance in his behalf of the contract with Chase. Chase had furnished the money with which Montgomery and Rea had paid Albers the deposit on the contract of sale. The purchase had been made in pursuance of previous directions from Chase to Montgomery and Rea, and, after the contract had been entered into, had been ratified by Chase. As between Chase on the one part, and Montgomery and Rea on the other, the interest acquired by that contract belonged to Chase, and in a proper action Albers could have been compelled to convey to Chase, as he afterwards did voluntarily so convey. Prior to making the contract with the plaintiff, Chase had authorized Montgomery and Rea, who were his agents, to sell the land; and in pursuance of such order, which was in writing and exhibited to Lawrence, they made the agreement with the plaintiff in the name of Chase. This was such an additional recognition by them of the interest of Chase in the land that Chase would be able to enforce any *bona fide* contract made by them in his behalf.

It is not necessary for us to decide whether by the terms of this agreement the title was to pass to the plaintiff prior to the payment of the last installment. The general rule, in the absence of special provisions in reference thereto, is that the vendee is not entitled to a conveyance until the full payment of the purchase money, and that, the acts of payment and conveyance being mutual and dependent, neither party is in default until after tender and demand by the other. In the present case we have seen that the right of rescission did not exist, and in any action upon the contract, either to enforce it, or to recover damages for its breach, it was incumbent upon the plaintiff to show a performance on his part of all the acts required to be performed by him before he could call upon Chase, and a subsequent failure on the part of Chase to comply with his part of the agreement. The plaintiff, not having alleged or proved such performance, is not in a position to maintain an action for the recovery of the money paid by him in part performance of his obligations, while the contract is still in existence and uncompleted. The judgment and order of the court below are reversed, and the cause remanded for a new trial.

We concur: PATERSON, J.; GAROUTTE, J.

(90 Cal. 297)

CASHMAN v. HARRISON. (No. 13,289.)[1]

(*Supreme Court of California.* July 20, 1891.)

BILL OF EXCHANGE — EQUITABLE ASSIGNMENT OF FUND—PRESENTMENT—EVIDENCE.

1. An instrument in the form of a bill of exchange was given by the drawer in settlement of his liability to the payee, and the drawer delivered certain property to the drawee for sale, with the understanding that the proceeds were to be applied on the bill. There was no agreement that the drawee should accept or pay the bill before sale, or that it should be wholly satisfied therefrom, or by payment of less than its face value. *Held*, that the instrument was a bill of exchange, and not an equitable assignment of the fund arising from the sale.

2. The fact that the drawer had no reason to believe the drawee would accept or pay the bill before the sale of the property excuses, as to the drawer, non-presentment for acceptance or payment and notice of dishonor, under Civil Code Cal. § 3220.

3. Where the consideration of a bill of exchange is in issue, evidence thereof is competent in rebuttal, and error in receiving it in chief, over the objection of incompetency, is harmless.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Action by James Cashman against C. H. Harrison on a bill of exchange. Trial to the court. Judgment for plaintiff, and defendant appeals. Affirmed.

E. F. Preston, for appellant *H. McCrea* and *J. D. Sullivan*, (*Hepburn Wilkins*, of counsel,) for respondent.

VANCLIEF, C. This action is by the payee against the drawer of a bill of exchange, of which the following is a copy: "$2,019.70. San Francisco, December 29, 1881. Pay to the order of James Cashman $2,019.70, gold coin of the United States, value received, and charge the same to account of C. H. HARRISON. To R. S. Howland, San Francisco. No." Of the defenses pleaded, two are alternately insisted upon here, viz.: (1) That the instrument was intended to effect merely an equitable assignment of a portion of a fund, and therefore is not what it purports to be; or (2) that, if it be considered and treated as a bill of exchange, there was no presentment of it to the drawee for payment, and no notice to the drawer of its dishonor. To excuse the non-presentment for payment, it was alleged in the complaint, and found by the court, "that the defendant at the time of drawing said bill as aforesaid, had no reason to believe that R. S. Howland, the drawee therein named, would accept or pay the same, and defendant at said time well knew that said drawee had no funds in his hands due or owing to defendant." The court also found that "the said bill was not intended as an assignment of a portion of any fund whatsoever," but that "said bill was executed by defendant in settlement of a liability to plaintiff theretofore incurred by defendant under a certain bond, and said liability existed in full force as a cause of action in plaintiff's behalf at the time of the execution of said bill by defendant as aforesaid." The judgment was for plaintiff, from which, and from an order denying his motion for a new trial, the defendant appeals.

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[1] Rehearing denied.

The facts and circumstances pertinent to the questions to be decided are substantially as follows: In February, 1881, one Tibbey chartered the plaintiff's schooner for a sealing voyage in the Northern Pacific. To secure the performance of the charter-party on the part of Tibbey, and for his accommodation, the defendant executed a bond to plaintiff in the penal sum of $6,250, but the defendant was not interested in the charter-party, nor in the sealing voyage. The schooner, after fishing for a season, sailed to Yokohama, Japan, with such cargo of skins as had been taken on the voyage, and there got into trouble and litigation. When news of her arrival in Yokohama, and of her trouble there, was received in San Francisco, Tibbey, to secure indemnity to the defendant for his liability on the bond to plaintiff, assigned to him the cargo of skins. While matters were in this condition, the plaintiff was demanding of defendant payment of about $3,100, which he claimed to be due him on the charter-party, and which Tibbey was unable to pay. Through the intervention and assistance of R. S. Howland, acting as the agent and adviser of plaintiff, a settlement was effected between plaintiff and defendant, the terms of which, as then executed, were (1) that plaintiff's demand was reduced to the sum of $2,019.70; (2) that defendant turned over to Howland his security for indemnity (the cargo of skins) to be disposed of and converted into money by the latter; and (3) that defendant drew on Howland the bill of exchange in suit for the sum of plaintiff's reduced demand, ($2,019.70.) This settlement was made with the consent of Tibbey. At the time of this settlement it was believed by all the parties concerned that the money product of the cargo would be even more than sufficient to pay the bill; but it was well known by plaintiff and defendant, at the time the bill was drawn, that defendant had no funds in the hands of Howland, and it was quite as well understood that Howland was not expected to accept or pay the bill until he should receive money for that purpose from the sale of the cargo, nor to pay a greater sum than he should thus receive. There appears to have been no agreement or understanding, however, that the bill should be wholly satisfied from the fund to be realized from the sale of the cargo, nor, in any event, by payment of less than the sum it called for. Howland, in his deposition, says: "It was understood that if sufficient funds came to me from the sale of that cargo it was to be paid to Cashman upon this instrument, (the bill,) to the amount named therein. * * * Harrison had no reason to believe that I would accept or pay said bill before the money came." Again he says: "I don't remember any other instrument executed at that time for the purpose of portioning the fund that was expected to be realized from the sale of the cargo of said schooner, nor did I understand that this instrument was for such purpose. I understood that the legal title to said cargo of said schooner, immediately prior to the execution of the bill of exchange, was in Harrison. The legal title to the cargo was vested in Harrison by the Tibbeys by their assignment of the same to him, to secure him for the liability he had incurred in their behalf by his bond given to Cashman. Harrison gave Cashman this paper or instrument to settle his liability to Cashman on account of this very bond for the payment of the charter money." The cargo of skins was finally sold in London, but after paying expenses, including expenses of litigation in Japan, Howland realized therefrom only $600, which was not received by him until some time after May, 1883; and when it was received the defendant took it out of his hands, so that no part of it was paid on the bill of exchange.

1. I think the bill was intended to be what it plainly purports to be, an inland bill of exchange, and that the finding that it "was not intended as an assignment of a portion of any fund whatsoever" is justified by the evidence. By turning over his indemnity security to Howland, Harrison intended merely to provide funds, then supposed to be sufficient, for the payment of the bill at such future time as those funds were expected to come into Howland's hands; thereby gaining time to realize upon his own security for indemnity. But the evidence fails to show that plaintiff agreed to rely solely upon that security, or that the bill of exchange should not have the legal effect of a bill of exchange. The substance of the transaction was—*First*, to settle and liquidate the amount of defendant's liability on his bond; and, *second*, to exchange securities for the payment thereof. The bill of exchange was given to secure the payment of the sum for which defendant was liable on his bond thus liquidated by the settlement. Had it been the intention of the parties that the bill was to operate only as an assignment of the fund to be realized from the cargo, and that it was to be wholly satisfied from that fund alone, it is difficult to conceive why, when the fund was received by Howland, the defendant should have thought himself entitled to demand and receive the whole of it, or why Howland should have complied with the demand. The taking of the money proceeds of the cargo out of the hands of Howland seems utterly inconsistent with the assignment theory, and can be rationally accounted for only upon the supposition that the defendant regarded the instrument as being what it purported to be; and, so regarding it, concluded as matter of law that his liability upon it

had been discharged by want of timely presentment of it to the drawee, or notice of dishonor; and consequently that he was entitled to withdraw his funds from Howland.

The bill itself, before acceptance, has no tendency to prove the assignment, but the contrary. In Harris v. Clark, 3 N. Y. 118, the court, by RUGGLES, J., after reviewing the cases, said: "The principle appears to be firmly established that a bill of exchange does not of itself give to the holder, either at law or in equity, a lien upon the funds of the creditor in the hands of the debtor until after acceptance by the latter." To the same effect are Mandeville v. Welch, 5 Wheat. 286, and Tiernan v. Jackson, 5 Pet. 580. In the well-considered case of Attorney General v. Insurance Co., 71 N. Y. 325, it was held that even a check upon a bank, which has funds of the drawer, does not operate as an assignment of the fund, unless the check specify the particular fund upon which it is drawn; and a like decision was rendered in Lunt v. Bank, 49 Barb. 221. In Bank v. Jauncey, 3 Sandf. 257, it was insisted by counsel that a bill of exchange drawn against a consignment of cotton, but without specifying the fund, was itself an equitable assignment by the drawer of the cotton or its proceeds. To this the court answered: "This is certainly carrying the doctrine of equitable assignment very far, and is, in our judgment, entirely unsupported by authority. In the cases cited by counsel, and in all the other cases where an order has been held to be an equitable assignment of a particular fund, the fund has been specified in the order, and the party giving the order has thereby divested himself of all right to control the fund purporting to be assigned. The form of the assignment is immaterial, but these two ingredients first named are essential. * * * A bill of exchange, however,—and the instrument in question is nothing more nor less,—differs from such an order. It must be payable at all events, and not out of a particular fund. If its payment is contingent, either with regard to the event or the fund out of which it is to be made, it is not a bill of exchange, but an order or assignment of a fund. The converse of this is also true, that, if the instrument be a bill of exchange, it is not an assignment of a fund."

2. Assuming, as we must, that the instrument is a bill of exchange payable immediately, as it purports to be, I think presentment thereof for acceptance or payment, and notice of dishonor, according to the general rule, were excused as to the defendant. Section 3220, Civil Code, provides: "Presentment of a bill of exchange for acceptance or payment and notice of dishonor are excused as to the drawer, * * * if, at the time of drawing, he had no reason to believe the drawee would accept or pay the same." See, also, Daniel, Neg. Inst. §§ 1073–1081 inclusive; Terry v. Parker, 1 Nev. & P. 752; Bank v. Hughes, 17 Wend. 94. The finding of the trial court that, at the time of drawing the bill, the defendant had no reason to believe that the drawee would accept or pay the same, is well supported by the evidence, and brings the case fairly within the Code exception to the general rule requiring presentment for acceptance or payment according to the tenor of the bill and notice of dishonor. To bring a case within this Code exception, it is not necessary, as contended by counsel for appellant, to prove fraud on the part of the drawer of the bill. The exception is based on the mere fact that the drawer, at the time of drawing the bill, "had no reason to believe the drawee would accept or pay the same;" and it is certainly possible that this fact may exist without fraud. It may be attributable to folly, or to a degree of negligence not at all evincive of fraud. Indeed, it is consistent with an ill-founded belief that the drawee would accept and pay the bill. Daniel, Neg. Inst. § 1073. Except for the purpose of proving want of consideration, fraud, accident, or mistake, which might nullify the instrument, parol evidence is inadmissible to vary or contradict a bill of exchange. "Therefore, if a bill or note be absolute upon its face, no evidence of a verbal agreement made at the same time, qualifying its terms, can be admitted." If the bill is payable on demand, "it cannot be shown by verbal testimony that it was agreed that it should not be paid * * * until the amount was collected from certain sources; nor until a certain draft was received; * * * nor that a note [or bill] in which no time for payment is expressed, and is therefore constructively payable on demand, was to be paid at a specified time; * * * nor that the liability of the drawer, maker, or other party was not to be enforced; * * * nor that it was to be paid out of a particular estate." Id. §§ 80, 81, and cases there cited. In this case there is no pretense of fraud on the part of the plaintiff or drawee, or that there was any accident or mistake affecting the express obligation of the drawee. The parol evidence introduced was admissible only for the purpose of proving the consideration or want of consideration for the bill, the timely presentment, demand, etc., or the excuse for not having made them. Id. § 81*a*.

But conceding, for the sake of the argument merely, that the parol evidence was competent to prove, and that it did prove, that the bill was payable only when Howland, at some future time, should receive from Japan or England the cash proceeds of the cargo of skins, yet, by withdrawing from Howland the whole cash proceeds of the cargo after they were received by him, the defendant committed a fraud by which he forfeited the right to require demand and notice. Id. § 1081. Besides, he thereby precluded any possible prejudice to himself by want of demand and notice. Said Lord DENMAN, in Terry v. Parker, supra: "The question is whether want of effects in the hands of the drawee excuses the holder of a bill of exchange from the necessity of presenting the bill for payment, as well as of giving notice of dishonor to the drawer. Many cases establish that notice of dishonor need not be given to the drawer in such a case, and the reason assigned is because he is in no respect prejudiced by want of such notice, having no remedy against any other party on the bill. This reason equally applies to want of presentment for payment, since, if the bill was presented and paid by the drawee, the drawer would become indebted to him in the amount, instead of being indebted to the holder of the bill, and would be in no way benefited by such presentment and payment." In Bank v. Hughes, supra, Cowen, J., said: "When the drawer has plainly suffered nothing, and can sustain no mischief for want of demand and notice, none need be made or given." Had the plaintiff demanded and received from Howland the full proceeds of the cargo, $600, that sum would have been credited on the bill. Had defendant, after withdrawing the $600 from Howland, paid it to plaintiff, the result would have been the same. Is defendant prejudiced by his withdrawal and retention of the $600, which should, and, according to his theory, would, have been paid to plaintiff if demanded? The principle upon which the exception to the general rule solely rests, is that, in the cases to which it applies, the drawer is in no degree prejudiced by the failure of the holder to protest the bill, and would not be benefited by demand and notice of dishonor. It thus appears that in no aspect of the case was the defendant prejudiced by want of presentment of the bill or notice of dishonor.

3. It is contended that the court erred in permitting plaintiff to introduce the bond of defendant to plaintiff as evidence in chief, against defendant's objection on the grounds that it was "immaterial, irrelevant, and incompetent." The bond was certainly competent, relevant, and material on the issue as to the consideration for the bill, raised by the answer, and insisted upon here. But it was at least irregular to introduce it in chief, since the bill was *prima facie* evidence of a sufficient consideration; but it was not objected to on the ground that it was offered out of the proper order, or that it could properly be offered only in rebuttal. That it became relevant in rebuttal there is no question; so that the error, if it was such, of admitting it out of the proper order, was harmless. I think the judgment and order should be affirmed.

We concur: Belcher, C. C.; Temple, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 418)

Berry *et al.* v. Kowalsky, (two cases. Nos. 13,116, 13,309.)[1]

(*Supreme Court of California.* July 22, 1891.)

Breach of Option Contract — Sufficiency of Complaint—Evidence—Exchange Rules.

1. A complaint for the breach of the following contract, "Received of A. Gerberding one hundred dollars, for which I allow him the privilege of delivering me, at any time within thirty days from date, five hundred tons S/87 wheat, at one dollar and eighty cents per cental," signed, "E. H. K.," which is set out *in hæc verba*, is sufficient on demurrer, although it does not allege that defendant executed the same.

2. The fact that the abbreviation "S/87" is used as descriptive of the wheat to be delivered under the contract does not make the complaint unintelligible and uncertain, as oral evidence may be introduced to explain the customary meaning, and need not be pleaded.

3. Where the contract sued upon was written on a sheet, with rules of the produce exchange printed at the head, and plaintiff testified that it was no part of the contract, and that the contract had no connection with the exchange, it was error to exclude evidence tending to show that it was an exchange contract, as well as the exchange rules governing such contracts.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by F. G. Berry and John F. English against E. H. Kowalsky for breach of contract. Judgment for plaintiffs. Defendant appeals. Reversed.

Thornton & Merrybach, for appellant. *Whittemore & Sears*, for respondents.

Vanclief, C. There are two appeals in this case, upon distinct records. No. 13,116 is from the final judgment, and upon the judgment roll. No. 13,309 is from an order denying defendant's motion for a new trial, upon a record consisting of a statement of the case in addition to the judgment-roll. On the appeal from the judgment it is contended that the court erred in overruling the defendant's demurrer to the complaint, and that the findings do not support the judgment. On the appeal from the order the errors assigned are errors in law occurring at the trial. The following is a copy of the verified complaint: "The said plaintiffs complain of the said defendant, and for cause of action herein allege: That on the 15th day of July, 1887, the plaintiffs paid to defendant the sum of one hundred dollars for the right and privilege of delivering to defendant five hundred tons of wheat at any time within thirty days from said 15th day of July, at the rate of one dollar and eighty cents per cental. Said contract is in the following words and figures, to-wit: 'San Francisco, July 15, 1887. Received of A. Gerberding one hundred dollars, for which I allow him the privilege of delivering me at any time, within thirty days from date, five hundred tons S/87 wheat, at one dollar and eighty cents per cental. E. H. Kowalsky.' That said contract was made in the name of A. Gerberding, as the agent of plaintiffs, but the plaintiffs were and still are the real parties in interest; that said plaintiffs, on the 13th day of August, 1887, in the said city and county of San Francisco, at the office of said defendant, tendered the delivery of said five hundred tons of wheat to said defendant, and performed all the conditions on their part under said contract. Said plaintiffs then and there demanded from said defendant the sum of eighteen thousand dollars, payment as the price of said wheat according to said contract; that said defendant denied having purchased said wheat, and refused to pay for said wheat, to the damage of plaintiffs in the sum of eighteen thousand dollars; that said plaintiffs made said contract with said defendant in good faith, for the purpose of delivering said wheat to said defendant, and had said wheat in warehouse in San Francisco for the purpose of delivering the same on said contract to said defendant. Wherefore plaintiffs pray for judgment against said defendant in the sum of eighteen thousand dollars, interest and costs of suit, and for such other and further relief as justice may require. WHITTEMORE & SEARS, Att'ys for Plaintiff." This complaint was demurred to on the ground (1) that it is ambiguous, unintelligible, and uncertain, in that "no meaning is alleged of the words 'S/78' in the contract;" and (2) that the complaint does not state facts sufficient to constitute a cause of action. The alleged contract is not, does not purport to be, and is not alleged to be, an agreement "to sell and buy," nor an agreement on the part of the plaintiffs to sell wheat at any time. It imposes upon the plaintiffs no obligation to be performed by them. If it be a valid contract, it is an agreement by the defendant, for an executed consideration, to buy and accept delivery of, from the plaintiffs, a certain quantity of wheat, within a certain period of time, for a certain price, at the option of the plaintiffs, and to pay plaintiffs the price therefor. Civil Code, §§ 1726-1730; Whart. Cont. § 453*a*. Nor is the action brought to recover the price or value of wheat "sold and delivered," or "bargained and sold," but to recover damages for defendant's breach of his alleged conditional agreement to buy the wheat at plaintiffs' option.

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[1] Reversed in banc. See 30 P. 202, 95 Cal. 134.

1. As against a general demurrer, I think the facts expressed and implied in the complaint barely constitute a cause of action. The written instrument set out purports to have been signed by the defendant, and it is designated as the contract for the breach of which (afterwards alleged) the action is brought. This implies that it was executed by the defendant. The instrument admits the receipt of a consideration of $100, for which defendant "allows" (gives) plaintiffs the "privilege" (option) to deliver (or not) to defendant, within thirty days, 500 tons of wheat, "at [the price of] one dollar and eighty cents per cental." The giving of the privilege to deliver the wheat to defendant at a certain price implies that he will receive it and pay for it the price specified. The foregoing, I think, is the only admissible construction of the instrument as pleaded. If it will not bear this construction, it can have no effect as an agreement. As a breach of this agreement, it is alleged that, within 30 days, the plaintiffs tendered a delivery of the wheat, and demanded payment of the price, thus creating the condition upon which defendant's liability depended; and that defendant refused to pay the price. This shows a breach of the agreement, for which the plaintiffs were entitled to such damages as proximately resulted therefrom.

2. The grounds of the special demurrer, that the "complaint is ambiguous, unintelligible, and uncertain," do not appear on the face of the complaint. The words or abbreviations "S/87" appear to have been used as descriptive of the wheat, and to require oral evidence of their customary meaning in the business of dealing in wheat; but such oral evidence need not be stated in a pleading in which the written agreement is set out *in hæc verba*. The meaning may be proved on the trial for the purpose of enabling the court to interpret the words. Civil Code, §§ 1636, 1644-1646; Callahan v. Stanley, 57 Cal. 476. Had it appeared on the face of the complaint that, even with the aid of parol evidence, the words "S/87" as used were meaningless, and that a complete contract was expressed without them, they might have been disregarded as surplusage, (Harrison v. McCormick, (Cal.) 26 Pac. Rep. 830;) and certainly a complete contract is expressed without them. But it does not appear that, read in the light of admissible oral evidence, they are meaningless or unintelligible. So read, they may have a certain unambiguous meaning descriptive of the subject of the contract. Therefore the court could not see, on the trial of the demurrer, that those words were unintelligible, or that their use rendered the complaint ambiguous or uncertain.

3. The execution of the contract, and the breach thereof, as alleged, are found as facts. Therefore, the findings support the judgment.

4. The contract, as set out in the complaint, being denied, it appears by the statement on motion for new trial that, to prove the contract, plaintiffs offered in evidence a paper on which was written the alleged contract as pleaded. Above the manuscript, and on the same paper, was printed matter composed of what was admitted to be extracts from the rules of the Produce Exchange and Call Board of San Francisco. The paper was objected to by counsel for defendant on the ground that it varied from the contract as pleaded, the printed matter not being set out in the complaint. Thereupon, for the apparent purpose of proving that the printed matter was no part of the contract, and that the contract was entirely independent of the printed heading, the plaintiff Berry, on behalf of plaintiffs, testified to the circumstances under which the contract was made, and to what he claimed to have been all the verbal negotiations—all that was said by each party—preceding and leading up to the signing of the written contract, which, he said, was drawn by him according to the verbal understanding. He was further permitted to testify, against the objection of defendant's counsel, that the "contract was drawn independent of any connection with what is known as the 'Produce Exchange.' * * * I was not figuring on the contract on the board. It was business outside. * * * I never read the printed matter on the top of the contract. It had nothing whatever to do with the contract. It is the written portion of this piece of paper that constitutes the entire contract between myself and the defendant." F. J. Bonney, a witness for the defendant, testified that he was a farmer, and was a member of the Produce Exchange and Call Board on or about July 15, 1887, and was somewhat familiar with the rules thereof, and that he was present when the contract in suit

was made, and heard the preliminary talk between the parties, but was not present when defendant signed the contract. Thereupon defendant's counsel asked the witness the following questions, each of which was objected to on the ground that the effect of the answer thereto would be to vary the written contract; and the objection to each question was sustained by the court, defendant duly excepting: "Question. Was there any reference had in the conversation between these parties to what was known as the 'Call Board Contract?' Q. Was anything said about the contract which was to be entered into between the parties being governed or to be complied with or performed under the rules of the San Francisco Produce Exchange and Call Board? Q. Was the term 'board contract' used in reference to the contract proposed to be executed by them in regard to the dealing in wheat upon which they were entering?" The defendant's counsel also offered in evidence all the rules and regulations of the Produce and Exchange Call Board; but, upon objection by plaintiffs' counsel, they were excluded by the court. It appeared that the plaintiff English, and Gerberding, (in whose name the contract was made,) were members of the exchange board at the date of the contract. The defendant, at the same time, owned a seat in the board, but was not then occupying it, having leased it temporarily to another person. The plaintiff Berry had formerly been a member of the board. As to whether, under the facts and circumstances disclosed by the evidence, the contract could properly be considered a "board contract," and as to what extent, if at all, it was governed or affected by the rules and customs of the board, the testimony was conflicting. Without deciding whether the testimony of Berry on the part of the plaintiffs was properly admitted or not, I think after it was admitted the proffered testimony of Bonney, and the rules of the exchange board on the part of defendant, should also have been admitted. The testimony of Berry may have influenced the decision of the court to the prejudice of the defendant, and it does not appear that it did not. Had the testimony of Bonney and the rules of the board been admitted, they might have even more than neutralized the effect of Berry's testimony. It was not questioned by either party that the words "S/87" in the contract were to be interpreted by reference to the rules and customs of the produce exchange board. Each party, without objection, introduced expert testimony as to the effect of the rules on the meaning of those words; and it is, at least, possible that the contract may have been otherwise qualified by them. Whether it was so or not could not have been determined without a knowledge of those rules and customs, together with a knowledge of the circumstances under which the contract was made. After the plaintiffs had been permitted to testify as to those circumstances, and that the contract was independent of the rules of the board, the proffered evidence on the part of the defendant as to the same matters should have been admitted. I think the judgment and order should be reversed, and a new trial granted.

We concur: Belcher, C. C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial granted.

De Haven, J. I concur in the judgment upon the ground last discussed in the opinion of Commissioner Vanclief. Upon the other points I express no opinion.

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90 Cal. 339

Hoyt v. Selby Smelting & Lead Co. *et al.* (No. 13,072.)

(*Supreme Court of California.* July 24, 1891.)

Replevin—Findings of Fact—Conflicting Evidence—Taxation of Costs.

1. A judgment in favor of the pledgee in an action of replevin for the pledge against him and his bailee, by one to whom the latter had sold it, will not be disturbed where the court finds that the property was pledged by a duly-authorized agent of the pledgeor, and the evidence of the agent's authority is conflicting.

2. The decision of a motion to retax costs will not be disturbed where the items appear proper on their face, and the objections thereto were heard and determined upon conflicting evidence.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco. James G. Maguire, Judge.

Action by A. A. Hoyt against Harris & Rhine and Selby Smelting & Lead Company for the possession of certain bullion. Trial to the court. Judgment for defendants, and plaintiff appeals. Affirmed.

A. B. Hunt, and *W. W. Davidson*, for appellant. *P. Reddy* and *F. R. Whitcomb*, for respondents.

Fitzgerald, C. This is an action of claim and delivery, brought by plaintiff against the defendants, for the possession of 230 bars of base bullion, or its alleged value, and damages for its detention. The allegations of the complaint, and the averment of value, are specifically denied by the answer, and for a further separate defense defendants justify under a pledge. The case was tried by the court without a jury, and judgment rendered in the alternative in favor of defendants. The appeal is taken from the judgment and the order denying plaintiff's motion for a new trial.

The facts necessary to be stated, in connection with the points upon which we have rested our decision, are as follows: On the 30th and 31st days of October, 1884, the defendants Harris & Rhine, partners doing business as merchants at Independence, in the county of Inyo, Cal., commenced two actions, one for $386.64, and another for $589.11, against the Owens River Mining & Smelting Company, a corporation of this state, having its principal place of business in San Francisco, and its smelting works and mining property in Inyo county. That thereafter writs of attachment were issued at the instance of Harris & Rhine, and placed in the hands of the sheriff of Inyo county, who executed the same by levying upon and taking into his possession, with other property, the bullion in question as the property of the said corporation. Afterwards, on the 5th day of November, 1884, one A. P. Minear, the superintendent of the company, and in charge of its smelting works, mining property, and business in Inyo county, for the purpose of releasing the bullion and all the property of the company in said county from these attachments, thereby enabling it to continue the operation of its smelting works, and the working of its mines, agreed to deliver, and subsequently upon the release thereof did deliver, the bullion in question to Harris & Rhine, in pledge to secure to them the payment of a valid and undisputed debt of the corporation, with the undertaking and agreement, on the part of Harris & Rhine, that they should ship the bullion to the Selby Smelting & Lead Company, of San Francisco, to be reduced and refined by it, and that they should cause it to be sold, and out of the proceeds retain the amount of their claim, costs of transportation, reducing and refining, and pay over the balance to the corporation or its order. On the same day, in pursuance of this agreement, they shipped the bullion to San Francisco, to the Selby Smelting & Lead Company, in whose possession it was at the time this action was brought. The plaintiff herein, who is an alleged creditor of the corporation, claims to be the owner and entitled to the possession thereof under and by virtue of a bill of sale, executed to him by the secretary of the corporation in pursuance of a resolution adopted at a meeting of the board of directors held on the 13th day of November, 1884, authorizing and directing him to sell the bullion to plaintiff for $2,000. It further appears that the meeting was called specially for this purpose, the object being, as was testified to by the secretary of the corporation, "to protect Mr. Hoyt against certain creditors," and "to turn the bullion over to Mr. Hoyt so as to prevent creditors from getting it, and that he subsequently understood that Harris & Rhine were the creditors referred to." The corporation was organized under the laws of this state for the purpose of carrying on a mining and smelting business in Inyo county. A. P. Minear was the superintendent of the company, and intrusted with the management of its business in that county, which is distant about 500 miles from San Francisco. It is contended that Minear, as superintendent of the company, had no power or authority to pledge the property in question, and that the agreement in relation thereto between Minear and Harris & Rhine was not binding on the corporation. The court in its decision found that the Owens River Mining & Smelting Company, acting by and through its duly-authorized agent, A. P. Minear, entered into the agreement referred to with Harris & Rhine, and in pursuance thereof, acting by and through said agent, delivered said property to them, in pledge for the purposes stated in the agreement. As the evidence upon this point is substantially conflicting, the finding, under the well-established rule of this court as to conflict, will not be disturbed on the ground of the insufficiency of the evidence to justify it. The conclusion here reached renders it unnecessary to notice the question involving the validity of the sale of the bullion to plaintiff, further than to say that the court below found adversely to plaintiff, and that there was evidence to support the finding.

In relation to the motion of plaintiff to retax the bill of costs filed by the defendants herein, and which was denied by the court, it is sufficient to say that upon its face the items of costs and disbursements charged appear to be proper, and, as the objections thereto were heard and decided by the court in favor of respondents, upon evidence which was substantially conflicting, we are of the opinion that the court properly exercised its judicial discretion in denying the motion. We therefore recommend that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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90 Cal. 346

GORHAM *et al.* v. HEIMAN *et al.*, (SNELL et al.. Interveners. Two cases. Nos. 12,958, 13,333.)[1]

(*Supreme Court of California.* July 24, 1891.)

MINING BROKERS — COMMISSIONS — STATUTE OF FRAUDS — AGREEMENTS RELATING TO SALE OF LAND.

1. An agreement was made between two brokers and the owner for an equal division of the commissions received upon the sale of a mine. Afterwards one of them secretly made an agreement with a third broker, by which the latter was to receive all of a 10 per cent. commission on the purchase price fixed by the owner, and the former to have all the mine sold for above that price. *Held*, that the first broker was entitled to one-half of the entire amount realized above the price fixed by the owner.

2. Where the purchase money of a mine was payable in installments, and broker's commissions were to be deducted from each installment as paid, it is error to render judgment for the full amount of commissions before all of the installments have been paid.

3. Where the court finds that the owner of a mine agreed with two brokers to sell it on commissions to be shared between them, and that a direction by the owner to the buyer to pay all the commissions to one of them was for the benefit of the other, it is immaterial that the court made no finding upon allegations of a partnership between the brokers, and of fraudulent collusion between the owner and the broker in so directing the payment of commissions.

4. Civil Code Cal. § 1624, subd. 6, requiring agreements employing an agent or broker to buy or sell real estate for compensation or commission to be in writing, does not apply to contracts between brokers to co-operate in making sales for a share of the commissions.

Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Action in chancery by Gorham & Rank against Heiman & Hamilton. Snell and others intervened. Trial to the court.

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[1] Rehearing denied.

Decrees for plaintiffs and interveners. Plaintiffs appeal from the decree in favor of interveners, and defendants appeal from both decrees. Reversed.

Cyril V. Grey, *W. S. Goodfellow*, *L. F. Dunand*, and *Cabaniss, Winans & Belknap*, for appellants. *Royce & Cummings*, for respondents. *Bishop & Watt*, for interveners.

BEATTY, C. J. This is a suit in equity arising out of a controversy between several opposing claimants to a sum of money in the hands of the London & San Francisco Bank. There are two appeals in the case,—the first, No. 12,958, being an appeal by plaintiffs from a part of the judgment in favor of the interveners; and the second, No. 13,333, being an appeal by the defendants Heiman & Hamilton from the whole judgment, which was in favor of the plaintiffs and the interveners. The two appeals have been argued and submitted, and may be conveniently considered together.

The controversy arose upon the following state of facts: In January, 1886, and prior thereto, John Rathgeb and brother were owners of a valuable mine in Calaveras county, known as the "Cordova Mine," which they were willing to sell for $150,000, less 10 per cent. commission, to any broker who might effect a sale for them at that figure. The plaintiffs, Gorham & Rank, were partners in the business of selling mines and other real estate on commission, and had been in communication with the Rathgebs, endeavoring to secure written authority to make sale of their mine. The interveners, Snell and others, partners in the same business, had likewise been endeavoring to secure such authority from the Rathgebs, but neither had succeeded. The matter being in this situation, plaintiffs and interveners, each without the knowledge of the other, brought the Cordova mine to the attention of the defendants, Heiman & Hamilton, who also were engaged as partners in selling mines on commission, and who, by reason of certain business connections, had unusual facilities for disposing of such properties in the London market. The result was that defendants Heiman & Hamilton, without the knowledge of the interveners, entered into an oral agreement with the plaintiffs, to the effect that they would unite with them in obtaining written authority from the Rathgebs to make the sale, that they would co-operate in effecting it, and divide the commissions equally. At the same time, without the knowledge of the plaintiffs, the defendants entered into another oral agreement, with the interveners, that they would unite with them in obtaining written authority from the Rathgebs, and, in making the sale, the interveners to take the whole of the 10 per cent. commissions, and the defendants to have what they could get over and above $150,000, the price asked for the mine by the owner. In pursuance of these agreements, the interveners furnished the defendants with the written report of an expert, and other valuable information they had concerning the mine, and gave the defendant Hamilton a letter of introduction to the owners, upon the understanding that he should visit them at the mine, for the purpose of procuring their written authority to sell. Shortly thereafter Hamilton did visit the mine, but he went in company with the plaintiff Rank, by whom he was introduced to the owners, and assisted in making measurements of the workings, taking photographs, etc. He did not inform the Rathgebs of his connection with the interveners, nor, it would seem, did he make any use of their letter of introduction. The result of his and Rank's visit to the mine was that the owners concluded to confide the business of making the sale to the plaintiffs and defendants Heiman & Hamilton, and to give them exclusive control of the property for a limited time. It seems to have been understood that Hamilton was to proceed to London for the purpose of effecting the sale there; and for the purpose of facilitating his operations, and at the same time protecting the owners, it was decided to put the transaction in the form of a grant of the mine to Hamilton, the deed to be deposited in escrow with a San Francisco bank, under instructions to deliver it to him upon payment of £30,000, less 10 per cent. A written memorandum to this effect was made at the mine in January, 1886, and afterwards, in March, 1886, a deed, granting the mine to Hamilton, was deposited, with instructions for its delivery, in a bank at San Francisco. Meantime Hamilton had proceeded to London, where he effected a sale of the property for £40,000, to be paid in installments extending over a period of 18 months. For the purpose, apparently, of conforming to the terms of this sale, the Rathgebs executed another conveyance of the mine directly to the English purchaser, and deposited it with the London & San Francisco Bank, under written instructions for its delivery to the grantee, upon the payment of £30,000 in certain installments, 10 per cent. of each installment, as paid, to be placed to the credit of the defendant Heiman. But, although this was the form by which written authority to make the sale was given, it was understood and intended by the Rathgebs, and by Hamilton and Rank,—the four parties who participated in the negotiations preceding the agreement,—that the direction to the bank to pay the 10 per cent. of the £30,000 to Heiman was for the equal benefit of the plaintiffs and defendants; that is to say, Gorham & Rank, as copartners, were to have one-half, and Heiman & Hamilton the other half, of said commissions. The defendants Heiman & Hamilton, however, seem to have determined at this stage of the proceeding to repudiate the claim of the plaintiffs to any share in the commissons, as well as their agreement with the interveners that they should have the whole thereof; for they concealed the fact that a sale had been made, and, even after Heiman had drawn and appropriated 10 per cent. of the first £5,000, he responded to the inquiries of plaintiffs and interveners by a denial of the sale. Before the second installment of £5,000 was paid, the plaintiffs, having discovered the truth, commenced this action, making Heiman & Hamilton and the Rathgebs defendants. Afterwards, by order of the court, the bank was made a defendant; but, having no interest in the controversy beyond that of a mere stakeholder, its pleadings need not be considered. The Rathgebs also are practically out of the case. The plaintiffs allege against them certain acts of collusion with Heiman & Hamilton, which they deny, and their denial is sustained by the findings of the court. For the rest, it is sufficient to say that in their answers to the complaints of plaintiffs and of the interveners the Rathgebs sustain the allegations of the plaintiffs, and deny those of the interveners, so far as they are brought in relation to the controversy. It will be understood, therefore, that, in speaking of the defendants hereafter in this opinion, Heiman & Hamilton alone are intended.

The plaintiffs in their amended complaint allege that on or about the 18th of January, 1886, they and the defendants associated themselves together as copartners, under an oral agreement to deal in mining properties, and divide the profits equally. That in pursuance of said agreement they informed defendants about the Cordova mine, and that the owners had orally agreed to give them, and such others as they chose to associate with them, a written contract to pay a commission, provided they procured a purchaser for said mine at $150,000 or more. That it was then and there agreed that Hamilton and Rank should examine the mine and if Hamilton was satisfied therewith, and satisfactory terms could be made with the owners, Heiman should advance the money to defray Hamilton's expenses in going to London and making the sale. That Rank and Hamilton went to Calaveras county, examined, mapped, and photographed the mine. That the owners then and there orally agreed to pay them and their associates 10 per cent. commissions, provided they made a sale in three months at $150,000 or over, and that said agreement should be reduced to writing in San Francisco, and executed in the presence of Gorham and Heiman. That afterwards John Rathgeb came to San Francisco, and, conniving with defendants to deceive and defraud plaintiffs, executed writings empowering defendants to sell the mine and receive the proceeds. That Hamilton sold the mine to an English corporation for £40,000, to be paid as follows:

£ 5,000......August 31, 1886
5,000...... 5 months thereafter,
5,000...... 6 " "
5,000...... 9 " "
5,000......12 " "
5,000......15 " " and
10,000......18 " "

—Each of the deferred payments to bear interest at the rate of 7 per cent. per annum. That on August 31st the Rathgebs executed deeds of the mine, and deposited them in the London & San Francisco Bank, with instructions to deliver them to the purchaser upon payment of the purchase price; and, for the purpose of defrauding plaintiffs out of their share of the commissions, instructed the bank to pay the commissions to Heiman. That the first payment was made August 31, 1886, and 10 per cent. thereof, amounting to $2,418.12, paid to and appropriated by Heiman, to the exclusion of plaintiffs. Upon these allegations, in substance, the plaintiffs prayed—*First*, that the defendants be required to bring in the papers deposited in the bank, to the end that they might be properly reformed so as to preserve the rights of the plaintiffs; *second*, that Heiman & Hamilton be required to account for and pay to them one-half of the commissions received; *third*, that the bank be made a party; *fifth*, for an injunction against payment by the bank to Heiman & Hamilton *pendente lite; sixth*, for costs and general relief. To this complaint Heiman & Hamilton each interposed a general demurrer for want of facts, which being overruled, they answered separately, denying all the material allegations of the complaint, except the sale of the mine and its terms, and alleging an exclusive contract between themselves and the Rathgebs for its sale and the payment of the commissions. Afterwards a supplemental complaint was filed, alleging the payment to the bank of two additional installments of the purchase price of the mine, and the receipt and appropriation by Heiman of 10 per cent. of the second installment, all of which was admitted by the several defendants to be true. Afterwards the interveners were permitted to file their complaint in intervention, wherein they alleged that in November, 1885, they associated themselves as copartners, under an oral agreement to deal in mining properties, and divide the profits. That thereafter they were engaged in negotiating a sale of the Rathgebs' mines, and while so engaged were informed by Heiman & Hamilton of the facilities they claimed to have for selling mines in London. That they thereupon informed defendants of their attempts to sell the Rathgebs' mine, and that they were to receive 10 per cent. of the selling price, which must not be less than $150,000. That defendants offered to aid them in negotiating a sale, and they "then and there agreed that said Snell and his associates would place said property in the hands of said Hamilton & Heiman for sale;" defendants to receive for their compensation in making the sale the excess which might be obtained over $150,000, and the interveners to receive the 10 per cent. That in pursuance of this agreement the interveners delivered to the defendants a written report and diagram of the property, supplied other information, and thereafter continued to render all possible aid to defendants in making a sale. That afterwards a sale was made as alleged in the complaint. That John Rathgeb was well informed of all the facts, and well understood that interveners were to receive the commissions on the sale. That after the sale said Hamilton induced John Rathgeb to order the commissions to be paid to him. That they refuse to pay any part thereof to the interveners, though demanded, etc. Wherefore interveners pray—*First*, that the bank be directed to pay them such sums as may be found to be due, etc.; *second*, that Hamilton &

Heiman be ordered to pay them the sums they have received; and, *third*, for general relief. To this complaint in intervention the plaintiffs and the Rathgebs interposed demurrers, which were overruled; whereupon they answered, denying all the material allegations contained therein. The defendants Heiman & Hamilton answered by similar denials without having demurred.

Upon these pleadings the cause was tried by the superior court without a jury, and the facts found substantially as set out in the beginning of this opinion, from which it was concluded as follows: "As against the defendants, the plaintiffs are entitled to one-half of the sum on deposit in the London & San Francisco Bank, Limited, as the commissions; as against the defendants, the interveners are entitled to the whole of said commissions; as between the plaintiffs, the interveners, and the defendant London & San Francisco Bank, Limited, the plaintiffs are entitled to one-third, and the interveners to two-thirds, of the sum on deposit in said bank. Defendants Hamilton & Heiman to pay the costs." The following judgment, omitting formal recitals, was at the same date signed and filed by the judge, together with the findings, and was afterwards duly entered: "Now, therefore, in accordance with law and decisions and findings aforesaid, it is ordered, adjudged, and decreed that the plaintiffs, C. L. Gorham and J. B. Rank, do have and recover of and from the defendants C. A. Hamilton and Joseph Heiman the sum of seven thousand two hundred and seventy-five dollars, with interest at seven per cent. per annum from the 31st day of August, A. D. 1886, and for their costs, taxed at the sum of ———. And it is further ordered, adjudged, and decreed that the interveners, Henry Snell, W. E. Griswold, James McMehan, and S. W. Howland, do have and recover of and from the defendants C. A. Hamilton and Joseph Heiman the sum of fourteen thousand five hundred and fifty dollars, ($14,550,) with interest thereon from the 31st day of August, A. D. 1886, and their costs of this action, taxed at the sum of ———. And it is further ordered, adjudged, and decreed that the defendant London & San Francisco Bank, Limited, do pay over and deliver to the plaintiffs and interveners, above named, all funds received and held by it as commissions on the sale of the so-called Rathgeb or Cordova mine, or held by it to the credit or order of the defendants C. A. Hamilton and Joseph Heiman, or either of them, and all moneys received by it from the Union Gold Company, Limited, or from John Rathgeb, Sr., and Hans Rathgeb, or either of them, to the credit of said defendants C. A. Hamilton and Joseph Heiman, or either of them, to the extent of the judgments in favor of the plaintiffs and interveners herein ordered, in the proportions following, viz., one-third of such funds to the plaintiffs, and two-thirds thereof to the interveners. Done in open court this 25th day of May, A. D. 1888."

We will first consider the appeal of the efendants from this judgment.

1. They contend that the superior court erred in overruling their demurrers to the complaint of the plaintiffs, because the oral agreement to form a copartnership to deal in mining properties therein alleged was void. But, reading the whole complaint together, it is apparent that the contract alleged was merely to buy and sell as brokers, and there is no statute of frauds requiring such contracts to be in writing. Besides, there is enough in the complaint to show a cause of action against the appellants, independent of the contract of partnership. It shows an agreement to co-operate in obtaining authority to sell, and in selling, a mine for an equal share of the commissions. It shows that the agreement was acted upon. It shows performance on the part of plaintiffs, collection of the commissions by appellants, and refusal to divide. Certainly this establishes a cause of action if the agreement was valid, and we know of no ground upon which it can be held invalid. Counsel seem to rely on section 1624, Civil Code, subd. 6. But, clearly, that provision was only designed to protect owners of real estate against unfounded claims of brokers. It does not extend to agreements between brokers to co-operate in making sales for a share of the commissions. It may be, as counsel argue, that the allowance of such claims as plaintiffs and interveners make in this action, unsupported as they are by any written evidence of the contract, opens the doors to frauds of as gross a nature as were ever perpetrated by real-estate brokers, under pretense of oral employment by the owners to make sales; but, if so, the evil is one which the legislature alone can remedy. It might be as plausibly argued that contracts should generally be held void if not in writing, but the law is otherwise. Id. § 1622. The court did not err in overruling the demurrers.

2. The objections to the sufficiency of the complaint in intervention urged in the argument are better founded, and will be referred to hereafter, but for the present it is sufficient to say that defendants did not demur to the complaint in intervention.

3. It is no objection to the sufficiency of the findings that they do not respond to the allegation of a partnership between plaintiff and defendants. As we have seen, that allegation is wholly immaterial. We think the findings do clearly and sufficiently show that it was understood and intended by the Rathgebs that plaintiffs were to have a share in the business of selling the mine, and an equal share of the commissions; that the direction to pay the commissions to Heiman was for the benefit of all these parties; and that Heiman was thereby constituted the agent and trustee of plaintiffs in the collection of their share of the commissions.

4. Such being the case, the allegation that the Rathgebs colluded with defendants to defraud the plaintiffs becomes immaterial, and the failure to find this allegation true does not affect their right to recover.

5. The findings in favor of the interveners are certainly rather meager, but they come

fully up to the allegations of their complaint, so that the particular objection made to them goes rather to the complaint than to the findings themselves. In setting out their agreement with defendants, interveners allege that they agreed "to place said property in the hands of Heiman and Hamilton for sale," but they nowhere allege compliance with this stipulation, or anything equivalent to it, or excuse for non-compliance. Their complaint was, in this respect, extremely faulty; but the court, in the absence of a demurrer, seems to have treated the allegation quoted as the equivalent of an allegation that interveners agreed to furnish Heiman & Hamilton with such information as they possessed concerning the mine, introduce them to the owners, and, when the mine should be placed in their hands, to assist in making a sale. This, in substance, is all they are found to have done, and this, no doubt, if such was the agreement, was a sufficient consideration for an agreement by defendants to allow them all the commissions on the price demanded by the owners. But the allegations of the complaint in intervention as to these matters are too loose and vague to deserve commendation, and the findings are necessarily like the pleadings. It is not necessary, however, to decide whether these deficiencies would necessitate a reversal of the judgment, since there is another ground upon which we are convinced it must be reversed; and, when the cause is remanded, the interveners will have an opportunity of amending their complaint so as to show precisely what they stipulated to do, and their compliance with their stipulations, or their excuse for any failure to comply.

6. The defendants make the point that the findings do not support the judgment, and in this respect we think their contention must be sustained. There is nothing in the pleadings or the findings to show that anything more than the three first installments of the price of the mine, amounting to £15,000, has been paid by the English purchaser, and it clearly appears that, under the contract with the Rathgebs, Heiman & Hamilton were only to receive for commissions 10 per cent. of the amount actually paid into the bank. But the judgment against them in favor of the interveners is for 10 per cent. of £30,000, and in favor of plaintiffs for half that sum; in other words, there are judgments against them for commissions which, so far as the record shows, they have never received, and may never become entitled to. For this error the judgment must be reversed, and the cause remanded for further proceedings.

For the purpose of such further proceedings, it is necessary that the superior court should be advised of our views respecting the controversy between plaintiffs and interveners as to the proportion of the fund in the hands of the bank to which they are respectively entitled. The plaintiffs contend, in support of their appeal, that the superior court erred in directing payment to them of only one-third of said fund, and we think they are right in this contention. It may be that defendants have become personally liable to the interveners for an amount equal to the whole of the 10 per cent. commissions on £30,000, and that, as against the defendants, the interveners would be entitled to the entire fund. But if one-half of the fund has always belonged to the plaintiffs, it cannot be taken away from them, and given to a party to whom the defendants, without right or authority, agreed to give it. According to the findings, the defendants, before obtaining any authority from the mine-owners, agreed to give the interveners the entire amount of the commissions. This, as we say, may have resulted in a personal liability to that amount, but the right of the interveners to share in the specific fund is dependent upon the right of the defendants, and can by no possibility exceed it. Now, this fund was created by the act of the mine-owners, and belongs to those for whose benefit they designed it. They had a right to select their agents for the sale of the mine, and they selected, not the defendants only, but the plaintiffs and the defendants, and they agreed with the plaintiffs that they should have one-half of the commissions. By virtue of this agreement, one-half of the commissions became the property of the plaintiffs, and the defendants had no power to dispose of it. The mere fact that Heiman was empowered to draw the whole of the commissions conferred upon defendants no property in the share of the plaintiffs. It simply constituted Heiman their trustee to receive and pay over the money to them. For these reasons the part of the decree appealed from by the plaintiffs must be reversed.

It remains to be decided what further proceedings in the superior court are necessary for determining and enforcing the rights of the parties. As to the plaintiffs, there seems to be no necessity for a new trial of the issues upon which their right to recover from defendants one-half of the commissions depends, but, for the purpose of determining the amount to which they are entitled, it will be necessary, by supplemental complaint and additional findings, to ascertain the amount paid by the purchaser of the mine, for upon that depends the amount of commissions earned. As to the interveners, they should be allowed to amend their complaint, and as between them and plaintiffs and defendants there should be a new trial. If they again recover, the funds in the hands of the bank should be equally divided and applied in satisfaction of the respective judgments in favor of plaintiffs and interveners. If the interveners fail to recover, the fund in the bank should be applied, as far as necessary, in satisfaction of the judgment in favor of the plaintiffs. The judgment is reversed, and the cause remanded, with directions to the superior court to proceed in accordance with the views herein expressed.

We concur: PATERSON, J.; DE HAVEN, J.; GAROUTTE, J.; SHARPSTEIN, J.

HARRISON, J., deeming himself disqualified, did not participate in the above decision.

90 Cal. 373

La Grille *et al.* v. Mallard. (No. 14,189.)

(*Supreme Court of California.* July 26, 1891.)

Mechanic's Lien—Complaint — Review on Appeal.

1. A complaint alleging that plaintiffs, in accordance with a contract made by them as original contractors with defendant, papered and decorated several rooms in a dwelling-house of the latter, and furnished the labor and material therefor, sufficiently shows that plaintiffs were "original contractors," within Code Civil Proc. Cal. § 1187, which provides that every "original contractor," claiming the benefit of a mechanic's lien, must file his claim within 60 days after the completion of any building, improvement, etc.

2. Section 1187 further provides that such claim must state the terms, conditions, etc., of the contract; and Civil Code, §§ 1609, 1610, provide that a consideration may be executed or executory, and, where executory, it is not indispensable that the contract should specify its amount, or the means of ascertaining it. *Held*, that an allegation that defendant promised to pay "the reasonable value" of said labor and material indicated a sufficient consideration to render the contract valid.

3. Where, on appeal by defendant from a default judgment, on the ground that the complaint fails to state a cause of action, the evidence is not before the court, the question will be determined by the allegations of the complaint.

4. Papering or decorating a house with paper decorations is a proper subject-matter of a mechanic's lien.

Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by La Grille & Kraft against Walter Mallard to enforce a mechanic's lien. Judgment for plaintiffs. Defendant appeals. Affirmed.

Thomas Mitchell, for appellant. *E. C. Bover*, for respondents.

Garoutte, J. This is an action to foreclose a mechanic's lien, in which plaintiffs obtained a decree, the defendant having filed an answer, and then failed to appear at the trial. He now appeals from the judgment, and insists that the complaint does not state facts sufficient to constitute a cause of action. The notice of lien was filed 34 days after the completion of the work. If the plaintiffs were not original contractors, the complaint is fatally defective, and will not support the judgment, for the notice of lien was not filed within 30 days. The evidence not being before us, this question must be weighed and determined by the allegation of the pleading.

The plaintiffs allege "that on or about the 10th day of June, 1886, plaintiffs made and entered into a contract, as original contractors, with the defendant herein, whereby the plaintiffs were to paper and decorate, with paper decorations, the walls and ceilings of four rooms and the hall in the building, the same being a dwelling-house of the defendant; and afterwards, about the 10th day of July, 1888, by the direction and request of the defendant, plaintiffs papered with plain paper the walls and ceiling of one other room and two closets in said building; the said plaintiffs were to furnish, and did actually furnish, the labor and material used in doing said papering and decorating in said building, and the defendant promised and agreed with plaintiffs that he would pay for said labor and material the reasonable value thereof, to be so paid when said work should be completed." Under this allegation the plaintiffs furnished the material and performed the labor in decorating these rooms, under a contract made directly with the owner, and were to receive from him what the services and material were reasonably worth, when said work was completed. If it had been agreed between the parties as to the exact amount to be paid by defendant, then certainly there would have been a complete and perfect contract, and the plaintiffs would have been original contractors, within the meaning of the statute; or if it had been stipulated that the compensation should be determined by arbitration, that would not have detracted from the completeness of the contract, or defeated the claims of plaintiffs that they were original contractors. Section 1609 of the Civil Code provides: "A consideration may be executed or executory, in whole or in part." Section 1610: "When a consideration is executory, it is not indispensable that the contract should specify its amount or the means of ascertaining it; it may be left to the decision of a third person, or regulated by any special standard." Section 1611: "When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the consideration is reasonably worth." It is a common practice for a party desirous of erecting a building to let different contracts to various parties for the building of certain portions of it. These parties would all be original contractors, and men employed by them would be entitled to file liens as laborers. Under this contract, men working for plaintiffs in the decoration of this house would have been entitled to their laborers' liens; and that, too, under section 1194 of the Code of Civil Procedure, prior to the satisfaction of any lien filed by plaintiffs. Plaintiffs and their employes both being entitled to liens, in order to distinguish their *status*, the former must unquestionably be designated as original contractors. These views are not in hostility to the case of Sparks v. Mining Co., 55 Cal. 389, or Schwartz v. Knight, 74 Cal. 432, 16 Pac. Rep. 235. Indeed, the case of Sparks v. Mining Co., supra, is in line with the foregoing views, for the test as there defined is: If there could be intermediate lienholders for work done or materials furnished, then the plaintiffs here would be contractors. We have already seen that such a result might follow in this case, and, measured by the foregoing test the plaintiffs are original contractors, and filed their notice of lien within the statutory time. Papering or decorating a house with paper decorations is as much the subject-matter of lien as painting or putting on a hard finish of plaster. The paper loses its character of personalty, becomes affixed to the building, and its removal therefrom results in a destruction of its value. For the foregoing reasons let the judgment be affirmed.

We concur: HARRISON, J.; PATERSON, J.

90 Cal. 363

MERITHEW v. ORR. (No. 14,241.)

(*Supreme Court of California.* July 25, 1891.)

REVIEW ON APPEAL—EVIDENCE NOT OF RECORD.

Where, in an action for the balance due on a mutual account, the items of which are set forth in the complaint, the court has found for plaintiff in a less sum than that demanded, and defendant, appealing from the judgment, brings only the judgment roll before the supreme court, the finding is conclusive, and the judgment will be affirmed.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action on a mutual account by one Merithew against one Orr. Judgment for plaintiff. Defendant appeals. Affirmed.

L. F. Fisher, for appellant. *Brousseau & Hatch*, for respondent.

PATERSON, J. It is alleged in the complaint that on November 4, 1888, the defendant's testator was indebted to plaintiff in the sum of $761.32, the balance of a mutual account; that, after the death of the said testator, and the probate of his will, plaintiff's claim was duly presented to defendant, the executor, for allowance, and was rejected. The answer denied that the defendant's testator was indebted to plaintiff, as alleged, or at all. The court found that on April 15, 1888, plaintiff and the testator, Matthew W. Orr, had a settlement of their accounts with each other, and agreed that there was due at that time from plaintiff to Orr the sum of $115; that said Matthew W. Orr thereafter became indebted to plaintiff for hay sold to him in his life-time in the sum of $515; for one mare, $75; for the use of a team and mowing-machine 10 days, $15; and for hauling hay, $30; amounting to $635; leaving a balance due plaintiff at the time of the death of said testator in the sum of $520. Judgment was entered in favor of plaintiff for the last-named sum, with interest, and defendant has appealed. The appeal is from the judgment, the judgment roll only having been brought before us. It cannot be said that the findings go beyond the issues. The action is to recover the balance due on the mutual account; and the items were duly set forth in the claim presented, and in the complaint. The court found as an ultimate fact that the estate was indebted to plaintiff in the sum of $520, which was less than the amount claimed. The evidence is not before us, and the finding is therefore conclusive. The judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

90 Cal. 377

PEOPLE v. LOUI TUNG. (No. 20,784.)

(*Supreme Court of California.* July 26, 1891.)

ROBBERY—EVIDENCE—NEW TRIAL.

1. Where, on a trial for robbery, it is conceded that there was blood upon defendant's coat, a witness who saw him shortly after the alleged robbery is competent to testify that such blood was fresh, although he is not an expert.

2. The denial by the trial court of a motion for new trial, on the ground of newly-discovered evidence, tending to show statements of the prosecuting witness inconsistent with his testimony, will be affirmed, where two eye-witnesses gave testimony directly contrary to that of such prosecuting witness, since such new evidence is merely cumulative.

3. Newly-discovered evidence, the only office of which is to impeach an adverse witness, is insufficient to justify a new trial.

In bank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Appeal of Loui Tung from a conviction of robbery. Affirmed.

C. C. Stevens and *J. A. Donnell*, for appellant. *Frank P. Kelly*, Dist. Atty., *W. H. H. Hart*, Atty. Gen., and *Oregon Sanders*, Dep. Atty. Gen., for the People.

GAROUTTE, J. The defendant was convicted of robbery, and appeals from the judgment and order denying his motion for a new trial. It is insisted that the court erred in its decision of questions of law. Many of the exceptions to the court's rulings are technical in the extreme, and others have not even a technicality upon which to lean for support. As an example, at the trial it was conceded that there was blood upon defendant's coat. A witness testified that shortly after the alleged robbery he saw the defendant, and there was fresh blood upon his coat. Counsel for defendant moved to strike out the statement as to its being fresh blood, upon the ground that the witness had not shown himself to be an expert. We fail to see that the question involved was such as to prevent any witness of ordinary understanding from testifying regarding it. The remaining exceptions were based upon rulings made upon matters largely in the discretion of the court, and we discover no abuse of that discretion. The offense was proven to have been committed in the city of Los Angeles, which constitutes sufficient proof of the venue. People v. McGreggor, (Cal.) 26 Pac. Rep. 97, and cases there cited. The evidence is contradictory, and we will not disturb the verdict of the jury upon the ground of its insufficiency. The motion for a new trial, upon the ground of newly-discovered evidence, is addressed to the sound discretion of the trial court. The affidavits relied upon tend to show statements of the prosecuting witness inconsistent with the testimony he gave in the case, thereby impeaching him. Two eye-witnesses gave testimony at the trial directly contradicting his testimony in all material points, and in that respect the facts set out in the affidavits would be simply cumulative. Where the only office of newly-discovered evidence is to impeach an adverse witness, it is insufficient for the purposes of a new trial. Stokes v. Monroe, 36 Cal. 388; People v. Anthony, 56 Cal. 399. Considering the character of these affidavits proffered, we cannot say that the court might not have reasonably inferred that the verdict would have been the same had the evidence set out in the affidavits been before the jury. Let the judgment and order be affirmed.

We concur: McFarland, J.; Sharpstein, J.; De Haven, J.; Harrison, J.; Paterson, J.

(89 Cal. 552)

Baird v. Milford Land & Lumber Co. (No. 13,143.)

(*Supreme Court of California.* July 23, 1891.)

Lease of Timber-Land—Construction.

A contract leasing certain land, with the privilege of removing timber therefrom, provided that the lessee should remove at least 1,500,000 feet the first year, and 2,000,000 each succeeding year, and pay one dollar per thousand feet therefor, in quarterly installments; provided that, if he should not remove such amount in any one year, he should pay therefor and remove the same in any subsequent year without further charge; the lease to continue 20 years, renewable at the option of the lessee, on certain stated terms. *Held*, that such contract provided only for the sale of the timber, and not for a continuous rent, and, where the timber is all removed before the end of the lease, the lessor cannot recover rent for the remainder of the term. Modifying 26 Pac. Rep. 1084.

On rehearing.

Per Curiam. The petition for a rehearing is denied, but the following portion of the opinion, being unnecessary to a decision herein, is eliminated therefrom: "It is certain that defendant cannot be deprived of the use of the land for general lumbering purposes until the end of the twenty years named, whether the timber is removed or not, and we do not think that the parties intended that any consideration should be paid to plaintiff during that term other than the value of the merchantable timber at the price fixed."

(90 Cal. 10)

Niles v. Edwards. (No. 13,050.)

(*Supreme Court of California.* July 30, 1891.)

Conversion—Measure of Damages.

Under Civil Code Cal. § 3336, which provides that, where an action for the conversion of personal property has been prosecuted with reasonable diligence, the measure of damages shall be the highest market value of the property at any time between the conversion and the verdict, a finding of the highest market value of the property, between the conversion and the trial, will not sustain a verdict for that amount, in a case which was pending for one year, unless there is a finding that the suit was prosecuted with reasonable diligence.

In bank. Motion for rehearing. For former report, see 27 Pac. Rep. 159.

Per Curiam. A rehearing of this cause is denied, but the judgment heretofore pronounced by the department is modified so as to read as follows: For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded for a new trial. This modification of our previous order is made because our attention is called to the fact that there is nothing in the findings to fix the amount of the damages to which the plaintiff is entitled. The rule of damages for conversion of personal property is prescribed by section 3336 of the Civil Code, as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of the conversion with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and (2) a fair compensation for the time and money properly expended in pursuit of the property." In this case the date of the conversion was November 17, 1886; action commenced, November 29, 1886; trial, December 13, 1887. The complaint alleges damages in the sum of $1,000, and prays judgment for $1,000, or for the highest market value of the stock before verdict. Waiving all questions as to the time when the plaintiff must make his election as to which method of computing damages he will ask the court to apply, and assuming that in this case he had a right to claim the highest market value, the findings are clearly insufficient to support a judgment on that basis. There is, it is true, a finding that the highest market value of the stock between the conversion and the trial was $3,300, but there is no finding, express or implied, that the action had been prosecuted with reasonable diligence. We could, perhaps, say as matter of law that the action was commenced in time to entitle the plaintiff to the benefit of the rule allowing the highest market value, but, a whole year having elapsed between the commencement of the action and the trial, it cannot be concluded as matter of law that it was prosecuted with due diligence. It may have been or it may not have been so prosecuted, and, without an express finding in his favor on this point, the plaintiff is not entitled to a judgment based on the highest market value, and, as there is no finding of the value of the stock at the date of conversion, there is nothing to sustain a judgment based on the other branch of the rule. A retrial of the cause is therefore necessary.

(90 Cal. 368)

Moffat v. Greenawalt *et al.* (No. 14,310.)

(*Supreme Court of California.* July 26, 1891.)

Appeal-Bonds—Failure of Sureties to Justify.

1. A complaint in an action on an appeal-bond which alleges that defendant, in an action in the justice court, "appealed to the superior court of said county from said judgment," is a sufficient averment that an appeal was taken, and it is unnecessary to set out the several acts performed in taking it.

2. Where the condition of a bond is that, "if the appeal be withdrawn or dismissed," the obligors will pay the amount of the judgment, the fact that the sufficiency of the bond was excepted to, and the sureties failed to justify, does not relieve them from liability, where execution was stayed on the filing of the bond, though the appeal was dismissed for failure to give a sufficient bond.

3. Under Code Civil Proc. Cal. § 978, which provides that when exceptions have been taken to the sufficiency of sureties, unless they justify within five days, "the appeal must be regarded as if no undertaking had been given," the sureties, on failure to justify, are not released from the obligation of an appeal-bond given, on the ground that no appeal was taken, but the appeal may be dismissed.

Department 1. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Action by Moffat against Greenawalt and others, on an appeal-bond from a justice court. Judgment for plaintiff. Defendants appeal. Affirmed.

Dupy & Bently and *R. Dunnigan*, for appellants. *Adams & Mitchell*, for respondent.

HARRISON, J. This was an action against the defendants as sureties upon an undertaking, given on an appeal from a judgment rendered in favor of the plaintiff in the justice's court of Los Angeles city township. The judgment was rendered in the justice's court, June 3, 1889. On the 18th of June the defendant in that case served and filed a notice of appeal therefrom, and on the 21st of June an undertaking on appeal executed by the defendants herein was filed in the justice's court. June 22d the plaintiff excepted to the sufficiency of the sureties, and they failed to justify; and, no other undertaking being filed, the papers in the case were not transmitted to the superior court by the justice; and on the 7th of November, 1889, the superior court, upon the motion of the plaintiff, dismissed the appeal.

1. The allegation in the complaint that the defendant in the action in the justice's court "appealed to the superior court of said county and state from said judgment" is a sufficient averment of that fact. The "appeal" is the ultimate fact to be alleged. The several acts performed in taking it are but probative facts, and their allegation in the complaint would be obnoxious to the charge of alleging evidence instead of facts. The provisions of section 456, Code Civil Proc., have no application to an averment of this nature. An appeal is not in any sense a "judgment or other determination." The objection urged in support of the demurrer, that the averment in the complaint that the "appeal was dismissed by the superior court" does not sufficiently comply with the requirements of section 456, Id., if it had any merit, was cured by the allegation in the answer that the court made an order that the appeal be dismissed, "which said judgment was duly made, duly rendered, and duly given."

2. It is contended by the appellants that, upon their failure to appear and justify after the plaintiff had excepted to their sufficiency under the provisions of section 978, Code Civil Proc., "the appeal must be regarded as if no such undertaking had been given;" and they further contend that, inasmuch as if no undertaking had been given, the appeal was "not effectual for any purpose," there was no appeal which could be dismissed; consequently their liability on the undertaking never attached. At the common law, when special bail were excepted to, they were considered as no bail, unless they justified, and, if they did not justify, the court would, upon their application, order an *exoneretur* to be entered upon the bail-piece, but until this was done they were held liable. 1 Tidd, Pr. 258. In Bramwell v. Farmer, 1 Taunt. 427, the court affirmed a judgment against the bail under these circumstances, saying: "The bail had nothing to do with the exception or the waiver of it. They entered into a recognizance, and thereby incurred the obligation to perform it." In New York, under a provision similar to that in our Code, it is held that the sureties upon an undertaking on appeal are liable thereon, although they have failed to justify after an exception has been taken to their sufficiency. Manning v. Gould, 47 N. Y. Super. Ct. 387; McSpedon v. Bouton, 5 Daly, 30. By their undertaking, the defendants promised and agreed that, "if the appeal be withdrawn or dismissed," the appellant would pay the amount of the judgment so appealed from. This was an original and independent agreement on their part, (Tissot v. Darling, 9 Cal. 278;) and, in legal effect, was entered into by them with the plaintiff. By virtue of the provisions of section 979, Code Civil Proc., upon the filing of the undertaking staying proceedings, all proceedings under the execution are to be stayed; and it was shown at the trial that, upon the making and filing of said undertaking, the property levied upon under an execution upon the judgment was released. The consideration recited in the undertaking was the "staying of the execution of the judgment appealed from." As soon as this undertaking was filed, it became an executed obligation on their part, and, whenever the contingency upon which the obligation was to depend arose, their liability became fixed. This liability could not thereafter be defeated by any act or omission on their part, or on the part of their principal. Their agreement to be bound, in case the appeal should be dismissed, extended as well to a dismissal resulting from their failure to justify as to a dismissal resulting from a failure on the part of their principal to prosecute the appeal. In Murdock v. Brooks, 38 Cal. 596, it was held that when the party in whose favor the undertaking was executed had had the benefit of a stay of execution the sureties could not be heard to say that the undertaking was void because all the forms of the statute, through their omission, were not complied with, and that the failure of the sureties to justify constituted no defense. In People v. Shirley, 18 Cal. 121, it was said: "The justification forms no part of the defendants' contract, and in no manner affects their liability." We do not think that it was competent for the defendants, after they had executed the undertaking, to avoid their liability thereon by any act of their own, or any failure to comply with a provision which is intended solely for the protection of the respondent.

3. The contention that no appeal was taken cannot be maintained. Section 974, Code Civil Proc., provides that "the appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party;" and the provision in section 978 that the appeal "is not effectual for any purpose, unless an undertaking be filed," implies that, when the undertaking is filed, the appeal is effectual. The subsequent clause in section 978 that unless, when an exception has been taken to their sufficiency the sureties justify within five days thereaft-

er, "the appeal must be regarded as if no such undertaking had been given," is to be construed, not as having the effect, *ipso facto*, to vacate the appeal already completed, but as giving to the respondent the right, if he shall choose to avail himself thereof, to move for its dismissal, upon the ground that since it was taken it has become ineffectual. The jurisdiction of the superior court attached upon the perfecting of the appeal, by the filing of the undertaking, and, having once attached, could be divested only by an order of dismissal, or some other act of that court. This principle was recognized in Coker v. Superior Court, 58 Cal. 179, where it was said that, when the papers have been served and filed within the time limited therefor, "the appeal is completed; and although some of the papers which make up the appeal may be defective, or may not have been served or filed in the order named in the statute, or an execution may have been issued on the judgment and levied, yet they are, unless fatally defective, sufficient to confer jurisdiction upon the appellate court, and to stay proceedings on execution according to section 979, Code Civil Proc." The principle was also recognized in Wood v. Superior Court, 67 Cal. 115, 7 Pac. Rep. 200, where it was held, under a state of facts almost identical with those in the present case, that the superior court should have granted the motion made on behalf of the respondent to dismiss the appeal. The expression used in the opinion, "the appeal was not perfected, and the superior court has no jurisdiction of the case," must be read in connection with the matter before the court, which was a review of the action of the superior court in proceeding to try the case. The court meant by that expression that the superior court had no jurisdiction against the objection of the respondent to try the case, or to change the judgment of the justice's court. It did not mean that it had no jurisdiction of the appeal; otherwise it would not have directed a dismissal thereof. It follows that the superior court in the present case had jurisdiction to dismiss the appeal, and that upon such dismissal the appellants became liable for the amount of the judgment appealed from. The judgment and order of the court below are affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

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90 Cal. 364

GODDARD *et al.* v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (No. 14,335.)

(*Supreme Court of California.* July 25, 1891.)

WRIT OF PROHIBITION—ASSIGNEE IN INSOLVENCY—JURISDICTION.

A writ of prohibition will not be granted to compel the superior court to discontinue an action by an assignee against petitioners to recover the property of the insolvent, on the ground that the assignee acquired no title to the property in controversy, since the court has jurisdiction to determine that question in the pending suit.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Petition of Goddard and others for writ of prohibition to superior court of San Francisco to compel the discontinuance of a suit against petitioners. Writ denied.

Sullivan & Sullivan, (*T. I. Bergin*, of counsel,) for petitioners. *Naphtaly, Freidenrich & Ackerman* and *E. H. Rixford*, (*T. H. Rearden*, of counsel,) for respondent.

DE HAVEN, J. This is an application to this court for a writ of prohibition to the superior court of the city and county of San Francisco, department 3, JOHN F. FINN, Judge, commanding and directing said court and judge, and assignee and receiver appointed by said court, to desist from further proceeding in the matter hereinafter stated. It is alleged in the petition that on December 1, 1890, W. H. Eastland and John Fowler were copartners, residents of this state, and doing business in the city of San Francisco under the name of Eastland, Fowler & Co., and as such partners were indebted to the petitioners in a large sum; and, in order to secure the same, the said firm made a transfer and conveyance of certain of its assets to the petitioners, and possession thereof was given to them. On the 9th of December, 1890, the said W. H. Eastland and John Fowler filed their petition in insolvency in the said superior court. The said petition is entitled "In the matter of W. H. Eastland and John Fowler, copartners," and recites that it is made by said named persons, "copartners in business." Such proceedings were thereafter had that an assignee of said insolvents was appointed, and the clerk of said superior court executed to said assignee an assignment and transfer, purporting to convey to said assignee "all the estate, title, right, and property of W. H. Eastland and John Fowler, and of the copartnership of Eastland, Fowler & Co., in and to all the assets of said Eastland and Fowler, and of said copartnership." Thereafter the said assignee, by virtue of said assignment, brought and is now maintaining an action in said superior court against the petitioners, to set aside the transfer made to them by the firm of Eastland, Fowler & Co., on December 1, 1890, alleging that said transfer was a fraudulent preference, and in violation of the insolvent act of 1880. In said action a receiver has been appointed, and he has, by the order of said court therein, taken possession of the said property claimed by petitioners and in controversy in said action. It is also shown that, prior to the appointment of said assignee, a receiver was appointed in the insolvency proceedings to take possession of the property of said insolvents until the appointment of an assignee, and he was directed by the court to commence the action now pending in said court against petitioners, and that said action was brought by him, and upon the appointment of said assignee the latter was substituted as plaintiff, and the action is being continued in the name of said assignee. The writ applied for is asked to prohibit the said superior court, and its judge, and also the assignee of said insolvents, and the receiver appointed in the said action against petitioners, from further proceeding upon the orders appointing said assignee and receiver, and from exercising the powers in said orders, or either of them, granted, with regard to the property transferred to petitioners by the said firm of Eastland, Fowler & Co., on December 1, 1890.

It is claimed by petitioners that the said superior court in the insolvency proceedings never acquired jurisdiction over the assets of the firm of Eastland, Fowler & Co., because the said petition of W. H. Eastland and John Fowler in insolvency was not filed by or on behalf of the said firm of Eastland, Fowler & Co., and contains no averment of the existence, at any time, of such a firm. Upon this assumption it is argued that the assignee appointed in said proceedings acquired no title to the property of said firm. We do not find it necessary to determine whether this contention of petitioners, in regard to the effect and scope of the insolvency proceedings, is correct or not, as, in any view, we are clear that the writ applied for must be denied. The respondent court has jurisdiction of the action of said assignee against the petitioners here, and of the parties thereto, and had to appoint a receiver to take possession of the property in controversy, and its jurisdiction is in no wise affected by or dependent upon the proceedings in insolvency. If, as claimed by the petitioners, the assignee acquired no title to the property in controversy by virtue of these proceedings, they will have ample opportunity to present and have that question determined in the action, to which they are parties, now pending in the superior court. The order appointing the assignee in the insolvency proceedings has already been made, and it is not the office of a writ of prohibition to prevent him from prosecuting such suits as he may deem proper for the recovery of property which he claims is vested in him as such assignee. Writ denied.

We concur: McFARLAND, J.; HARRISON, J.; SHARPSTEIN, J.; GAROUTTE, J.; PATERSON, J.

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90 Cal. 342

ANZAR *v.* MILLER *et al.* (No. 12,938.)

(*Supreme Court of California.* July 24, 1891.)

MEXICAN GRANTS — ADVERSE POSSESSION—WHEN TITLE VESTS.

1. A Mexican grant not confirmed by the land commissioners confers no title, although judicial possession of the land was given the grantee. Following Botiller v. Dominguez, 9 Sup. Ct. Rep. 525.

2. The fee of lands held under an imperfect grant vests for the first time upon the issue of a patent, and no length of adverse possession prior thereto will support the statute of limitations.

Commissioners' decision. Department 2. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

Action to recover real estate by P. E. G. Anzar against Henry Miller and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Olney, Chickering & Thomas, for appellants. *William Reade*, for respondent.

TEMPLE, C. Defendants appeal from the judgment and an order refusing a new trial. This action is brought under sections 380 and 738 of the Code of Civil Procedure, to try title to, and recover possession of, 28.41 acres of land in the county of San Benito. The plaintiff derives title under a patent from the United States in confirmation of a grant made by a prefect to Mariano Castro, May 19, 1839. The defendants claimed under a grant to one Jose Modesto, an Indian, dated March 23, 1843. Judicial possession was given to Modesto, March 28, 1843. Defendants also plead the statute of limitations. The claim of Modesto was never presented to the United States board of land commissioners for confirmation. On the trial the defendants relied upon the grant to Modesto and the judicial possession as a perfect grant, not forfeited by non-presentation; but since this appeal was taken, the supreme court of the United States, in the case of Botiller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. Rep. 525, declared that all Mexican grants, whether perfect or not, must have been presented to the land commissioners on pain of forfeiture. The only defense left is therefore the plea of the statute.

In addition to their claim under Modesto, the defendants also procured a patent from the state of California, to which the lands had been listed by the United States. Of the defendants' possession it is sufficient to say, that since 1861, they have maintained an adverse possession of the demanded premises, sufficient in all respects to constitute a bar under the statute, if the plaintiff's title could thus be barred prior to the issue of the patent. The grant to Castro was for a plot of ground 100 varas front and 200 varas deep, a square of 100 varas in front of his house, "being the spot which is occupied by his garden and the four pieces of land [*suertes de tierra*] which he cultivates on the Ricon de Pajaro; without detriment, however, to the Indians, who there have lands, which have been granted to them." The Ricon de Pajaro contained about 100 acres of land, and the evidence seems to show that Castro cultivated different portions in different years. The grant was therefore an imperfect grant, and it has been held repeatedly that in such cases the fee was in the United States, and vested in the patentee for the first time upon the issuance of the patent. This precise question was presented in Gardiner v. Miller, 47 Cal. 570, and was there fully considered, and a conclusion reached which has since been uniformly adhered to, and we are entirely satisfied with its correctness. It is there said: "The grant had passed a present and immediate interest in the general tract, to the extent of the quantity designated; but that quantity had to be segregated, and until the segregation the title attached to no particular part of the premises. The principal question, therefore, is whether the statute then commenced to run against the right of the government thus to segregate and perfect the grantee's interest. * * * By the patent thus issued, the government divested itself of any interest in the tract described, and thereby the legal title to the particular tract became, for the first time, vested in the grantee under Sutter." It was therefore held that, inasmuch as the statute could not run against the title while held by the United States, it did not commence to run against the claimant until the patent issued to him. The same ruling was made in Henshaw v. Bissell, 18 Wall. 255.

Some doubt is supposed to have been raised upon this question by some remarks of Mr. Justice Fox in Norris v. Moody, 84 Cal. 143, 24 Pac. Rep. 37. This part of Justice Fox's opinion, however, did not receive the approval of a majority of the court; and it is obvious, from what has been said, that the ground upon which it is held that the statute does not begin to run until the patent issues is not because of any qualification in the statute, but because, the fee being in the United States, such statute cannot affect it; and it may be added that because such statute, so construed, would be violative of the treaty under which the United States acquired the country. In San Jose v. Trimble, 41 Cal. 536, which is relied upon here, it is intimated that a grantee may be barred by the statute as to the right he has before the patent, and that he may acquire a new right by the patent; and the intimation is that in such case the new right is not barred. A similar idea is advanced in Hayes v. Martin, 45 Cal. 559. These cases are not favorable to appellants. We are not called upon to express an opinion as to the operation of the statute upon a perfect grant in which the title was not in the United States, or as to the grants the survey of which had been approved under the act of congress passed June 14, 1860. There is nothing in the case to raise any question of laches. The plaintiff asserts no equitable rights, and, whatever may be said as to the form of the action, it is simply to recover land. In such case the statute of limitations generally furnishes the rule by which to determine whether the delay to assert the right is fatal. We think the judgment should be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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90 Cal. 379

HOWELL v. BURLINGAME *et al.* (No. 14,083.)

(*Supreme Court of California.* July 30, 1891.)

REVIEW ON APPEAL—CONFLICTING EVIDENCE.

Where the sole question is one of fact, and the evidence, though conflicting, is sufficient to justify the findings, the judgment will be affirmed.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action by Charlotte Howell against E. C. Burlingame and one Marsh. Judgment for plaintiff. Defendants appeal. Affirmed.

Albert M. Stephens, for appellants. *Minor & Woodward*, for respondent.

BELCHER, C. C. This is an action to recover damages for alleged willful and malicious trespasses on real property of the plaintiff. The case was tried by the court without a jury, and the findings were that the defendants "wantonly and maliciously, unlawfully and with force," committed the trespasses complained of, and thereby damaged the plaintiff in the sum of $800, and that $200 more should be allowed as exemplary damages. Judgment was accordingly entered against both defendants for $1,000 and costs. The defendants moved for a new trial, which was denied, and have appealed from the judgment and order. The only contention on the part of appellants is that the evidence was insufficient to justify the findings as against the defendant Marsh. It is said: "There is no evidence whatever to sustain the finding that Marsh wantonly or maliciously trespassed upon the property." And again: "The complaint alleges that Marsh committed the trespass at the instigation of Burlingame. The facts are that Burlingame committed the trespass himself, and that Marsh had nothing whatever to do with it." We have carefully read over all the evidence presented in the record, and, in our opinion, it was sufficient to justify the findings as against both defendants. It is true there was some conflict, but in such cases the decision of the trial court is ordinarily held conclusive in this court. We advise, therefore, that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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90 Cal. 381

PEOPLE v. CESENA. (No. 20,749.)

(*Supreme Court of California.* July 30, 1891.)

RAPE—EVIDENCE—NEW TRIAL.

1. A conviction of assault with intent to rape will not be reversed on account of discrepancies in the testimony of certain children, witnesses for the state, when such discrepancies are no greater than should be expected from their tender ages, and their statements are strongly corroborated by other evidence and by defendant's own testimony.

2. The refusal of the trial court to grant a new trial on the ground of newly-discovered evidence will be affirmed when such evidence is merely cumulative or contradictory of the state's testimony, and counter-affidavits show that unless such testimony is false defendant must have known of it before.

3. Counter-affidavits are competent on such motion to show that defendant has not exercised due diligence.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; J. K. ALEXANDER, Judge.

Marcos Cesena was convicted of assault with intent to rape, and from the judgment of conviction he appeals. Affirmed.

Morehouse & Keaney and *Mr. Tuttle*, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

TEMPLE, C. The defendant, having been convicted of an assault with intent to commit rape, appeals from the judgment and an order refusing him a new trial. He does not complain of any ruling at the trial, nor does he deny that there is some evidence tending to prove the charge against him, but he contends that the testimony of the main witnesses against him is contradictory, and so improbable that they are not to be believed; that it furnishes proof of a conspiracy; and that the charge is a pure fabrication. But it does not strike us in that way; the discrepancies in the statements of the children are not more than should be expected from their tender age. Then there is much to corroborate their account. Indeed, the testimony of the defendant himself, carefully analyzed, affords many items strongly confirming their story. The statements as to the time when Cesena left the saloon constituted only conflicting testimony, and was properly left to the jury. We do not attribute very much importance to the testimony as to time. It is easy to be mistaken in such matters. And then the value of the evidence depends largely upon the credibility of the witnesses, a matter peculiarly for the jury. The newly-discovered evidence is all cumulative, or simply contradictory of the testimony of the people, and the counter-affidavits show that, if the story be not a pure fabrication, the defendant must have known of it and of the witness. Counter-affidavits may be used on such motion, to show that due diligence has not been used. Such applications are addressed to the discretion of the trial court, and the presumption is that the discretion was properly used. We see no reason for interfering with the action of the court in this case, whether its decision were based upon lack of due diligence, or a belief that the proposed evidence would not render a different result probable, though a new trial were had. We think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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90 Cal. 384

PECK *et al.* v. BOARD OF SUPERVISORS OF LOS ANGELES COUNTY. (No. 14,053.)

(*Supreme Court of California.* July 31, 1891.)

ROAD SUPERVISORS—REMOVAL OF OBSTRUCTION—MANDAMUS—SUFFICIENCY OF PETITION.

1. Under Pol. Code Cal. § 2643, which gives boards of supervisors general supervision over highways, with power to abolish or abandon such roads as are not necessary, a petition for a writ of mandate to compel the board to remove an obstruction from a highway is insufficient, when it fails to show that the obstructed road had not been abandoned and discontinued by the board.

2. Pol. Code Cal. §§ 2645, 2731, make it the duty of road overseers, under the direction and supervision of the road commissioner, and pursuant to orders of the board of supervisors, to take charge of the highways, and keep them clear from obstructions. *Held*, that a petition for a writ of mandate to compel the board of supervisors to remove an obstruction from a highway is insufficient when it fails to state that the attention of the road commissioner or road overseer had ever been called to the obstruction, or that either of them had ever been asked to have it removed.

3. The duty to remove was on the road overseer, and he should have been made a party to the proceeding.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Application by George H. Peck and J. C. Hannon for a writ of mandate to the board of supervisors of Los Angeles county. Writ denied. Petitioners appeal. Affirmed.

John Mansfield and *Edgerton & Blades*, for appellants. *Frank P. Kelly*, *O'Melveny & Henning*, and *James McLachlan*, Dist. Atty, for respondent.

BELCHER, C. C. This is an application for a writ of mandate to compel the board of supervisors of Los Angeles county "to clear of obstructions, repair, open, put in condition, and keep in condition for public travel," a portion of a road situate in that county. A demurrer to the verified petition was interposed and sustained by the court below. The applicants declined to amend, and thereupon judgment was entered dismissing the proceeding. The appeal is from that judgment. The demurrer was upon several grounds, and, in our opinion, was properly sustained, for the following reasons:

1. Boards of supervisors have general supervision over the roads within their respective counties. They must lay out and establish such highways as are necessary for public convenience, and may abolish or abandon such as are not necessary. Pol. Code, § 2643; County Government Act, § 25, subd. 4. It is not stated in the petition, and it in no way appears therefrom, that the obstructed road had not been abandoned and discontinued by the respondent board.

2. It is made the duty of road overseers, under the direction and supervision of the road commissioners, and pursuant to orders of the board of supervisors, to take charge of the highways within their respective districts, and to keep them clear from obstructions and in good repair. Pol. Code, §§ 2645, 2731, et seq. It is stated in the petition that the road complained of is within a certain named road-district, but it is not stated that the attention of the road commissioner or road overseer had ever been called to the alleged obstruction, or that either of them had ever been asked to have the obstructions removed.

Writs of mandate are issued only to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Code Civil Proc. § 1085. The duty here was upon the road overseer, and he should at least have been made a party to the proceeding. We advise that the judgment be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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90 Cal. 389

HINKEL v. DONOHUE *et al.* (No. 13,318.)

(*Supreme Court of California.* Aug. 1, 1891.)

PRACTICE—DISMISSAL OF ACTION.

Under Code Civil Proc. Cal. § 581, which provides that an action may be dismissed by plaintiff at any time before trial on payment of costs, provided no counter-claim has been made, or affirmative relief sought, by cross-complaint or answer, defendant cannot file such pleadings after an order of dismissal has been filed by plaintiff with the clerk who is authorized to enter the same, though it was not entered at the date of its filing.

Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action in ejectment by Patrick Donohue and others against John Hinkel. Suit dismissed on plaintiff's motion. Defendants appeal. Affirmed. For former report, see 26 Pac. Rep. 374.

Mich Mullany and *W. C. Burnette*, for appellants. *O'Brien, Morrison & Daingerfield*, for respondent.

Harrison, J. The plaintiff commenced an action in ejectment against the defendants by filing a complaint on the 28th of November, 1887. Summons was issued thereon upon that day, but no service thereof was ever made upon either of the defendants. March 16, 1888, the attorneys for the plaintiff filed with the clerk of the court the following paper writing, viz.: "[Title of court and cause.] The above-entitled cause is hereby dismissed, and the clerk of the above-named court is hereby authorized to enter said dismissal of record. O'Brien & Morrison, Attorneys for Plaintiff." At the time of filing said dismissal, no appearance had been made in the action by or on behalf of either of the defendants, and the said dismissal was within a day or two thereafter entered by the clerk in his register of actions. September 13, 1888, the appellants served upon the plaintiff and filed with the clerk an answer to the complaint in said action. October 17, 1888, the attorneys for the plaintiff served upon the defendants and filed with the clerk a notice that on October 26, 1888, the plaintiff would move the court for an order "that a judgment of dismissal of said action be entered without prejudice, at plaintiff's costs, *nunc pro tunc*, as of March 16, 1888, and striking out the answer filed herein September 13, 1888. October 18, 1888, the defendants filed a cross-complaint, which on the same day was served upon the plaintiff's attorneys; and on the 20th of October, 1888, the attorneys for the plaintiff served upon the defendants, and filed with the clerk, a notice that on October 26, 1888, they would move the court for an order "striking out the so-called cross-complaint that was filed herein on the 18th day of October, 1888." When these motions came on for hearing, they were granted by the court, and an order was made that a judgment of dismissal of the action be entered, and that the cross-complaint be stricken from the files. Judgment dismissing the action was thereupon entered January 17, 1889. From this judgment the defendants have appealed, bringing up the foregoing matters by bill of exceptions. Section 581, Code Civil Proc., provides that "an action may be dismissed, or a judgment of nonsuit entered, in the following cases: (1) By the plaintiff himself at any time before trial upon payment of costs: provided, a counter-claim has not been made or affirmative relief sought by the cross-complaint or answer of the defendant. * * * The dismissal mentioned in the first two subdivisions of this section is made by entry in the clerk's register; judgment may thereupon be entered accordingly." At the time the plaintiff gave the notice of his intention to move for an order that a judgment of dismissal of said action be entered, the defendants had not sought any affirmative relief by their answer, nor had they filed any cross-complaint. The above section of the Code gave to the plaintiff the right to have the action dismissed upon the mere filing of the dismissal, and to have judgment entered thereon accordingly. The defendants could not, by filing a cross-complaint, after receiving this notice, deprive the plaintiff of this right. The fact that before the motion was heard by the court the defendants filed a cross-complaint did not impair the right of the plaintiff to have the motion determined according to the facts as they existed when the notice of the motion was given. The order when made, and the judgment entered in pursuance of the order, related to the first step taken in its procurement, and is to be regarded as having been made at that date. The right of the plaintiff as it existed October 17, 1888, to have his motion granted, did not depend upon the relative speed of himself and the defendants in any race to procure the first hearing before the court. Indeed, even if it had been a matter of discretion with the court to grant or deny the motion of the plaintiff, we think that, under the facts disclosed by the record herein, it would have been an abuse of discretion had the judge refused to grant the motion. When the matter came before the court for hearing, and it determined that the plaintiff's motion should be granted, the court, upon having its attention called to the fact that subsequent to the making of the motion the defendants had filed a cross-complaint, was justified in striking that also from the files. The judgment is affirmed.

We concur: Garoutte, J.; Paterson, J.

(90 Cal. 393)

Anglo-Nevada Assur. Corp. v. Nadeau's Ex'rs *et al.* (No. 14,217.)[1]

(*Supreme Court of California.* Aug. 1, 1891.)

Executors—Failure to Present Claims—Foreclosure of Mortgage—Waiver.

Code Civil Proc. Cal. § 1493, provides that all claims arising on contracts, whether due or not, must be presented within the time allowed in the notice for presenting claims against the estate of the decedent, and claims not so presented shall be barred. Section 1500 provides that no action shall be brought on any claim against an estate unless the claim is first presented to the executor or administrator, except that an action may be brought by any holder of a mortgage to enforce the same against the property mortgaged, where all recourse to any other property of the estate is expressly waived in the complaint. *Held*, that where the holder of a mortgage commenced an action to foreclose nearly two years after the time allowed for presenting claims had expired, and about six months after the note matured, the complaint expressly waiving all recourse to other property, the action was not barred, although the claim was never presented for allowance.

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[1] Rehearing denied.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Anglo-Nevada Assurance Corporation against executors of Nadeau et al. to foreclose a mortgage. Judgment for plaintiff. Defendants appeal. Affirmed.

S. M. White and *Chapman & Hendrick*, for appellants. *Jarboe Harrison & Goodfellow* and *Graves, O'Melveny & Shankland*, for respondent.

VANCLIEF, C. Action to foreclose a mortgage executed by decedent on the 10th day of November, 1886, to secure payment of a promissory note for the sum of $150,000 and interest, dated November 6, 1886, payable "on or before September 6, 1889." Nadeau died January 15, 1887. His will was admitted to probate, and his executors appointed, April 18, 1887. Pursuant to an order of the probate court, notice to creditors was published on April 25, 1887, and the 10 months within which creditors were required to present their claims expired February 25, 1888, about 18 months before the maturity of the note. This action was commenced March 29, 1890, nearly 6 months after the maturity of the note. Neither the note nor the mortgage was ever presented to the executors for allowance, but in the complaint all recourse against any other property of the estate than the mortgaged property is expressly waived. Judgment of foreclosure was rendered in the usual form, except that there was no judgment for a deficiency, nor for counsel fees. This appeal is from the judgment upon the judgment roll, including a bill of exceptions, showing that it was stipulated at the trial that the facts stated in the answer of the defendants (the substance of which is included in the above statement) are true. There was also a demurrer to the complaint on the ground that it does not state a cause of action, and on the further ground that "it appears from said complaint that the plaintiff's alleged cause of action is barred by the provisions of section 1493 of the Code of Civil Procedure."[1]

Counsel for appellants contend that plaintiff's entire claim arising upon the note and mortgage was barred by sections 1493 and 1500 of the Code of Civil Procedure, because it was not presented to the executors for allowance within 10 months from the publication of notice to creditors; and that it does not come within the exception contained in section 1500, (viz., "an action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint,") because, when the action was commenced, plaintiff had no right to enforce the mortgage against any property of the estate, and therefore could not have "expressly waived in the complaint" a right that it did not then have. No authority is cited for this except a legal definition of the verb "to waive," from which counsel deduce the proposition that nothing else than an existing right can be waived. But this deduction is not warranted by the decisions from which the definition relied upon was extracted no by authority of lexicographers. The verb "to waive," as well as the noun "waiver," is properly used in different senses. Webster defines the verb thus: "(1) To relinquish; to give up claim to. (2) To throw away; to cast off; to reject; to desert. (3) (Law.) (*a*) To throw away; to relinquish voluntarily, as a right which one may enforce, if he chooses. (*b*) (Old Eng. Law.) To forsake; to desert; to abandon." The same author defines the noun "waiver" as follows: "(Law.) The act of waiving, or not insisting on, some right, claim, or privilege." In the third definition above, an example of a voluntary relinquishment is given, viz., "as a right which one may enforce, if he chooses;" but this does not imply that one may not relinquish, "give up claim to," or "abandon" a thing to which he has no right; and an example might have been given of such relinquishment of a "claim to" something without right, for both the verb and the noun are often properly used in this sense, and the legislature may have so used the verb, if that meaning was intended. Besides, it is not clear that the plaintiff had no right to "recourse against" other than the mortgaged property at the time it filed its complaint. Plaintiff may have had the right, though the remedy for its enforcement depended upon the contingency of whether or not the defendants would plead the statute of limitations. If there had been no waiver in the complaint and no plea of the statute of limitations, plaintiff might lawfully have taken judgment for a deficiency, and might have enforced such judgment against other than the mortgaged property. However this may be, the object of the exception, in section 1500 of the Code of Civil Procedure, is to require a plaintiff to put his waiver upon record, in his complaint, so that there may be no question that he had waived recourse, etc.; and it is immaterial whether or not he had made the waiver before his complaint was drawn, by failure to present the claim to the executors within the 10 months or otherwise. The construction contended for by counsel for appellants would deprive the exception of any effect in all that large class of cases in which the mortgage debt does not become due until after the expiration of the 10-months notice to creditors; yet there is no conceivable reason why the legislature should have intended to exclude this class of cases from the exception. Finally, the question as to the construction of the exception has been decided by this court adversely to the contention of appellants' counsel in a number of cases: Society v. Hayes, 56 Cal. 303; Morrell v. Morgan, 65 Cal. 575, 4 Pac. Rep. 580; Dreyfuss v. Giles, 79 Cal. 409, 21 Pac. Rep. 840; Bank v. Charles, 86 Cal. 323, 24 Pac. Rep. 1019. I think the judgment should be affirmed.

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[1] Sec. 1493. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever. * * *

Sec. 1500. No holder of any claim against an estate shall maintain any action thereon, unless his claim is first presented to the executor or administrator, except in the following cases: An action may be brought by any holder of a mortgage or other lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint. * * *

We concur: BELCHER, C. C.; FITZGERALD, C.

BEATTY, C. J. Owing to the disqualification of HARRISON, J., in the foregoing opinion, MCFARLAND, J., will act with the remaining justices of department 1.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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90 Cal. 397

DYKE *et al.* v. BANK OF ORANGE *et al.*

(No. 14,351.)

(*Supreme Court of California.* Aug. 3, 1891.)

MONEY JUDGMENT—DOCKET ENTRY—USE OF DOLLAR-MARK.

In a docket entry certain figures were placed under the words "amount of judgment," and other figures underneath the first were preceded by the word "costs." The last two figures of each sum were divided from the others by a vertical red line, the customary dollar-mark being omitted. *Held*, that the words "amount" and "costs" indicated a money judgment, and the red line the division of the sums into dollars and cents, and that the judgment was sufficiently docketed to create a lien, under Code Civil Proc. Cal. § 672, providing that, if judgment be for the recovery of money, the amount must be stated in the docket under the head of "Judgment;" if for any other relief, its general character must be stated.

Commissioners' decision. Department 2. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Action by Lydia A. Dyke and F. M. Dyke against the Bank of Orange and F. M. Harris, sheriff, to enjoin an execution sale of their homestead under judgment recovered against them by the defendant bank. Decree for plaintiffs, and defendants appeal. Reversed.

Ray Billingsley, for appellants. *Chas. S. McKelvey*, for respondents.

VANCLIEF, C. The plaintiffs are husband and wife, and own a tract of land in Orange county, upon which they reside, and which they claim as a homestead. On October 30, 1888, the defendant Bank of Orange obtained a judgment against F. M. Dyke and others for the sum of $394.82 debt, and $34.40 costs. On July 8, 1890, an execution was issued on this judgment, and placed in the hands of the defendant, Harris, who, as sheriff, on July 9, 1890, levied the same on a part of plaintiffs' homestead, and advertised it for sale. This action was brought to enjoin the sale. The plaintiffs prevailed, and the defendants bring this appeal from the final decree upon the judgment roll, including a bill of exceptions.

The plaintiffs' declaration of homestead was recorded on the 12th day of August, 1889, more than nine months after the rendition of the judgment against F. M. Dyke, on which the execution was issued; and the only material question presented for decision is, was the judgment properly docketed so as to become a lien on plaintiffs' land before the recording of their homestead? There is no question that the judgment was properly docketed on October 31, 1888, in all respects, except as to the requisite statement of the "amount" of the judgment, which the court found to have been stated in the third column of the docket, under the heading "Amount of Judgment," as follows, and not otherwise:

AMOUNT OF JUDGMENT.		
	394	82
Costs..	34	40

(Folio 74.)

Red-

As conclusions of law, the court found that this was not a sufficient statement of the amount of the judgment; that the "judgment did not become and was not a lien upon the homestead premises" before the declaration of homestead was recorded; and that the plaintiffs were entitled to the relief demanded. Counsel for appellants contend that the conclusions of law are not supported by the facts found, and I think this point should be sustained. Section 672 of the Code of Civil Procedure provides: "If judgment be for the recovery of money or damages, the amount must be stated in the docket under the head of 'Judgment;' if the judgment be for any other relief, a memorandum of the general character of the relief granted must be stated." In the first place, the word "amount," in its connection with the numeral figures, indicates that the judgment is for money or damages, since the amount of any other kind of relief is not required to be stated, nor could a memorandum of "the general character" of other kinds of relief be expressed by numeral figures, however written or marked. In the second place, the word "costs," immediately preceding the figures 3440, indicates that those figures represent money, since judgments for costs are always for money. Finally, the position of the figures in the columns headed "Amount of Judgment," inclosed by double lines, and divided by a single red line, plainly indicates that the figures on the left of the red line represent dollars, and those on the right represent cents. This mode of writing dollars and cents is more generally practiced, and quite as well understood as that in which the dollar-mark ($) is used. It is almost universally practiced where sums of money are to be written in columns, as in blotters, journals, ledgers, and statements of accounts. When so written, not only courts, but all persons of common education, readily read and understand the figures as representing a definite number of dollars and cents. In this form statements of accounts are ordinarily reported to the courts by executors, administrators, referees, and masters in chancery. When and where was an exception to such a report sustained on the ground that it was unintelligible?

A question similar to the one under consideration was decided in the case of De Lashmutt v. Sellwood, 10 Or. 319, in which the court, by WATSON, C. J., said: "The objection that it does not appear from the docket entry what the figures in the column headed 'Amount of Judgment,' stand for presents a question by no means new in this court. In the case of French v. Rogers, disposed of at the last term, we held, in effect, that any mark commonly understood and ordinarily employed in business transactions to denote the division of figures, obviously representing money, into dollars and cents, would suffice for that purpose in entries of this character. Such we deemed the mark ordinarily used in setting down sums of money on paper to denote the amount represented by the two figures on the right as cents, and that represented by the figures on the left as dollars; and the same effect, in our judgment, must be allowed to the lines and spaces in the ruled money columns in regular account books or official records similarly prepared. General usage and common understanding have given such marks and lines, when so employed, a signification by which, not individuals only, but courts as well, are enabled to determine what, and what amount, figures so placed were intended to represent, with as much ease and almost as much certainty as though the dollar-mark itself, or written words, even, had been used to express the same meaning." Upon this point the respondent cites several cases in which it was held that mere numeral figures in a tax assessment roll do not express the value of the property assessed, viz.: Hurlbutt v. Butenop, 27 Cal. 50; Brady v. Seamen, 30 Cal. 610; People v. Savings Union, 31 Cal. 132, and People v. Hastings, 34 Cal. 571. As to these cases, it is to be remarked, in the first place, that in none of them are the numeral figures written in columns similar to those in the docket in this case. In none of them is there any line or mark separating dollars from cents. In none of them are the figures written in the form commonly employed in account-books and records to denote that they are intended to represent dollars and cents. In the second place, while admitting that the strict rule applied to the assessment cases may be too firmly established to be overruled or disregarded by the courts in that class of cases, I think there is no necessity for extending it to the class to which this case belongs. The only case in this court, except the assessment cases, having any bearing upon the question under consideration, that I have been able to find, is that of Hibberd v. Smith, 50 Cal. 511. In that case the alleged defect in the docket was that it did not state the Christian name, nor the initials of the Christian name, of the judgment debtor; yet this court held that the docketing was sufficient to constitute a lien upon the land of the judgment debtor. I think the judgment should be reversed, and that the court below should be directed to render judgment upon the findings of fact in favor of the defendants.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to render judgment upon the findings of fact in favor of the defendants.

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90 Cal. 386

JONES v. TALLANT *et al.* (No. 13,265.)

(*Supreme Court of California.* Aug. 1, 1891.)

COMPROMISE—PAROL EVIDENCE—HARMLESS ERROR.

1. The owner of certain bonds, pledged to secure a debt, gave a written order for their delivery to another, who paid the debt with money borrowed by him for that purpose, pledging the bonds as security, and thereafter paid interest on the loan. He afterwards contributed to the expense of litigating the bonds, and the former owner acknowledged that he no longer claimed any interest in them. Upon the death of the first owner, his son claimed that they were part of the estate, and, after an investigation and on the advice of his attorneys, entered into an agreement with the person to whom they had been delivered, by which, in consideration of $1,500, the son acknowledged that they were not part of the estate, and were the property of the other party, who in turn agreed to make no claim on the estate. By direction of the son, the bonds were not inventoried, and no claim against the estate was ever made. The agreement was never rescinded, nor was the $1,500 ever repaid or tendered by the son or his heirs. *Held*, that the evidence sustained a finding that neither the son nor his heirs had any interest in the bonds, and that they were the property of the other party.

2. The admission of parol evidence of a written contract was harmless error, where the contract was afterwards introduced.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by Charles A. Jones, administrator of Louis G. Partridge, against Elizabeth Tallant and others, to determine the right of plaintiff in certain bonds pledged to defendant Tallant by defendant John Partridge. Trial to the court. Judgment for defendant John Partridge, and plaintiff appeals. Affirmed.

Peter G. Partridge, the father of Louis G. Partridge, and the uncle of John Partridge, was the owner of the bonds in suit, and had pledged them to a bank as security for a debt of $7,000. Demand for payment having been made, John Partridge paid the debt with funds borrowed by him from defendants Tallant & Co., and the bonds were delivered to him by the bank on the written order of Peter Partridge. John Partridge pledged them to Tallant & Co. as security for the money advanced to pay the debt to the bank, and thereafter paid interest to Tallant & Co. on the loan. At this time the bonds were worth but little, but afterwards appreciated in value, as the result of litigation, to the expense of which John Partridge contributed. Upon learning of this litigation, Peter Partridge stated that he had no claim to the bonds; that they belonged to John, who had paid his money for them. Peter Partridge died, leaving a will devising all his property to Patrick Partridge, his brother, disinheriting his son Louis. Louis threatened to contest the will, and an agreement was made between Patrick and Louis, by which he withdrew his objections to the will, and allowed the same to be probated in consideration of his receiving half of his father's estate. Louis claimed that the bonds were part of the estate, and his attorneys investigated the matter, and reported to him that John claimed the bonds had been given to him by Peter in consideration of his having paid the debt to the bank. The accounts kept by John with Peter Partridge showed an item of $7,000 which John claimed was the amount paid to the bank, and this item was indorsed by Peter Partridge, "Audited and correct." Upon advice of his attorney, and at the same time the first agreement was made, Louis entered into an agreement with John, (Exhibit B,) by which, in consideration of $1,500, he acknowledged the bonds as the property of John, and no part of the estate of Peter, and John agreed to make no claim against the estate. The money was paid, and by direction of Louis the bonds were not inventoried by the administrator. No claim against the estate was ever made by John Partridge. After the death of Louis, his widow filed a petition in the estate of Peter Partridge, alleging that the bonds were part of its assets; and an order was made directing them to be inventoried, and a decree subsequently rendered which, without determining the question of ownership, adjudged that the interest of said estate in the bonds should be distributed to the heirs of Louis, subject to administration of his estate. The sum of $1,500 was never repaid or tendered to John by Louis or his heirs, nor was any attempt to rescind the agreement (Exhibit B) ever made. The court found that Louis and his heirs had no interest in the bonds, and that they belonged to John, subject to the claim of Tallant & Co.; and that Louis, after full investigation of the rights and ownership of John in and to said bonds, entered into the agreement, (Exhibit B.)

T. Z. Blakeman, for appellant. *Pillsbury & Blanding* and *E. J. Pringle*, for respondents.

Foote, C. This action was brought to determine the right of the plaintiff, as the administrator of Louis G. Partridge, deceased, to certain bonds which are claimed to have belonged to Louis G. Partridge, subject to a claim of Elizabeth Tallant and others, as pledgees, for money advanced upon the bonds to John Partridge. There is no question made as to the right of the pledgees to be reimbursed the money due them, whether the bonds properly belonged to Louis G. Partridge in his life-time, or whether they properly belong to John Partridge. The appeal is from a judgment in favor of the defendants, and an order denying a new trial.

The contest here is mainly as to whether the findings of fact, which show that the estate of Louis G. Partridge and his heirs at law have no interest in the bonds, and that they are the legal property of John Partridge, subject to the claim of Elizabeth Tallant et al., are sustained by the evidence; and, further, whether the court erred in permitting Mr. Thomas B. Bishop to testify as to an agreement between Louis and John Partridge, which had been reduced to writing. After a careful examination of the whole record, we are satisfied that the evidence is sufficient to support the findings. And particularly is this the case with reference to those which show the nature of the agreement between John and Louis Partridge, whereby it is evident that for an adequate, sufficient, valuable consideration, which has never been returned or offered to be returned to John Partridge, Louis, with a full knowledge of the facts and circumstances of John's claim to the bonds, and acting under the advice of able attorneys, voluntarily entered into the agreement marked "Exhibit B," whereby he in effect transferred to John all his (Louis') interest in the bonds, and acknowledged John as the owner thereof, and the administrator and heirs of Louis are bound by his acts.

As to the matter of the evidence of Mr. Bishop, even conceding that the portion referring to the terms of the written agreement was inadmissible, it is plain that no injury resulted, as the instrument itself was placed in evidence, and was controlling in the matter. We perceive no error in the record, and advise that the judgment and order be affirmed.

We concur: Belcher, C. C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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90 Cal. 410

Ingerman v. Moore *et al.* (No. 12,733.)

(Supreme Court of California. Aug. 5, 1891.)

Master and Servant—Dangerous Machinery—Harmless Error.

1. Where an employe was injured while operating a scantling machine and saw, by a projecting set-screw which was concealed below the saw, the fact that he had been employed for nine months in putting lumber in place to be cut by the saw, and had run the machine for 18 days in the absence of the foreman, is not sufficient evidence to warrant a court to say that, as a matter of law, he was experienced, and knew the location of the set-screw, and the danger of putting his hand below the saw.

2. In such case, it was not error to instruct that if defendants were negligent in not giving proper instructions to the servant, and warning him of danger, it was immaterial whether the hand was pulled off by the set-screw or cut off by the saw.

3. Where the record of a particular ruling is not embodied in a bill of exceptions, it forms no part of the record on appeal, and leave will not be granted to file the same afterwards as an additional record.

In bank. Appeal from superior court, city and county of San Francisco; T. K. Wilson, Judge.

Action by Ingerman against Moore and

others to recover damages for personal injuries. Judgment for plaintiff. Defendants appeal. Affirmed.

Wm. F. Herrin and *Jarboe, Harrison & Goodfellow*, for appellants. *Pillsbury & Blanding*, for respondent.

DE HAVEN, J. This is an action to recover damages for a personal injury sustained by the plaintiff, and alleged to have been caused by the negligence of the defendants. The complaint alleges, in substance, that at the date of receiving the injury, and for some time prior thereto, plaintiff was employed by defendants in their saw-mill; that his regular work was to assist the man in charge of a "scantling-machine and saw" for cutting lumber, plaintiff's duty being "to put the lumber in place, to be run through the machine and cut by the saw." On or about February 14, 1884, the man regularly employed to run this machine became sick, and plaintiff was directed by the defendants to take his place for the time. The plaintiff expressed a doubt as to his ability to do so on account of his inexperience, but was assured by defendants that he was qualified to take charge of this work, and he did so. While engaged in this work, in removing some slivers from under the saw, plaintiff's sleeve caught on a set-screw fixed upon and projecting from a shaft located below the saw, which shaft worked the rollers carrying lumber to the saw, and by means thereof the arm of plaintiff was wound around the shaft, and so broken as to necessitate amputation. It is alleged that the plaintiff did not know of this set-screw, and could not see the same, and was not acquainted with the danger of removing the slivers, and that in the attempt to remove the same he acted in the same manner as he had seen the man do who had regular charge of the machine. The complaint further alleges that the work of running the machine was dangerous, and plaintiff was inexperienced and ignorant of the dangers attending the same, and that defendants knew this, and neglected to warn him of such dangers, or properly instruct him in such work. In their answer the defendants allege that plaintiff was employed to take the place of the foreman on the scantling-machine, when for any reason necessary; that he had frequently done so, and was fully acquainted with the work, and never expressed any doubt of his ability to run the machine and saw; that he had been fully instructed and warned concerning the saw, and the mode of using it, and of the danger of said employment; and that plaintiff knew the work was dangerous, and that it was fraught with danger to attempt to remove slivers from the saw when in motion. Plaintiff recovered a judgment for $12,500, and costs. The defendants appeal.

The principles of law governing this class of actions are clearly defined. It is well settled that one who enters the service of another takes upon himself the ordinary risks of the employment, and if he is an adult, and engages to do a particular work, the employer has a right to presume, unless otherwise informed, that the employe is competent to perform it, and understands and appreciates such risks. But, on the other hand, when one who is known to be an inexperienced person is put to work upon machinery which is dangerous to operate unless with care, and by one familiar with its structure, the employer is bound to give him such instructions as will cause him to fully understand and appreciate the danger attending the employment, and the necessity for care. This rule is thus stated by the supreme court of Wisconsin: "We think that it is now clearly settled that if a master employes a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely, with proper care on his part." Jones v. Mining Co., 66 Wis. 277, 28 N. W. Rep. 207. It is true this rule which requires the employer to give proper instructions is most frequently applied in cases where persons of immature years are employed about dangerous machinery, but the same principle governs where the person so put to work is of mature years, but without experience in the particular work, and without knowledge of the actual dangers attending it. But, of course, the fact that the person injured was of mature years, as was the plaintiff here, is a matter for the careful consideration of the jury in determining whether he fully understood and appreciated the dangers of his position. It is claimed by the appellants that they were not guilty of any negligence towards plaintiff, and that plaintiff by his own want of care contributed to the injury which he received. In passing upon the question of defendants' alleged negligence, it was necessary for the jury to determine: (1) Was plaintiff in fact inexperienced in the work in which he was engaged? and, if so, (2) were defendants informed of this fact? (3) If defendants were so informed, did they neglect to give him notice of the location of the set-screw, and to instruct him in the manner of running the machine, so as to guard him against the injury which he received?

The verdict of the jury necessarily implies that all of these questions were answered affirmatively in the minds of the jury, and upon all of them there is a substantial conflict in the evidence, unless it can be said as a matter of law that, upon the plaintiff's own statement, showing the length of time he had been employed as assistant on the machine, and how much he had himself run it in the absence of the foreman, the jury ought to have found that he was not inexperienced in the place he was temporarily filling, and not without knowledge of the location of the set-screw, and the danger to be incurred from placing his hand where he did while the machine was running. It appears from plaintiff's own testimony that he had worked inside of the mill, taking lumber from the big saw, for nearly two years, and had been employed as assistant on the scantling-machine,—that is, in putting the lumber in place to be cut by the saw,—for about nine months; and during that time he had, upon different occasions when the foreman was absent, run the machine, in all 18 days prior to the accident. It does not appear that plaintiff's duty as assistant was such as would necessarily give him knowledge of the structure of the machine, or of the existence of the projecting set-screw, which was a concealed danger. It is not shown that he had ever been called upon, or that it was any part of his duty, to become acquainted with this machinery, or to adjust it when out of order. It is doubtless true that some men, with the same opportunity, would have become familiar with its mechanism, and fully qualified to take charge of it, but it is a matter of common experience that all men would not. There is a difference in the capacity of men to acquire a particular knowledge of machinery, or the arrangement of its parts, or manner of construction; some having greater power of observation, and more desire to investigate and understand, than others. The extent of plaintiff's knowledge of this machinery was therefore a question of fact for the jury to determine from all the evidence before them, and we think it was fairly submitted to them in the instructions of the court.

The defendants insist that the plaintiff was himself guilty of contributory negligence in attempting to remove the sliver without stopping the machinery. We think, however, that upon the evidence in this case this was a question of fact to be determined by the jury, and the finding upon this point would largely depend upon plaintiff's knowledge, or want of knowledge, of the location of the set-screw. If he knew the screw was there and projecting, it was gross carelessness for him to place his hand where he did, with this shaft in motion. If he was ignorant of its existence, it was still a question for the jury to consider whether he was exercising due care in what he did, unless he knew that he could remove the sliver with safety to himself. In reaching a conclusion the jury might properly consider that he had often seen such obstructions removed from near the same place when the saw was in motion, and had received no notice that it was dangerous to do so, and that to have stopped the machinery, in order to remove the sliver, would have occasioned delay in the work, and that it was not the custom to do so. It seems clear to us that the inference to be drawn from these facts would not necessarily be that the plaintiff was guilty of culpable negligence, and different persons might fairly dissent as to the proper conclusion to be reached. In such a case the question to be decided is one of fact for the jury, and not of law for the court. And when the matter has been passed upon by the jury, and the judge of the trial court is satisfied with their finding, the verdict is conclusive of the question here. The law upon this point is clearly stated in the case of Coombs v. Cordage Co., 102 Mass. 585, as follows: "Whether it was possible for the plaintiff to have met with the accident from inadvertence or want of acquaintance with the danger of his position, without being chargeable with a want of reasonable care, we think is a question to be submitted to the jury. The facts that he saw, or might have seen, the machinery in motion, and might have known that it was dangerous to expose himself to be caught in it, are considerations which should be regarded on one side. On the other, some allowance should be made for his youth, his inexperience in the business, and for the reliance which he might have placed upon the direction of his employers. It has been held in other cases that previous knowledge of a danger is not conclusive evidence of negligence in failing to avoid it." In the case of Swoboda v. Ward, 40 Mich. 420, the plaintiff had been working in the mill for about 14 days, carrying slabs from the gang-saws, and placing them on the rollers; and when injured he had taken hold of a heavy slab, too heavy for one man to carry, and was pulling it, walking backwards, when he slipped back against the cog-wheels near the slab run, and his feet were caught and leg drawn into the cog-wheels, and permanently injured. It was shown that he had not been warned about the cog-wheels, and had never noticed them until he was hurt, but that he could have seen the cogs if he had stopped work to look for them, and that he was without experience and knowledge in mills. Upon these facts the court held that the question of contributory negligence was for the jury, and that the trial court erred in holding, as a matter of law, that there was such negligence. The court there said: "The plaintiff at the time of the injury was properly engaged in the active discharge of his duty. He testified that he had not been warned about these cogs, and had not noticed them until after he was hurt. Contributory negligence presupposes the doing of some act which ought not to be done, or the omission to do something which should be done,—in other words, a want of due care. 5 Amer. Law Reg. (N. S.) 405, note. If he did not know of the exposed and dangerous condition of these cogs, then by remaining at work he was not doing something which he should not have done; and the effort he was making, at the time of the accident, to remove the slab, showed no want of due care on his part, but, on the contrary, was commendable. Even if he had known of the cogs and their unguarded condition, it would not thereby conclusively follow that he could not recover. Other facts and circumstances would have to be considered in connection therewith, —his age, his intelligence, his experience, and such like,—so that the jury might ascertain and determine whether he fully understood and appreciated the danger." See, also, Dowling v. Allen, 74 Mo. 13.

The jury must have found in this case that plaintiff was without knowledge of the existence of the set-screw, and did not know that he was exposing himself to danger from it when he placed his hand where he did. We do not feel authorized to disturb the verdict of the jury on this point.

The instruction complained of, to the effect that, if defendants were negligent in not giving proper instructions to plaintiff, it was immaterial whether his hand was pulled off by the screw or cut off by the saw, could not, upon the evidence before the jury, have injured the defendants.

We have not overlooked the fact that in this case the defendants did not manage their mill in person, and did not personally employ plaintiff, or have any communication with him personally. If their superintendent, or other foreman, was negligent in putting the plaintiff to work without proper instructions, such negligence is in law that of the defendants, and they are liable for it.

The defendants have appealed from the order of the superior court made April 30, 1888, denying their motion for a new trial, and upon the argument of this case suggested a diminution of the record, and asked leave to file as an "additional record" the previous order of that court made in this action January 30, 1888, granting a new trial thereof, and the subsequent order vacating and setting this aside, and reinstating the motion for a new trial. It is claimed by the appellants that the power of the court was exhausted when it granted the motion for a new trial, and that its subsequent orders vacating this and denying their motion for a new trial were absolutely void. This additional record is not embodied in any bill of exceptions, and we do not think it forms any part of the record on this appeal. Judgment and order affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.

HARRISON, J., being disqualified, did not participate in the foregoing opinion.

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90 Cal. 402

MURRAY v. HOME BENEFIT LIFE ASS'N.

(No. 13,356.)

(*Supreme Court of California.* Aug. 5, 1891.)

MUTUAL BENEFIT INSURANCE—WAIVER OF FORFEITURE.

An insurance policy provided for six assessments per annum, and that no claim could be made thereunder if payment was not made within 30 days from the date of notice that an assessment was due. The assessments of June 1st and August 1st were unpaid on September 1st, and the company wrote the assured: "According to the conditions of your certificate of membership No. 8,361, an assessment amounting to $29.40 will be due and payable at this office on the 1st of October, 1886. The assured died September 30th. *Held*, that the letter waived the right to declare the policy forfeited for non-payment, when due, of the June and August assessments.

Department 2. Appeal from superior court, San Francisco county; WALTER H. LEVY, Judge.

Action by Murray against Home Benefit Life Association, to recover on an insurance policy. Judgment for defendant. Plaintiff appeals. Reversed.

L. T. Hengstler and *J. Alva Watt*, for appellant. *Van Ness & Roche*, for respondent.

DE HAVEN, J. The plaintiff is the beneficiary named in an insurance policy upon the life of one Lemuel T. Murray, the policy being a certificate of membership, issued by defendant to said Murray, upon accepting him as a member of said Home Benefit Life Association. By the terms of the certificate, the holder was to pay to the defendant six assessments per annum, at stated times and in stated amounts, and it was also provided that no claim was to be made thereunder "should the member neglect or omit to pay the last assessment that may have been levied on the certificate within thirty days from the date of the notice thereof." Upon September 1, 1886, the assessments which had fallen due on June 1st and August 1st of that year were still unpaid, and the defendant on that day addressed a note to said Murray, calling his attention thereto, with a request that he remit the amount due. At or about the same day it also addressed to him this letter: "According to the conditions of your certificate of membership No. 8,361, an assessment amounting to $29.40 will be due and payable at this office on the 1st of October, 1886. Remittances should always be made payable to Home Benefit Life Association, San Francisco, Cal. Return this notice, with remittance." On September 22, 1886, the said Murray, unable from sickness to make the payment in person, sent to the defendant the amount due on assessments for June and August of that year, which the defendant declined to receive, its president saying that he could not, under the circumstances, "but would be only too happy to do so" when Murray should come and tender it himself. Murray died on September 30, 1886. The plaintiff was nonsuited, and the only question before us is whether, upon the foregoing facts, the certificate or policy was in force at the date of Murray's death.

There can be no doubt that the failure of the deceased to pay the assessments of June and August within 30 days after notice thereof, released the defendant from all further liability upon the certificate held by him, if the defendant company had so elected; but conditions like that before quoted from this certificate, which in effect provide for a forfeiture of all rights thereunder unless payment of assessments is made within the time specified, may always be waived by the party for whose benefit they are inserted in the contract, and the rule is firmly established in this class of cases that if the insurance company, after knowledge of any default for which it might terminate the contract, enters into negotiations or transactions with the assured which recognize the continued validity of the policy, and treat it as still in force, the right to claim a forfeiture for such previous default is waived. Viele v. Insurance Co., 26 Iowa, 9; Insurance Co. v. Young, 86 Ala. 424, 5 South. Rep. 116; Titus v. Insurance Co., 81 N. Y.

419. Imposing or collecting an assessment by a mutual insurance company, after the company has knowledge of facts entitling it to consider the policy no longer binding upon it, without its assent, is upon this principle held to be a waiver of the right to claim the forfeiture, which otherwise it might have insisted upon. The cases are numerous which hold that the acceptance of a premium, after the time when it should have been paid, is a waiver of the forfeiture which might have been enforced because it was not paid when due, and precisely the same effect is given to an agreement to accept, at a future time, such overdue premium, and a tender in pursuance of such agreement. In speaking of acts showing an election to continue the existence of the policy of insurance, and to waive a forfeiture incurred, the supreme court of the United States, in the case of Insurance Co. v. Norton, 96 U. S. 234, say: "It is conceded that the acceptance of payment has this effect; and we do not see why an agreement to accept and a tender of payment according to the agreement should not have the same effect. Both are acts equally demonstrative of the election of the company to waive the forfeiture of the policy." The respondent, while not disputing the general rule that a forfeiture may be waived at the option of the person entitled to enforce it, insists that the letters of the defendant, above referred to, show only an offer by it to waive the previous default in the payment of the June and August assessments, upon condition that such past-due assessments were immediately paid, and while the insured continued in the same state of health. There are no such conditions expressed in these letters, and we do not think any such arise therefrom by legal implication. The first, calling attention to the assessments already due, and requesting payment, specified no time within which such requested payment was to be made. A tender, therefore, within a reasonable time, would have been sufficient to satisfy the requirements of this letter; and it cannot be said, as a matter of law, that the tender made was not within such time. But the letter notifying the insured that an assessment would be due and payable on October 1st, and in substance requesting payment, of itself constituted a waiver of the previous default, and must be construed as an unconditional offer to accept payment of that assessment on or before the date named. It was, in effect, an assertion that the certificate was still in force, and, notwithstanding previous defaults known to the defendant, would remain in force until the date therein named for such payment. As already stated, this notice was sent after full knowledge by defendant of the non-payment of the previous assessments; and if it was the intention to make the acceptance of the amount to become due on this assessment conditional upon the payment of such prior assessments, immediately upon the receipt of the other letter, it should have so stated; but, not having done so, we think the legal effect of this letter was to waive the previous forfeiture, and continue the certificate in force until October 1st; and this being so, the insured had the right at any time after receiving it, and before October 1st, to make payment of all assessments accruing prior thereto, and necessary to be made in order to give the certificate continued existence.

Forfeitures are not favored, and it necessarily follows, from the rule that a forfeiture will not be enforced unless specifically and definitely provided for in the contract that a waiver thereof will be treated as unconditional unless it clearly appears that it was otherwise understood by the parties. The supreme court of the United States in Insurance Co. v. Norton, supra, say: "It is true, we held in Statham's Case, 93 U. S. 24, that in life insurance time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given the courts should be liberal in construing the transaction in favor of avoiding the forfeiture." And there is nothing unjust in this rule, as the party entitled to claim a forfeiture need not waive it, but may stand upon his contract as written, or, if he desires to waive his strict right only upon condition, the condition can be specified so as to leave no doubt of the real intention. In giving further time for the payment of the assessments of June and August, by its letter of September 1st, the defendant could, if it had so desired, prevented all controversy by fixing the time within which they must be paid, or by requiring immediate payment, as was done by the insurance company in Servoss v. Society, 67 Iowa, 86, 24 N. W. Rep. 604, a case cited and relied upon by respondent. The fact that no tender of payment was made by the insured until his last illness was upon him, and near his death, we do not regard as material. If the certificate was then in force, and we hold that it was, he had a right to pay what was then due. It was not made a condition of defendant's offer to receive said assessments that he must be in good health at the time of payment. As the case must be remanded for a new trial, it is proper to add that the questions asked on the cross-examination of the plaintiff, relating to the policy held by the deceased in another company, and the payment of premiums therein, are not relevant to any issue in this case. Judgment and order reversed.

We concur: SHARPSTEIN, J.; McFARLAND, J.

(3 Cal. Unrep. 426)

HOME OF CARE OF INEBRIATES v. REIS, Treasurer. (No. 13,741.)

(*Supreme Court of California.* Aug. 6, 1891.)

MANDAMUS — PRACTICE — SETTING ASIDE SUBMISSION.

Where, on an application for a writ of mandate against a city treasurer, the supreme court, after the cause is submitted, concludes that the constitutionality of certain acts must be determined, which questions have not been argued, the submission will be set aside, and an opportunity for argument thereof will be afforded.

In bank.

Application for writ of mandate by the Home of the Care of the Inebriates against

Reis, as treasurer of the city of San Francisco.

Tilden & Tilden, for petitioner. *John H. Dwist* and *George Flournoy, Jr.*, for respondent.

Per Curiam. This cause was submitted upon an argument which raised but a single question, viz., whether the act of the legislature, approved March 17, 1876, was repealed by the act of 1889. Upon mature consideration, the court has concluded that a writ of mandate cannot be awarded without determining other questions, viz.: The constitutionality of the acts of April 7, 1870, and March 17, 1876; and whether the treasurer of San Francisco, in view of the provisions of section 82 of the consolidation act, can be compelled to pay any unaudited claim. These questions ought not to be decided without argument, and the submission of the cause is therefore set aside, in order that such argument may be had.

90 Cal. 522

Mills v. City of Los Angeles. (No. 14,035.)

(*Supreme Court of California.* Aug. 17, 1891.)

Adverse Possession—Land in Street—Appeal.

1. In an action to quiet title to a strip of land lying in a street, it appeared that plaintiff's grantor took possession of a tract of land in Los Angeles in 1842, while the present city was a pueblo, and built a house thereon. The official survey of 1849 showed that the house extended across the street. In 1855 the city bought a portion of the tract shown to be in the street. The land in controversy was continuously inclosed and occupied from 1842 to 1887. A patent was issued to the city for the pueblo lands in 1876. Plaintiff shows no grant from the pueblo or the city. *Held*, that plaintiff could not recover, as the land in controversy was in the street as shown by the official map of 1849, and the fact that plaintiff's grantor maintained an obstruction in the street did not affect the dedication, or give him title by adverse possession.

2. The fact that the city purchased a part of the tract of land lying in the street is not sufficient to show that the city recognized a right to the street in plaintiff's grantor.

3. The exclusion of proper evidence is not prejudicial error, where it appears that, if admitted, it would not have benefited the party offering the evidence.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action to quiet title by Howard W. Mills against the city of Los Angeles. Judgment for defendant. Plaintiff appeals. Affirmed.

Graves, O'Melveny & Shankland and *Chapman & Hendricks*, for appellant. *Chas. McFarland*, for respondent.

TEMPLE, C. Plaintiff appeals from the judgment and order refusing a new trial. The action is to quiet title to a strip of land in Los Angeles 16 feet wide, extending westerly from Main street along Second street, and constituting a portion of Second street, as now laid out and used. The answer denies the title of plaintiff, avers title in defendant, and dedication of the land as a public street. It is admitted that Los Angeles was a Mexican pueblo, and continued to be such until its organization under the laws of the state in 1850, and that the land was a portion of the pueblo lands. In 1842 Tomas Urquidez took possession of a tract of land which included the land in controversy, and erected an adobe building which extended entirely across what is now Second street, near the junction of Main and Second; and the strip claimed by plaintiff, who derives title from Urquidez, was continuously inclosed and occupied up to 1887. A patent was issued to the city of Los Angeles for the pueblo lands in 1875, and another in 1876. Plaintiff shows no grant for the lands from the pueblo or the city, or any other source, except from Urquidez and those who succeeded him as grantees. But he claims that possession is evidence of title. Possession is sufficient evidence of title as against a mere trespasser without right, but is of no value as against the patent to the city, unless it constitutes a bar under the statute of limitations. It seems immaterial to this inquiry whether prior to the patent the pueblo had an inchoate title to the lands, or only a limited authority within defined limits over public lands which had been assigned for the use of the public. By the patent all the lands included in it passed to the city, except such as were held under grant from the pueblo or city, or under grant from Mexican authorities. Under the stipulation, *prima facie*, the title is in the city, and the plaintiff who seeks a judgment adjudging him to be the owner must show, by competent proofs, title in himself. He has not attempted to show, and does not claim to have, a title from Mexico. Has he then acquired title from the pueblo or city, or by adverse holding barred her right? It may be assumed that the statute did not begin to run against the city until the patent was issued, in 1875. There is no evidence of an approved survey of the pueblo lands, under the act of congress of June 14, 1860.

Plaintiff claims that the city has recognized his right, and, although his briefs do not make it very clear in what way such recognition can confer title, he seems to argue that in some way the city is estopped from denying his title, or the acts referred to raise the presumption of a grant from the city or pueblo. Where there is a question as to whether one holds in subordination to another, or whether he holds adversely, the fact that the title has been recognized is important, but evidently mere recognition cannot confer title. There must be something in the nature of an estoppel. In 1849 the pueblo adopted a map and survey as official. On this map Second street appears as now located and used. But at the intersection of Second and Main streets it shows Second street was occupied by the buildings of plaintiff's predecessor. In other words, that it was not an opened street, and could not be, until the buildings were removed. Occupants of the land claiming under Urquidez have had the land assessed to them, and the city has collected the taxes upon it. In 1855 one Dryden, claimant of a portion of the property, sold a portion of Second street to the city, which paid him $1,000 therefor, and took his deed. Dryden's deed covered the balance of the street adjoining plaintiff's claim, and the calls of the deed bound it upon Anderson's land. Plaintiff derives title from Anderson. In 1872 the council referred the matter of the obstruction in Second street to a committee, which reported that Anderson stood upon his rights. In 1884 the council passed an ordinance directing proceedings for the condemnation of this strip, and in 1885 another in reference to compensation for the strip. In all this we see nothing that can estop the city, or tends to raise a presumption of a grant, and the latter is completely disproved by the fact that Anderson petitioned the council for a grant to this and other land on the Urquidez tract. There is no evidence that any claimant under Urquidez ever pretended that there was a grant from the city or the pueblo to Urquidez. So far as the record shows, all disclaimed such grant, and asked for and received, after the controversy arose, deeds from the city. But the plaintiff claims that the strip is included in a deed from the city to Anderson, upon his petition dated August 6, 1855. He petitioned for the land fronting 18 yards on Main street. Previously, February 17, 1855, he had presented a petition showing that he had purchased property which extended five feet "in a street that is intended to be opened as soon as required; I therefore wish to exchange that same quantity of land for the same quantity on the other side of my lot," etc. The petition of August 6th for a deed was referred to a committee, which reported in favor of granting it on condition that Second street be made his southern boundary, and the council ordered "that title be given to the petitioner on the conditions mentioned in the report." The mayor's report shows that a deed was given to Anderson, which described the land as beginning at the corner of Main and Second streets.

The deed itself was offered in evidence, and excluded on the objection of defendant. This ruling is assigned as error. The offered deed also described the land as bounded on Second street, which it says constitutes the southern boundary. If the plaintiff, in connection with the offer of the deed, proposed to show that it included the land,—and he claims that is shown,—the deed should have been admitted, and then a finding, founded upon proper and legal evidence, would have been conclusive here. But now, if we can see that the deed if admitted would have been of no advantage to appellant, it is not prejudicial error. As the land granted is bounded upon the line of Second street, and the description commences with the call for the corner of Second and Main streets, it would seem that the deed does by express language exclude the land in controversy; and this, no doubt, is the reason why the court ruled it out. But it is contended that the corner of Second and Main streets, and the call for Second street as the southern boundary of the land conveyed to Anderson, refers to that street as opened by the purchase from Dryden, which is bounded upon the land of Anderson. The Dryden purchase was for 66 feet of Second street, and plaintiff contends that, when Anderson asked to exchange 5 feet in the street for 5 feet on the other side of his lot, he was claiming 5 feet of the ground conveyed by Dryden, and by that conveyance made a part of Second street. But this reasoning seems forced and far-fetched. We have not been able to find in the record any evidence that Second street was then open to the public. The deed from Dryden to the city bears date August 15, 1855. It appears that he was not to give possession for two months after the conveyance. Anderson's petition, in which he offers to exchange, bears date February 17, 1855, nearly six months prior to the conveyance. He must, therefore, have referred to the street as marked out on the official map. Anderson's petition for a deed is dated August 6, 1855, and the order allowing him a deed on condition that he accept it with the boundary on Second street was made August 30, 1855. The city had not then taken possession. Anderson filed still another petition, September 18, 1855, which also shows that the street had not yet been opened. And then the fact that Anderson's petition was granted only on condition that he would accept it with the boundary on Second street shows that they did not give him the land asked for, but required him to give up his claim to the land on Second street. But the presumption would be that the point called for is the corner of the streets as fixed on the official map, and the circumstances would be required to show very clearly that something different was intended to justify a different conclusion. But the record does not show that Second street had been opened to use, or was defined in any way save by the official map. Appellant contends that the confirmation of the title of the city inures to his benefit under section 14 of the act of congress passed March 3, 1851. But that section is for the benefit of those who but for it could, and to prevent forfeiture must, have presented their claims individually. Neither Urquidez, nor any of those claiming under him, have shown a claim which could have been so presented. To have the confirmation and patent inure to his benefit, he must show a grant from the pueblo or city. Plaintiff has not expressly claimed that he acquired title under the statute of limitations, but perhaps that claim is involved in his contention. The Ord map, made in 1849, being the official map of the city, is evidence that as early as 1849 the premises were declared a public street. That it was occupied by a trespasser would not affect the dedication. Such obstruction would not manifest an intention on the part of the city or pueblo to withhold that part of the street from public use, but only that there was an obstruction to be removed. There was no necessity for an acceptance by the public by using the proposed street to complete the dedication. The city was not only proprietor, but the political authority to lay out, establish, and to accept streets which were offered to the public by ways of dedication. In City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. Rep. 928, and 23 Pac. Rep. 1085, it was said: "The common council must be the proper body to accept a dedication. If not, who is there that can give a formal acceptance?" The pueblo was, or represented, the proprietor. Its authorities also represented the public, and were authorized to lay out streets. In fact, to accomplish the purpose for which pueblos were formed and lands assigned to them, they must do so. Lots cannot be sold or villages built up without streets. At first streets would naturally exist only on paper. But they were necessary to designate the lots and the different classes of land belonging to a pueblo. Whether they had been accepted and used by the public, so that they could not have been changed or otherwise disposed of by the municipal authorities, is not material to this inquiry. That question seems to have been considered important in San Francisco v. Calderwood, 31 Cal. 585, and San Francisco v. Canavan, 42 Cal. 555. In the last case it was said: "Until accepted, the dedication, whether made by deed or otherwise, may be revoked by the owner of the land;" and this was applied to a supposed dedication by ordinance of a public park. But it does not follow, because the city might revoke the dedication until it had been used, that therefore, before such revocation, it should not be considered as a park. Of course no adverse rights could be acquired in this property after it had become a public street. We think the judgment and orders should be affirmed.

We concur: Fitzgerald, C.; Van Clief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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90 Cal. 444

Emeric *et al.* v. Alvarado *et al.* (No. 13,276.)

(*Supreme Court of California.* Aug. 7, 1891.)

Tenancy in Common—Deed of Co-Tenant—Description — Acknowledgment — Tax Titles—Assessment — Priority of Mortgage — Estoppel—Attorney and Client — Amendments to Answer—Delay in Filing.

1. Where a co-tenant conveys a specific tract, which is less than his undivided interest in the common land, by deed of bargain and sale, describing the tract by metes and bounds, or other sufficient description, and purporting to convey the whole title to such tract in severalty, such tract should be allotted in partition to the grantee in severalty, whenever it can be done without material injury to other co-tenants not join-

ing in the deed; and the tract so conveyed should be charged, in proportion to its value, against the interest of the grantor, under Code Civil Proc. Cal. § 764, providing that, whenever it shall appear in an action for partition of lands that one or more of the tenants in common, being the owner of an undivided interest in the lands sought to be partitioned, has sold to another a specific tract by metes and bounds out of the common land, and executed a deed of conveyance purporting to convey the whole title to such tract in fee-simple and in severalty, such tract shall be allotted and set apart in partition to such purchaser, his heirs and assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract can be so allotted without material injury to the rights of other co-tenants not joining in such conveyance; and, such statute being merely declaratory of the existing law, the rule therein prescribed applies to conveyances executed prior to its enactment.

2. A deed by a co-tenant, conveying a specific part of the common land, is not void.

3. Where a co-tenant sells a fractional undivided interest in a specific tract of the common land, and executes a quitclaim deed purporting to convey his interest in such specific tract in fee, the grantee should be allotted in partition such fractional interest only.

4. A conveyance by a co-tenant and his wife described the premises as "all our right, title, and interest in and to all the land inherited by us, or either of us, from one C., the father of" the co-tenant. The father had devised to the co-tenant a certain undivided share of "all my property, rights, and actions, together with all the land of my Rancho San Pablo." The father had applied to the Mexican government for a grant of three leagues, and, after his death, one of his sons renewed this application, and afterwards made another for four leagues, on which the grant was finally made to the heirs of the original applicant. A vendee of the co-tenant's grantee claimed a specific tract of the common land under his deed, but it did not appear that such specific tract was within the grant applied for by the father. *Held*, that the description in the deed from the co-tenant was insufficient to pass title to such specific tract. BEATTY, C. J., dissenting.

5. A certificate of acknowledgment of a deed taken by a justice of the peace, which fails to show of what county he was a justice, or whether he was a justice of any county, or in what county or state the acknowledgment was taken, is fatally defective.

6. Error in excluding evidence offered by one party cannot be assigned by another party, who did not except.

7. One co-tenant cannot acquire a tax-title to the premises to the prejudice of the others.

8. Revenue Act May 15, 1854, § 90, (St. Cal. 1854, p. 88,) providing that the tax-deed shall be *prima facie* evidence of certain matters, was repealed by Revenue Act April 29, 1857, § 55, (St. Cal. 1857, p. 344;) and the introduction of a tax-deed under the former statute, without proof of the preliminary steps necessary to vest the power of sale, does not show a *prima facie* title.

9. Where, under Revenue Act Cal. May 15, 1854, an assessment of lands owned by "Castro" was made in the name of "Castero," the assessment and the tax-deed, describing the lands as having been assessed to "Castro," are void; the rule of *idem sonans* not applying to assessments for taxes.

10. Where there is no dollar-mark or other character in the assessment and duplicate rolls, showing what was meant by the figures in the columns headed "Value" and "Taxes," the assessment, and tax-deed based thereon, are invalid.

11. A deed purported to convey "all the right, title, and interest" of the grantor, being an undivided interest in a specific tract of lands held in common. The grantee executed a deed purporting to grant, bargain, and sell the specific tract, and reciting that it was the same land thus conveyed to him. At that time the grantor in the second deed had no general interest in the common land, as his grantee knew, but he subsequently acquired one. *Held*, that the grantee in the second deed took only an undivided interest in the specific tract. BEATTY, C. J., dissenting.

12. Under the California statutes in force in April, 1853, which provided that every conveyance of real estate, which shall not be duly recorded, shall be void against a subsequent purchaser or mortgagee for value in good faith whose conveyance or mortgage shall be first duly recorded, a mortgage, executed after a deed to another person, but recorded before it, has priority.

13. The grantee in such deed, being junior to the mortgage, is a proper party to the foreclosure, and is concluded by decree therein against him.

14. A finding that the mortgagee had no notice of the grantee's rights is conclusive on appeal, when the evidence is not brought up, and such finding is not affected by a finding that the grantee's tenant was in possession when the mortgage was given, since possession is not notice, but only evidence of it.

15. One whose interest in lands held in common had been exhausted, conveyed a specific tract of 300 acres thereof in consideration of a reconveyance of a specific tract of 27 acres out of the 300. The grantee in the first deed subsequently acquired an undivided interest in the common lands from other co-tenants. *Held*, that such subsequently acquired interest should not be applied in partition to effectuating the grant of the 27-acre tract under the rule prescribed in Code Civil Proc. Cal. § 764.

16. A notary public of the county of C. took an acknowledgment of a deed therein. His certificate was as follows: "State of California, city and county of S. On this day * * * before me, H. I. Tillotson, a notary public in and for said city and county, appeared," etc.; and it was signed, "H. I. Tillotson, Notary Public." The certificate stated that he had "affixed his official seal," which contained the words "Notary Public, C. County." He was not a notary for the city and county of S. *Held*, that the acknowledgment was fatally defective, under Civil Code Cal. §§ 1188, 1189, requiring the name and quality of officers taking acknowledgments to be in the certificate, and section 1193, requiring that they must authenticate their certificates by affixing their signatures followed by their names and seals of office. BEATTY, C. J., dissenting.

17. The record of a deed so acknowledged does not impart constructive notice, under Civil Code Cal. § 1161, providing that, before it can be recorded, an instrument must be acknowledged, and the acknowledgment certified, as required by law. BEATTY, C. J., dissenting.

18. One claiming title under a void tax-deed of the share of certain co-tenants allotted them in partition, executed a deed of bargain and sale purporting to convey the whole title to a specific tract. The deed described the premises as "being a portion of lands allotted in partition to" the co-tenants, and covenanted that neither the grantor nor the co-tenants had done, or suffered to be done, anything whereby the premises, or any part thereof, are, or hereafter may be, impeached, charged, or incumbered in any manner. The grantee, afterwards acquiring an undivided interest in the common land, conveyed all his right, title, and interest therein to his grantor, reserving the specific tract previously conveyed. *Held* that, as it was the intention of the first grantor to convey a perfect title to the specific tract, he was estopped to impeach it.

19. Where a contract between an attorney and his client provided that, in consideration of professional services to be rendered in an action for partition, the attorney should receive a share of the interest of the client when the partition suit should be determined, and it does not appear that any services were rendered or performance thereof waived, such contract confers no legal or equitable right in the land, and titles based thereon are void.

20. The original answers in a cause were filed in 1868, and judgment rendered in 1878. After reversal on appeal, the cause came on for trial in January, 1885. In December, 1885, counsel asked leave to file amendments to the answer, and the amendments were then drawn and verified. The court, after repeatedly urging counsel to present them, and after granting one continuance for that purpose, peremptorily ordered them to be filed October 1, 1886; but they were not presented until January, 1887, after the case had been declared substantially closed. There was no excuse offered for the delay. *Held*, that the court properly refused to receive them.

21. Notice by the purchaser to the owner or occupant of lands sold for taxes is essential to the validity of the tax-deed, under Pol. Code Cal. § 3785, providing that the purchaser must, 30 days prior to the expiration of redemption, or 30 days prior to application for a deed, serve on the owner or occupant a written notice stating the sale, its date and amount, and the time of expiration of redemption, or when application for deed will be made.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action for partition by Joseph Emeric and others against Alvarado and others. Trial to the court, and decrees rendered, from which different parties appeal. Affirmed.

Wm. Matthews, Wm. Leviston, Wm. Mintzer, Garber & Bishop, Stanley, Stoney & Hayes, W. H. L. Barnes, E. Kirkpatrick E. J. & J. H. Moore, Flournoy & Mhoon, E. J. Pringle, Taylor & Haight, Geo. E. Lawrence, Henry E. Highton, and *A. H. Loughborough*, for appellants. *Theodore H. Hittell, William C. Belcher*, and *W. H. H. Hart*, for respondents.

McFARLAND, J. This is an action for the partition of a tract of land called the "San Pablo Ranch," containing 17,938.59 acres. It is situated in what is now Contra Costa county, and was granted by the Mexican government, and afterwards patented by the United States to the successors of Francisco Maria Castro, who died on the 5th day of November, 1831. The action was commenced on November 19, 1867, in the district court of the fifteenth judicial district in and for the city and county of San Francisco, and an interlocutory decree was rendered in that court on July 15, 1878. Several appeals were taken, and the judgment and order denying a new trial were reversed by this court, because the findings as to two or three issues were deemed defective; and furthermore, and mainly, because the decree determined rights, interests, and shares in the land only as they existed in the hands of the original tenants in common, and did not determine the present rights, interests, and shares of all the parties to the suit as they existed at the time the action was commenced. Most of the findings of the district court were approved, and the cause was remanded to the superior court, (successor to said district court,) with instructions to find on certain issues mentioned; and "upon the findings heretofore made and herein approved, and those hereafter to be made under the directions of this court," to proceed and specify in its interlocutory decree the "rights and interests of all parties to the action," and adjudge partition between them according to such rights and interests. Emeric v. Alvarado, 64 Cal. 627, 2 Pac. Rep. 418. It was established by the first decree, and the decision of this court, that the persons denominated "original tenants in common," and the shares belonging to each, were as follows: Martina Castro de Alvarado, fifteen equal twenty-second parts of said rancho; Antonio Castro, Joaquin I. Castro, Juan Jose Castro, Gabriel V. Castro, Victor Castro, and Jesus Maria Castro, each one equal twenty-second part; and Luisa Moraga de Briones, Maria de los Angeles Moraga de Briones, Jose Moraga, Guadalupe Moraga de Martinez, and Francisca Moraga, each one equal one-fifth of one equal twenty-second part of said rancho. (The seven persons first above named were children of Francisco Maria Castro, and the five persons last named were children of Francisco Castro de Moraga, a deceased daughter of said Francisco Maria Castro.) After the cause went back to the superior court, further findings were had; and that court—Judge JAMES G. MAGUIRE presiding—with great care, and in a systematic method that must have cost great labor and thought, found, determined, and stated the interests and shares, not only of the said original co-defendants, but of all persons holding or claiming under them, and being parties to this action; and entered an interlocutory decree adjudging partition among the parties in accordance with the findings. The case now comes here the second time upon numerous appeals from the interlocutory decree, and from an order denying a motion for a new trial. There are several hundred parties to the action. The interests of many of the parties to the appeals are friendly as to some matters and hostile as to others, so that they are appellants as to some points and respondents as to others, thus presenting different and contradictory claims upon the same transcript. The findings of fact of the superior court number 274, many of them having numerous subdivisions, and they were all necessary to the disposition of the case. These findings, with the conclusions of law, the original findings of the district court, and the last interlocutory decree occupy 752 pages of the printed transcript No. 13,276, while there is much additional matter in the other transcripts. It is apparent, therefore, that the labor of the court below must have been very great; and that it would be impossible to give here a full statement of the whole case in detail without exceeding all reasonable limits of an opinion. As, however, the opinion of this court delivered on the former appeal contains quite an extensive history of the case, and as the points arising on the present appeals may be grouped into a few general classes, we think that the case can be disposed of without much detailed statement of facts. There are five separate transcripts,—Nos. 13,276, 13,275, 13,871, 13,984, and 14,006. In the present opinion, rendered in No. 13,276, we will consider and determine all the points made in all the appeals, and judgments will be rendered in the appeals based upon the other transcripts according to the conclusions declared in this opinion. (The references here made to the transcript refer to transcript 13,276, unless otherwise stated.)

I. Specific Tracts. At various times individual tenants in common, owning large undivided interests in the ranch, undertook by grant, bargain, and sale deeds, to convey the whole of particular parts of the ranch described by metes and bounds, or other sufficient description, as though the grantor owned in severalty the particular part conveyed. The lands described in these conveyances are called "specific tracts." There are more than a hundred of such tracts, and they are designated in the findings by numbers. The court below found that these specific tracts, conveyed by deeds purporting to convey the whole title, "should be allotted and set apart in partition as a portion of the shares and interests of such co-tenants, and in such manner as to make such deeds effectual as conveyances of the whole title to such segregated parcels, if the same can be done without material injury to the rights and interests of other co-tenants who did not join in such conveyances, or those claiming under such other co-tenants, or any of them; and the tracts so conveyed are to be charged in proportion to their value to the interests in said rancho of the said grantors." This finding is attacked as erroneous by some of the appellants, who contend—*First*, that such a conveyance is void; and, *second*, that, if not void, the grantee under it of a specific tract should take, on partition, only such a share as is equal to the undivided interest which the granting co-tenant had in such specific tract. Upon this subject it is declared in section 764 of the Code of Civil Procedure as follows: "Whenever it shall appear, in an action for partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance purporting to convey the whole title to such specific tract to the purchaser in fee-simple and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs and assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury to the rights and interests of the other co-tenants who may not have joined in such conveyance." If this section of the Code controls in the case at bar, then the question under discussion must be answered adversely to the contention of appellants. But the part of the section above quoted was not enacted until 1876; and, as the conveyances here involved were made prior to that time, it is contended by appellants that the said provision of the Code is not applicable to this case. Of course, if this amendment to the section was an entirely new provision, and completely changed the old law upon the subject, it would not be retroactive, and could not destroy or seriously disturb prior vested rights. But, in our opinion, the law was substantially the same before the amendment as after it. From a general statutory enactment not expressing a design to change the law there arises no necessary presumption that the law was different before the enactment. It was said at a very early date in the history of our jurisprudence that "to know what the common law was before the making of a statute, whereby it may be known whether the statute be introductory of a new law or only affirmatory of the common law, is the very lock and key to set open the windows of a statute," and that "in all general matters the law presumes the act did not intend to make any alteration." These rules were approved by our predecessors, the learned Justice FIELD delivering the opinion of the court, in Baker v. Baker, 13 Cal. 95, 96. Statutes are frequently intended to remove all doubt and uncertainty as to some principle of law, and to state, in apt, distinct, and explicit language, what the law is upon a particular subject; and we think that such was the effect of the amendment which we are now considering. In the same amendment it was also enacted, for the first time, that, when a co-tenant had made improvements on a part of the common land, that part should be allotted to him, on partition, without considering the value of such improvements, if the same could be done without material injury to the other co-tenants; but it is not contended that such was not the law before the amendment. In Seale v. Soto, 35 Cal. 102, (decided in 1868,) the lower court had ordered in its interlocutory decree "that there be set off to the said several parties such portions of said premises as will include their respective improvements, provided, always, that the rights or interests of neither of the other parties be prejudiced thereby;" and this court held, on appeal, that the order was "equitable, just, and proper," and "cannot be successfully assailed."

The decision of this court on the former appeal, if not declaring, as the law of the case, that the rule laid down in section 764 should govern, is at least strong authority to that point. Mr. Justice THORNTON, who delivered the leading opinion in the case, when giving reasons for the proposition that an interlocutory decree should determine the rights of all the parties, urges, as an argument, the consideration that otherwise the provisions of section 764 could not be carried out. He quotes the section in full, and says: "We cannot see how these provisions can be carried out by the referees unless the interest of each party is ascertained by the court and stated specifically in the decree. And when the decree for partition is made, as it is in this case, the court must determine under which of the original co-tenants each party claims, and state it in the decree, so that the referees can perceive clearly and be enabled to execute the provisions in section 764 when inserted in the decree." None of the other justices dissent from this part of the opinion, although Mr. Justice Ross holds that it was sufficient, in the first instance, to determine the shares and interests of the original co tenants. The concurring opinion of Mr. Justice McKee merely fortifies the opinion of Justice Thornton as to the proper character of the interlocutory decree, and says, among other things, as follows: "The next step in order is to ascertain and determine the respective rights and interests of each of the tenants in common in the mode prescribed by sections 763, 765, and 769 of the Code of Civil Procedure, and adjudge partition between them according to their respective rights." Moreover, in the findings of the district court which were then under the review of this court, there was a finding on the subject of specific tracts to the precise effect, and in the identical language, of the finding of the superior court which we are now considering, and the superior court was directed to "proceed upon the findings heretofore made and herein approved." Therefore, whether or not the decision can be taken as a direct adjudication of this point, it is evident that, in the judgment of the court at that time, the true rule on the subject is that declared in section 764. And we are satisfied, upon principle and authority, that such is the correct rule.

It is clear that a deed made by one cotenant conveying a specific part of the land of the co-tenancy is not void. That was definitely settled in Stark v. Barrett, 15 Cal. 362. In that case one of the cotenants (Vaca) had undertaken to convey all his right, title, and interest in and to a tract containing 1,500 acres, being a part of the common land; and it was argued, and authorities cited to the point, that the conveyance was void because it destroyed the unity of possession, because it impaired the right of the other co-tenants to partition, and imposed additional burdens on them when seeking partition, etc. But the court, after reviewing the authorities, held definitely that such a conveyance was not void, although, as against the other co-tenants, the grantee might lose his rights on partition. And, of course, where, as in the case at bar, a co-tenant undertakes to convey the whole title to a specific tract, his conveyance, under well-settled principles, operates as an alienation of, at least, all the right and interest which the grantor had in the specific tract; so that he comes within the rule that his conveyance is not void, as established in Stark v. Barrett. Freem. Co-Tenancy, § 204 et seq. Furthermore, when a co-tenant undertakes by a bargain and sale deed to grant a specific tract in severalty, although his deed will not convey the interests of his co-tenants, he is estopped under well-settled rules from denying, as against his grantee, that he owned a less interest than his deed purports to convey. And, under equally well-settled rules, if he afterwards acquires the title of his co-tenants in the specific tract, such title will inure to the benefit of his grantee; and if, upon partition, such specific tract be allotted to him, then it happens that he does acquire his co-tenants' title, and it passes to his grantee. But a suit in partition under our Code is, in its nature and essence, equitable, (Emeric v. Alvarado, 64 Cal. 619, 2 Pac. Rep. 418; Gates v. Salmon, 35 Cal. 593;) and the court in its decree, proceeding to do what is "equitable, just, and proper," will not only allot to a co-tenant that part of the common land upon which he has valuable improvements, but will also set apart a specific tract to the share of a copartner who has undertaken to convey the title in fee to such tract in severalty, so that the grantee may have that which is justly his, when such disposition of the land can be made "without material injury to the rights and interests of the other co-tenants." See 1 Story, Eq. Jur. § 656*c*; Freem. Co-Tenancy, §§ 202-205; McKee v. Barley, 11 Grat. 340; Campau v. Godfrey, 18 Mich. 27; Holcomb v. Coryell, 11 N. J. Eq. 548; Nichols v. Smith, 22 Pick. 319.

There are no decisions in this state which assert a different rule. Gates v. Salmon (reported in 35 and also in 46 Cal.) is cited on both sides. In the case as reported in 35 Cal., the only point decided is that, in a suit for partition, grantees of specific tracts are necessary parties to the action; and the views expressed in the opinion on the general subject are in harmony with the conclusion above stated. In the case as reported in 46 Cal., it is stated that the grantees of specific tracts, under certain deeds, acquired the interests which their grantors had at the time of the execution of the deeds; but the character of such deeds does not appear, nor, in the confused state of the pleadings and issues and parties in that case, does it appear against whom the statement is intended to apply, or between what parties the question was raised. Of course, one tenant in common cannot, as against his co-tenants, absolutely convey away the interests of the latter in any part of the common land. In Pfeiffer v. Regents, 74 Cal. 156, 15 Pac. Rep. 622, a tenant in common had undertaken to grant to a stranger the right to perpetually divert water from the common land upon the several land of the grantee; and in support of that grant the respondent had cited Stark v. Barrett and Gates v. Salmon and other cases in which the rule applicable to conveyances of specific tracts was discussed, and had sought to invoke that doctrine in behalf of the asserted water-right. And it was in that connection that the court said that the former decisions on the subject should not be pushed further; that is, that they should not be so extended as to embrace the asserted right of one tenant in common to create an easement on the common land. The case, however, recognizes the rule as hereinbefore stated. (It may be remarked, as was said in that case, that it appears, from many cases in the California Reports, to have been a common custom among the owners of large Mexican grants in California for individual co-tenants to convey specific parcels of the common land. The custom probably grew out of the fact that during the long periods of time necessary to complete titles, to obtain patents, and to make partitions there could be but little beneficial use of the land, unless it were segregated into parcels by the co-tenants and their grantees.) Our conclusion on this point is that the court below was right in holding that specific tracts embraced in deeds purporting to convey the whole title should be allotted in severalty to the grantees therein, and charged, respectively, to the shares and interests of the granting co-tenants, where it could be done without material injury to the rights of the co-tenants not joining in such deeds, in manner as set forth in the findings and decree.

2. There were also quitclaim deeds of interest in specific tracts; and with respect to them the court found as follows: "And it further appearing that various of said co-tenants sold fractional undivided interests in specific tracts out of the common land of said rancho, and executed to the purchasers deeds of conveyance purporting to convey interests in such specific tracts to the purchasers in fee, the interests described in such deeds should be allotted and set apart in partition to such purchasers, or their grantees, respectively, in such manner as to make such deeds effectual as conveyances of such interests, if the same can be done without material injury to the rights and interests of other co-tenants who did not join in such conveyances, or those claiming under such other co-tenants, or any of them; and the interests so conveyed, and hereinafter designated as fractional interests of specific tracts, are to be charged in proportion to their value to the interests in said rancho of the same grantors." We see no error in this finding. The grantee in such a deed cannot expect, or legally claim, more than the deed purports to convey, which is merely the share of the grantor in the tract. The contention of some of the appellants that such a deed should be filled by an allotment of the whole tract in severalty cannot be maintained, and where there is a covenant of warranty in such a deed it attaches merely to the interest which the deed purports to convey. Kimball v. Semple, 25 Cal. 441; Gee v. Moore, 14 Cal. 472; Morrison v. Wilson, 30 Cal. 344; San Francisco v. Lawton, 18 Cal. 465; Barrett v. Birge, 50 Cal. 655; Brannock v. Monroe, 65 Cal. 491, 4 Pac. Rep. 488.

II. Appeals of Maraschi et al., on Transcript 13,275. The views and conclusions above expressed on the subject of specific tracts, and the distinction between a deed purporting to convey the whole tract in severalty and a deed purporting to convey only the grantor's interest in the tract, are determinative, against the appellants, of the appeals taken from the interlocutory decree by appellants Maraschi, Ruth Ann Boyd, administratrix, Boorman, administrator, et al., and by appellants Pitman, Gill and Mayhew; all founded on transcript No. 13,275. We have carefully examined the able brief of counsel for those appellants, in which it is argued that the grantees in certain deeds which do not purport to convey more than the interests of the grantors in certain specific tracts should have allotted to them the whole of said tracts; but we do not think it necessary to discuss that question any further. In addition to what we have before said, it is sufficient to say that, in our opinion, the law is correctly stated in section 764 of the Code of Civil Procedure.

2. And such views are also determinative against the appellants of the appeals taken by the appellants William Meyer, Richard O'Neil, et al., whose contention on this point has been very ably presented by their counsel.

3. The appeal of Pitman, Gill, et al., from an order denying them a new trial, based on the record in transcript No. 13,984, presents no point not raised by their appeal from the interlocutory decree.

III. Specific Tract No. 41. The court found that specific tract No. 41 should be allotted to John Davis; and appellant Emily S. Tewksbury contends that the part of the decree so allotting said tract is erroneous. John Davis deraigns title to said specific tract No. 41 through a deed from James T. Dean; and the title of Dean came through a deed to him from Gabriel Castro and his wife, Marcelina Castro, made on August 20, 1853. This latter deed was duly executed in every respect, except this: the notary who took the acknowledgment failed to certify that the wife acknowledged it "on examination apart from and without the hearing of her husband." Therefore, if, at the date of the deed, the title to said tract No. 41 was in the wife, Marcelina, it did not pass to Dean; but if the title was then in the husband, Gabriel, it did pass to Dean. Appellant contends that the title was then in the wife, because on November 15, 1851, Gabriel Castro (under whom both parties claim) and his wife made a deed to one Jesus Acosta, which, as is contended, embraced said tract No. 41, and on the same day said Acosta executed a deed to the said wife, Marcelina, which, as is contended, also embraced said tract. These two last deeds were without consideration, and were intended to consummate a gift from the husband to the wife. These deeds were recorded; but the court finds that Dean purchased in good faith, for a valuable consideration, and without notice of said deeds.

We think that said deed from Gabriel Castro and his wife to Acosta did not convey said specific tract No. 41. In the first place there was no description in said deed which embraced said tract. The only description, or attempted description, of land in said deed is as follows: "All our right, title, and interest in and to all the land inherited by us, or either of us, from Francisco Maria Castro, the father of said Gabriel Castro." There is no reference to the San Pablo rancho, nor is there any description by metes and bounds, or by common name, or by any sort of designation by which real property is usually described. There is no mention of any county, state, or nation. The whole of the force, point, and virtue of the alleged description rests solely on the word "inherited." But Gabriel Castro, son of Francisco Maria Castro, did not really inherit any part of the San Pablo rancho from his father. If any interest in the ranch passed to the son from the father, it passed by the will of the latter, in which there was the following clause.

"I order, and it is my will, to leave, as in fact I do leave and give, all my property, rights, and actions, together with all the land of my Rancho San Pablo, to my wife one-half, and the remaining half equally between my legitimate sons and daughters, each being owner of his equal part or share of the effects." 64 Cal. 549, 2 Pac. Rep. 426. But one who gets property by will does not inherit; he takes by purchase, and not by descent. We are well aware that, in construing deeds and other contracts, the strict legal meaning of a word will not be adhered to where the context fairly shows that a different meaning was intended; but where there is no such context, and the word alone is relied on, it is difficult to see why it should be given any other than its legal meaning. Moreover, the grant for which Francisco Maria Castro made several applications in his life-time included only three square leagues. (It is not necessary here to linger over the question whether any grant was ever made of any land to said Francisco. The facts are stated in the original findings, and may be found in 64 Cal., commencing at page 543, and 2 Pac. Rep. 421. The real grant upon which title vested was made after his death to his wife and children, upon application of his son Joaquin I. Castro.) After the death of Francisco, his son Joaquin renewed his father's application for the three leagues; but, before any final action on that application, he made another application for four leagues. It was upon this final application that the only grant ever consummated was made, and there is no showing that specific tract No. 41 was within the land applied for by Francisco.

Again, we think that the certificate of acknowledgment of the deed from Gabriel Castro and wife to Acosta is fatally defective. It commences as follows: "Be it remembered that on the fifteenth day of November, A. D. 1851, before me, Gustavus Harper, one of the justices of the peace in and for said ———, came the above-named," etc.; and it is signed, "Gustavus Harper, J. P." This certificate shows neither venue nor jurisdiction. It does not appear from it of what county Harper was a justice, or whether he was a justice of any county, or in what county or state the acknowledgment was taken. The fact that the name of a certain state and county were written at the commencement of the deed has no more significance than the appearance of those names in the body of the deed, where they usually appear, would have had. Defects in certificates of acknowledgment should be usually overlooked as much as possible in furtherance of justice; but in this case the defect is radical, and, so far as we can see, to condone it would not be in the interest of justice. We do not think that the allotment of specific tract No. 41 to John Davis was erroneous.

IV. Title of Ann Wilson to Specific Tract No. 42. The court allotted this tract to Ann R. Wilson; and with respect to that matter appellant Emily Tewksbury, on her appeal from the order denying her motion for a new trial, contends that the court erred in excluding from evidence a paper claimed to be a certified copy of a deed from Juan Jose Castro to his wife, Petra Bernal Castro, dated July 15, 1852, and recorded November 1st of the same year. But appellant Tewksbury is in no position to present that point. The deed was offered in evidence by defendant Gutierrez through her attorney, George E. Lawrence, and was objected to on various grounds by the defendant Mary E. Wakeman, and also by some other parties. When the objection was sustained, an exception was taken by said Gutierrez alone, through her said attorney, Lawrence. On a subsequent day the defendant William Leviston asked in his name to have the benefit of the exception taken by Gutierrez, and his request was allowed. The proceedings with respect to the point are to be found in transcript No. 14,006, from folio 8,235 to 8,248; and there is nothing there to show that appellant Tewksbury excepted or took any step in the matter. Neither Gutierrez nor Leviston moved for a new trial. The point, therefore, does not arise on Tewksbury's appeal from the order denying a new trial, and her counsel have probably come to take that view, for in their reply brief they make no answer to the position as above stated, taken by Hittell and Belcher, counsel for respondents. It is not necessary, therefore, to discuss the objections made to the introduction of said deed; but we may say that, if the question were before us, we would be strongly inclined to hold that there was no error in excluding the deed.

V. Tewksbury Tax-Deeds. At the first trial the district court found that several tax-deeds upon which Jacob M. Tewksbury relied for title to various parts of, and interest in, the ranch, were invalid; but this court held, on the former appeal, that the findings of fact as to those tax-titles were insufficient. At the trial in the superior court the facts were fully found, and the said deeds were again found to be of no value. Appellant Emily Tewksbury now attacks the findings as to two of those deeds, viz., the deed as to C. T. Pollard of one-eighth of the rancho, dated August 25, 1856, and the deed to J. M. Tewksbury of a specific tract of 213 acres, dated October 5, 1860. With respect to these deeds it may be sufficient to say, in support of the judgment, that the court found as follows: "At the said several times that the said Jacob M. Tewksbury acquired or pretended to acquire interests in the said San Pablo ranch, or any part thereof, as hereinbefore stated, (under the tax-sales,) he became or was a tenant in common in the whole of said rancho with said Martina Castro de Alvarado, and others;" and that there was evidence to support this finding. Tewksbury, therefore, being an owner, and being under "a legal or moral obligation to pay the taxes, he could not, by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by buying from a stranger who purchased at the sale." Moss v. Shear, 25 Cal. 45.

There are other reasons why the tax-sales were not valid, which we notice briefly.

1. The deed to Pollard was made under the revenue act of May 15, 1854, (St. 1854, p. 88.) Appellant merely introduced the tax-deed, relying upon it as making a *prima facie* case, and introduced no other evidence. Section 90 of the said act of 1854 provided that the deed should be *prima facie* evidence of certain things, but section 55 of the revenue act of April 29, 1857, expressly repealed said section 90 of the act of 1854. St. 1857, p. 344. And in the absence of the effect given to the deed as evidence by the statute, proof of the preliminary steps necessary to vest the power of sale was essential. Keane v. Cannovan, 21 Cal. 291. In the case of Moss v. Shear, supra, cited by appellant, the point that the tax-deed was not *prima facie* evidence was not made by counsel or noticed by the court. The other cases cited were under the act of 1857.

Furthermore, the assessment was invalid because the owner was Castro, and the assessment was made to "Castero." People v. Whipple, 47 Cal. 591; Crawford v. Schmidt, Id. 617; Kelsey v. Abbott, 13 Cal. 609; Smith v. Davis, 30 Cal. 537. Lake Co. v. Mining Co., 66 Cal. 17, 4 Pac. Rep. 876, is also to the same point; for while the tax-sale involved there was governed by the subsequent amendment to the revenue law, which provided that a mistake in the name of the owner of real property should not invalidate the assessment, (Pol. Code, § 3628,) the court applied the rule to the assessment of personal property; and held that a mistake in the name of the owner, less important than the one in the case at bar, was fatal, saying that "in making the assessment the provisions of the statute under which it is to be made must be observed with particularity." It is contended by appellant that "Castero" sounds like "Castro," and by respondents that in pronouncing the former name the accent should be on the second syllable, thus making the sound entirely different; but it is not a case to which the rule of *idem sonans* applies. Tax proceedings are *in invitum*, and, to be valid, must closely follow the statute; and *idem sonans* applies to cases of pleas of misnomer and issues of identity, where the question is whether the change of letters alters the sound, not to assessments, and other cases of description, where the written name is material. "Different letters will make different names, though the sound be the same." Com. v. Gillespie, 7 Serg. & R. 478. The deed to Pollard described the land sold as having been assessed to "Castro," and does not purport to be made in pursuance of an assessment to "Castero." The assessment was invalid because on the original assessment roll there was nothing to show what valuation had been put on the land and improvement attempted to be assessed to Castero; and on the duplicate roll referred to in the deed there is nothing whatever to show what was meant or intended by the figures in any of the columns headed "value" or "taxes." The exhibits there referred to are to be found in the original of transcript 13,276. The duplicate roll is the tax collector's warrant. Act 1854, §§ 85, 88. There are other objections to the assessment and deed not necessary to be here noticed.

2. The tax-deed to Tewksbury of the specific tract of 213 acres, founded on proceedings under the revenue act of 1857, was also valueless, because the assessment upon which it was based was invalid. With respect to this assessment the court finds —both as to the original assessment, and the duplicate roll—that "there is no dollar mark, word, abbreviation, or other character or thing in said book, or any page thereof, to show what was meant or intended by the figures in the columns headed 'Value' or 'Tax.' That such a defect is fatal to an assessment has been too long the established law to be now questioned; it has become a rule of property. Hurlbutt v. Butenop, 27 Cal. 57; Braly v. Seamen, 30 Cal. 611; People v. Savings Union, 31 Cal. 132; People v. Hastings, 34 Cal. 571; People v. Hollister, 47 Cal. 408. We think, also, that the attempted description of the property sought to be assessed was fatally defective; but we do not deem it necessary to discuss that question here.

VI. Specific Tract No. 30. On June 1, 1859, Joseph Boyd and wife executed a deed to J. M. Tewksbury, describing a certain part of the ranch, containing 99 acres, which was afterwards designated as "Specific Tract No. 30." The court held that this deed carried only the undivided interest which Boyd then had; and appellant contends that the court erred in not holding that it carried the whole tract in severalty. This point is very meagerly argued. The general counsel for respondents say that it "specially concerns respondent Boyd, and will be very fully and ably argued by her counsel;" but we do not find it to be fully argued anywhere. The finding of the court represents that the deed contained some words purporting to grant, bargain, and sell the described tract; but it also contained these words: "Being the same land derived to the said party of the first part by a deed from Martina Perez, dated September 6, 1858." And the said deed from Martina Perez to Boyd only purports to convey "all the right, title, and interest"—being an undivided interest—in said specific tract No. 30. At the time of the deed from Boyd to Tewksbury, Boyd did not own any interest as a co-tenant in the San Pablo rancho. The only interest which he owned was the undivided interest in said specific tract No. 30, which he had obtained under said deed from Martina Perez, although several years afterwards he did acquire a similar undivided interest in the rancho, equal to 100 acres. He was therefore not in the position of one to whom the rule as stated in section 764 of the Code of Civil Procedure applies; that is, he was not one who, "being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land." Moreover, on the same day on which said deed was made by Boyd to Tewksbury, the latter made a deed to Boyd of all his

(Tewksbury's) interest in another specific tract of the rancho, and there is reason to believe, as contended by respondent, that the transaction between the parties was merely one of exchange. Tewksbury knew that the only interest which Boyd had in tract 30 was that which he had derived from Martina Perez, as stated in the deed itself; Boyd had no general interest in the rancho which he could concentrate upon the particular tract; and, as there is no evidence before us showing what circumstances there were to indicate the understanding and intention of the parties, we do not see how we can hold that the court erred in determining that the said deed was only intended to convey, and did only convey, Boyd's undivided interest in said specific tract No. 30.

VII. The Dall Claim to Specific Tract No. 115. Appellant George W. Haight contends that this tract passed from the original co-tenant, Victor Castro, to John H. Dall, (and through Dall to said appellant,) and that the court erred in not so holding. The court held that the interest claimed by Dall passed to Ephraim Leonard by virtue of the foreclosure of a mortgage made to him by said Victor Castro, and we think that the court was right. On April 21, 1853, the said Victor Castro executed and delivered to said Leonard a mortgage, with covenants of warranty, of all Castro's right, title, and interest, in law or in equity, in the rancho, and all his improvements on the same, to secure the payment of a certain promissory note of even date given by Castro to Leonard; which mortgage was duly recorded April 21, 1853. But five days prior thereto, viz., on April 16, 1853, said Castro had executed to said Dall a deed purporting to convey said tract No. 115. This deed, however, was not recorded until June 9, 1853; and, at the time of the execution, delivery, and recording of said mortgage to Leonard, the latter "had no knowledge of said previously mentioned deed of said Victor Castro to said John H. Dall." There are also these other facts: In November, 1852, Castro and Dall entered into a written contract by which Dall was to build a second story on the dwelling-house of Castro on the ranch, and Castro was to pay Dall $2,000, and to convey to him 100 acres of land, situated on the ranch; the 100 acres, however, not being described or located. In pursuance of this contract Castro, before April 1, 1853, paid Dall the $2,000, and put him in possession of a tract of land on the ranch which was afterwards designated as "Specific Tract No. 115." Before April 1, 1853, Dall leased said land to Charles H. H. Cook and E. W. Hiller. "Said Cook had, prior to the making of said contract between said Victor Castro and said Dall, and prior to and up to the making of said lease, lived and resided on said San Pablo rancho, acting as the servant and looking after the interest of said Victor Castro." Cook and Hiller were in the actual occupation of said tract of land at the time of the making of the said note and mortgage to Leonard. On the 16th day of April, 1853, one Smiley, who was the authorized agent of Dall, surrendered the said contract of purchase to Castro; and Castro on the same day executed and delivered to Smiley, for Dall, the deed before mentioned. On May 13, 1856, Leonard commenced an action to foreclose his mortgage, making Dall a party defendant, with the usual averment that Dall claimed some interest, etc., in the premises, and that such interest, if any he had, was subsequent, etc., to the mortgage. Dall answered, setting up his said contract of purchase of 1852, his possession, and his said deed of April 16, 1853, his alleged priority under the same, and averring that plaintiff had notice of his title. The court, in due course, rendered judgment for plaintiff, adjudging and decreeing, among other things, that plaintiff had no notice of Dall's asserted title, and barring and foreclosing all the latter's right, title, interest, and equity of redemption in and to the mortgaged premises, and every part thereof. Under this judgment the premises were duly sold, and Leonard, becoming the purchaser, received in due course a sheriff's deed therefor. So far as appellant stands upon his unrecorded deed alone, the question is, we think, of easy solution. There is considerable abstruse learning to be found in the books on the question, who are proper parties in a foreclosure suit, and whose titles or interests can be adjudicated in such suit? In McComb v. Spangler, 71 Cal. 418, 12 Pac. Rep. 347, the rule was laid down that "the only proper parties are the mortgagor and mortgagee, and those who have acquired rights under them subsequent to the mortgage." In that case the wife alone had executed a mortgage on community property; the husband was made a party defendant to the foreclosure suit, and made default; and it was held that he was not estopped by the decree, because his claim to the land was "adverse and paramount to that of the mortgagor." But to apply that rule to the case of a prior unrecorded deed of the mortgagor would be to entirely ignore the statutes about recordation, and destroy the protection which they give, and upon which a purchaser may securely rely. Those statutes, at that time, provided that "every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this act, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, when his own conveyance shall be first duly recorded;" and that "the term 'conveyance,' as used in this act, shall be construed to embrace" a mortgage. Dall's deed, therefore, as against Leonard's mortgage, was void. As against Leonard it had no existence before its recordation in June following; and whatever right he could then assert under it was "subsequent to the mortgage," and could properly be subjected to the foreclosure suit.

2. It is contended, however, that because Dall's tenants, Cook and Hiller, were in possession, therefore Leonard must be held to have had notice of Dall's claim under his contract and deed. But the court finds that Leonard had no notice of such contract or deed; and, as there was no motion for a new trial, that finding is

conclusive. The force of the finding of this ultimate fact is not broken by the finding about the possession. It is to be observed that the statute makes no exception in favor of a party in possession, and the courts had to exercise some liberality of construction to make such exception. The philosophy upon which it was founded was this: That where a third party was in the open and conspicuous possession of the land conveyed, with nothing to indicate that he was not holding adversely to the grantor, the grantee, although a purchaser "for a valuable consideration," should not, in view of such pronounced hostile possession, be deemed to be a purchaser "in good faith." But the authorities on the subject in this state —many of which are cited in the briefs— go only this far: that such possession is evidence of notice, and puts the purchaser on inquiry. It is not, *ipso facto*, notice, but merely evidence tending to show notice. The first thorough discussion of the subject in this state is to be found in Hunter v. Watson, 12 Cal. 363. In that case the learned Justice BALDWIN, in delivering the opinion of the court, says that the question is "full of embarrassment," and comes to a conclusion with great hesitancy. He suggests "whether the statutes of registration should not be thoroughly revised, so as to secure uniform and certain rules for the dispostion and protection of real estate in the future." After reviewing the authorities, he says that "some of the cases hold that mere possession is actual notice, and will not suffer any proof to be made to the contrary; other, and perhaps the greater number, hold that it is only a presumption of notice which may be rebutted; and others, again, hold that the possession is not so much notice of the title of the holder as a circumstance which should put the purchaser on inquiry;" and the utmost conclusion to which he comes is that "open, notorious possession of real estate, by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser of the first vendee's title;" and that "the possession must exist at the time of the acquisition of title or deed of the subsequent vendee." The rule, however, was modified and more fully explained in subsequent cases. Fair v. Stevenot, 29 Cal. 489, is a leading case on the subject. In that case Mr. Justice RHODES, delivering the opinion of the court, discusses the question very thoroughly, and says, among other things, as follows: "The fact of possession is only evidence tending to prove notice. Neither the recorded deed in the one case, nor the possession of the grantee of the unrecorded deed in the other, is the ultimate fact, but notice is the ultimate fact to be established by the evidence. Upon proof being made of the record of the deed, the notice necessarily results by operation of law; but not so upon proof of the possession, for the possession may be taken and held in such various modes, and accompanied by so many qualified circumstances, that each case must depend upon its own peculiar features, and therefore proof of possession is not decisive, without regard to the other facts of the case." In Pico v. Gallardo, 52 Cal. 206, the court cites Fair v. Stevenot, and says: "The court below found that, at the date of the sale and conveyance to plaintiff, the defendants were in possession of the demanded premises. Such possession was not notice of the defendants' equities, but only evidence tending to prove notice." Smith v. Yule, 31 Cal. 180, is also to the same point, and the opinion in that case is very full and instructive. See, also, Thompson v. Pioche, 44 Cal. 516. The above cases state the true rule, and a close examination of the other California cases will disclose nothing in conflict therewith, although there is a *dictum* to the contrary in Talbert v. Singleton, 42 Cal. 395.

Of course, where it is claimed that the circumstances of possession in a particular case are sufficient to show notice, and that the court or jury erred in finding otherwise, such finding can be reviewed on a statement or bill of exceptions which brings up the evidence; but in the case at bar there was no motion for a new trial, (as to this matter,) and there is no evidence before us. It does appear that prior to and almost up to the very time of the execution of the mortgage, Cook, who was in possession, "resided on said San Pablo rancho, acting as the servant and looking after the interest of said Victor Castro;" and it may have appeared that Leonard had the right to suppose that the servant was acting for the master, and that, therefore, there was no such want of "good faith" as would make an exception to the statutory rule. In Smith v. Yule, supra, a case quite similar to the one at bar, the court say that "inquiry does not become a duty where the apparent possession is consistent with the title appearing of record," and that "the subsequent purchaser is not justly chargeable with fraud in failing to make inquiry for a prior unrecorded conveyance, unless there is some fact or circumstance, apparent to his observation, calculated to excite the suspicion of a prudent man, dealing with the property, that a prior conveyance had been made." At all events, in the case at bar, the court found as an ultimate fact that there was no notice; and, the evidence upon which the finding was based not being before us, the finding cannot be disturbed. Moreover, we think that Dall's claim of possession and notice to Leonard was conclusively adjudicated against him in the foreclosure suit. Having set up said notice in his answer, and the court having found and decreed against him, he was, in our opinion, —notwithstanding some confusion of authorities on the general subject,—concluded.

VIII. Specific Tract No. 78. Specific tract No. 78 is a small tract containing 30.47 acres, and appellant Leviston contends that the court should have allotted 27 acres of said tract to him, as successor of Martina Castro, and should have charged the same to the interest and share of respondent Maria L. Velasco, and that the court erred in not so doing. The facts on this point, are, briefly, these: In July, 1873, said Martina Castro and Petra Bernal de Castro (Martina being the daughter, and Petra being the wife, of Juan Jose Castro, one of the original tenants in common) made a mortgage of all their interest in the rancho to said respondent Velasco. At the date of this mortgage, neither Martina nor Petra had any interest in the rancho, their interest having been exhausted prior to that time. (This last statement seems to be verified by the findings on the Juan Jose share and interest; at all events, the statement is made by counsel for respondent, and is not controverted by counsel for appellant.) In 1878, Mrs. Velasco commenced an action to foreclose the mortgage; but while the action was pending she dismissed it as against said Martina Castro upon an agreement that Martina should convey to Velasco a specific parcel of 300 acres, and that Velasco should reconvey to Martina, out of this parcel, a certain specific piece of 27 acres,—the said 27 acres being the tract here now in controversy. In pursuance of this agreement, deeds were interchanged between the parties at the same time, and as one transaction, no money consideration being paid by either. Velasco got nothing through her deed from Martina of the 300 acres, and, of course, conveyed back no title to the 27 of that 300 acres. The whole transaction was practically a nullity. Valesco proceeded with her foreclosure suit against said Petra, and, obtaining a decree, had all Petra's interest in the rancho sold under it. Velasco became the purchaser at the sheriff's sale, and under the sheriff's deed she got possession of a small piece of land, not being a part of the 300 acres or of the 27 acres mentioned in the said deeds between said Velasco and said Martina. Upon this small piece of land, obtained under said sheriff's deed as aforesaid, Velasco made valuable improvements. Several years after the above occurrences, viz., on September 7, 1885, Velasco purchased from the holders of an entirely different share, viz., the Alvarado share, an undivided 80-acre interest in the rancho. (This purchase was in all probability made in order that she might have some title to concentrate upon the small tract which she took possession of under the sheriff's deed, and upon which she made her improvements, as she got no title thereto under said deed.) And now appellant contends that under the general principle applied to sales of specific tracts by co-tenants of the whole rancho, as stated in section 764 of the Code of Civil Procedure, this 80 acres undivided interest thus afterwards acquired by Mrs. Velasco, in 1885, should be applied to making good and filling the said deed for 27 acres made by her to Martina, in 1879. It is evident, however, (1) that this contention of appellant does not bring him within the rule as stated in section 764; and (2) that it is entirely outside the equitable considerations upon which the principle contended for is founded. As Martina could not satisfy any part of her deed to Velasco for the 300 acres, she (and her grantee) cannot be heard to demand satisfaction of the deed of a part of said 300 acres which she, at the same time, received back from Velasco. It was the evident intention of the parties to the transaction that the one interest should be satisfied out of the other, and that the title which Velasco conveyed back to Martina was no other or greater than the title which Martina conveyed to Velasco; and it is the intent of the parties which controls a court of equity in working out fair and just results. To hold that, under these circumstances, Velasco, while getting nothing from the deed for 300 acres, should be compelled to make good her return deed to Martina of a part of that 300 acres, would be to hold just the reverse of that which is "equitable, just, and proper." If the doctrine of estoppel be invoked, then each party would be estopped by her own deed, and the one estoppel would neutralize the other. Carpenter v. Thompson, 3 N. H. 204; Kimball v. Schoff, 40 N. H. 190. Our conclusion is that the court below did not err in its disposition of said 27 acres of specific tract 78. (The court did give a small fractional part of said 27 acres to appellant; but, as Velasco does not appeal from this part of the decree, the correctness of that ruling of the court is not before us.)

IX. Appeal of E. Kirkpatrick. This appeal rests on the contention that the court erred in holding that the attempted record of a deed from James B. and Henry V. Alvarado to A. B. Patrick, dated December 6, 1879, did not impart constructive notice to McLaughlin, the grantor of respondents, who purchased the same land from the same grantors a few months later. McLaughlin purchased for a stated sum of money, which was the "full value" of the land; and at the time he purchased and recorded his deed he had "no actual notice or knowledge, or notice or knowledge in fact," of the said deed to Patrick, "or of any fact, matter, or thing which might, could, would or should put him on inquiry concerning the same," but was "wholly ignorant of said deed of conveyance." No equities are shown in favor of said Patrick, and the only question is whether his attempted record of his deed must be held to be conclusive constructive notice to McLaughlin. We think that the court was right in holding that it did not impart such notice, on account of the insufficiency of the certificate of acknowledgment. Section 1213 of the Civil Code provides that a conveyance of real property shall be constructive notice of its contents to subsequent purchasers when it is acknowledged, or proved, "and certified and recorded, as prescribed by law." Section 1170 provides that "an instrument is deemed to be recorded, when, being duly acknowledged or proved, and certified, it is deposited in the recorder's office with the proper officer for record." Section 1161 provides: "Before an instrument can be recorded, * * * its execution must be acknowledged by the person executing it, * * * or proved by a subscribing witness, * * * and the acknowledgment or proof certified in the manner prescribed by article 3 of this chapter." In said article 3 it is provided that an acknowledgment may be made "within the city, city and county, county, or district for which the officer was elected or appointed," before either of several officers, including a notary public. Section 1181. Said article also provides a form of a certificate of acknowledgment, which must be substantially followed, and indorsed on or attached to the instrument, and which requires that "the name and quality of the officer" taking the acknowledgment must be in the certificate. Sections 1188, 1189. It is also provided that "officers taking and certifying acknowledgments * * * must authenticate their certificates by affixing thereto their signatures, followed by the names of their offices; also their seals of office," if they are required to have seals. Section 1193. Now, the certificate of acknowledgment to the said deed to Patrick commences as follows: "State of California, city and county of San Francisco—ss.: On this eighth day of December, A. D. eighteen hundred and seventy-nine, before me, H. I. Tillotson, a notary public in and for said city and county." It is signed, "H. I. Tillotson, Notary Public." At the end of the certificate he says that he has hereunto "affixed my official seal," and he attaches a seal as follows: "[Seal.] H. I. Tillotson, Notary Public, Contra Costa County." The court finds that said Tillotson was not a notary public in and for said city and county of San Francisco, but was a notary in and for Contra Costa county, and that said grantors appeared before him in said last-named county, and there acknowledged said deed. It is evident that the material statements in the certificate are not true. The acknowledgment was not taken in the county of San Francisco, and the notary was not a notary of that county. The "name and quality of the officer taking the acknowledgment" was not "in the certificate," as provided by sections 1188, 1189, Civil Code; nor was the name of his office given, as required by section 1193. A notary is an officer of the county for which he has been appointed, and his proper official name is "notary public in and for" said county. Willard v. Cramer, 36 Iowa, 22. And if it be contended that a certificate, good on its face, is sufficient, although its material statements are false, —a dangerous doctrine,—still it is evident that the certificate in this case is not sufficient on its face. It states that the acknowledgment was taken in the county on San Francisco before a notary public of that county who certifies that he attaches to it his notarial seal, while the seal, and the only seal, that is attached to it is the seal of a notary public of the county of Contra Costa,—a direct failure to comply with section 1193. And so a view from any stand-point shows that the ruling of the trial court should not be disturbed. There is nothing to induce a leaning against the correctness of that ruling.

X. Specific Tract No. 90. It is contended by appellant Tewksbury that the court erred in allotting specific tract No. 90 to the grantees of William B. Fleming. On January 5, 1857, J. M. Tewksbury and Martina Perez executed a bargain and sale deed to said Fleming, purporting to convey to the latter the whole of said tract No. 90 in fee; but it is contended that said deed should be held valueless, because at its date said Tewksbury and Perez had no interests in the rancho, although they acquired such interests soon afterwards. It is contended by said appellant—at this particular point of her appeals—that J. M. Tewksbury acquired his earliest interest in the rancho on March 7th of the same year, through a deed to him made by said Fleming. It is to be noticed, however, that, at the date of said deed to Fleming, Tewksbury had an apparent title, and claimed to have the legal title, to the Antonio Castro interest in the rancho through the tax-deed to C. P. Pollard, heretofore noticed in this opinion; and that at said date said Martina Perez claimed to own the Joaquin Castro interest through the foreclosure of a mortgage and a sheriff's sale thereunder made to her March 11, 1856. In the deed, the land—afterwards designated as "Specific Tract No. 90"—is described as "being a portion of land set apart and allotted to certain parties named as the sixth part in the partition proceedings of 1856, hereinbefore mentioned;" and the principal parties of the sixth part were Joaquin Castro and his wife, Trinidad Pacheco de Castro. The deed contains the following covenant: "And the said parties of the first part, for themselves, heirs, executors, and administrators, do hereby also covenant, promise, and agree, to and with the said party of the second part, his heirs, and assigns, that neither they nor Joaquin Castro, nor Trinidad Pacheco, his wife, certain parties named as parties of the sixth part in the above-mentioned deed of partition, have made, done, constituted, executed, or suffered any act or acts, thing or things, whatever, whereby, or by means whereof, the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be, impeached, charged, or incumbered in any manner or in any way whatever." Shortly afterwards, viz., on March 13, 1857, the said Fleming (having in the mean time become the owner of a certain undivided interest in the whole rancho, through a conveyance from Marcilla B. Bradley) executed and delivered to said J. M. Tewksbury, who accepted the same, a deed conveying to Tewksbury all Fleming's title and interest in the rancho, "excepting and reserving from the operation of this deed all that lot of land in said rancho known and designated on said Gray's map of said rancho as 'Lot A, Subdivision No. 109,' containing 214 acres of land;" being the said specific tract No. 90. It is quite clear that the intent was to convey a perfect title to said specific tract No. 90 to said Fleming, and to insure the same; and, in view of the circumstances, the appellant Tewksbury cannot now be heard to impeach said title. We see no error, therefore, in the disposition which the court below made of said specific tract No. 90.

XI. Appeals of Frank Webber et al. These appeals are from the interlocutory decree, and from an order denying a new trial, and rest, partly, upon the record in transcript No. 13,871. Appellants base their alleged rights in the rancho upon what is known as the "lawyers' title," which was connected with, and to some extent arose out of, an attempt at a partition of the rancho made in 1856. But said attempted partition, and said lawyers' title, were at full issue at the first trial in the district court. Evidence was introduced on the issues, and the court fully and clearly found and decided against the validity of both the partition and the said lawyers' title; and that "all subsequent acts and claims thereunder, or based thereon, were and are invalid and ineffective." On the appeal these questions were elaborately argued by counsel, and this court considered them at great length in its opinion, and affirmed the decision of the lower court. It did this, not only in express terms when discussing these very questions, but also when adjudicating what had been "correctly determined" by the district court. (The findings of the district court were full on this point, and they are set forth in detail in 64 Cal., from page 569 to page 584, and 2 Pac. Rep. 441-453.) We therefore consider the question raised by these appeals and about said "lawyers' title" as having been definitely settled on the former appeal, and shall not again discuss them. Counsel for appellants suggests the point that the opinion of Mr. Justice Thornton, delivered on the former appeal, was not the decision of the court on these questions, because, as is contended, it was not concurred in by a majority of the justices; but the point is not tenable. That opinion was expressly concurred in, as a whole, by Chief Justice Morrison and Justice Myrick; and Justice Ross also concurred, except as to the two questions upon which the opinion reverses the judgment. Justice Thornton's opinion reverses the judgment for two reasons: (1) Because the findings as to certain taxes and judgments were deemed insufficient; and (2) because, under section 760 of the Code of Civil Procedure, the court below should have determined the interests of all the parties to the action, as well as those of the original co-tenants. Justice Ross dissented upon these two points, and upon these alone; and held that the entire judgment of the court below should have been affirmed. He says: "I dissent from the judgment, and am of the opinion that the interlocutory decree appealed from should be affirmed, except with respect to the construction of section 760 of the Code of Civil Procedure, and to the findings in relation to taxes and judgments for taxes. I agree with the conclusions reached, and in much that is said in support of them, in the opinion of Mr. Justice Thornton. I do not agree with the conclusions reached in the opinion in regard to the findings just alluded to, nor am I able to agree with my associates in their construction of section 760 of the Code of Civil Procedure." 64 Cal. 631, 2 Pac. Rep. 488. There are therefore four justices expressly concurring in the "conclusions reached" as to the partition of 1856 and the "lawyers' title." Moreover, Mr. Justice Sharpstein concurs generally in the judgment, and in the conclusion "that the findings of the court below, with the exceptions specified by Mr. Justice Thornton, ought not to be disturbed;" and Mr. Justice McKee, in a separate opinion, concurs in the judgment, and makes additional arguments to the point that the interlocutory decree should have determined the rights of all the parties, but does not dissent from any conclusion stated in the opinion of Mr. Justice Thornton.

2. These appellants contend, on their appeal from the order denying a new trial, that the court erred in refusing to allow appellants to file amendments to their answers. One of the grounds upon which the motion to make the amendments was resisted was unreasonable delay in presenting them; and we think that ground alone is abundantly sufficient to sustain the ruling of the court. The refusal of a trial court to allow an amendment to a pleading is not *per se* error. Such matters are within the discretion of the lower court, and this court will not interfere when such discretion has not been clearly abused. We see no such abuse of discretion here. The facts in relation to this point are to be found in transcript 13,871 from folio 373 to 441. The original answers of these appellants were filed in 1868, and the judgment of the district court was rendered in 1878. After the decision of this court on appeal from said judgment of the district court, and the filing of the *remittitur* in the superior court, the cause came regularly on for trial on January 26, 1885. The proposed amendments to the answers were not presented until January 5, 1887. It appears in the statement on motion for a new trial, as a fact stated, that in December, 1885, counsel for said appellants "suggested to the court that he desired to file amendments to the answer of said defendants, and was thereupon, and several times afterwards, urged by the court and opposing counsel to present such amendments to said answers seasonably, but did not present said amendments until the 5th day of January, 1887." Moreover, it appears from the uncontradicted affidavit of Theodore H. Hittell, of counsel for respondents, which was filed in opposition to the motion to amend, that for more than six months last past he had made strenuous efforts to induce the said attorney for appellants to present their amendments; that said appellants "made application after application for delay and continuance, and thereby put off the final closing of the case much longer than it would have otherwise been put off;" that, after several such continuances, the attorney for appellants appeared in court on September 23, 1886, and asked for a further continuance, stating again that he desired to file amendments to the answers; that the amendments were already drawn, and that he would serve and present the same for filing on or before October 1, 1886; that "thereupon the court made an order, which was understood at the time to be peremptory and final as to such amendments, that they must and should be served and presented to the court on or before October 1, 1886." The amendments, however, were not presented on said October 1st, nor until the next January,

when, as stated in said affidavit of Hittell, the case "had been declared substantially closed." It appears, also, upon the face of the amendments themselves, that they had been prepared, subscribed by the attorney, and verified by the appellants, on December 12, 1885; and there is no intimation of an excuse for the delay in presenting them. Under these circumstances, we cannot see upon what ground this court can be expected to hold that the court below abused its discretion by refusing to allow the amendments. The foregoing is determinate of the point against the appellants; but we also think the other objections made by counsel for respondents to the proposed amendments were good, namely, that "the points raised by the proposed amendments had been already passed upon by the supreme court of this state upon the appeal hereinbefore taken," and that "said proposed amendments were not material amendments, and set up nothing not covered by the old pleadings."

3. We also think that the court did not err in its rulings on the William Rehnert tax-deeds. There was no sufficient proof introduced or offered to show that said Rehnert, as purchaser of property sold for delinquent taxes, gave notice to the owner or occupier of the property so purchased, as provided by section 3785 of the Political Code.[1] Moreover, Rehnert was, at the time, a tenant in common of the rancho.

XII. Alleged Insufficiency of Findings and Decree. There is some slight contention that the findings of fact and law and the interlocutory decree do not conclusively dispose of the issues of ownership, and that too much is left for the determination of the referees. We see no just ground for this criticism. The findings and decree are remarkably full. They dispose of all questions of title and ownership; and the referees are simply to determine values, and make partition among the owners, as declared and directed by the court. Of course, in this case, owing to the multitude of owners, the referees will have an arduous work to perform; but their powers are not beyond those contemplated by the Code, and are necessary to a practicable consummation of the partition.

Conclusion. There are a few respondents, and, perhaps, one or two appellants, who have not been expressly mentioned in this opinion; but their contentions are involved in, and determined by, the views and conclusions hereinbefore stated. It is our opinion that the interlocutory decree, as an entirety, and all orders denying a new trial, should be affirmed. It is ordered that in this present case, No. 13,276, the judgment and interlocutory decree, and every part thereof, be, and the same hereby are, affirmed; and with respect to the other cases, viz., Emeric v. Alvarado et al., No. 13,275; Flood v. Alvarado, No. 13,871; Flood v. Alvarado et al., No. 13,984; and Flood v. Alvarado et al., No. 14,006, —it is hereby directed that an order be entered in each of said cases affirming the judgment and interlocutory decree, and every part thereof, and also affirming the order denying a new trial in each case in which there is an appeal from such order.

We concur: GAROUTTE, J.; SHARPSTEIN, J.; PATERSON, J.; DE HAVEN, J.

HARRISON, J., being disqualified, did not participate.

BEATTY, C. J. I concur in the judgment upon all points decided, except two: *First.* I think the certificate of acknowledgment to the deed of the Alvarados to A. B. Patrick was sufficient to make its record constructive notice to subsequent purchasers, and consequently that the decree of the superior court should have been modified in accordance with the contention of E. Kirkpatrick and the other appellants who claim under the Patrick deed. *Second.* With respect to specific tract No. 30, I think the decree should have been modified in favor of the appellant Tewksbury. I also concur in the reasoning and conclusions of the principal opinion except in a few particulars. With respect to specific tract No. 41, I concur in the conclusion reached, upon the ground that the certificate of acknowledgment of the deed from Gabriel Castro and wife to Acosta was so fatally defective that its record did not impart constructive notice to subsequent purchasers from Gabriel. But I differ with the court as to the supposed insufficiency of the description in the deed of the interest conveyed. With respect to the various tax-titles, I come to the same conclusion as to their invalidity, but do not agree with some of the grounds of that conclusion stated in the principal opinion.

90 Cal. 507

WELCOME v. HESS *et al.* (No. 14,245.)

(*Supreme Court of California.* Aug. 12, 1891.)

LANDLORD AND TENANT — SURRENDER — ACCEPTANCE—IMPROVEMENTS.

1. A landlord leased a building for five years, and after the tenants had occupied the premises for about a year they abandoned the same, and sent the keys to the landlord. About two months later the landlord painted the front of the building, obliterated the tenants' signs, and made repairs. Soon afterwards he relet the premises at a less rent, for a period of five years, without notifying the tenants that he did it on their account. *Held*, that he thereby accepted the surrender.

2. Where a landlord builds for his tenant a store-room which does not add to the value of the premises, and which is to be paid for by rents reserved in the lease, if the landlord accepts a surrender of the premises he cannot recover for building such store-room.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by A. P. Welcome against Will J. Hess et al. for the recovery of damages.

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[1] Pol. Code Cal. § 3785, provides that the purchaser of property sold for taxes must, 30 days prior to the expiration of the time for redemption, or 30 days before he applies for a deed, serve upon the owner or occupant of the property a written notice, stating that the property has been sold for taxes, the date of sale, amount of property sold, amount for which it sold, the time when redemption will expire, or when the purchaser will apply for a deed, etc.

Judgment for the defendants. Plaintiff appeals. Affirmed.

M. C. Hester and *Judson, Hester & Wood*, for appellant. *Enoch Knight* and *Brousseau & Hatch*, for respondents.

TEMPLE, C. Plaintiff appeals from an order refusing new trial. This action is by a landlord to recover damages from his tenants. He avers that in October, 1887, he owned the demised premises, and was carrying on there a lucrative bakery business, which business added largely to the value of the premises; that defendants proposed to hire the premises, bakery, and business for five years, and to purchase his horses and wagons, and the equipments of the establishment, and falsely and fraudulently represented that they would enlarge the establishment and business, and would operate the same for five years, when they would surrender the establishment and business to the plaintiff, while, in fact, they had no such intention, but their real design was to get control of the establishment and business, and to remove the same to some other locality in the city; that, believing the representations, plaintiff did execute a lease to them wherein defendants agreed to pay plaintiff for the term of five years from October 19, 1887, the sum of $4,380, in monthly installments, $65 per month for the first and second years, $75 per month for the third and fourth years, and $85 per month for the fifth year, and to surrender the premises at the end of that term in good condition; that they took possession, occupied and paid rent, until June 30, 1888, when they abandoned the premises, removed therefrom the bakery business, and since that time have been carrying on the business at another point in the city of Pasadena; that, by reason of the abandonment, plaintiff was compelled to, and did, on the 1st of September, 1888, take possession of the premises, and relet them for the term of five years, at $40 per month, which was the best rental he could obtain. He charges that by reason of the abandonment of the premises and the diversion of the business he has been damaged in the sum of $3,000. Plaintiff also claims to recover for the cost of adding a store-room for the defendants, which he avers added nothing to the value of the premises, and also for their failure to surrender the premises in good condition. The answer admits the lease, and that defendants moved out of the premises June 30, 1888. It avers that plaintiff had not kept his part of the agreement; that he did not give them the use of a certain outbuilding which he had agreed to furnish, and that he neglected and refused to place the premises in an inhabitable condition; that in consequence the defendants were compelled to, and did, on the 30th day of June, 1888, surrender the demised premises to plaintiff, who accepted the same, and took possession of the whole thereof. The other allegations of the complaint are denied. A jury having been waived, the case was tried by the court.

It appears that defendants removed from the premises June 30, 1888, and sent the keys to plaintiff, claiming that plaintiff had not complied with his contract. Plaintiff did not at once re-enter, but on August 3d commenced an action to recover rent for the months of July and August. September 1st, while that suit was pending, he called upon the defendants, and requested them to return and occupy the premises, which they refused to do. He then took possession, had the front painted in order to obliterate the defendants' sign, made necessary repairs, and tried to find a new tenant, and finally rented them to Guan Kee for a laundry, for five years from October 1st, at $40 per month, which he says was the very best he could do. The new lease extended nearly one year beyond the term of defendants' lease. So far as appears, nothing was said or done by plaintiff, other than as above stated, to qualify his acts in taking possession and reletting. He did not inform defendants that he did not accept the offered surrender, or that he would relet on their account. This suit was commenced December 3, 1888. Do these facts show a surrender of the term? A surrender is the yielding up of an estate for life or years to the reversioner or remainder-man. Under the statute of frauds, it can be done only by express consent of the parties in writing, or by operation of law, when the parties do something which implies that both have consented. These acts are such as the parties would be estopped from disputing, and which would not be valid unless the term were ended; as, for instance, a new lease accepted by the tenant, or the resumption of possession by the landlord, if the tenant acquiesces, or the giving of a lease to another. And any act which will amount to eviction will estop the landlord, and make a formal surrender unnecessary. And, while it is said that a surrender by operation of law is by acts which imply mutual consent, it is quite evident that such result is independent of the intention of the parties that their acts shall have that effect. It is by way of estoppel. It was held in Auer v. Penn, 99 Pa. St. 370,—and many cases are to the same effect,—that "the landlord may accept the keys, take possession, put a bill on the house for rent, and at the same time apprise the tenant that he still holds him liable for the rent. All this, as was said in Marseilles v. Kerr, 6 Whart. 500, is for the benefit of the tenant, and is not intended, nor can it have the effect, to put an end to the contract, and discharge him from rent." In that case the trial court had instructed the jury, in effect, that, if the tenant gives up the demised premises, the landlord may re enter and relet, and that it is for the advantage of the tenant that he should do so, and, being for the mutual advantage of the parties, it raises no presumption that the landlord has accepted a surrender. Of this instruction the court said: "We see no error in this. It is good sense as well as good law." In that case the landlord expressly refused to accept a surrender, and notified the defendant that he would hold him for the rent. While there are many cases which hold to this view, the weight of authority and the better reason is the other way. Ladd v. Smith, 6 Or. 316. The term is an estate in lands. The tenant, subject to the covenants of his lease, is the owner for the term. If he leaves the demised premises vacant, and avows his intention not to be bound by his lease, his title still continues, unless the landlord has accepted the offer of surrender. The landlord has no more right to the possession or to lease than a stranger. Admit that he may take such care of the property as will prevent waste, still he must not interfere with the right of the tenant to the absolute dominion and control. If he does so interfere, it is an eviction, and the tenant will be released. The tenant cannot abandon his title; and notwithstanding he has gone out, unless the surrender is accepted, that continues. It is his right to resume possession at any time during his term. If he bring ejectment against the new tenant, what defense can the new tenant have, except that plaintiff's right has ceased? How has it ended, unless by surrender? The assertion that the reletting is for the interest of the tenant is gratuitous and unwarrantable, though, if it were true, how would that fact tend to show authority in the landlord to dispose of the tenant's property? Any person might assume authority on the same ground. The premises might be a rival business stand which the tenant desires to have kept vacant. The complaint in this case substantially avers such fact. Perhaps if the tenant finally ascertains that his landlord will not accept the offered surrender, and could continue to collect his rents, he would elect to return. It is said that defendants abandoned the premises at a time of great business depression at Pasadena. It may be that on the revival of business at the end of a few months they would have been glad to resume business there, and would have done so with profit, if the landlord had not relet. Under such circumstances, shall they continue to pay rent? If the surrender has not been accepted, have they not been evicted? But this case hardly comes up to the authorities which we have criticised. In taking possession, the landlord did not announce his intention to continue to hold the tenants. He relet without notifying the defendants that he should do so on their account. He relet for a period longer than the remainder of their term, thus showing plainly that he was acting in his own right, and not as their self-constituted agent. Under such circumstances, he cannot say that he did not accept the surrender.

The plaintiff also claims damages for the expense in building the store-room for defendants, which he avers adds nothing to the value of the premises. His own statement being taken as true, it must be admitted that he has been hardly used, and if possible, consistent with legal principles, the courts should afford him relief. It is true that a lease is not only a grant or conveyance of an interest in land, but is also a contract between the parties, and upon a breach of any promise contained in it the injured party has his action as upon other contracts; but the trouble is that, by the terms of the contract, compensation to the landlord, for this improvement, was to be made by the rents reserved in the lease. When, therefore, he elected to release the tenants from the remainder of the term, he gave up his stipulated mode of compensation. In other words, his acts, which estop him from claiming rent, have deprived him of his remedy. The case of Respini v. Porta, recently decided by this court, (26 Pac. Rep. 967,) does not really militate against these views. It was the case of the lease—if it may be called such—of a dairy of cows, the necessary buildings, fixtures, and utensils, and pasturage for the cows. The right to the land was subordinate to the business, the stock in which belonged to the lessor. It partook more of the nature of an ordinary contract than a grant of a term. The landlord in such a case, when the tenant abandons, cannot refuse to take possession, for otherwise his property would perish. An examination of the record in the case shows that the point was conceded. The only question was as to the rule of damages. As to the other claims for damage, the findings are against the plaintiff on the facts, and the evidence sustains the findings. It follows that the order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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90 Cal. 496

BRYMER v. SOUTHERN PAC. CO. (No. 14,332.)

(*Supreme Court of California.* Aug. 10, 1891.)

MASTER AND SERVANT—DEFECTIVE MACHINERY—INSTRUCTIONS.

In an action by a servant against the master for injuries caused by the breaking of a chain, it was error to refuse an instruction that the master was not an insurer of the servant, and was not bound to provide machinery or appliances which were absolutely safe; that he was bound to use only reasonable and ordinary skill and diligence in procuring safe machinery; and that the mere fact that an accident occurred did not raise the presumption that the master was at fault in providing such machinery or appliances.

Department 1. Appeal from the superior court of Los Angeles county; WILLIAM P. WADE, Judge.

Action by Brymer against the Southern Pacific Company for personal injuries. Judgment for plaintiff. Order granting new trial. Plaintiff appeals. Affirmed.

Frederic Stanford, for appellant. *John D. Bicknell*, for respondent.

PATERSON, J. Appellant received bodily injuries while engaged with others in the employ of defendant, under the directions of a superintendent, in raising a derailed and wrecked car. He alleged that the injury occurred through the use of inadequate, inappropriate, insecure, and defective appliances furnished by defendant without proper care and caution in the selection thereof, and through the negligence and unskillfulness of the superintendent, who was engaged in directing the work on behalf of defendant. The defendant asked the court to give the following instruction, which was refused: "As respects the duty of a master or employer towards his servant or employe in his service, the court instructs the jury, as a matter of law, that the master or employer is not bound to provide machinery or appliances which are absolutely safe. The law imposes on the master or employer only the obligation to use reasonable and ordinary care, skill, and diligence in procuring and furnishing suitable and safe machinery and appliances for the servant to perform the duties for which he is engaged. The master does not stand in the relation of an insurer to the servant against injury, and can only be held chargeable when negligence can be properly imputed to him. The mere fact that an accident occurred, by which the plaintiff was injured, does not fix the liability, or even raise a presumption that the defendant was at fault in providing machinery or appliances for the labor in which the plaintiff was engaged." The defendant moved for a new trial, and the motion was granted, on the ground that the court had erred in refusing to give the instruction above quoted. We think the instruction ought to have been given. When the employer exercises all the care and caution which a prudent man would ordinarily take for the safety and protection of his own person under the same circumstances, he cannot be held liable for the consequences of a defect in the machinery or appliances used. This is the sense in which the expression, "reasonable and ordinary care, skill, and diligence in procuring and furnishing suitable and safe machinery and appliances," was used in the instruction asked, as we understand it; and is equivalent to the rule, as stated in many of the authorities, viz., that the employer is liable only when he had knowledge of the defect, or failed to exercise reasonable diligence in procuring suitable machinery, or in the inspection of it to discover any defect that might exist. Bajus v. Railroad Co., 103 N. Y. 312, 8 N. E. Rep. 529; Railroad Co. v. McCormick, 74 Ind. 440; Devlin v. Smith, 89 N. Y. 470; Payne v. Reese, 100 Pa. St. 301; Hobbs v. Stauer, 62 Wis. 108, 22 N. W. Rep. 153; Provision Co. v. Hightower, 92 Ill. 139; Railroad Co. v. Ledbetter, 34 Kan. 326, 8 Pac. Rep. 411; Cagney v. Railroad Co., 69 Mo. 416; Smoot v. Railroad Co., 67 Ala. 13; Railroad Co. v. Duffey, 35 Ark. 602. And our Code establishes the same rule: "An employer must in all cases indemnify his employe for losses caused by the former's want of ordinary care." Civil Code, § 1971. The use of the word "accident" in the instruction is not obnoxious to the criticism put upon it by appellant. The court meant to say simply that the mere fact that the chain broke would not authorize the inference that the defendant had failed to exercise reasonable care in the selection of the appliances used. Such is the fair import of the word as used, and the jury must have so understood it. It is claimed that no prejudice could have resulted from the refusal of the court to give the instruction, inasmuch as there was no evidence on the question as to whether the appliances used were defective. We cannot say, however, that there was no evidence on the subject; and there is nothing in the record to show whether the jury believed the injury was due to defects in the machinery used, or to the negligence of the superintendent. The plaintiff tendered both issues, neither was withdrawn, and it was proper to instruct the jury as to the law applicable to each of them. The views expressed render it unnecessary for us to consider the effect of the statement found in the order of the court granting a new trial, that "no other grounds assigned by defendant for the granting of a new trial are well taken." The order is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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90 Cal. 500

BALLERINO v. BIGELOW. (No. 14,181.)

(*Supreme Court of California.* Aug. 10, 1891.)

JUSTICES OF THE PEACE—JURISDICTION.

Under Const. Cal. art. 6, § 11, which provides that justices' courts shall have concurrent jurisdiction with the superior courts, in actions of forcible entry and detainer, where the rental value of the property detained does not exceed $25 per month, and the whole amount of damages claimed does not exceed $200, the allegation of a complaint that the rental value does not exceed $25 is not conclusive of the justice's jurisdiction, but the same must be determined by the evidence.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action of forcible entry and detainer by B. Ballerino against L. M. Bigelow. Judgment for plaintiff. Defendant appeals. Reversed.

Wells, Guthrie & Lee, for appellant. *H. Allen* and *H. Bell*, for respondent.

FOOTE, C. Ballerino brought this action against Mrs. Bigelow, claiming that she had forcibly deprived him of the possession of certain premises, and in pursuance of such forcible entry unlawfully detains the same from him. The damages claimed was the sum of $200, and it is also alleged in the complaint that the rental value of the premises did not exceed $25 per month. The cause was originally brought in a justice's court, and, judgment being rendered for the plaintiff, an appeal was taken upon the law and facts to the superior court of the proper county. There a trial was had *de novo*, and judgment was rendered for the plaintiff that he recover the premises and $510 as damages, that being treble the amount of the damages sustained, which judgment for damages was awarded in accordance with the provisions of section 1174 of the Code of Civil Procedure. From this judgment, and an order denying a new trial, this appeal is taken. There are several points made for the reversal of the judgment and order, but it becomes necessary to determine but one, which, as we think, is conclusive of the matter. While the complaint only alleges that the rental value did not exceed, as a fact, the sum of $25 a month, the overwhelming weight of the evidence is that the rental value exceeded that sum. The court below disregarded the weight of evidence, not upon the idea that there was a conflict, in which it believed the plaintiff's evidence upon the point, but upon the theory that it was legally concluded by the allegations of the complaint as determining the question of the jurisdiction of the justice's court to try and render judgment in the cause, and that it was not bound to determine the question of jurisdiction in accordance with the evidence. This was clearly error. Says the judge below: "Concerning the value of the rents, if it had not been for the allegations of the complaint I should have found in this case, where the defendant herself is evidently anxious that the value should be put above the amount claimed, that it is more. But I think the same rule of pleading governs in this case as in any other; that the plaintiff cannot recover any more than he alleges, although the defendant seems perfectly willing that the plaintiff should consider the rental value to be greater than the amount claimed." In other words, it seems that the view of the trial court was that if a complaint states that property in San Francisco is worth not to exceed $25 a month, and the proof shows that the rental value is $1,000 a month or more, still the justice's court, upon a showing of facts like that here as to forcible entry, could render judgment for the possession of such valuable property. Not so do we understand the law to declare. Our view is that the damages claimed and proved is all that the defendant can recover, but the rental value is not confined to what is alleged, but extends to what is proved; and no recovery can be had where the proof shows that the court has not jurisdiction to render judgment for the possession of the premises.

It will be perceived, upon examination of the constitution of the state, (article 6, § 11,) that, after declaring the legislature shall determine the number of justices of the peace to be elected in townships, incorporated cities, and towns, or cities and counties, and shall fix by law "the powers, duties, and responsibilities of justices of the peace," it is further provided: "Such powers shall not in any case trench upon the jurisdiction of the several courts of record, except that said justices shall have concurrent jurisdiction with the superior courts in cases of forcible entry and detainer, where the rental value does not exceed twenty-five dollars per month, and where the whole amount of damages claimed does not exceed two hundred dollars," etc. Following this constitutional provision, the legislature enacted section 113 of the Code of Civil Procedure, which contains the same limit as to concurrent jurisdiction of justices with superior courts in this class of actions. Thus, the measure of the jurisdiction of justice's courts in these matters is fixed and determined by law. The appeal from the justice's to the superior court does not enlarge the jurisdiction as to such cases. It is plainly evident that the constitution and the statute, so far as concerns this case, apply two tests as to jurisdiction, both of which must be met: The plaintiff must not claim more than $200 damages in all, nor can he recover more; and the rental value of the property involved must not exceed the sum of $25 a month as a matter of fact, to be determined by the evidence. If it had been intended that the test of jurisdiction, as to the matter of rental value, was what was claimed in the complaint, and in no wise dependent upon proof of such fact, it would have been expressed as plainly as it is with reference to the damages claimed. But the word "claimed," as applied to the question of damages, is omitted from that of the matter of rental value, and instead the words used are, "and where the rental value does not exceed twenty-five dollars a month." It was said in Newman v. Duane, (Cal.) 27 Pac. Rep. 66: "The plaintiff herein, by simply framing his complaint in a particular way, could not deprive the defendant of a jury trial of the issues raised by his answer." By parity of reasoning, it may be properly said that, by framing his complaint in a certain way, the plaintiff cannot confer jurisdiction denied by the constitution and the statute to a justice's court, and force the defendant to submit the right of her possession to property to the determination of a tribunal which has no right so to do; thus depriving her of the privilege guarantied to her to have such a case tried originally in the superior court. We are therefore of opinion that the judgment is *coram non judice*, and void, and that it and the order denying a new trial should be reversed, and the cause dismissed in the court below for the want of jurisdiction.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed, and cause dismissed in the lower court for want of jurisdiction.

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90 Cal. 515

O'CONNELL *et al.* v. MAIN & TENTH STS. HOTEL CO. (No. 14,244.)

(*Supreme Court of California.* Aug. 12, 1891.)

CONTRACTS—DAMAGES FOR BREACH—APPEAL.

1. In an action to recover for a breach of contract, it appeared that plaintiffs were to furnish certain iron-work required in the construction of a building, and had made patterns, flasks, etc., for the purpose of carrying out the contract, and furnished a part of the material, when defendant refused to proceed further with the building, or receive material. *Held*, that plaintiffs could recover for loss of profits by reason of the breach of the contract, and the amount expended in preparing patterns which thereafter became useless.

2. Where plaintiffs employed another to furnish a portion of the material called for in the contract, the fact that they paid him for work done and damages sustained for failure to continue the work, after suit was brought, does not bar a right of recovery for the amount so paid, especially where it appears that the settlement was advantageous to defendant.

3. The admissibility of evidence under the pleadings cannot be raised for the first time in the supreme court.

4. A notice in a cause that defendant "intends to and will move this court to set aside the decision and judgment heretofore entered and made in said cause," (setting out the grounds,) and that the motion will be made upon a state

ment of the case, is a sufficient notice that a new trial will be asked for, and it will be taken as so understood, when it appears that opposing counsel stipulated to extend the time within which to prepare and serve a statement on motion for a new trial.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Martin O'Connell and others against Main & Tenth Streets Hotel Company, to recover for breach of contract and for material furnished. Judgment for plaintiffs. Defendant appeals. Affirmed.

Stephen M. White, for appellant. *Finlayson & Finlayson*, for respondents.

Temple, C. This action is based upon two contracts, and the complaint contains two counts or causes of action. The first is upon an account stated for materials furnished, and as to it no question is raised. The second cause of action arises upon a contract by which plaintiffs agreed to perform certain work, according to the plans and specifications, and furnish certain materials for the construction of an hotel which defendant was then building at Los Angeles, and for which defendant agreed to pay $40,000. Plaintiffs were to manufacture and deliver at the building all the iron-work required above the basement. After plaintiffs had furnished a small portion of the material contracted for, defendant became embarrassed and asked for delays, and finally failed to resume work upon the proposed hotel, or to receive any further material from plaintiffs. Plaintiffs, at the request of defendant, suspended work, and now sue for damages resulting from a breach of the contract. Plaintiffs recovered judgment, and the defendant moved for a new trial. It is objected that the court had no jurisdiction to entertain the motion, because, as plaintiffs claim, no notice of intention to move for a new trial was given. The notice given was that defendant "intends to and will move this court to set aside the decision and judgment heretofore rendered, entered, and made in said cause upon the following grounds, to-wit." Then follow three of the grounds set out in section 657 of the Code of Civil Procedure, to-wit: Insufficiency of the evidence to justify the findings and decision herein, and that they were against law; errors in law, and newly-discovered evidence. It also states that the motion will be made upon a statement of the case, bill of exceptions and affidavits, as defendant may be advised. A motion for a new trial is a special proceeding within the case, and I agree with respondent that the court has no jurisdiction to entertain the motion, unless the notice of intention is given substantially as prescribed. The objection to this notice is that it does not formally give notice that a new trial will be asked for. But if it does distinctly and unmistakably give that information it must be held sufficient, and I think it does. Notice is given that defendant will move to set aside the decision. I do not think of any case in which such motion is mentioned in the practice act except for the purpose of a new trial. There might be a motion to vacate a judgment upon various grounds, but could any attorney imagine such a motion, based upon the ground of insufficiency of the evidence, or errors at law occurring at the trial, or for newly-discovered evidence, and made upon a statement of the case, unless it were a motion for a new trial under the statute authorizing and requiring these things? And respondents' attorneys were not misled, since they stipulated giving further time to defendant "within which to prepare and serve its statement on motion for a new trial." The objection cannot be sustained.

In their second cause of action plaintiffs claim, not only general damages for the breach of the contract, *i. e.*, the profits they would have made by performance, but certain special damages which they aver they have suffered in consequence of the breach. These are: (1) For iron base-plates delivered, $981.50; (2) for expense in making patterns, flasks, and other iron-work, to enable them to perform their contract, $1,500; and (3) for money paid one Isaacs, who had been employed to make certain wrought-iron girders, and had commenced their manufacture, as damages, $1,500.

As to the first item there is no controversy. The expense incurred for patterns, flasks, and other iron-work, was found by the court to be certain patterns, flasks, and an oven, which were necessary to enable plaintiffs to perform their contract; that they cost $1,600; and are worth to the plaintiffs not to exceed $150, damage of plaintiffs of $1,450. It is objected that the finding does not correspond with the pleadings; the oven is not mentioned in the complaint. The phrase, "other iron-work," is undoubtedly too general and indefinite, but it cannot be said that it would not include the oven. In the connection in which this phrase is used, it does not imply that the other iron-work referred to must necessarily be composed of iron. The patterns are not of iron, nor are the flasks, which are the wooden frames in which the moulds are made. If that be the sense, there would be nothing to justify the use of the word "other." The evidence as to the cost of the oven came in without objection. Had an objection been interposed, there probably would have been an amendment. It does not seem fair to allow the objection, when interposed now for the first time. Appellant, however, contends that in no case can plaintiffs recover for expenditures made in preparing to do their work. It contends that it is a breach of a buyer's agreement to accept and pay for personal property; that the detriment upon the breach of such contract is prescribed by section 3311, Civil Code, and is the excess of the amount due from the buyer over the value to the seller, with the expense of carrying to market. But this is unnecessary liberality on the part of the defendant. This rule would give plaintiffs $40,000, less the value of the material as scrap-iron at Los Angeles. If this rule be supplemented by section 3358, Id., we have just the rule adopted by the court. But the case is not that of a seller of personal property, either on hand or to be manufactured. Upon receiving notice that defendant would not proceed with the contract, plaintiffs stopped the manufacture of the articles contracted for. They have not the material on hand therefor, and their detriment is not estimated under section 3311, Id. Plaintiffs do not gain more than they would had the contract been fully performed. In such case they would have received the cost of production and profits. They have received such costs as they have actually incurred and the profits they would have made.

The item of $1,500 paid Isaacs is objected to because it was paid after suit brought, and because defendant had no contract with Isaacs, and was not consulted as to the settlement. The testimony showed that Isaacs had commenced the manufacture of the wrought-iron girders called for in the contract, and, when defendant declined to go on with the work, was notified by plaintiffs to stop work. He did so, but demanded compensation for work done. This was arranged at $1,500, but was paid after suit brought. The evidence shows that the compromise was a reasonable one, and that, had Isaacs insisted upon going on with the work, defendant would have been chargeable with some $10,000 worth of material, which, as it turned out, it did not want. The settlement was advantageous to defendant. The greatest difficulty in mastering the facts of this case here comes from the assumption of the parties and the court below that by the contract a value was placed upon specific portions of the materials contracted for. The contract is for a lump sum, and if there was any mode by which it could be ascertained what the contract price of the base-plates was, or of the wrought-iron or steel, or the cast-iron, or what profits plaintiffs would have made upon any specific portion of the work, the basis is studiously kept out of the record. The complaint does not state the value of the base-plates furnished, or the cost of production, but states that $981.50 is the contract price. Apparently there was no contract price for them. In the evidence it appears that this price included a profit of $270. Their cost, therefore, was $981.50, less $270. The same assumption that the profits were capable of being apportioned is carried into the computations showing the cost of performance and the profits. The allegation is only as to the cost of performing that part of the contract which they were precluded from performing, and the profits which they would have made upon full performance of that part of the contract which they were prevented from performing. Apparently there was not, and could not have been, any possible mode of ascertaining the profits so as to determine what profits they would have made upon such performance. But the evidence does show what would probably have been their profits upon full performance of the whole contract, and the amount recovered seems less than they would have been entitled to. The contract and its breach are sufficiently alleged. The trouble, if any, arises from adopting a wrong construction of the contract in setting out in detail the source of their damages, but, as no objection is urged here upon this ground, the parties may have had some means, with which we are not furnished, of understanding the process. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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90 Cal. 504

CLARK v. GUNN. (No. 14,299.)

(*Supreme Court of California.* Aug. 10, 1891.)

SUMMONS—NOTICE OF RELIEF.

Code Civil Proc. Cal. § 407, provides that the summons must be directed to defendant, and must contain a notice that, unless defendant appears and answers, plaintiff will apply to the court for the relief demanded in the complaint. *Held* that, where a copy of the complaint was served with the summons, a notice, "You are notified that if you fail to appear and answer plaintiff will take judgment against you for the relief demanded in his complaint," is sufficient, though it does not state that plaintiff will apply to the court for the relief demanded.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

Action by R. G. Clark against Eliza M. Palmer, Douglas Gunn, and C. E. Johnson, to foreclose a mortgage. Judgment for plaintiff. Defendant Gunn appeals. Affirmed.

Works, Gibson & Titus, for appellant. *Collier & Haines*, for respondent.

VANCLIEF, C. This action was brought in the county of San Diego by Clark against Eliza M. Palmer, Douglas Gunn, and C. E. Johnson, to foreclose a mortgage executed by Eliza M. Palmer to secure the payment of her promissory note to the plaintiff for the sum of $5,000 and interest. The ground upon which Gunn and Johnson were made parties defendant is expressed in the complaint, as follows: "That Douglas Gunn and Charles Edward Johnson have, or claim to have, some interest in or claim upon said premises, as mortgagees or otherwise, which claims or interest were acquired by them subsequent to the mortgage of plaintiff." No relief is asked affecting Gunn and Johnson, except that plaintiff's mortgage be first satisfied from the proceeds of a sale of the mortgaged property. The summons, with a copy of the complaint, was served on Gunn in said county. The summons contained the following notice: "And you are hereby notified that, if you fail to appear and answer the said complaint as above required, said plaintiff will take judgment against you for the relief demanded in his complaint." The summons also contained a specific statement of the nature of the action, and of Gunn's interest in it as subsequent mortgagee. The defendant Gunn failing to appear within the time required by law, his default was regularly entered, and thereupon a decree of foreclosure, in the usual form, was rendered by the court on the 31st day of December, 1889. On the 23d day of December, 1890, the defendant Gunn filed his notice of this appeal from the judgment of foreclosure. The only point made by the appellant is that the notice in the summons does not comply with subdivision 5 of section 407 of the Code of Civil Procedure, which, in a case of this kind, requires a notice that "the plaintiff will apply to the court for the relief demanded in the complaint." The Code of Civil Procedure (section 4) enacts that "its provisions, and all proceedings under it, are to be liberally construed, with a view to effect its objects and to promote justice;" and the courts have emphatically sanctioned the application of this rule of construction to section 405 of the Code of Civil Procedure, and to a similar section in the Code of New York. Bewick v. Muir, 83 Cal. 368, 23 Pac. Rep. 389; King v. Blood, 41 Cal. 315; McCoun v. Railroad Co., 50 N. Y. 176. So construed, I think the notice that plaintiff would "take judgment * * * for the relief demanded in his complaint" was, in substance, a notice that he would "apply to the court" for that relief. That being the only lawful mode by which he could take it, (Code Civil Proc. § 585,) the notice, as expressed, implies that he intended to take it in that mode, and not in any unlawful manner. As the record shows that the plaintiff did apply to the court for his relief, that the court did grant such relief as was given, and that the relief given did not differ from or exceed that demanded in the complaint, it seems inconceivable that the defendant could have been misled or injured by the variance of the summons from the form of words prescribed by the Code. I think the judgment should be affirmed.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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90 Cal. 289

HICKS v. THOMAS. (No. 13,761.)

(*Supreme Court of California.* Aug. 15, 1891.)

On rehearing. For former report, see 27 Pac. Rep. 208.

PER CURIAM. The petition for rehearing in this cause is denied, but the judgment heretofore rendered is modified so as to read as follows: The order denying a new trial is affirmed, and the cause is remanded, with directions to the superior court to modify its judgment, so as to require the plaintiff to repay to the defendant the amount of money received by her, with legal interest to the date of tender, and the judgment as so modified is affirmed, the appellant to pay costs of appeal.

90 Cal. 562

DOW v. ROSS. (No. 14,312.)

(*Supreme Court of California.* Aug. 26, 1891.)

COSTS—SERVING MEMORANDUM—EXCUSABLE NEGLECT.

1. Under Code Civil Proc. Cal. § 1033, which provides that "the party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict or notice of the decision of the court, * * * a memorandum of the items of his costs and necessary disbursements in the action or proceeding," etc., where a judgment was rendered for defendant on October 5th, his attorney having actual notice at the time, though no written notice was served on him, and he failed to file his memorandum of costs until the 11th of the same month, such filing was too late, and he was not entitled to costs.

2. An affidavit by the attorney does not show "excusable neglect," under Code Civil Proc. Cal. § 473, when it sets out that he had notice of the judgment on October 5th, but was too busy to make the memorandum; that the 6th was Sunday; that the 7th he was unable to obtain the items; that on the 8th he partly prepared it, and then forgot about it until the 11th, when it came to his attention, and he immediately prepared, served, and filed the same.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Action by H. G. Dow against A. L. Ross. Order striking out defendant's costs, from which he appeals. Affirmed.

Sprigg & Barber, for appellant. *A. E. Cochran*, for respondent.

BELCHER, C. The judgment in this case was that the plaintiff take nothing, and that defendant recover his costs, "adjusted at the sum of $50.50." The findings on which the judgment was based were filed October 5, 1889. Six days later, on October 11th, one of the attorneys for defendant prepared, verified, served, and filed a memorandum of defendant's costs, and the amount thereof was afterwards inserted by the clerk in a blank left in the judgment for the purpose. In due time thereafter the plaintiff moved the court to strike out the costs from the judgment, on the ground that the memorandum was not served and filed in time, and hence the insertion thereof in the judgment was inadvertently and illegally made. The court granted the motion, and from that order this appeal is prosecuted. The Code provides: "The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk and serve upon the adverse party, within five days after the verdict or notice of the decision of the court, * * * a memorandum of the items of his costs and necessary disbursements in the action or proceeding," etc. Section 1033, Code Civil Proc. It is claimed for appellant that his memorandum was filed in time, because—*First*, he had received no written notice of the decision of the court, and hence the five-days limitation had not commenced to run; and, *second*, his delay was excusable, under the circumstances shown.

It is a settled rule in this state that, if a party entitled to costs neglects to serve and file his memorandum thereof till more than five days have elapsed after he has knowledge of the decision of the court, though no notice of it has been served upon him, the filing will be too late, and the costs will be stricken out on motion. O'Neil v. Donahue, 57 Cal. 226; Mullally v. Society, 69 Cal. 559, 11 Pac. Rep. 215. Here it appears from the affidavit of the attorney who served and filed the memorandum that he had actual knowledge of the decision on the day the findings were filed. The case in this respect is therefore brought clearly within the rule above stated. As an excuse for the delay, the attorney states in his affidavit that during the remainder of October 5th he was extremely busy in preparing, serving, and filing papers in another case, and attending to other pressing engagements; that on October 6th he attended to no business, as it was Sunday; that on October 7th he attempted to prepare the bill of costs, and intended to immediately serve and file the same, but was unable to obtain all the items; that on October 8th he prepared a bill of costs, so far as he was able, and laid the same on his desk, in order that it might not escape his attention; that, "in press of business, and some confusion consequent thereon, said bill of costs became covered over with papers in other cases, and neither that nor the subject of said costs again came to affiant's mind until about three or four o'clock in the afternoon of October 11th, when the matter of said costs was brought to his attention by something said as to costs by an attorney in argument, that being motion day, during which affiant was engaged in court; affiant at once examined the Code, got excused from court, consulted defendant, prepared a new bill of costs on another blank, so far as he could, and immediately served and filed the same, with the admission of service by plaintiff's attorney; * * * that owing to said stress of work, and the constant calls made upon his time during said week, affiant could not give said matter of costs the attention required under the circumstances to insure against errors and lapse of memory. Wherefore affiant prays for an order relieving defendant from said mistake, inadvertence, and neglect, and that said judgment may stand as entered." Conceding, without deciding, that, under the provisions of section 473 of the Code of Civil Procedure, relief in a matter of this kind might be granted by the court upon a proper showing, still we are satisfied that the showing here made was altogether insufficient to authorize the relief asked for. It results, in our opinion, that the order appealed from was proper, and should be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(3 Cal. Unrep. 424)

LORD v. THOMAS. (No. 14,336.)

(*Supreme Court of California.* Aug. 1, 1891.)

SUPERIOR COURT — JURISDICTION — SEPARATE CAUSES OF ACTION.

In an action by a landlord against his tenant for $183 rent due under a lease, and, as a second cause of action, for the restitution of the same premises, which were alleged to have been unlawfully detained after the expiration of a subsequent lease thereof, with damages for such unlawful detention, judgment was rendered for the rent demanded, ($183,) but restitution of the premises was denied. *Held*, that the superior court had jurisdiction to render the judgment in question, though it was for less than the jurisdictional amount ($300) of such court, since the relief demanded in prayer of judgment was within the jurisdiction of the court. Following Bailey v. Sloan, 65 Cal. 387, 4 Pac. Rep. 349.

Department 2. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

Action by William J. Lord against Stephen Thomas for unlawful detainer and for rent. Judgment was rendered for plaintiff for $183, but restitution of the premises was denied. Defendant appeals. Affirmed.

The complaint alleged for a first cause of action that "on or about the 11th day of May, 1887, plaintiff's predecessor of the lands and premises hereinafter described had leased, demised, and let the same unto said defendant at the monthly rental of $9 per month, for each and every month, to be paid monthly; under which lease said defendant was holding said premises when this plaintiff became the owner of and seised in fee of the same on the 28th day of April, 1888, when said lease, by the mutual consent of plaintiff and defendant, was continued from month to month at the said rental up to the 20th day of January, A. D. 1890. That there is now due plaintiff from defendant, on account of said lease, the sum of one hundred and eighty-three dollars. That defendant has not paid the same. That the land and premises herein referred to are situate in the county of Stanislaus, state of California, and described as follows, to-wit: Commencing at the N. W. corner of the N. E. quarter of sec. No. 33, T. No. 3 S., R. No. 10 E., Mt. D. M; thence east 417½ feet; thence at right angles south 208½ feet; thence at right angles west 417½ feet; thence at right angles north 208½ feet, to place of beginning,—containing two acres of land." For another and separate cause of action against defendant, and in favor of plaintiff, the complaint alleged that "on or about the 20th day of January, A. D. 1890, the said plaintiff, by written lease made on or about the said day at the said county of Stanislaus, leased, demised, and let to the said Stephen Thomas, of the said county of Stanislaus, the premises situate, lying, and being in the said county of Stanislaus, state of California, and described as follows, to-wit: Commencing at the N. W. corner of the N. E. quarter of section No. 33, township No. 3 south, range No. 10 east, Mt. D. M; thence east 417½ feet; thence at right angles south 208½ feet; thence at right angles west 417½ feet; thence at right angles north 208½ feet, to place of beginning,—containing two acres of land. To have and to hold the said premises to the defendant for the term of three months from the 20th day of January, A. D. 1890, at the monthly rent of ten dollars, payable in equal monthly installments in advance. That by virtue of said lease said defendant Stephen Thomas went into possession of said premises, and still continues to hold and occupy the same. That the term for which said premises were demised as aforesaid terminated on the 20th day of April, 1890, and that the said defendant holds over and continues in possession of said demised premises without the permission of the said plaintiff, and contrary to the terms of said lease. That the said plaintiff since the expiration of the term for which said premises were demised, to-wit, on the 22d day of April, 1890, made demand in writing of the said defendant to deliver up and surrender to him or his agent, Joseph Lord, the possession of said premises. That more than thirty days have elapsed since the making of said demand, and the defendant has refused and neglected for the period of thirty days after said demand to quit the possession of said demanded premises, and still does refuse. That the monthly value of the rents and profits of the said premises is the sum of ten dollars." The prayer of the complaint was as follows: "Wherefore the said plaintiff prays judgment for the sum of $183 for the restitution of said premises, and for damages for the rents and profits of said premises, and that such damages may be trebled as damages for the occupation and unlawful detention and holding over of the same, amounting to the sum of ten dollars per month, besides costs of suit." Judgment by default for the relief asked was set aside on defendant's motion, with leave to defendant to file an answer, and, after trial by the court, judgment was rendered as above stated.

P. J. Hazen, for appellant. *T. A. Caldwell* and *Stonesifer & Minor*, for respondent.

PER CURIAM. This case cannot be distinguished in principle from that of Bailey v. Sloan, 65 Cal. 387, 4 Pac. Rep. 349, and on the authority of that case the judgment must be affirmed.

(90 Cal. 559)

CARUTHERS v. HENSLEY *et al.* (No. 14,176.)

(*Supreme Court of California.* Aug. 25, 1891.)

APPEAL ON JUDGMENT ROLL—PRESUMPTIONS—REPLEVIN.

Code Civil Proc. Cal. § 627, authorizes the jury in an action for the recovery of specific personal property, in case the verdict is for plaintiff, to find the value, "if the property has not been delivered to plaintiff;" and section 667 authorizes a judgment for possession, "or the value thereof in case a delivery cannot be had." *Held* that, when the jury find that plaintiff is entitled to possession, they are not required to find the value of the property if it has been delivered to him; and on appeal from a judgment "that the plaintiff have and recover from the defendant the said property, and the sum of $280 damages for the detention thereof," where the appeal is on the judgment roll alone, it will be presumed that it appeared at the trial that plaintiff had already obtained possession.

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action for the recovery of personal property by Caruthers against Hensley and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Church & Cory and *H. H. Welsh*, for appellants. *P. Meux*, for respondent.

HARRISON, J. This action, for the recovery of certain personal property, was tried by a jury, which rendered a verdict in favor of the plaintiff for the possession of a portion of the property sued for, and assessed the damages for the detention thereof. Judgment "that the plaintiff have and recover from the defendants the said property, and the sum of $280 damages for the detention thereof," was thereupon entered by the court. From this judgment the defendants have appealed upon the judgment roll alone, and ask a reversal upon the sole ground that the judgment is not in the alternative, as required by section 667, Code Civil Proc. When an appeal to this court is to be determined upon the judgment roll alone, all intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken. If the error relied on to destroy such presumption consists in matters *dehors* the record, such matters must be brought to this court by bill of exceptions or other appropriate method. If any matters could have been presented to the court below which would have authorized the entry of this judgment, it will be presumed on this appeal, in support of the judgment, that such matters were so presented, and that the judgment was entered in accordance therewith. Section 627, Code Civil Proc., authorizes the jury in an action for the recovery of specific personal property, in case their verdict is in favor of the plaintiff, to find the value of the property, "if the property has not been delivered to the plaintiff;" and section 667, Code Civil Proc., authorizes a judgment for the plaintiff for the possession, "or the value thereof in case a delivery cannot be had." When the jury find that the plaintiff is entitled to the possession, they are not required to find the value of the property, if it has been delivered to the plaintiff, and, unless the value has been found, there is no basis upon which to render the alternative judgment for its value. For the purpose, therefore, of sustaining a judgment entered in favor of the plaintiff for the possession of personal property, without the alternative for its value "in case delivery cannot be had," it can be presumed, in the absence of any bill of exceptions or other showing of error, that it appeared at the trial that the plaintiff had already obtained the possession of the property sued for. In Brown v. Johnson, 45 Cal. 76, judgment was rendered in favor of the plaintiff for the value of the property, and damages for the wrongful taking, but without any judgment for its return. Upon an appeal by the defendant on the judgment roll alone, upon the ground that the judgment was not in the alternative, the court said: "If, at the trial of this action, it had distinctly appeared that the personal property in controversy had been hopelessly lost or had been destroyed, so that a judgment for its delivery would be necessarily unavailing, a failure to render judgment for its possession would, at most, be but a technical error or omission, and one for which we would not reverse the judgment; and in support of such judgment, where, as here, the record discloses nothing on the point, we will intend that the facts actually appearing below were such as to warrant its rendition." In Claudius v. Aguirre, (Cal.) 26 Pac. Rep. 1077, it was held that when it appeared, by the findings of the court, that the property had been delivered to the plaintiff prior to the trial of the cause, a judgment for the possession, without the alternative for its value, was not erroneous. Applying the principles of these cases to the present case, as the record shows nothing to the contrary, we will intend, for the purpose of supporting the judgment, that at the trial it was shown to the court below that after the commencement of the action the plaintiff had obtained the possession of the property awarded to her by the judgment. The judgment is affirmed.

We concur: McFARLAND, J.; DE HAVEN, J.

(90 Cal. 553)

***Ex parte* CLANCY.** (No. 20,873.)

(*Supreme Court of California.* Aug. 22, 1891.)

CONTEMPT — RIGHT OF APPEAL — APPEAL-BOND — INSOLVENCY.

1. Code Civil Proc. Cal. § 943, provides that, when an order appealed from directs the delivery of personal property, the order cannot be stayed by appeal, unless the thing required to be delivered be placed in the custody of the officer, or unless an undertaking be entered into on the part of appellant, with at least two sureties, and in such amount as the court may direct, to the effect that appellant will obey the order of the appellate court. *Held* that, where one appealed from an order adjudging him guilty of contempt for dis-

obeying an order to turn over to his receiver in insolvency proceedings property value at $4,000, a bond to the effect that he would pay all damages on appeal or dismissal thereof, not exceeding $300, will not stay the order of commitment.

2. Insolvent Act Cal. § 64, which provides that an appeal shall be allowed from any order adjudging a person guilty of contempt, being in conflict with Code Civil Proc. Cal. § 1222, which provides that all orders and judgments of the court or judge made in cases of contempt are final and conclusive, the Code must prevail, as a contrary construction would prevent the uniform operation of a general law, contrary to Const. Cal. art. 1, § 11.

In bank. Petition for a writ of *habeas corpus.* Writ denied, and petitioner remanded.

A. D. Splivalo and *E. N. Duprey*, for petitioner.

Sharpstein, J. The petitioner alleges that he is imprisoned by the sheriff of San Francisco, and that such imprisonment is illegal, for the following reasons: On the 2d day of July, 1891, petitioner, upon the petition of certain of his creditors, was adjudged by the superior court of the city and county of San Francisco an insolvent debtor, and ordered to file and did file his schedules in said matter of insolvency. On the 16th day of July, 1891, petitioner, in compliance with an order of said court, appeared therein, and was examined concerning his property and estate, and thereupon said court ordered petitioner to turn over or pay to the receiver in said insolvency proceeding $4,000 in assets, to-wit, goods, wares, and merchandise, or its avails. Petitioner did not comply with that order, and was by the court adjudged guilty of a contempt of court for not complying therewith, and committed to the custody of the sheriff, there to remain until he (petitioner) should comply with said order. Petitioner, on the 25th day of July, 1891, duly served and filed a notice of appeal to this court from said order adjudging him guilty of contempt, and within five days thereafter filed an undertaking on appeal with sufficient sureties, to the effect that appellant would pay all damages and costs that might be awarded against him on the appeal, or on the dismissal thereof, not exceeding $300. No other undertaking has been filed, and the sheriff refuses to release petitioner from imprisonment. The contention of counsel for petitioner is that the appeal from the order adjudging him guilty of a contempt stayed all further proceedings upon said order pending such appeal. Section 64 of the insolvent act of 1880 provides that "all sections of the Code of Civil Procedure of the state of California, relating to contempts, are hereby made applicable to all proceedings under this act. An appeal shall be allowed to the supreme court from any order adjudging any person guilty of a contempt of court." The Code of Civil Procedure makes no provision for an appeal from an order or judgment adjudging any person guilty of a contempt, but does provide that "the judgment and orders of a court or judge, made in cases of contempt, are final and conclusive." Code Civil Proc. § 1222.

Conceding, however, that an appeal does lie from an order or judgment in a case of contempt arising under the insolvent act, we must determine whether the undertaking, on appeal in this case, was sufficient to stay the execution of the judgment or order appealed from. If it be a case not provided for in sections 942–945, Code Civil Proc., the undertaking filed is sufficient to stay execution of the judgment or order appealed from. But we think it is a case provided for by section 943. As we construe it, the judgment or order appealed from does direct the delivery of personal property, by the petitioner to the receiver, and that the execution of such "judgment or order cannot be stayed unless the things required to be delivered be placed in the custody of the officer or receiver appointed by the court, or an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court or judge thereof may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal." We think the undertaking filed in this case was insufficient to stay the execution of the judgment or order appealed from, and therefore the petitioner must be remanded to the custody of the sheriff of the city and county of San Francisco. Petitioner remanded.

McFarland, J. I concur.

Harrison, J. I concur in the judgment. The petitioner, by not questioning, concedes that the order of the superior court directing him to "turn over or pay to the receiver, at its cost, $4,000 in assets, goods, wares, or merchandise, or its avails," found by the court to have been in his possession or under his control at the date of his adjudication in insolvency, was an order which the court had jurisdiction to make, and that it was made after a hearing upon due notice to him thereof, and on an application therefor. His only attack upon this order is that the finding of the court was not in accordance with the evidence. This, however, was but error, and, no appeal having been taken from the order, it is conclusive upon the petitioner. Being a lawful order of the court, the disobedience thereof by the petitioner was a contempt of the authority of the court, (Code Civil Proc. § 1209, subd. 5;) and the court having, under proper proceedings therefor, determined that he was guilty of the contempt charged, was authorized, under section 1219, to direct him to be imprisoned until he complied with the order. This judgment and order of the court was by section 1222 "final and conclusive," and from it no appeal is permitted. Tyler v. Connolly, 65 Cal. 28;[1] Ex parte Vance, (Cal.) 26 Pac. Rep. 118. By the constitution the superior court is vested with original jurisdiction of proceedings in insolvency, but in all matters pertaining to procedure in the exercise of such jurisdiction the court is governed by statutory provisions. The court does not, however, in the exercise of this jurisdiction, become merely a special tribunal for carrying into effect the provisions of the statute, but the proceedings authorized by the statute are taken in it as the superior court, and when acting thereon it has the functions and powers of the superior court in all matters pertaining to its actions as a court. As such court, it has the power to determine and punish all contempts of its authority, even without the provisions found in the insolvent act giving it such authority. "Contempt" is not only made a special title in the Code of Civil Procedure, wherein specific instances thereof are enumerated, and the mode and limit of punishment therefor are defined, (sections 1209-1222;) but the right of protecting itself against contempts of its authority, and enforcing punishment therefor, is essentially inherent in every court of general jurisdiction; and any definition of acts constituting contempt, or limitation upon the mode or extent of punishment therefor, has its appropriate place in a statute relating to the jurisdiction and procedure of the court. The insolvent act is a special statute adopted for a particular object. Its title is "an act for the relief of insolvent debtors, for the protection of creditors, and for the punishment of fraudulent debtors." It does not purport to prescribe the jurisdiction or limit the power of the superior court, but is merely a system of procedure in that court for accomplishing the objects specified in the title of the act. The incorporation in section 64 of this act of certain provisions concerning the power of the superior court relating to contempts, cannot be construed as any limitation upon the power conferred by the Code of Civil Procedure, or as being a grant of such power to the court for the purpose of exercising its authority under that act. If there be any conflict between the two, the provisions of the Code of Civil Procedure, which professes to define the powers of courts, and the effect of their judgments for contempt, must prevail over the provisions of the insolvent act, and the provisions of that act must be limited to the purposes defined in its title. The contempt consists in the disobedience of a lawful order of the court. It is the dignity of the court, or the majesty of the state as represented by the court, against which the offense is committed. The character of the offense is the same whether it be committed by disobeying an order made in proceedings in insolvency, or one made in probate, or in any civil action. Any law for the punishment of this offense is necessarily of a general nature, and must have a uniform operation. It was not competent for the legislature to provide a different procedure for contempts of the superior court committed while in the exercise of its jurisdiction in proceedings for insolvency from that which is provided for those committed while it is exercising its jurisdiction in any other matter. The clause of section 64 of the insolvent act, which provides, "An appeal shall be allowed to the supreme court from any order adjudging any person guilty of contempt," is in conflict with the provisions of section 1222, Code Civil Proc., which declares: "The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." To give effect to this provision of the insolvent act is to permit an appeal from judgments of contempt in one class of cases, which, under the general law applicable to contempts, is denied to all other judgments for the same offense. Such construction would except cases arising in insolvency from the uniform operation of this general law, and thereby destroy its uniformity, and violate the provisions of section 11, art. 1, of the constitution. French v. Teschemaker, 24 Cal. 544; Railroad Co. v. Baldwin, 57 Cal. 160; Miller v. Kister, 68 Cal. 142, 8 Pac. Rep. 813; People v. Henshaw, 76 Cal. 445, 18 Pac. Rep. 413.

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[1] 2 Pac. Rep. 414.

De Haven, J. I concur in the views expressed in the foregoing opinion of Mr. Justice Harrison.

Beatty, C. J. I concur in the judgment on both grounds,—that stated by Justice Sharpstein and that stated by Justice Harrison,—both grounds being, in my opinion, correct, and either a sufficient reason for denying the writ.

91 Cal. 35

People v. Clendennin. (No. 20,727.)

(*Supreme Court of California.* Sept. 3, 1891.)

Criminal Law — Instructions already Given.

Where a defense of insanity was interposed on a trial for assault with intent to kill, and the court charged that defendant was not responsible unless he was conscious of his act at the time it was committed, it was not error to refuse to charge that, although defendant may have felt an impulse to do the act while conscious, if such consciousness did not exist up to and at the time the act was committed, the jury should acquit.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Indictment of W. S. Clendennin for an assault with intent to commit murder. Verdict of guilty. Defendant appeals. Affirmed.

Alexander Campbell and *Hunsaker & Britt*, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

Temple, C. The defendant was convicted of an assault with the intent to commit murder, and appeals from the judgment, without a statement or bill of exceptions. He objects to the refusal of the court to give certain instructions. As the evidence is not brought up, it would be enough to say that we cannot see that the instructions refused were applicable to any matter before the jury; but it is not necessary to rest the decision upon that ground, for it is evident that there was no error. The instructions asked read as follows: "While the law does not recognize as a defense an irresistible impulse to do an act of a criminal nature when the party doing the act is conscious of the nature and character of the act, and that it is wrongful and unlawful, yet though the person accused may have felt an impulse to do the act while such consciousness existed, it is for the jury to determine whether such consciousness existed up to and at the time of the commission of the act, and if it did not so continue, it is their duty to acquit. You are further instructed that insanity, as hereinbefore defined, is a complete defense to all criminal acts committed while under its influence, whether such insanity be permanent or temporary." Assuming for the purpose of this decision, although we really have no warrant in so doing, that there was evidence tending to show the existence of an irresistible impulse before the commission of the criminal act, it is evident that such circumstance was entirely immaterial unless the jury found that the defendant was conscious at the time of the commission of the act; and having been told, as common sense would have taught them without instruction, that defendant was not responsible unless he was at the time conscious, there was no intelligible purpose to be served by such an instruction. It was confusing rather than instructive. It might impress them with the idea that previous mental states could affect the question of responsibility, the very reverse of what defendant desired. They had been told that it must appear that at the time of the alleged assault the defendant was capable of knowing and did know the nature and character of the act and its wrongfulness, and the very last instruction given was: "You are to determine what the condition of the defendant's mind was at the precise time of the alleged assault. Its condtiion before or afterwards is only to be considered for the purpose of throwing light upon its state at the time of the commission of the act." If, under these instructions, the jury could misunderstand the point made in the proposed instruction, they were incapable of enlightenment. It would have appeared to them, as it was in fact, utterly immaterial whether there was or was not an irresistible impulse before that time, if they found that he then was not conscious of his act. The same reasoning answers the proposition as to the instruction concerning temporary insanity. We advise that the judgment be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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90 Cal. 622

WIXOM *et al.* v. GOODCELL *et al.* (No. 14,349.)

(*Supreme Court of California.* Sept. 2, 1891.)

REVOKING PROBATE OF WILL — CROSS-EXAMINATION OF WITNESS.

Where the probate of a will is sought to be revoked on the ground of mental incapacity of the testatrix, and a witness testifies that he was the attending physician of the testatrix during the winter before the will was executed; that during the time he attended her she was in litigation with her sons over property she had conveyed to them; that witness acted as her agent during the litigation; and that he saw no evidence of failing mind or memory,—the witness may be asked, on cross-examination, whether he had not asked one Mrs. S. to testify, in the controversy between mother and son, that the testatrix was not of sound mind; if he had not said to Mrs. S. at that time that the testatrix was not in her right mind; and if he had not intended to testify in that case that the testatrix was not in her right mind.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Proceeding to revoke the probate of a will by Charles Wixom and others against Henry Goodcell, Jr., and others. Judgment for plaintiffs. Defendants appeal. Reversed.

Rolie & Freeman and *Harris & Gregg*, for appellants. *Paris & Fox* and *Goodsell & Leonard*, for respondents.

FITZGERALD, C. Appeal from an order of the superior court of San Bernardino county denying plaintiffs' motion for a new trial. This proceeding was instituted under section 1327 of the Code of Civil Procedure, to revoke the probate of the will of Betsey E. Cole, deceased, on the ground of incompetency by reason of mental incapacity at the time of its alleged execution. The plaintiffs are the children of the deceased children of testatrix, and as such claim an interest in her estate. The defendants, with the exception of the executors, are the children of testatrix, and legatees and devisees under the will. The only issue submitted by the court to the jury was as to the mental capacity of the testatrix, and the finding of the jury thereon was as follows: "Was the deceased, Mrs. Betsey E. Cole, on the 7th day of May, 1887, the time of the execution of the alleged will, of sound and disposing mind? Answer. Yes." Plaintiffs then moved the court to set aside the verdict, and grant a new trial, on the following grounds: "(1) Insufficiency of the evidence to justify the verdict, and that it is against law. (2) Errors in law occurring at the trial, and excepted to by plaintiffs,"—which motion was denied by the court. This appeal is taken by plaintiffs from the order denying their motion for a new trial. The facts necessary for a proper understanding of the points upon which the order herein must be reversed are as follows: In 1886 the testatrix conveyed to her sons, Wallace and Jasper Wixom, all of her property, with the understanding, says Willard in his deposition read at the trial, "that she would make a will and we would execute it." He further testified "that, when she heard that Jasper was not going to do as agreed, she brought suit to recover it. It was finally arranged during the winter of 1886-87. We deeded her part of the property back, and kept part for our share. I got $21,000 for the part I had, a short time afterwards." The ground upon which the action was brought for the recovery of this property from her sons is not shown by the record, but it does appear that while that case was pending she employed, as her agent to look after her interests in connection with that litigation, one Dr. A. Thompson, who was then, and for a long time at and before the making of the will had been, her attending physician. The case was settled by compromise in the winter of 1886–87, and, on the 7th day of May following, she, being then 76 years of age, executed the will in question, by the express terms of which her entire estate was devised to those of her children who are defendants in this action. She intentionally omitted to provide therein for plaintiffs for the reason stated in the will "that each and all of them [meaning her deceased children, of whom plaintiffs are the issue] have received in my life-time all the provision intended for them." On this point one of the attorneys for the defendants testified as follows: "That she [testatrix] came to the office on the 7th day of May, 1887, to have her will drawn; that he told her she must make a just will as between her children; that she told him that was what she wanted to do; that she had given some of them their portions, and she wanted to leave what property she had to those that had had nothing." The will was signed "with her mark." The proof is clear, as we think, that her estate was not disposed of by the will upon the fair and equitable basis indicated by the expressions used by her in this conversation. But, as the order herein must be reversed on other grounds, we do not feel called upon to consider this subject further than is necessary to elucidate the points upon which we have based our decision.

At the trial, the Dr. A. Thompson referred to was sworn as a witness in behalf of defendants, and testified as follows: "That he was a physician of many years' experience; that he was acquainted with Mrs. Betsey E. Cole, formerly Mrs. Wixom; that during the winter of 1886–87, and the spring of 1887, he was her attending physician; that during that time she was in litigation with her sons, Jasper and Willard, over her property, which she had conveyed to them, and witness acted as her agent, having been employed by her, in that litigation; that he saw her a great many times during that winter and spring, and he saw no evidence of failing mind or memory, and, in his opinion, both were good; she was entirely competent to attend to business and make a will; that he frequently conversed with her on business matters, and his opinion was based upon such conversations, and as a physician." Cross-examination: "Question. When Mrs. Cole had her trouble with her two sons, you acted in part for her, did you not? Answer. I did. Q. You were employed for that purpose? A. I will say so; yes, sir. Q. Did you not go to Mrs. Schyffe during that trouble, and ask her to testify that Mrs. Cole was not in her right mind? Mr. Paris: Objected to as irrelevant, immaterial, and not responsive to the direct examination. The Court: Objection sustained. (Plaintiffs except.) Q. During the spring of 1887, did you not, in the employ of Mrs. Cole, go to Mrs. Schyffe, and say to her that Mrs. Cole was not in her right mind? Mr. Paris: Same objection as before. The Court: Sustained. Q. Did you not at that time, and during the time that you have testified that Mrs. Cole was in her right mind in this case, did you not intend to go upon the stand in the case between herself and her two sons, and testify that she was not in her right mind? Mr. Paris: The same objection as before. The Court: Same ruling." Plaintiffs excepted to each of these rulings, and they are assigned as error.

From this it will be seen that the professional and business relations which this witness sustained towards the testatrix at and for a long time before the pretended execution of the will, and during the existence of the "trouble" with her sons, was of such a close and intimate character as to afford him greater facilities for forming a correct opinion as to her mental condition than was possessed by any other witness in the case. As a witness, he assumed to speak from personal acquaintance, business intercourse, and professional or scientific knowledge, and his opinion as to her mental capacity at the time of the alleged execution of the will was founded thereon. The questions propounded to this witness on his cross-examination were clearly competent. They were strictly responsive to matters testified to in the direct examination, and should have been allowed for the purpose of testing the value of his testimony upon the subject in relation to which he testified in his examination in chief. And it is fair to presume that if he had been permitted to answer these questions, and had answered them in the affirmative, without giving a satisfactory explanation, his credibility as a witness might have been very seriously impaired. The jury was entitled to all the knowledge possessed by the witness on this subject; and if shortly before the making of the will, that is, during the time of her trouble with her sons, he was then of the opinion that she was not of sound and disposing mind, they had a right to know what it was that caused so radical a change in his opinion in so short a period of time as to her mental condition. We are clearly of the opinion that the rulings of the court in sustaining the objection to these questions was a prejudicial error, for which the order should be reversed, and a new trial granted, and we so advise.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is reversed, and a new trial ordered.

(3 Cal. Unrep. 427)

PHELPS v. BROWN *et al.* (No. 13,277.)[1]

(*Supreme Court of California.* Aug. 7, 1891.)

RESCISSION OF CONTRACT — REFUNDING PURCHASE DEPOSIT—MONEY HAD AND RECEIVED.

Plaintiff agreed with one N. and wife to exchange lands, and advanced $500 of the purchase price. N. gave a receipt for the money, and indorsed thereon: "Trade to be finished within two weeks from this date, or this deposit to be forfeited without recourse. Title to prove good, or no sale, and this deposit to be returned." An attachment against plaintiff's husband had been levied on her property, which she refused to procure discharged. N. abandoned the trade, and returned the money to defendants, who had negotiated the exchange of lands for N. *Held*, that the deposit remained in the hands of defendants as money had and received to plaintiff's use.

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[1] Affirmed in banc. See 30 Pac. 774, 95 Cal. 572.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; JOHN REYNOLDS, Judge.

S. G. Phelps sued J. E. Brown and others to recover money had and received for plaintiff's use. Judgment for defendants, and plaintiff appeals. Reversed.

T. H. Laine and *Laine & Hatch*, for appellant. *Crandall & Biddle*, for respondents.

BELCHER, C. It appears from the findings in this case that in June, 1887, one Norton and wife owned a tract of land in Santa Clara county, which was incumbered by a mortgage for $9,000, and the plaintiff, a married woman, owned a house and lot in the city of San José. The Nortons wished to exchange their land for the lot of plaintiff, and to negotiate the exchange they employed the defendants, who were real-estate agents doing business in San José as partners under the firm name of Brown & Ensign, and orally agreed to pay them $500 as a commission if the exchange should be made. The proposition of the Nortons was that they would convey their land to the plaintiff for $20,000, and in payment thereof she should assume and pay the mortgage on the land, and should convey her lot to them for $6,500, and pay to them the balance of $4,500 in cash when the deeds should be executed. This proposition was put in writing, and given to the defendants, and they delivered it to the plaintiff. She was willing to accept the proposition and make the trade if she could realize $6,750 for her lot, and not otherwise. The defendants then agreed to pay her $250 out of their commissions when the trade should be consummated. This arrangement was satisfactory, and she thereupon drew her check on a local bank for $500 payable to the Nortons, and handed the same to the defendants as a deposit or first payment. The defendants on the same day gave the check to the Nortons, who executed a receipt therefor, closing with the words: "Trade to be finished within two weeks from date, or this deposit to be forfeited, without recourse. Title to prove good, or no sale, and this deposit to be returned." A few days later the defendants handed back to the plaintiff her check, and she thereupon gave to them in place of the check $500 in money, which they at once paid over to the Nortons. Subsequently it appeared from the abstract of title furnished by the plaintiff that an attachment, issued in an action against her husband, had been levied on her property; and on learning this the Nortons refused to accept her deed, or to carry out the proposed exchange, unless she would have the attachment removed. She offered to give him a warranty deed, but refused to procure the discharge of the attachment. The Nortons were ready and willing to complete the trade, and tendered a deed of their property to the plaintiff, but she never offered to convey to them an unincumbered title to her property, and never tendered or offered to pay the balance of the purchase money. Thereupon the Nortons abandoned the trade; and without the knowledge of plaintiff, and without any directions as to the disposition to be made of the money, returned the $500 to the defendants, and the latter returned to them their receipt, with an indorsement thereon in these words: "Money returned and their receipt is canceled. BROWN & ENSIGN. July 25, 1887. We agree to release the signers of this receipt from any expense, legal or otherwise. BROWN & ENSIGN." There are further findings as follows: "That when the trade was finally abandoned by the Nortons they were no longer entitled to retain the $500 as part of the purchase money. That the defendants, on receiving the $500 from the Nortons, took their place as to the money, and assumed all liabilities as to the plaintiff that the Nortons had incurred. That the oral agreement on the part of the plaintiff to forfeit the $500 paid, on failure to comply with the terms of the oral agreement to purchase of the Nortons, was valid, and she was not entitled to recover it back when she refused to complete the purchase." Judgment was entered that the plaintiff take nothing by her action, and that the defendants recover their costs. From that judgment the plaintiff appeals.

The action was brought to recover the $500 paid to the defendants, as above stated, as money had and received by them to the plaintiff's use. The respondents contend that the judgment was right and should be affirmed, because, as the plaintiff paid the money as a forfeit, and then failed to complete the trade by offering to convey an unincumbered title to her property, and to pay the balance of the purchase money, she could not have recovered the money back from the Nortons, and hence had no cause of action against them. This contention cannot, in our opinion, be sustained. The plaintiff could have maintained an action against the Nortons to recover the money; and their only defense, if any they had, would have been a counter-claim for damages. Cleary v. Folger, 84 Cal. 316, 24 Pac. Rep. 280; Drew v. Pedlar, 87 Cal. 443, 25 Pac. Rep. 749. And the liability of the defendants is shown by the finding that, when they received back the $500, they took the place of the Nortons as to the money, and assumed all their liabilities to the plaintiff. This finding is not questioned, and its correctness seems to be admitted. It follows, therefore, we think, that the plaintiff was entitled to maintain this action against the defendants, and that the judgment was improperly entered against her. We advise that the judgment be reversed, and the cause remanded.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded.

Rehearing granted.

(90 Cal. 565)

Gow v. Marshall *et al.* (No. 13,896.)[1]

(*Supreme Court of California.* Aug. 27, 1891.)

Attachment of Debts and Credits.

Code Civil Proc. Cal. §§ 542–545, concerning attachments, provides that debts owing to the defendant, or any credits or other personal property belonging to the defendant, under control of a third person, may be attached. Section 546 provides that the sheriff must make a full inventory of the property attached, and he must request, at the time of serving the writ, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each. *Held*, that an attachment of "certain credits belonging to the defendant" does not give the attaching creditor a lien on or right to a debt owing to the defendant by the party served with the writ.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by N. W. Gow against H. B. Marshall and the Centinela-Inglewood Land Company to recover credits attached. Judgment for defendants. Plaintiff appeals.

Enoch Pepper and *Wells, Guthrie & Lee*, for appellant. *Albert M. Stephens*, for respondents.

Belcher, C. This is an action by an attaching creditor against a garnishee, based on section 720 of the Code of Civil Procedure. It is alleged in the complaint that, on the 13th day of March, 1888, the plaintiff, N. W. Gow, commenced an action against H. B. Marshall to recover the sum of $1,686.78 for work and labor performed and money paid; that a summons was duly issued and served on the defendant; that a writ of attachment was also duly issued and delivered to the sheriff of the county, and the plaintiff then gave to the sheriff information in writing that the Centinela-Inglewood Land Company, a corporation, "had in its possession, or under its control, certain credits belonging to the defendant;" that the sheriff served the writ upon the said corporation by delivering to its president a copy thereof, "together with a notice that said credits were attached under and in pursuance of said writ," and that no reply to the notice was made; that thereafter such proceedings were had in the action that on the 29th of March, 1888, judgment "was duly rendered and entered" therein, in favor of the plaintiff and against the defendant, for the sum prayed for and costs, making in all the sum of $1,705.53; that thereafter the corporation, by an order of the court, was required to and did, by its president, attend before the court to be examined, and the president was then and there examined respecting the property in its possession and credits and other personal property belonging to the defendant; that upon such examination the president denied that anything was due from the company to the defendant, and thereupon the court made an order permitting the plaintiff to institute a suit against the corporation garnishee for the recovery of such interest or debt due the defendant Marshall, and in the mean time forbade a transfer or other disposition of such interest or debt until such action could be commenced and prosecuted. It is then further alleged that the Centinela-Inglewood Land Company was and still is a corporation, duly organized and doing business under the laws of this state, and that, at the time the writ of attachment was served upon it, it was and still is indebted to the defendant Marshall in the sum of $1,976.70; and that by virtue of the proceedings in attachment the plaintiff had become subrogated to the rights of Marshall against the corporation to the extent of his said judgment. Whereupon judgment was asked against the Centinela-Inglewood Land Company for the sum of $1,705.53, and costs of suit.

The defendant corporation demurred to the complaint, and its demurrer was overruled. It then answered, denying that it was indebted to Marshall in the sum alleged in the complaint, or in any sum whatever; and denying that, by virtue of the proceedings in attachment set out, the plaintiff became subrogated to the rights of Marshall, or to any rights of any kind or nature, or to any sum of money whatever. The case was tried, and the court found that the defendant corporation was indebted to Marshall in the sum of $553, and no more, at the time the writ of attachment was served upon it, and was still so indebted. It further found as follows: "That the plaintiff has not, by virtue of the proceedings in attachment set out in the complaint on file herein, or in any other manner, become subrogated to the rights of the defendant Marshall to the extent of the said claim of plaintiff against the said Marshall, to-wit, in the sum of one thousand seven hundred and five and fifty-three one-hundredths dollars, or to any sum or amount whatever, or has become subrogated to the rights of said Marshall to any extent, by virtue of said proceedings or otherwise;" and, as a conclusion of law, that the defendant Centinela-Inglewood Land Company was entitled to judgment for its costs. Judgment was accordingly so entered, and from that judgment the plaintiff appeals on the judgment roll.

It is well settled that proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed or no rights will be acquired thereunder. Roberts v. Landecker, 9 Cal. 262; Hisler v. Carr, 34 Cal. 641; Wade, Attachm. § 333. The Code of Civil Procedure provides: "Debts and credits, and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, * * * a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits or other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ." Section 542, subd. 5. "Upon receiving information in writing from the plaintiff or his attorney that any person has in his possession or under his control any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ, and a notice that such credits or other property, or debts, as the case may be, are attached in pursuance of such writ." Section 543. "All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of the service upon them of a copy of the writ and notice, * * * shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts," etc. Section 544. "Any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant, may be required to attend before the court." Section 545. "The sheriff must make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached, he must request, at the time of service, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each," etc. Section 546. It is evident that by these provisions debts and credits are treated as separate and distinct things. A debt is money owing by the garnishee to the defendant which may be paid over to the sheriff, while credits are something belonging to the defendant, but in the possession and under the control of the garnishee, like promissory notes or other evidences of indebtedness of third parties, which may be delivered up or transferred to the sheriff. Robinson v. Tevis, 38 Cal. 614. It appears from the complaint that the only attachment in this case was of "certain credits belonging to the defendant," which the Centinela-Inglewood Land Company had in its possession or under its control. This was not an attachment of the debt due from the company to the defendant, and the plaintiff, therefore, acquired no lien upon or right to such debt by the service of his writ. This being so, it is clear that the action cannot be maintained. Other points are discussed by counsel, but they need not be considered. In our opinion, the proper judgment was entered in the court below, and we advise that it be affirmed.

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[1] Rehearing denied.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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91 Cal. 5

HEWITT v. DEAN *et al.* (No. 14,011.)

(*Supreme Court of California.* Sept. 2, 1891.)

MORTGAGES—NON-PAYMENT OF INTEREST—WHOLE DEBT DUE—WAIVER OF ELECTION—PAYMENT OF MORTGAGE TAX—NOTICE OF FORECLOSURE.

1. A provision of a mortgage note that, upon default in the payment of interest, the whole sum of principal and interest shall immediately become due and payable, at the holder's election, is an absolute agreement of the makers, depending solely upon such election, and does not require the giving of notice before suit to foreclose. Dean v. Applegarth, 65 Cal. 391, 4 Pac. Rep. 375, distinguished.

2. In foreclosing a mortgage given to secure such a note, it appeared that, a short time before the interest fell due, the mortgagors requested a few days' extension; that about 20 days after the interest fell due they asked the mortgagee if he would accept all of the principal and interest, to which he replied that he wanted the money; and that the mortgagors were several times urged to carry out their proposition. *Held* not a waiver of the default, or of the mortgagee's right to make election within a reasonable time whether he would consider the principal and interest immediately due.

3. An instrument executed with a note and mortgage, and as part of the transaction, agreeing to credit the mortgagors with a certain per cent. of the interest, if they should produce each year "the proper official receipts showing the payment of all taxes against the property," is not a "contract" on their part, by which they are "obligated" to pay any tax upon the mortgage, but a contract solely of the mortgagee; and, as such, is not in contravention of Const. Cal. art. 13, § 5, providing that every contract by which a debtor is so obligated "shall as to any interest specified therein, and as to such tax or assessment, be null and void."

4. Whether the words "all taxes" in such an instrument include the mortgage tax is to be determined by the court, and not by the testimony of witnesses as to the intention of the parties.

5. A mortgage note providing "for an additional sum of 5 per cent. on principal as attorneys' fees," if suit be brought to enforce payment, limits in amount "the reasonable counsel fee" provided for in the mortgage.

In bank. Appeal from superior court, Los Angeles county; J. W. TOWNER, Judge.

Action by R. E. Hewitt against Cornelia R. Dean and G. L. Dean for the foreclosure of a mortgage upon real property. There was judgment for plaintiff, and defendants appeal. Modified and affirmed. For motion before one department to set aside sale, see 26 Pac. Rep. 1101.

Victor Montgomery, for appellants. *Ray Billingsley*, for respondent.

HARRISON, J. This is an action for the foreclosure of a mortgage upon real property, executed by the defendants to the plaintiff. The note to secure which the mortgage was given is as follows: "$2,500. Santa Ana, Cala., Oct. 29, 1887. Three years after date, for value received, we promise to pay R. E. Hewitt or order, at the Commercial Bank of Santa Ana, the sum of twenty-five hundred dollars, with interest at the rate of 12½ per cent. per annum from date until paid. Interest payable annually, and, if not so paid, to be compounded annually, and bear the same rate of interest as the principal; and, should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable, at the option of the holder of this note. Should suit be commenced to enforce the payment of this note, we agree to pay an additional sum of five per cent. on principal as attorney's fees in such suit. Principal and interest payable in gold coin of the United States. MRS. CORNELIA R. DEAN. G. L. DEAN." The mortgage contained the following clause: "And the mortgagors promise to pay said note according to the terms and conditions thereof, and, in case of default in payment of the same or of any installment of the interest thereon when due, the mortgagee may foreclose this mortgage, and may include in such foreclosure a reasonable counsel fee, to be fixed by the court." The complaint herein was filed January 18, 1889. It alleges "that no part of the principal sum, nor of the interest mentioned in said note, has been paid," and contains also the following averment: "That because of said interest not having been paid when due, and upon the provision with reference thereto contained in said note, the plaintiff elects to consider and declare the whole sum of principal and interest of said note now due and payable." The plaintiff gave no notice to the defendants prior to the commencement of the action of this election, nor did he make any demand upon them for payment. Judgment was rendered in favor of the plaintiff, and from this judgment, and from an order denying a new trial, the defendants have appealed.

1. It was not necessary that the plaintiff should give to the defendants any notice of his election to consider the whole principal sum due upon their failure to pay the interest when it matured, or to make any demand upon them for payment prior to commencing the action. Whitcher v. Webb, 44 Cal. 127; Leonard v. Tyler, 60 Cal. 299; Buchanan v. Insurance Co., 96 Ind. 510; Trust Co. v. Munson, 60 Ill. 371; Cundiff v. Brokaw, 7 Ill. App. 147; Johnson v. Van Velsor, 43 Mich. 208, 5 N. W. Rep. 265. The provision of the note that upon such default the whole sum of principal and interest should become immediately due and payable, at the option of the holder thereof, was an absolute agreement on the part of the defendants depending solely upon the option of the plaintiff, and did not require any notice from him that he elected or intended to exercise such option in order to make this agreement binding upon the defendants. The fact of their default was peculiarly within their own knowledge, and they also knew that by the provisions of the note they had agreed that upon such default the plaintiff might, within a reasonable time thereafter, consider the principal sum named in the note as due, and institute proceedings for the foreclosure of the mortgage. It was competent for them to include in their note or mortgage a provision requiring notice of such election as a condition precedent to instituting the suit, but instead thereof they have agreed that upon the mere fact of the default the plaintiff may, at his option, treat the whole amount as due, and foreclose the mortgage. To add to this agreement the requirement that the plaintiff should give notice of his election would be for the court to add to the agreement of the parties a condition which they have not themselves chosen to make. In Buchanan v. Insurance Co., supra, the court said: "Such a notice might have been contracted for and made a condition precedent, but it was not. Appellant was bound to know that by his default the obligee had the right to regard and treat the whole sum as due and collectible, and that nothing was required of him except the exercise of his own will. Upon making default, it was the duty of appellant to seek the creditor. It clearly was not the duty of the creditor to seek him, and notify him of the results of his own laches." The case of Dean v. Applegarth, 65 Cal. 391,[1] differed from the present in the fact that in that case it was provided that, in case of default, the rate of interest upon the note should be increased at the option of the holder, and the court held that this option must have been exercised and manifested in some way by the plaintiff before it could have effect; that the burden of the increased interest could not be imposed upon the defendant by any undisclosed intention of the plaintiff, or by a mere secret unmanifested intention in the mind of the mortgagee or holder of the note. In that case, however, the court held that the notice of the election could be sufficiently given to the maker of the note by merely bringing an action to foreclose the mortgage. The plaintiff was not required to exercise this option immediately upon the failure of the defendants to pay the interest. He could not know in advance that they would make default, and he would therefore be allowed a reasonable time within which thereafter to determine whether he would exercise his right of option. This provision was inserted for his benefit, and he was not compelled to exercise the option immediately upon the default under the penalty of losing all right to exercise it, but was to be allowed a reasonable time for enabling him to determine whether its exercise was necessary for his protection or advantage. "'Immediately due at the option of the holder,' means immediately upon or after his election, and not immediately upon default, providing he immediately elects." Manufacturing Co. v. Howard, 28 Fed. Rep. 741. At the trial certain evidence was presented to the effect that, a "few days" before the interest fell due, one of the defendants, in an interview with the plaintiff, requested of him an extension of a few days within which to pay the interest, and was told by the plaintiff that he could get along for a few days, and under the circumstances he would not push him. The defendants, however, did not pay the interest within the "few days," or take any steps in reference thereto, except that about the 20th of November one of them asked the plaintiff if he would accept all of the principal and interest, to which the plaintiff replied that he wanted the money, and expected it. The defendants, however, did not make any payments to the plaintiff, although several times urged by him to carry out their proposition, and, upon their failure to do so, he commenced this action. These acts and sayings of the plaintiff indicate no act of waiver on his part, or failure to make his election within a reasonable time after the default. Although the plaintiff might have dealt with the defendants in such a way that he would be estopped from asserting his right of option, or by some act of his waive such right, yet mere forbearance or inaction

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[1] 4 Pac. Rep. 375.

would not cause such waiver. His leniency towards the defendants by forbearing to make an election within a reasonable time could not impair his right, or be regarded by them as a waiver thereof. Defendants, moreover, do not allege in their answer any waiver by the plaintiff of their default, or any act on his part waiving his right to make the election. Neither do they in their answer, nor did they at the trial, assert any equity in their behalf, or, by offering to pay the plaintiff the interest which they admit had matured, seek to relieve themselves from the consequences of their default.

2. At the same time with the execution of the note and mortgage, and as a part of the same transaction, the plaintiff executed to the defendants the following instrument: "For valuable consideration I hereby promise and agree to give credit for two and one-half (2½) per cent. of the twelve and a-half (12½) per cent. interest on the mortgage note signed 'Mrs. Cornelia R. Dean' and 'G. L. Dean,' in my favor, dated October 29, 1887, provided said Mrs. Cornelia R. Dean and G. L. Dean shall on or before the 15th day of December of any year after the present, during continuance of said note unpaid, present to me proper official receipts showing the payment of all taxes against the property covered by the mortgage securing payment of said note for that year, respectively. R. E. HEWITT."

At the trial the defendants offered to show that the words "all taxes" were intended to cover and include the mortgage tax. The court excluded the evidence, and its ruling in this respect is assigned as error. The court did not err in this ruling. There was no ambiguity in the words themselves. If the "mortgage tax" is a tax "against the property" described in the mortgage, it is clearly included in the term "all taxes," and if it is not a tax against the property, it is quite as clearly excluded from the term. In either case the agreement was to be construed by the court, and not to be determined upon the testimony of witnesses as to the intention of the parties. The defendants contended that this instrument is a contract in violation of section 5, art. 13, of the constitution, and that thereby they are released from all obligation to pay any interest upon the note secured by the mortgage. Section 5 of article 13 of the constitution provides that "every contract hereafter made, by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void." Section 4 of the same article provides that "a mortgage * * * by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. * * * The value of the property affected by such mortgage, * * * less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof. * * * The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security. * * *" Assuming that the tax upon the mortgage referred to in section 5 is a tax "against the property" by virtue of the provision of section 4 that the mortgage is, for the purposes of taxation, "an interest in the property affected thereby," and that the tax levied thereon is a "lien upon the property," as well as upon the security, the agreement referred to does not contravene the provisions of section 5. The agreement is solely upon the part of the mortgagee, and is in no respect binding upon or enforceable against the mortgagors, and it cannot, under any theory, be said to be a "contract" on their part; nor are they by its terms in any way "obligated" to pay any tax upon the mortgage.

It is well known that, prior to the adoption of the present constitution, it was the universal custom for the mortgagee to incorporate into the mortgage a stipulation binding the mortgagor to pay all taxes that might be levied upon the mortgage, or the debt secured thereby. This provision engendered a vast amount of litigation, and the collection of this tax was stoutly resisted at all points, chiefly upon the ground that a tax imposed upon the land and also upon a mortgage thereon was double taxation, and unconstitutional. As a consequence of various decisions of the supreme court in this litigation, all money loaned upon mortgage security escaped taxation, and the owner of the land mortgaged was compelled to pay more than his share of the expenses of government. It was for the purpose of obviating this consequence that the constitutional convention adopted the foregoing provision of section 5, art. 13, in order that a portion of the taxes might be collected from the mortgagee, and that the burden upon the mortgagor might not at the same time be increased. The provision thus incorporated into the constitution was intended for the benefit of the borrower, but it is unnecessary to say that the results expected therefrom have not been realized. All experience has shown that the rate of interest is governed by the inflexible laws of trade, and is regulated by the same law of supply and demand as that which governs all other articles of commerce; and that legislatures and constitutional conventions are powerless in their attempts to change this law; that, whenever the state imposes a tax upon a commodity, the burden of that tax is borne by him whose necessities require him to purchase, and not by him who holds it for sale. This subject in its relations to a tax upon mortgages is so fully presented in the opinion of Mr. Justice CROCKETT, in the case of Society v. Austin, 46 Cal. 416, that it is unnecessary to do more than to state the proposition that whatever burdens in the form of taxation the state imposes upon money which is loaned are in reality borne by the borrower, and not by the lender; that the lender, in fixing the rate of interest for the loan, will invariably add the amount of this tax to the market value of the money, and, under the guise of interest, collect from the borrower a sufficient amount to reimburse himself for the amount of the tax. Now, if the parties to a loan can, by an arrangement between themselves which shall not violate the requirements of any special provision of the constitution, provide for the payment of the mortgage tax in such a mode that the burden upon the borrower shall not be increased, but may possibly be diminished, such arrangement is not only not in conflict with the letter of the constitution, but is in direct harmony with its spirit and the evident purpose of its framers. Of this character is the instrument under consideration. By it, as we have seen, there is created no obligation upon the borrower to pay any portion of the mortgage tax. He is merely granted by the lender a privilege, of which he may avail himself or not, as he may choose, of reducing the interest upon his loan to the market value of the money, by a liquidation on his part of another obligation of the lender. This privilege is in reality given to the borrower by the constitution itself in that provision which permits him to pay the mortgage tax and have the amount so paid deducted from his debt. Under such arrangement, the lender will always fix the conventional rate of interest at a figure sufficiently high to cover the whole estimated rate of the mortgage tax. If, however, at any time during the existence of the loan, that tax shall be less than this estimated rate, the borrower, instead of the lender, will receive the benefit of such reduction, while, if the rate be at any time increased, he will leave the lender to pay the tax, and himself pay only the conventional rate of interest. Such an agreement is, in our opinion, in entire harmony with the spirit of the constitution, and must be held to be valid.

3. The court erred in allowing to the plaintiff the sum of $300 for attorneys' fees. The note provided that, "should suit be commenced to enforce the payment of this note, we agree to pay an additional sum of five per cent. on principal as attorneys' fees in such suit." As no action could be brought upon the note except in connection with a suit to foreclose the mortgage, the reasonable counsel fee provided for in the mortgage must be held to be limited in amount by this agreement of the parties. This was evidently deemed by the attorney for the plaintiff to be the correct construction of this clause, inasmuch as in the prayer to his complaint he only asks for judgment "for five per cent. on the said principal sum of $2,500 for attorneys' fees, as provided in said promissory note, and being such reasonable counsel fee as is provided in said mortgage." The order denying a new trial is affirmed; and the court below is directed to modify the judgment by reducing the amount allowed for attorneys' fees to $125 as of the date the judgment appealed from was entered, and, as so modified, the judgment shall stand affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.; DE HAVEN, J.

REED *et al.* v. NORTON. (No. 13,843.)

(*Supreme Court of California.* Aug. 31, 1891.)

MECHANICS' LIENS—NOTICE OF CLAIM—LIABILITY OF OWNER.

Where the owner of a building, against which mechanics' liens are filed, fails to retain, after the completion of the work, and pay over to those entitled thereto, one-fourth of the contract price, as provided in his contract, he is responsible to that extent, but may have deducted any lawful credits to which he is entitled, under Code Civil Proc. Cal. § 1200, which provides that, if the contractor fails to perform his work in full or abandons it, the portion of the contract price applicable to mechanics' liens shall be deemed the difference between the value of the work and materials already done and furnished and the payments then due and actually made. BEATTY, C. J., dissenting.

In bank. On rehearing. For former report, see 26 Pac. Rep. 767.

Action by C. H. Reed and others against Thomas Norton, the owner of a building, and Thomas Helm, his contractor, to enforce the liens of mechanics and materialmen. The contractor, Helm, made default. There was judgment for plaintiffs, and Thomas Norton alone appeals. Reversed.

PER CURIAM. This case was first submitted in department 2, and on January 31, 1891, the judgment and order denying a new trial were reversed, the opinion having been prepared by Commissioner FOOTE. A hearing in bank was afterwards ordered, and the cause was again argued and submitted. After a full consideration of the case we are satisfied with the conclusion reached and the opinion filed in department. 26 Pac. Rep. 767. In their brief on rehearing counsel for appellant suggest that the last clause of the said opinion would compel the court below to render judgment against appellant for the full amount of 25 per centum of the contract price, and to exclude any credits which he might lawfully have. We do not think that such is the meaning of the opinion; but, in order to remove any doubt on the subject, we say, in addition, that, if appellant has any lawful credits under section 1200 of the Code of Civil Procedure,[1] or otherwise, he is entitled to the same, to be deducted from said 25 per centum. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

BEATTY, C. J. I dissent.

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[1] Sec. 1200. In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor shall be fixed as follows: From the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections eleven hundred and eighty-three and eleven hundred and eighty-four, and the remainder shall be deemed the portion of the contract price applicable to such liens.

WHITE v. McKIE. (No. 14,240.)

(*Supreme Court of California.* Aug. 28, 1891.)

REVIEW ON APPEAL—CONFLICTING EVIDENCE.

Where there is a conflict in the evidence, the findings of the trial court will not be disturbed.

Department 2. Appeal from superior court, San Bernardino county; C. N. C. ROWELL, Judge.

F. F. Oster and *Waters & Gird*, for appellant. *L. M. Sprecher*, for respondent.

PER CURIAM. 1. The complaint states a cause of action in favor of plaintiff, and against defendant.

2. Upon the question whether defendant failed and refused to carry out and perform the contract made between plaintiff and the South Rialto Land & Water Company, we cannot disturb the finding of the court below, as it cannot be said that it is without evidence to justify it. The question here, when a finding is assailed as being against evidence, is not as to the preponderance of evidence, but only whether there was a substantial conflict in the evidence, and, if there was, the finding of the lower court is conclusive here.

Judgment and order affirmed.

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90 Cal. 569

PEOPLE v. LOPEZ. (No. 20,782.)

(*Supreme Court of California.* Aug. 29, 1891.)

LARCENY—SUFFICIENCY OF INDICTMENT.

Pen. Code Cal. § 484, defines larceny as "the felonious stealing, taking, carrying, leading, or driving away the personal property of another." Section 487, subd. 3, makes the stealing of a horse grand larceny, which is a felony. Sections 957-960 provide that the words used in an information are to be construed according to their usual meaning; that the information is sufficient if the act charged is clearly set forth in ordinary language, so that a person of common understanding may know what is intended; and that no information is insufficient, by reason of any defect in form, which does not prejudice the substantial rights of the defendant. Section 1258 provides that, on appeal, the court must give judgment without regard to technical defects, which do not affect the substantial rights of the parties. *Held*, that an information charging defendant "with the crime of felony," in "stealing, taking, and driving away" a horse, the property of the person named, is not defective in failing to charge that the offense was feloniously committed, where no such objection was urged in the court below.

Commissioners' decision. In bank. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Information against Manuel Lopez for larceny of a horse. There was judgment of conviction, and defendant appeals. Affirmed.

John M. Poston and *A. Laidlaw*, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

FITZGERALD, C. The information upon which the defendant was tried and convicted of the larceny of a horse is claimed to be fatally defective, because it fails to charge that the offense was committed feloniously. At common law, simple larceny, whether grand or petit, was a felony, and was defined to be the felonious taking and carrying away of the personal goods of another. The word "feloniously" was therefore essential to the validity of an indictment for a felony, and it has been uniformly held that this word, when used in a statute or constitution without being defined, should be construed to have the meaning affixed to it by the common law. But our statute has modified the common-law system of pleading and the rule of procedure in many important respects, and prescribed certain simple rules by which alone the sufficiency of such pleading shall be determined. These rules, or such of them as have a direct bearing on the question under consideration, are contained in the following sections of the Penal Code: Section 948 provides that "all the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Code." Section 957 provides that "the words used in an indictment or information are construed in their usual acceptance in common language." Section 958 provides that the "words used in a statute to define a public offense need not be strictly pursued in the indictment or information, but other words conveying the same meaning may be used." Section 959, subd. 6, provides that the indictment or information is sufficient if it can be understood therefrom "that the act or omission charged as an offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." Section 960 further provides, "that no * * * information is insufficient, by reason of any defect in matter of form, which does not tend to the prejudice of a substantial right of the defendant upon its merits." And section 1258 provides that "after hearing the appeal the court must give judgment without regard to technical errors or defects * * * which do not affect the substantial rights of the parties." The defendant is accused by the information herein "with the crime of felony," which he is charged with having committed by "stealing, taking, and driving away" a horse, the personal property of the person therein named. No objection was made to the information in the court below, and the question of its sufficiency is raised for the first time by this appeal. "Larceny" is defined by section 484 of the Penal Code to be "the felonious stealing, taking, carrying, leading, or driving away the personal property of another." And subdivision 3 of section 487 of the Penal Code makes the stealing of a horse grand larceny, which is a felony under our statute, and punishable by imprisonment in the state prison. The word "steal," as here used, has, as will be hereafter shown, a fixed and well-defined meaning, and is perhaps, in its common every-day use and general acceptation, as well understood as any word in the English language. Webster defines it, "to take and carry away feloniously, as the personal goods of another," quoting Blackstone. The same definition is substantially given in all the standard law dictionaries, some of them giving "larceny" as a synonym, and it is used with the same meaning in the following among other sections of the Penal Code: Section 492 relates to how the value of a thing stolen may be ascertained; section 496 to receiving stolen property, knowing the same to be stolen; and section 497 provides that "every person who, in another state or county, steals the property of another, * * * and brings the same into this state, may be convicted and punished in the same manner as if such larceny * * * had been committed in this state." To therefore contend that the defendant, who must be presumed to be a person of common understanding, did not know what was intended when he was charged by the information with stealing another man's horse, is simply preposterous. Testing the sufficiency of this information by the application of the foregoing rules, we are forced to the conclusion that where the word "feloniously" is omitted from, and the word "steal" employed in, the charging part of an information for grand larceny, it will be understood as charging the criminal intent with which the act was committed, and the offense, when so charged in an information or indictment, will be deemed to be substantially charged in the language of the Code. And an indictment or information for larceny which contains both or either of those words will be held valid if found to be sufficient in all other respects. It therefore follows that, as the omission of the word "feloniously" from the information herein did not tend to the prejudice of a substantial right of the defendant, the judgment appealed from should be affirmed, and we so advise.

We concur: Belcher, C. C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

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90 Cal. 583

Herberger v. Husman. (No. 14,012.)

(*Supreme Court of California.* Aug. 31, 1891.)

Vendor and Vendee — Rescinding Contract — Surrender of Title — Sufficiency of Tender.

Land was sold under an agreement that, if the vendee should be dissatisfied with his purchase at the end of a year, and should give the vendor 30 days' notice and a release of the title, the latter would return the price paid with interest. Seventy-eight days before the expiration of the year the vendee gave written notice of his dissatisfaction, demanded the return of the money, and offered a release of the title. Again, at the end of the year, and twice afterwards, similar statements, demands, and offers were made, and each time the vendor promised to return the money and accept the title. *Held*, that the offer was sufficient, under Code Civil Proc. Cal. § 2074, providing that an offer in writing to deliver a written instrument is, if not accepted, equivalent to the actual production and tender of the instrument; and that the vendor was estopped by his promise to deny the tender.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Herberger against Husman to rescind a contract for the purchase of real property and recover the amount paid. There was judgment for plaintiff, and defendant appeals. Affirmed.

R. L. Horton, for appellant. *Allen & Miller*, for respondent.

Paterson, J. The defendant agreed that if plaintiff should be dissatisfied with the purchase of the lots at the end of one year (at which time—November 30, 1888—the balance of the purchase price was to be paid) he, the defendant, would return the $1,500 with interest thereon, provided the plaintiff gave him 30 days' notice and a surrender of the title to the lots.

The plaintiff did become dissatisfied with the purchase, and notified defendant of the fact on September 13, 1888, in a written notice, which contained a demand for the return of the $1,500 with interest, and an offer thereupon to surrender the title to the lots. Again, on November 30, 1888, the agent of plaintiff notified defendant of the plaintiff's dissatisfaction, made an express demand upon him for the return of the $1,500, and offered to surrender the title. In January and March following, similar statements, demands, and offers were made, and on every occasion, the court finds, upon sufficient evidence, the "defendant promised to return said sum of $1,500 with interest, as aforesaid, and accept a return of the title conveyed by said agreement to the property herein mentioned." The written notice of dissatisfaction was not premature. The terms of the contract are plain and easily understood. Defendant agreed to return the money upon 30 days' notice if plaintiff was dissatisfied with his purchase at the time the balance of the purchase price became payable. The defendant could not be required to return the money before the end of the year, and not then unless the 30 days' notice was given. The plaintiff's offer in writing was equivalent to the actual production and tender of a written release or quitclaim. Section 2074, Code Civil. Proc.[1] But if the appellant's contention that the contract called for notice of dissatisfaction at the end of the year, and at no other time, be taken as the true meaning of the terms of the contract, it is sufficient to say that such notice was given. It is not clear that a written release was necessary to restore the title to defendant. But, be that as it may, defendant is estopped by his conduct from claiming that no release was tendered, or that the contract was not tendered for cancellation. The only claim or objection he made was that he did not have the money at the time. He led the plaintiff to believe that he would return the money as soon as he could raise the amount; and, having induced the defendant to act upon the belief that he would do so, it is too late now to change his position and defeat the plaintiff on the ground that a complete technical tender was not made. 2 Herm. Estop. §§ 820,

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[1] Sec. 2074. An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.

822, 825, 1042; Ashbaugh v. Murphy, 90 Ill. 182; Whelan v. Reilly, 61 Mo. 568; Brock v. Hidy, 13 Ohio St. 306; Hills v. Bank, 105 U. S. 319. Other questions presented by appellant have not been overlooked, but we deem it unnecessary to discuss them. They are without merit. The judgment and order are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.; DE HAVEN, J.; HARRISON, J.

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90 Cal. 487

NEWTON v. HULL *et al.* (No. 14,343.)

(*Supreme Court of California.* Aug. 8, 1891.)

FORECLOSURE OF VENDOR'S LIEN — REFORMATION OF CONTRACT—PLEADING.

1. In an action to foreclose a vendor's lien, it appeared that the contract for the sale of the land provided that defendants should pay a certain amount down, and the balance of the purchase price in two installments, due, respectively, on or before May 1, 1888, and on or before November 1, 1888, with a further provision that, "time being of the essence of this contract," a failure of defendants to comply therewith operates as a forfeiture of all their payments and rights thereunder. February 7, 1889, plaintiff tendered a deed, and demanded payment of the unpaid installments, which was refused. *Held*, that plaintiff was not in default in not tendering a deed November 1, 1888, and was entitled to judgment.

2. An averment in the complaint, in an action to reform a contract to sell land, that the agreement was to sell an undivided two-fifths of the land described in the written memorandum, and "that the parties * * * intended to insert therein a description of the undivided two-fifths, * * * but that by mistake in drawing said memorandum * * * the description of said lot or parcel of land was therein set forth incorrectly in the following particulars," definitely setting forth the mistake, and how it occurred, sufficiently alleges that the mistake was a mutual mistake of the parties.

3. A direction in the second paragraph of the order of sale "that the land and premises in the complaint, and hereinafter described," be sold, etc., and which are described in the last paragraph as an entire tract instead of two-fifths, as set forth in the complaint, is a mistake, evidently clerical, creating an uncertainty as to the amount of land to be sold, not a subject for correction by appeal until after a motion for that purpose has been denied by the trial court.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Mary H. Newton against B. J. Hull, W. D. Read, and others to reform an agreement for the sale of land and to foreclose the vendor's lien. Judgment for plaintiff, and defendant Hull appeals. Affirmed.

I. Hall and *Holloway & Kendrick*, for pellant. *Lee, Gardiner & Scott*, for respondent.

VANCLIEF, C. Action to reform an agreement by which the defendants Hull and Read agreed to purchase, and plaintiff to sell, two-fifths of a piece of land situate in Los Angeles county, containing about 17 acres, together with 8 shares of the capital stock of the Lake Vineyard Land & Water Association, a corporation; and also to foreclose the vendor's lien upon the property for the unpaid portion of the purchase money. It is alleged in the complaint that by mistake in drawing the written memorandum of the agreement the words "undivided two-fifths of" were omitted from the description of the land, so that the memorandum purports to be that of an agreement to sell the whole undivided piece of land, but that the parties to said memorandum intended to insert therein a description of only the undivided two-fifths of the piece of land therein described. It is further alleged that, by mistake of the draughtsman, the description of the land in the written memorandum refers to page 312 of Book 118 of Deeds in the recorder's office, instead of page 407 of Book 167. A copy of the written agreement bearing the date of November 1, 1887, is set out in the complaint, and its execution is admitted. The price to be paid for the land and water stock was $10,000, in the following installments: $3,333.33 in hand, on the execution of the agreement, which was paid accordingly; $3,333.33 on or before May 1, 1888; and $3,333.33 on or before November 1, 1888. Interest on deferred payments at 10 per cent. per annum. The other terms of the agreement pertinent to the question to be decided are as follows: "In the event of a failure to comply with the terms hereof by the said parties of the second part, the said party of the first part shall be released from all obligations in law or equity to convey said property, and said parties of the second part shall forfeit all right thereto, and shall also forfeit to said first party all right to any and all moneys theretofore paid thereon, time being of the essence of this contract. And the said party of the first part on receiving such payment, at the time and in the manner above mentioned, agrees to execute and to deliver to the said parties of the second part, or their assigns, a good and sufficient deed conveying the above-described property, and to deliver said water stock." The defendants Hull and Read failed and refused to pay the second and third installments, or any part thereof, up to the time of the commencement of this action, April, 1889. The complaint also contains the following: "That on or about February 7, 1889, plaintiff demanded payment from defendants B. J. Hull and W. D. Read of all the unpaid balance due and owing to plaintiff under and by virtue of the terms of said agreement, to-wit, demanded payment from defendants B. J. Hull and W. D. Read thereunder of the sum of $6,666⅔, together with interest thereon at the rate of ten per cent. per annum from November 1, 1887, until date of such payment; that thereupon plaintiff tendered and offered to deliver to defendants B. J. Hull and W. D. Read, on receiving such payment, a good and sufficient deed conveying to defendants the title to said property so as aforesaid agreed to be conveyed, to-wit, said undivided two-fifths of said 17.42 acres of land; that thereupon plaintiff tendered and offered to assign and deliver to defendants B. J. Hull and W. D. Read said eight shares of capital stock of said Lake Vineyard Land & Water Association, a corporation as aforesaid; that thereupon defendants B. J. Hull and W. D. Read declined and refused to accept or receive either said deed or said water stock, and declined and refused to pay to plaintiff said $6,666⅔, or any part thereof; that thereupon defendants B. J. Hull and W. D. Read expressly stated that they would not make any further payments under said contracts." All the defendants except Hull made default or disclaimed any interest in the suit. Hull answered, and also filed a cross-complaint praying for a rescission of the agreement, and a judgment against plaintiff for $1,666.66, that being the portion of the purchase money alleged to have been paid by him. The court found for the plaintiff on all the issues and rendered judgment accordingly. The defendant Hull alone appeals from the judgment and from an order denying his motion for new trial.

1. It is contended for appellant that because it does not appear that plaintiff tendered to defendants a deed to the land on the 1st day of November, 1888, when the third and last installment of the purchase money became due, she was in default equally with the defendants; that, "time being of the essence of the contract," the deed must have been tendered "at the time agreed upon, and at no other time;" and that by the mutual default of both parties "the contract came to an end, and cannot be enforced by either party." To maintain this position, counsel rely, principally, upon the case of Cleary v. Folger, 84 Cal. 316, 24 Pac. Rep. 280; but I think the opinion of the commissioners in that case, (in which I concurred,) in so far as it sustains the point made here by appellant's counsel, is out of line with the otherwise uninterrupted current of authority in this state. It is not sustained by the cases therein cited. The case of Bohall v. Diller, 41 Cal. 532, therein cited, decides nothing as to the point under consideration here, except that a party who agrees to convey land upon the payment of the purchase money cannot recover the purchase money until he tenders a deed; but does not decide that he will be in default unless he tender a deed on the very day the purchase money becomes due. In Englander v. Rogers, 41 Cal. 421, also cited, the facts were that the party agreeing to purchase paid a part of the purchase money under an agreement that it should be refunded if, upon payment of the balance, the vendor should not convey a good title. He sued the vendor to recover back the sum he had paid without averring that he had tendered payment of the balance of the purchase money. The court said: "The covenants of the vendor and vendee were mutual and dependent, and neither could put the other in default, except by tendering a performance on his own part, unless the other party either waived the tender, or, by his conduct, rendered it unnecessary. To entitle the plaintiff to maintain the action on the contract set out in the complaint, he should have averred a tender of the unpaid portion of the purchase money, or some sufficient excuse for the omission to tender it." This neither implies nor warrants the inference that the vendor might not have recovered the unpaid purchase money after tendering the conveyance of a good title, as was done in the case at bar, but rather the contrary. The report of the case does not show any express limitation of the time within which either party was to perform, nor does it appear that the time of performance by either party was of the essence of the contract. It follows that the case can have no proper application to the point here under consideration. Nor was the point to which it was cited in Cleary v. Folger (viz., that the defendant in that case "was no longer obliged to make a deed to the premises, * * * as the balance of the purchase money was not tendered") relevant or material in that case, since the defendant (vendor) in that case had not been asked to make a deed. He was only asked to refund that portion of the purchase money which the plaintiff had paid; and, though it may have been true that he "was no longer obliged to make a deed," it did not thence follow that he would not have been entitled to recover from the plaintiff (vendee) the unpaid portion of the purchase money in case he had tendered a deed, as did the vendor in the case at bar. Undoubtedly, time is of the essence of the contract under consideration, so far as it is expressed or implied that it should be so. It is expressly of the essence of the agreement on the part of the defendants to pay the last two installments of the purchase money, and as to which they were put in default by the plaintiff's tender of a deed and demand of payment on the 7th day of February, 1889, three months after the last installment became due; but, as to the agreement on the part of the plaintiff to convey the land "on receiving such payment," there was no default whatever, as there was no tender of payment by the defendants, or either of them. Hill v. Grigsby, 35 Cal. 656, and cases there cited; Englander v. Rogers, 41 Cal. 421; Bohall v. Diller, Id. 532. But the stipulation that time is of the essence of the contract seems to be applicable only to the agreement on the part of the defendants to pay the purchase money, and to be intended for the benefit of the plaintiff alone. Wilcoxson v. Stitt, 65 Cal. 596,[1] and cases there cited; Vorwerk v. Nolte, 87 Cal. 236, 25 Pac. Rep. 412; Smith v. Mohn, 87 Cal. 489, 25 Pac. Rep. 696. It is true that the plaintiff was not obliged to accept payment and convey the land at any time after the defendants had failed to pay the second installment at the time it became due, (May 1, 1888;) and at any time thereafter she might have elected to rescind the agreement, (Grey v. Tubbs, 43 Cal. 359;) but, as above remarked, it does not follow that the defendants could work a rescission of the agreement, or avoid their obligation to pay the purchase money by simply refusing to pay it, or by delaying payment thereof until after it became due. There is no provision in the agreement that the plaintiff should forfeit her right to the purchase money in case the defendants should fail to pay it on or before the day on which it became due, nor in case she failed to tender a deed on that day, or at any time before the defendants ten-

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[1] 4 Pac. Rep. 629.

dered payment of the purchase money. Nor was she bound to tender a deed, except upon tender of payment of the purchase money. Smith v. Mohn, and Wilcoxson v. Stitt, supra. As we have seen, she could not be put in default, even after the purchase money was overdue, except by her refusal to convey upon tender of the purchase money. She was, therefore, entitled, upon tendering the deed, to demand payment of the purchase money on the 7th day of February, 1889, as she did, and, upon defendants' refusal to pay, to bring this action.

2. Counsel for appellant contend that the complaint does not state facts sufficient to entitle plaintiff to a reformation of the written memorandum of the agreement, the alleged deficiency being that it is not averred that the mistake complained of was a mutual mistake of the parties, nor a mistake of one party which the other at the time knew or suspected. Inasmuch as there was no demurrer to the complaint on any ground, I think it should be held sufficient to show that the mistake was a mutual mistake of the parties. The complaint states that the agreement was to sell an undivided two-fifths of the land described in the written memorandum; that the plaintiff owned only two-fifths thereof; "that the parties to said memorandum of agreement intended to insert therein a description of the undivided two-fifths of the premises; but "that, by mistake in drawing said memorandum of agreement, the description of said lot or parcel of land was therein set forth incorrectly in the following particulars;" and then proceeds to state definitely the mistake, and how it happened to be made. To say that by mistake a description, different from that intended by the parties to the agreement, was inserted therein, is to say, substantially, that the mistake was a mutual mistake of the parties to the agreement.

3. The objection that the findings do not support the judgment is made upon no other ground than those upon which it is claimed that the complaint is insufficient; and, since the findings are quite as full and specific as the complaint as to the mutual mistake of the parties, this objection should be overruled.

4. In their reply brief, for the first time, counsel for appellant call attention to a mistake (evidently merely clerical) in the order of sale, by which that order is made, at least, ambiguous and uncertain as to whether the whole or only two-fifths of the piece of land described is to be sold by the sheriff. In the second paragraph of the decree it is ordered "that the land and premises in the complaint, and hereinafter described," be sold, etc. This evidently refers to the description in the first paragraph of the complaint, which is the same as that in the revised agreement; but the uncertainty is created by what purports to be a description of the land "directed to be sold," in the last paragraph of the decree, where it (the land to be sold) is particularly described by metes and boundaries as an entire piece of land containing 17.42 acres, instead of being described as the undivided two-fifths of that piece of land, as it should have been described. This error might and should have been corrected on motion in the trial court, as the record contains all the *data* necessary for that purpose. There was no necessity for an appeal to correct it, at least, until after a motion for that purpose had been denied by the trial court. I think the judgment and order should be affirmed in all respects, except that the court below should be directed to correct the description of the land directed to be sold, as indicated in this opinion, on motion of either party, the costs of this appeal to be borne by the appellant.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed, and the court below is directed to correct the description of the land directed to be sold, indicated in this opinion, on motion of either party; the costs of this appeal to be borne by the appellant.

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90 Cal. 574

SAN DIEGO LUMBER CO. v. WOOLDREDGE *et al.* (No. 14,188.)

(*Supreme Court of California.* Aug. 31, 1891.)

MECHANIC'S LIEN — RECORDING CONTRACT — VALIDITY—NOTICE OF CLAIM.

1. Under Code Civil Proc. Cal. § 1183, which provides that material-men may have liens, and that all building contracts shall be in writing when the price exceeds $1,000, and shall be filed in the office of the county recorder before work is commenced, otherwise the contract to be void, and in such case all material furnished shall be deemed to have been furnished at the instance of the owner, a failure to give a description of the property affected by the contract does not invalidate it, as no description is required by statute.

2. Where a contract was recorded, a notice of lien which states that the lien claimant agreed with the contractor to furnish the lumber and building material to be used in the construction of a building, and delivered the same, for which the contractor agreed to pay $833.86, as he received payment under his building contract, is sufficient, as the terms of payment could be ascertained from the building contract.

3. Under Code Civil Proc. Cal. § 1184, concerning mechanics liens, which provides that at least 25 per cent. of the whole contract price of a building shall be made payable at least 35 days after the final completion of the work, a contract providing for final payment in 30 days after the completion of the work is not invalid, as the statute requires liens to be filed within 30 days after completion of a building, and no prejudice could arise.

4. A notice of lien was subscribed, "Williams & Whitmore," followed by a form of verification, viz.: "———, being duly sworn, deposes and says that he is one of the persons named as Williams and Whitmore in the foregoing claim of lien. * * * [Signed] A. C. WILLIAMS." *Held* sufficient to show that Williams, of Williams & Whitmore, was the affiant.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Action by San Diego Lumber Company against W. D. Wooldredge and others to foreclose a material lien. Judgment for defendants. Plaintiff appeals. Reversed.

Wellborn, Stevens & Wellborn, for appellant. *David L. Withington* and *Geo. W. Hardacre*, for respondents.

TEMPLE, C. This action is to foreclose a lien for materials furnished defendant Smith, as contractor, for building a house for defendant Wooldredge. The other defendants were lienors. Williams & Whitmore were the only lien claimants who answered. The contract price for the building was $1,945, all of which had been paid except $505. Plaintiff's demand was for $748.86. Williams & Whitmore recovered judgment for $145.50, and $50 as an attorney's fee. On the trial various objections were made to plaintiff's notice of lien, all of which, however, are only modifications of the general one, "that it contains no sufficient statement of the terms, time given, and conditions of the contract" under which the materials were furnished. The objection was sustained, and subsequently a nonsuit was granted as to defendant Wooldredge. Exceptions were duly taken, and the case comes here on an appeal from the judgment and an order refusing a new trial.

The material portion of the notice of lien is as follows: "The said San Diego Lumber Company agrees to furnish said lumber and building material to said Smith, to be used in the construction of said building upon said real property, and deliver the same at Escondido, in said county; and the said Smith agrees to pay therefor the sum of $833.86, the same to be paid in partial payments, (the amounts of which were not fixed,) at the time when payments become due said Smith, under said contract between him and said Wooldredge, provided that full payment for all materials furnished as aforesaid was to be made when the final payment become due said Smith from said Wooldredge under said contract between them." The trouble is that it refers to the contract between the contractor and Wooldredge for the terms of making payments, and does not repeat the provisions of the contract on that subject. The contract, being for more than $1,000, was duly filed in the recorder's office of the county, and all parties interested could there readily ascertain what the contract had provided upon the subject. Referring to that contract, we find payments by installments explicitly stipulated. But the notice of lien states that the amount of partial payments was not fixed. Upon this contract the plaintiff could not insist upon any specific sums being paid until the final payment became due upon the completion of the contract, when all became due. This seems a sufficient compliance with the statute, and we think the claim should have been received in evidence.

Plaintiffs contend that their recovery should not be limited to the balance unpaid on the contract, because they say the contract is void—*First*, because it contains no description of the property to be affected thereby, to which it is sufficient answer that the statute contains no such requirement; and, *second*, it makes the final payment of 25 per cent. due 30 days after final completion of the contract, when the Code provides that 25 per cent. of the contract price shall be payable at least 35 days after the final completion of the contract. Section 1183, Code Civil Proc., makes the contract void, if the amount exceeds $1,000, unless it be in writing, subscribed by the parties thereto, and filed in the office of the county recorder of the county. All this was done, and upon no other default does the statute declare the contract void. But the same consequence follows for a material non-conformity of the contract with the statute, under section 1184, Code Civil Proc., so far as to permit material-men and laborers to recover without regard to the amount due upon the contract. After stating what the contract shall contain, it proceeds: "In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and the materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." This section, as amended in 1885, declared all such contracts and alterations void. In 1887 that provision was stricken out; but, although the contract is not rendered void, lienors may recover irrespective of the amount due, and upon a contract which shall be deemed to have been made at the personal instance and request of the person contracting with the contractor, and for the value of the labor or materials. But is there such a substantial non-conformity with the requirements of the Code as will justify a judgment against the owner to pay again a debt which he has already paid in good faith upon his contract? In determining this question it must be kept in mind that this is a penalty, and not a statutory mode of acquiring a right against another, as in the case of a claim of lien. In the latter case, although the rule has been somewhat relaxed in favor of liens under this chapter, very great strictness of performance is generally exacted, but every reasonable intendment is indulged to avoid a penalty. The plaintiff has not been injured, nor can we see how any lienor could be, by the fact that the final payment became due in 30 rather than 35 days. Their liens must be filed within 30 days, and attach before this payment could legally be made under this contract. As they are in as good a position as they would have been had the time been 35 days, I think the penalty has not been incurred.

There being due only about one-half enough to pay the two liens, plaintiff objects to the notice of lien on the part of Williams & Whitmore, on the ground that it was not verified. The objection was sustained, and the ruling is complained of here. The claim of lien is subscribed, "Williams & Whitmore," and immediately following this signature is what is claimed as a verification, as follows: "State of California, county of San Diego—ss.: ———, being duly sworn, deposes and says that he is one of the persons named as Williams and Whitmore in the foregoing claim of lien; that he has read the same, and knows the contents thereof; and that the same is true, and that it contains (among other things) a correct statement of their demand, after deducting all just credits and offsets A. C. WILLIAMS. Subscribed and sworn to before me this 2d day of February, 1887. W. R. HAWTHORNE, Justice of the Peace." It is contended that this does not show who was sworn, but I cannot subscribe to that view. Evidently some one who in the notice of lien was named Williams or Whitmore was sworn, as appears from the body of the verification, and the signature and certificate of the magistrate fix the matter beyond question. The blank is not more indefinite than the word "affiant" would have been. The verification is sufficient. The judgment against the plaintiff, and also the order denying its motion for a new trial, should be reversed, and a new trial had.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

90 Cal. 581

RAMISH v. KIRSCHBRAUN *et al.* (No. 13,818.)

(*Supreme Court of California.* Aug. 31, 1891.)

BREACH OF CONTRACT—MEASURE OF DAMAGES.

1. Where, in an action for breach of contract, the complaint alleges that defendants agreed to deliver to plaintiff, at A., 12,000 dozen eggs, as soon as they could be transported from O., and that the eggs arrived at A. on July 8th, but were not delivered to plaintiff until July 14th, evidence of the price of eggs on July 18th is inadmissible to show damage.

2. It was error to permit plaintiff to testify that he had contracted to sell the eggs at 21 cents per dozen, but, on account of the failure to deliver them in time, he lost the sale, and was obliged to sell them at 16 cents, as the evidence must be confined to the market value of eggs between July 8th and 14th.

In bank. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Action by Remish against Kirschbraun and others to recover damages for breach of contract. Judgment for plaintiff. Defendants appeal. Reversed.

Gould & Stanford, for appellants. *Del Valle & Munday*, for respondent.

PATERSON, J. It is alleged in the complaint that on or about June 25, 1888, the defendants agreed to deliver to plaintiff, at Los Angeles, 12,000 dozen of eggs, for the sum of $1,770, as soon as the same could be transported by rail from Omaha, Neb.; that the eggs arrived at Los Angeles on July 8, 1888, but defendants did not deliver them to plaintiff until July 14th, although he was ready and willing at all times on and after the 8th to receive and pay for them; that by reason of the failure of defendants to deliver the eggs to plaintiff upon their arrival at Los Angeles he sustained damages to the amount of $600. The defendants filed an answer denying each and every allegation. Judgment was entered on a verdict in favor of plaintiff for $600, and defendants have appealed.

It will be seen from this statement of plaintiff's cause of action that his claim is based upon the facts that defendants failed to deliver the eggs before July 14th, although they actually arrived at Los Angeles on the 8th, and that between these dates the price of eggs had depreciated, incurring a loss to him of $600 on the lot. In his testimony plaintiff stated that the market price of eggs was highest on the day and the day after the eggs arrived at Los Angeles. After that several car-loads came into the market, and the price went down. He was permitted by the court to state that he had contracted with Stanley and Henry to sell the eggs to them for 21 cents, but on account of the failure of defendants to deliver them in time he lost the sale, and was obliged to sell the eggs at a fraction over 16 cents per dozen. The court ought to have sustained defendants' objection to the evidence as to what Stanley and Henry had agreed to pay plaintiff for the eggs. The evidence should have been confined to the inquiry, "What was the market value of eggs between July 8th and July 14th?" The price agreed upon between himself and others—in no way connected with defendants—was incompetent to establish the market value of the eggs or the liability of the defendants. The court erred in a more serious particular. It permitted a witness called on behalf of plaintiff to state that about the time the eggs arrived at Los Angeles they were worth 21 cents per dozen, but owing to the arrival of several car-loads the market price of eggs was reduced, and about the 18th they were worth only 17 cents per dozen. Between the 8th and 18th, the witness testified, eggs were worth 21 cents per dozen, but about the 18th the market price was about 17 cents per dozen. The damages claimed by plaintiff were sustained by him, according to the allegations of his complaint, between the 8th and 14th. Any evidence, therefore, showing the market value of eggs subsequent to the 14th, was clearly inadmissible. It is claimed by appellants that there was no contract to deliver the eggs at any particular time, and therefore plaintiff failed to prove any cause of action. On this subject the court fairly instructed the jury, and, as the case must be sent back for a new trial, we will not express any opinion as to the weight of the evidence. Judgment and order reversed.

We concur: BEATTY, C. J.; GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.; DE HAVEN, J.; HARRISON, J.

90 Cal. 586

PEOPLE v. ELLIOT. (No. 20,808.)

(*Supreme Court of California.* Aug. 31, 1891.)

FORGERY—SIGNING FICTITIOUS NAME.

1. One who, with intent to forge the check of R. & M., signs the name "A. E. R. & Co." thereto, believing it to be the true name of the firm, is not guilty of forgery, but may be prosecuted under Pen. Code Cal. § 476, declaring it a crime to make and pass checks bearing fictitious names, with intent to defraud.

2. In such case the defendant cannot be convicted of forgery, upon his confession alone that he had signed the name "A. E. R. & Co."

In bank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Indictment of H. N. Elliot, for forgery

Verdict of guilty. Defendant appeals. Reversed.

M. W. Conklin, for appellant. *W. H. Hart*, Atty. Gen., for the People.

Garoutte, J. The defendant was convicted of the crime of forgery, and appeals to this court from the judgment and order denying his motion for a new trial. He was charged by the information with forging a certain check signed "A. E. Rice & Co." The evidence in the case was as follows: (1) At the time the defendant procured money upon the check he stated that "Red Rice," who was engaged in the furniture business at the city of Los Angeles, gave him the check as the result of a transaction in furniture. (2) "Red Rice" testified that his name was Edwin A. Rice; that at the time of the alleged forgery he had a partner, and the name of the firm was Rice & McKee; and that he did not sign the check or authorize it to be signed. (3) The confessions of the defendant that he forged the check. It is elementary law that the defendant cannot be convicted upon his confessions alone, and in this case there is no evidence whatever as to the non-existence of such a firm as "A. E. Rice & Co.," and *non constat* but there was such a firm, and the check was genuine. If we assume that there was such a firm in existence, then the judgment must be reversed, and a new trial ordered, by reason of the insufficiency of the evidence in not showing that the check was not signed by such firm. If we assume that there was no such firm in existence then the check was a fictitious check, and the prosecution should have been had under section 476 of the Penal Code, and the case must be reversed upon that ground. From the facts set forth in the information it is apparent that it was filed and conviction had under section 470 of the Penal Code, which section is quite broad in its scope, but not sufficiently broad to include the matters contained in section 476; for that section contemplates that the information must contain allegations, and the evidence be produced to substantiate them, that the check was fictitious, and the defendant knew that fact. Williams v. State, 9 Humph. 80; People v. Dowd, 4 Pac. Coast Law, L. J. 459.

The court gave the jury the following instruction: "If you find from the evidence beyond a reasonable doubt that at the time and place alleged, with the intent alleged, defendant did feloniously make, utter, and pass as genuine the check in question; that he intended to sign thereto the name of the firm of Rice & McKee, and by mistake signed the name of 'A. E. Rice & Co.,' believing that to be the correct name, and uttered the same as the genuine check of said firm; and that said Southern California National Bank is a corporation as alleged; and that said check is false and unauthorized,—then you should find the defendant guilty, notwithstanding the mistake in the name of said firm." Without going into a technical analysis of this instruction, as to whether or not it fully answers the requirements of the law in other respects, let us see if it be true that in the words of the instruction the defendant is guilty of forgery, "if, intending to sign the name of the firm of Rice & McKee to the check, by mistake he signed the name of A. E. Rice & Co., believing that to be the correct name." Where a note, bill, check, etc., is the subject of a forgery, it must be proven that the instrument was not signed by the person by whom it purports to be signed, or that such person did not exist at the time; or, in other words, is a fictitious person. In this case, as we have already seen, the proof is lacking in both of these essential respects. Considered in the light of the foregoing instruction of the court, there is no such firm in existence as "A. E. Rice & Co.;" therefore, the check is fictitious, and the prosecution should have been had under section 476, heretofore cited. The law appears to recognize a distinction between forged instruments purporting to have the signature of a person in existence, and those where the signature is purely and entirely fictitious. Indeed, at common law, at one time, it was not forgery to sign the name of a fictitious person to an instrument. Section 470 of the Penal Code is quite broad in its terms, and, in the absence of said section 476, it might probably be construed broad enough to include fictitious instruments as referred to in said section; but, the legislative mind having been directed specially to that class of instruments with reference to the offense of forgery, it would seem the act of making or passing a fictitious check could only be prosecuted when brought within the requirements and conditions of that section. Considered in the light of the instruction, the signature is of a copartnership not in existence, which, *ipso facto*, makes the instrument a fictitious check; and the fact, if it be a fact, that defendant intended to sign the name of an existing firm to the check appears to be entirely immaterial. He is being prosecuted, and necessarily so, for an offense actually committed, and not for an offense he may have intended to commit. The law does not recognize a man's intentions as a crime, however corrupt and criminal those intentions may be. His intentions simply form the light by which we read and weigh his acts. This is in no sense a question of *idem sonans*, but the defendant appears to have been prosecuted upon the theory that the signature of the existing firm "Rice and McKee," for the purposes of this case, was attached to the check. Especially is this apparent when we consider the following instruction: "In order to constitute the crime of forgery, the resemblance of the forged signature to the genuine must be such as might deceive a person of ordinary caution." While we are not called upon to review this instruction, it being given at the request of the defendant, yet in the face of the fact that the signature to this check is fictitious, as the court assumed in the other instruction which we have considered, and that there was no such firm in existence as A. E. Rice & Co., and therefore no such genuine signature in existence, to say the least, the two instructions, when taken together, must have tended to confuse and cloud the minds of the jury. For the foregoing reasons the judgment and order are reversed, and the cause remanded for a new trial.

We concur: PATERSON, J.; HARRISON, J.; MCFARLAND, J.; DE HAVEN, J.; SHARPSTEIN, J.

(90 Cal. 610)

MANNING v. DEN. (No. 13,821.)

(*Supreme Court of California.* Aug. 31, 1891.

STREET IMPROVEMENTS — VALIDITY OF CONTRACTS —ASSESSMENT—EVIDENCE.

1. Act Cal. March 18, 1885, § 5, relating to street improvements, provides that after contracts have been awarded notice thereof shall be posted for 5 days, and that within 10 days from the first posting, if the owners of the major part of the frontage on the street where work is to be done shall elect to take the work at the price awarded, and shall enter into a contract to that effect, they shall have the work; but if they do not so elect, the street superintendent shall contract the work to the one to whom it was awarded. *Held*, that the superintendent had no authority to contract with the one to whom it had been awarded until after 10 days from the first posting of the notice of award.

2. Where the complaint in an action to foreclose the lien of a street assessment alleges a contract with the street superintendent, and the answer denies it, the award, assessments, and diagrams, with the affidavit of demand and nonpayment, constitute *prima facie* evidence of such contract.

3. Defendant offered in evidence two documents, one purporting to be a contract between the plaintiff's assignors and the street superintendent, but which was signed by the assignors only; the other was in the form of a bond, which justified in "double the sum in the bond specified as the penalty thereof," without naming the amount of the penalty, or the names of the obligors, or making any reference to any contract for specific work, and was signed by the obligors only. Each document was certified as a "true and correct copy" of the original on file in the street superintendent's office. *Held* that, as they tended to show that no contract for doing the work had ever been made, they should have been admitted in evidence.

4. The objections to the correctness of the proceedings, being jurisdictional, were not waived by defendant's failure to appeal to the city council under Act Cal. March 18, 1885, § 11, which provides, among other things, for appeals to the council by those who have any objection to any act or proceeding of the superintendent of streets; and, after authorizing the council to correct the proceeding, declares that the decision of the council shall be final "as to all errors, informalities, and irregularities which said city council might have remedied and avoided."

5. Nor does the further provision in section 11, that "no assessment shall be held invalid except upon appeal to the city council," etc., apply to a case where the council are powerless to remedy the defect.

6. The judgment was erroneous in providing for a personal judgment against defendant for any deficiency that might remain after the sale of the lot assessed.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by E. R. Manning against R. S. Den to foreclose the lien of a street assessment. Judgment for plaintiff, and defendant moved for a new trial, which being denied he appeals. Reversed.

M. Whaling, for appellant. *Herdon, Cain & Garrison*, for respondent.

HARRISON, J. 1. It is alleged in the complaint that on the 15th day of October, 1888, the city council of Los Angeles awarded to the assignors of the plaintiff a contract for doing the work upon which the assessment in question was afterwards issued; that the clerk posted a notice of said award "on the 17th day of October, 1888, and for five days thereafter;" that afterwards, on the 22d day of October, 1888, the street superintendent entered into a contract with the plaintiff's assignors to do said work, and thereafter made the assessment upon which this action is brought. Section 5 of the act of March 18, 1885, authorizing street improvements, provides that after the contract has been awarded "notice of such awards of contracts shall be posted for five days, in the same manner as hereinbefore provided for the publication of proposals for said work. The owners of the major part of the frontage of lots and lands upon the street whereon said work is to be done * * * may within ten days after the first posting of notice of said award elect to take said work, and enter into a written contract to do the whole work at the price at which the same has been awarded. Should the said owners fail to elect to take said work, and to enter into a written contract therefor within said ten days, * * * it shall be the duty of the superintendent of streets to enter into a contract with the original bidder, to whom the contract was awarded, at the prices specified in his bid." The provisions of this section make it clear that the superintendent is not authorized to enter into a contract with the person to whom it has been awarded until after the expiration of 10 days from the first posting of the notice of award. During that period the owners of the land to be assessed are allowed the privilege of electing to take the work, and enter into a written contract to do the same at the price at which it was awarded. The power of the superintendent to enter into a contract with the "original bidder" does not arise or come into existence except upon a failure of the owners to make their election within the statutory period; and any contract entered into by him with the bidder before the time when by the statute he has the power to enter into such contract is without authority and void, and, consequently, cannot be the basis of a valid assessment. Burke v. Turney, 54 Cal. 486.

2. One of the issues to be determined by the court was whether the superintendent of streets had entered into a contract with the assignors of the plaintiff. The complaint alleged that such contract had been entered into by him on the 22d day of October, 1888. This allegation was denied by the answer, and it was, therefore, incumbent upon the plaintiff to establish the fact. If the superintendent had not entered into any contract for doing the work, there was no authority for him to make any asesssment, and the assessment that had been offered in evidence by the plaintiff would not create any charge upon the property of the defendant. The award, assessment, and diagram, with the affidavit of demand and non-payment, offered by the plaintiff, was *prima facie* evidence that such contract had been en-

tered into, and, in the absence of any other evidence, would have justified the court in so finding. It was, however, competent for the defendant to overcome the effect of this evidence, and establish his denial of the allegation, by any competent and relevant evidence. The documents offered by him were both relevant and material for this purpose, and should have been received in evidence. One of the documents offered purported to be a contract between the superintendent and the plaintiff's assignors for doing the work that had been awarded to them, and bore the same date as the contract alleged in the compaint. It had been prepared for execution by both parties, and was signed by the plaintiff's assignors, but was not signed by the superintendent. The other document was in the form of a bond for the faithful performance of the work, and was signed by the plaintiff's assignors and two sureties, who justified in "double the sum in the bond specified as the penalty thereof;" but the bond itself named no obligors, nor did it specify any sum as the penalty thereof. It was only a blank form, without containing any reference to any contract for any specific work, and was without any date. These two documents were produced from the records of the superintendent of streets, and were each certified to be a "true and correct copy of the original on file in the office of the superintendent of streets." They certainly tended to show that no contract for doing the work had ever been entered into by the superintendent. Being on file in his office, they bore the presumption of an official character and relevancy to an assessment made by him for the work described therein; and, in the absence of proof of any other contract, the court must have found that they were the only contracts in his office for doing that work.

3. Any objections to the correctness of the proceedings by reason of the foregoing defects, were not waived by the defendant by his failure to appeal to the city council. Section 11 of the statute in question provides for an appeal to the city council by those who feel aggrieved, or have any objection to any act, determination, or proceeding of the superintendent of streets; and, after authorizing the city council to remedy and correct any error or informality in the proceedings, declares that the decisions and determinations of said city council upon such appeal shall be final and conclusive "as to all errors, informalities, and irregularities which said city council might have remedied and avoided." It is evident, however, that the foregoing defects in the proceedings could not have been remedied or avoided by the city council upon any appeal from the assessment. At that time the work had been done, and there was no occasion for any contract to be entered into; and any direction from the city council to the superintendent of streets to enter into a contract would have been nugatory as to anything that had taken place prior thereto. A contract entered into by the superintendent at that date would not validate an assessment for work that had been done prior thereto. Unless the superintendent had entered into a contract in pursuance of the award at a time when by the provisions of the statute he was authorized to do so, there was no foundation for any of the subsequent proceedings, and the person who did the work acquired no rights thereby against the owner. "A contract authorized and executed in the mode prescribed by the act, is indispensable to the validity of the assessment. This defect is not cured by the failure of the lot-holders to appeal to the board, because, had an appeal been taken, the defect could not have been remedied by the board." Dougherty v. Hitchcock, 35 Cal. 524. "The premature action of the superintendent was one which affected his power or jurisdiction. His action was void, and that which was void does not become valid by reason of a failure to appeal. The property owners were not aggrieved, and the failure of the contractor to appeal did not operate (1) to create a grievance on the part of defendants, and (2) to estop them from complaining of it." Burke v. Turney, 54 Cal. 487.

The provision in the latter part of section 11, that no assessment shall be held invalid except upon appeal to the city council, etc., has no application to a case in which an appeal is not authorized, or in which, even if taken, the city council could not have remedied the defect. The legislature did not intend to declare that the owner should be deprived of his defense to any claim upon an assessment, where the assessment was void by reason of incurable defects, because he had failed to invoke the aid of a tribunal which was powerless to grant him any relief. Nor would the owner be estopped from presenting any such defects because he had appealed to the city council, and that body had denied him relief. Their denial of relief may have been based upon the express ground that the matter appealed from was not such as they could remedy, and, therefore, they would decline to take any action. If, however, they had expressly determined that the assessment was valid and the previous steps irregular, their decision would not have any binding force. Being a tribunal of limited jurisdiction, unless the facts conferring such jurisdiction existed, their action would be void, and it would be competent at any time to show that they had no jurisdiction to determine the question.

4. The judgment entered herein is erroneous. It provides for a personal judgment against the defendant for any deficiency that may remain after a sale of the lot assessed. Such judgment is unauthorized. Taylor v. Palmer, 31 Cal. 241. The judgment and order denying a new trial are reversed.

We concur: Beatty, C. J.; McFarland, J.; De Haven, J.; Garoutte, J.; Sharpstein, J.

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90 Cal. 617

In re CHENEY. (No. 20,854.)

(*Supreme Court of California.* Sept. 1, 1891.)

Carrying Concealed Weapons—City Ordinance—Penalty.

1. Const. Cal. art. 11, § 11, providing that any city may make all such local police regula-

tions as are not in conflict with general laws, empowers a city to prohibit by ordinance the carrying of concealed weapons by persons, not public officers or travelers, without a permit from the police commissioners.

2. A city has the right to prescribe any penalty for the violation of its ordinances within the limits designated by its charter; and where St. Cal. 1861, p. 552, fixed the limit at $1,000, a fine of $250 for carrying concealed weapons is not excessive.

In bank. Petition by O. F. Cheney for writ of *habeas corpus*. Writ discharged.

Z. T. Cason, for petitioner. *Davis Louderback* and *W. S. Barnes*, Dist. Atty., for respondent.

HARRISON, J. The petitioner was convicted in the police court of the city and county of San Francisco of violating section 22 of ordinance No. 1603 of said city and county, as amended by ordinance No. 2189, and was sentenced "to pay a fine of $250, and, in default of payment of said fine, to be imprisoned in the county jail of said city and county at the rate of one day for each one dollar of said fine, until said fine is satisfied." The fine not being paid, he was on the 8th day of June, 1891, committed to the custody of the sheriff, by whom, at the issuance of the writ herein, he was detained in the county jail under said commitment. Section 22 of the ordinance named reads as follows: "Sec. 22. It shall be unlawful for any person, not being a public officer or traveler, or not having a permit from the police commissioners of this city and county, to wear or carry concealed in this city and county any pistol, dirk, or other dangerous or deadly weapon. Every person violating any of the provisions of this order shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than $250 and not exceeding $500, or by imprisonment not less than three months and not exceeding six months, or by both such fine and imprisonment. Such persons, and no others, shall be termed 'travelers,' within the meaning of this order, as may be actually engaged in making a journey at the time. The police commissioners may grant written permission to any peaceable person, whose profession or occupation may require him to be out at late hours of the night, to carry concealed deadly weapons for his own protection." It is contended by the petitioner that the judgment under which he was convicted is void, and his detention thereunder unlawful, for the reason that by the terms of the ordinance the court has no discretion to fix the penalty for its violation at a less sum than $250, and the ordinance is therefore "repugnant to, and not in harmony with, the spirit and letter of the laws and constitution of the state of California upon kindred subjects, and in conflict with the kindred statutory provisions thereof;" and also for the reason that under the terms of his sentence he may be confined 250 days, whereas the limit of imprisonment which the court is authorized to impose as a punishment for the violation of the ordinance is 6 months.

Counsel for petitioner has not pointed out to us any specific provisions of the statutes or constitution of this state with which the ordinance is directly repugnant or in conflict, but in his argument has chiefly relied upon the proposition that the ordinance is void upon the ground that the minimum penalty for its violation is excessive and unreasonable. Article 11, § 11, of the constitution of this state provides that "any county, city, town, or township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws." This gives to each municipality the right to determine what police regulations it will prescribe; and the only limitation upon the exercise of the power is that such regulations shall not be in conflict with the general laws of this state. There is no general law in this state which forbids the carrying of deadly weapons concealed; so that in the passage of this ordinance there is no violation of the constitutional limitation. It is a well-recognized principle in government that the police requirements of a city are different from those of the state at large, and that stricter regulations are essential to the good order and peace of a crowded metropolis than are required in the sparsely-peopled portions of the country. Hence the organic act of the state has directly conferred upon each city the power to make such rules, in regulating the conduct of those within its jurisdiction, as in the judgment of its legislative body will best preserve their rights. Many police regulations which are demanded by the exigencies of life in a crowded city have reference chiefly to social order, and are directed to the promotion of the comfort and safety of the citizen, as well as to the protection of individual and public property. The mode of using the streets, the manner of conducting business, the times and places at which certain occupations shall be plied, are instances of this class, and the power granted to the city is limited to their regulation. It is with reference to ordinances of this character that it is said by courts they must be reasonable, and not violate those rights of the individual that are superior to the demands of society. There are other police regulations, however, which are intended for the prevention of crime and the preservation of the public peace, and in reference to which the legislative body of the city is vested with a discretion that is not reviewable by the courts. In the exercise of this power, the municipality, in determining the penalty to be imposed for violating its ordinances, is limited only by the terms of its charter, and the reasonableness of the punishment is not to be questioned elsewhere. It is a well-recognized fact that the unrestricted habit of carrying concealed weapons is the source of much crime, and frequently leads to causeless homicides as well as to breaches of the peace that would not otherwise occur. The majority of citizens have no occasion or inclination to carry such weapons; and it is often the case that the innocent bystander is made to suffer from the unintended act of another, who, in the heat of passion, attempts to instantly resent some fancied insult or trivial injury. It is to protect the law-abiding citizen, as well as to prevent a breach of the peace or the commission of crime, that the ordinance in question has been passed. By its terms, ample provision is made for those whose necessities of life or of occupation require protection from carrying such weapons; and, as the prohibition does not extend to those who come within the exceptions, there is no invasion of the rights of the citizen.

Having the right to pass the ordinance in question, the city has the right to prescribe any penalty for its violation within the limit designated in its charter. As the legislature has fixed this limit at the sum of $1,000, (St. 1861, p. 552,) it follows that the penalty prescribed by the ordinance is not illegal. The writ is discharged, and the prisoner remanded to the custody of the sheriff.

We concur: Paterson, J.; McFarland, J.; Sharpstein, J.; Garoutte, J.

I concur in the judgment: De Haven, J.

(90 Cal. 543)

Bates *et al.* v. Santa Barbara County *et al.* (No. 14,372.)[1]

(*Supreme Court of California.* Aug. 21, 1891.)

Mechanics' Liens—Notice to Owner—Costs and Counsel Fees.

1. Under Code Civil Proc. Cal. § 1184, providing that a mechanic or material-man may give the owner of the building for which he has furnished material or labor written notice of his claim, and that it thereupon becomes the duty of the owner to retain sufficient funds to pay it, a mechanic employed by a subcontractor, who serves the required notice, acquires a prior right to the fund in the hands of the owner due the contractor, though the latter may not be entitled to a lien, the building being a public one.

2. The right of such mechanic to a deficiency judgment against the subcontractor is not waived by his proceeding to enforce the lien, or to recover from the owner the balance of the contract price unpaid.

3. Where no lien exists, the costs of filing notice thereof and counsel fees for its attempted enforcement cannot be allowed.

Department 1. Appeal from superior court, Santa Barbara county; R. M. Dillard, Judge.

Action by Bates and others against Santa Barbara county and others to enforce a mechanic's lien. Judgment for plaintiffs, and defendants appeal. Modified and affirmed.

Jas. G. Garrison, W. C. Stratton, and *Del Valle & Munday,* for appellants. *B. F. Thomas, John J. Boyce,* and *A. E. Putnam,* Dist. Atty., for respondents.

Paterson, J. On October 2, 1888, the defendants Booty and Holmes entered into an agreement with the defendant the county of Santa Barbara to erect for the latter on a public block in the city of Santa Barbara a brick building, to be used by the county as a hall of records, for the sum of $19,850. The contract was reduced to writing, but was never signed by any officer of the county. Thereafter, defendant the Star Brick & Supply Company began the construction of the building under a contract with Booty and Holmes, and prosecuted the same until August, 1889, when Booty and Holmes assumed control of the work, which was completed by them, and turned over to and accepted by the county on September 11, 1889. Plaintiffs and their assignors performed services and furnished materials under contracts made with the Star Brick & Supply Company, while the latter was engaged in constructing the building, and it is for the value of such services and materials that this action was brought. During the progress of the work the county paid to Booty and Holmes on account of the contract price the sum of $11,991, leaving a balance of $7,859 due at the time the building was completed. Soon after the completion of the work plaintiffs served upon the proper county officers notices in writing of their respective demands, and thereupon the board of supervisors passed a resolution reserving the balance of the contract price for the satisfaction of all claims and liens. Notices in the form required by section 1187, Code Civil Proc., were filed in due time in the office of the county recorder by the plaintiffs. On January 4, 1890, plaintiffs filed their claims against the county with the clerk of the board, setting forth the facts required by the provisions of the county and township government act, and the board refused to pay the same, or any of them, until the claims were established by the judgment of a court of competent jurisdiction. Thereupon this action was commenced against the county of Santa Barbara for the sums of $6,551.73, value of the work done and materials furnished by plaintiffs, $37.40, cost of filing and recording the notices of lien, and $850, attorneys' fees. Upon the application of the county, the defendants Booty and Holmes, original contractors, and the brick and supply company, subcontractors, were brought in and made parties defendant. The court found as conclusions of law that the several plaintiffs were entitled to recover judgment against the county of Santa Barbara in accordance with the rank of their respective claims, specifying the rank of each, the amount to which they were entitled, together with interest thereon, costs, and an attorney fee of $30 for each claimant, the same to be paid out of the balance of $7,859, set aside for that purpose by the board of supervisors; that the claims of Booty and Holmes and the brick and supply company were all subordinate and subject to the claims of the plaintiffs; that, in case the fund was insufficient to pay the amounts found due, plaintiffs would be entitled to judgment against the defendant the brick and supply company for the deficiency; and that plaintiffs were entitled to a lien on the hall of records. Judgment followed in accordance with the conclusions of law, except that no lien was declared therein against the building. The county was satisfied with the judgment, and paid the claims as directed by it. The defendants Booty and Holmes and the brick and supply company appealed, bringing the case before us on the judgment roll alone.

Appellants' contention that a lien cannot be acquired against a public building is sustained by the authorities, (Phil.

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[1] Rehearing denied.

Mech. Liens, § 179; Code Civil Proc. § 690, subd. 13; Ripley v. Gage Co., 3 Neb. 397; 2 Dill. Mun. Corp. § 577; Foster v. Fowler, 60 Pa. St. 27; Poillon v. Mayor, 47 N. Y. 666; Mayrhofer v Board, [Cal.] 26 Pac. Rep. 646;) but it does not follow that the claims of Booty and Holmes are not subordinate and subject to the claims of the plaintiffs, so far as the unpaid portion of the contract price is concerned. Under section 1184, Code Civil Proc., the mechanic or material-man may give the owner of the building upon which he has performed labor, or for which he has furnished material, written notice of his claim, and thereupon it becomes the duty of such owner to retain sufficient funds to answer such claim. Upon receipt of the notice the owner becomes liable as on garnishment or assignment. McAlpin v. Duncan, 16 Cal. 128. "It is a form of equitable subrogation regulated by statute." Loonie v. Hogan, 9 N. Y. 439, 440; Frank v. Chosen Freeholders, 39 N. J. Law, 347; 2 Jones, Liens, § 1285. The rights of plaintiffs do not depend upon the legality of the contract. Whether it was void or valid, the contractor and subcontractor will be held to be the agents of the owner for the purposes of the law, and neither the one nor the other can assert a want of privity between himself and the laborer or material-man. The right of plaintiffs to recover does not depend upon their right to a lien. The equitable garnishment provided for by section 1184, Code Civil Proc., is a cumulative remedy, in ordinary cases; but in this instance it is the only remedy provided by the lien law, because the pursuit of the remedy by foreclosure would involve the taking of buildings which, on the grounds of public policy and public necessity, are exempt from execution and forced sale. And this remedy is one which does not contravene any principle of public policy. It operates merely as an assignment *pro tanto* of the money due by the owner to the contractor, and in no way affects the public buildings. The fund is in the treasury, and the statute justly provides that, instead of paying it to the contractor for the work which he agreed to do, but which the laborer has actually performed, the owner shall pay it to the latter. The true spirit and merit of the statute is lost sight of in the contention that this remedy is a mere substitute for the remedy by lien, and that, when the latter does not exist, the former cannot exist. The right to control and direct the fund remaining in the hands of the owner is as distinct and independent as the right to file and enforce a lien. It is a remedy entirely disconnected from and additional to the remedy by lien upon the building, and as the exceptional element which it is claimed arrests in this case the usual operation of the lien law does not exist, it is a remedy which should be regarded with favor by the court. The brick and supply company was primarily liable to plaintiffs for their respective claims, and cannot be heard to complain of the deficiency judgment. The right to a money judgment against the person who employs the mechanic or purchases the material is not lost or waived by a proceeding to enforce the lien or recover from the owner the balance of the contract price remaining in his hands. Brennan v. Swasey, 16 Cal. 140; Association v. Wagner, 61 Cal. 349; Code Civil Proc. §§ 1194, 1197. Furthermore, it appears that the funds held by the county are more than sufficient to pay all the demands of the plaintiffs.

The complaint contains all the allegations necessary to show a due presentation of plaintiffs' claims against the county and the rejection thereof; but if it did not, so long as the county does not complain, we do not think appellants should be heard on such an objection.

The court erred in allowing each claimant $2.20 for filing his notice of lien, and $30 attorney fee. Inasmuch as no lien could be acquired by any of the claimants, no expense incurred in attempting to secure one should have been allowed. The statute does not in express terms provide for counsel fees, except in cases of lien, (sections 1184, 1195, Code Civil Proc.,) and, of course, such fees cannot be allowed unless expressly authorized by law, (section 1021, Code Civil Proc.) The cause is remanded, with directions to modify the judgment by striking out from the amounts allowed to the several claimants the sum of $32.20. As thus modified, the judgment will stand affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(90 Cal. 635)

SHEWARD *v.* CITIZENS' WATER CO. (No. 14,265.)

(*Supreme Court of California.* Sept. 2, 1891.)

CITY ORDINANCES—REGULATION OF WATER-RATES—APPEAL FROM INJUNCTION.

1. Const. Cal. art. 14, requires cities to regulate water-rates by ordinance. Ordinance Los Angeles Feb. 1890, § 1, fixes certain specific rates for the use of water according to the size of the house, etc. Section 2 provides that, where there is a large consumption or waste of water, the person or corporation furnishing it may apply a meter, and collect a certain amount for certain quantities of water used. *Held*, that the ordinance was not invalid, in that it fixed different rates for consumers of the same class.

2. Where a preliminary injunction was granted, and afterwards made perpetual on full hearing, an appeal only lies from the final judgment.

Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action by Sheward against the Citizens' Water Company for injunction. Judgment for plaintiff. Defendant appeals. Reversed.

Howard & Balmer, for appellant. *Dooner & Burdett*, for respondent.

HARRISON, J. The defendant is a corporation supplying a portion of the inhabitants of Los Angeles with water for domestic use by means of its system of water-works in that city; and the plaintiff is the owner of a certain house and premises connected with the water system of the defendant, and dependent upon it for all water necessary for domestic use or consumption. In the month of February, 1890, the city council of Los Angeles, in accordance with the requirements of the constitution, adopted an ordinance "regulating the rates and compensation to be collected by any person or corporation supplying water for domestic use and private purposes to the inhabitants of that city during the year commencing July 1, 1890, and ending June 30, 1891." By the first section of this ordinance it fixed certain specific rates for the use of water furnished for dwelling-houses, according to the size of the house, and with additional rates for water used for certain specific purposes, such as bath-tubs, water-closets, lawn-sprinklers, etc., commonly called "house-rates." The second section of the ordinance declares: "Any person or corporation furnishing water to the inhabitants of the city of Los Angeles shall have the right, in all cases where there is a large consumption or waste of water, to apply a meter and collect the following meter rates: For quantities of water, 1,000 cubic feet or less, for each 100 cubic feet, 35 cents; * * * for each 100 cubic feet, over 5,000 and less than 10,000, 25 cents. * * * Any person or consumer of water shall have the right to apply a meter at his own expense, but under the supervision of the water company, and pay for his water at meter rates as above, provided that in no case where meters are used shall the bill for water be less than one dollar per month." In the month of May of that year the defendant, with the consent of the plaintiff, had applied a meter to the water service of the plaintiff, and through it supplied him with all water consumed by him during the months of July and August. According to the schedule of house-rates fixed by section 1 of the ordinance, the rates of water for the house and premises of the plaintiff amounted to $6.20 each month. By the measurements of the meter the defendant was entitled to collect a greater sum of money, and accordingly it demanded of the plaintiff $12.95 for the water consumed in July, and the sum of $11.95 for that consumed in August. The plaintiff tendered to the defendant on the last day of each of said months the sum of $6.20, and demanded therefor a receipt in full payment of the water-rates for the month ending on that day, but the defendant refused to receive the same, or any sum less than the above amounts of $12.95 and $11.95, respectively, as a payment of said rates, and, the plaintiff refusing to pay any more than the amounts tendered by him, the defendant threatened to shut off its water supply, and disconnect the house and premises of the plaintiff from its water-works and system. Thereupon the plaintiff brought this action to enjoin the defendant from so doing. Upon the filing of the complaint a restraining order was issued by the judge of the court in which the action was brought, and subsequently, viz., October 20, 1890, upon the application of the plaintiff, and after notice to the defendant, the judge issued a provisional order of injunction in accordance with the prayer of the complaint. Thereafter the defendant filed an amended answer, to which the plaintiff demurred, and, the court having sustained the demurrer, the defendant declined to further amend its answer; whereupon the court rendered its judgment, which was entered October 25, 1890, "that the portion of the ordinance set out in the complaint which provides for meter rates, at the option of the company furnishing water, is contrary to law and void," and perpetually enjoined the defendant from shutting off the water supplied to the plaintiff, and furnished by it, or from severing or in any wise impairing the connection of the plaintiff's premises with the water system of the defendant. On the 8th of November, 1890, the defendant appealed from the judgment, and on the 19th of November, 1890, from the order of injunction.

The plaintiff has moved to dismiss the latter appeal upon the ground that, the final judgment awarding the plaintiff a perpetual injunction having been entered before such appeal was taken, no appeal could thereafter be taken from the order.

1. The order of injunction made October 20, 1890, was a provisional remedy, which by its terms was limited "until further order in the premises." Upon the entry of the final decree this provisional remedy was merged in the perpetual injunction thereby granted to the plaintiff, and ceased to have any operative effect upon the defendant. Its functions having thus terminated, there was thereafter no existing "order" granting an injunction from which an appeal could be taken. Webber v. Wilcox, 45 Cal. 301; Lambert v. Haskell, 80 Cal. 611, 22 Pac. Rep. 327; Gardner v. Gardner, 87 N. Y. 14; Jackson v. Bunnell, 113 N. Y. 220, 21 N. E. Rep. 79. It follows that the motion to dismiss the appeal from the provisional order of injunction must be granted.

2. The demurrer to the answer admits not only the facts alleged therein, but, also, for the purpose of determining the sufficiency of the answer, that the facts alleged in the complaint, which are denied in the answer, form no part of the plaintiff's cause of action, and are not to be regarded by the court. It is thus admitted by the plaintiff that the ordinance above named was properly adopted, and that for the year beginning July 1, 1890, the defendant was entitled to collect from the plaintiff for the water consumed by him according to the rates therein specified; that in the month of May, before the said ordinance went into effect, the defendant, for the purpose of ascertaining the exact consumption of water on the premises of the plaintiff, applied a meter to the water service for said premises "with the knowledge and consent of the plaintiff;" that the consumption of water by the plaintiff during the months of July and August of that year "was much in excess of the amount reasonably required," and that the use of water by him on said premises during said months was "large, unusual, and wasteful;" that said meter was so constructed "that it would properly and accurately measure the water consumed by plaintiff on his said premises, and, by said meter measuring the water so used by the plaintiff, it was ascertained that said plaintiff consumed upon said premises during the month of July, 1890, 7,311 cubic feet of water, and during the month of August, 1890, the plaintiff consumed on his said premises 6,652 cubic feet of water;"

that the sums demanded of the plaintiff for water consumed by him during these months were reasonable, and were the ordinary meter charge made by the defendant to its customers, and in no wise discriminative against the plaintiff, and were less than the amount of rates therefor fixed by the ordinance; and that the plaintiff had refused to pay said sums. Upon the facts thus admitted the plaintiff showed no cause of action for compelling the defendant to continue its supply of water, or to enjoin it from cutting off such supply.

The argument presented in support of the judgment is that an ordinance "which fixes two rates, one to be determined by the size of the house and lawn and by certain specific uses, the other by the amount of water consumed, as shown by the meter," is invalid for the reason that it establishes two or more different rates for the same class of consumers, and enables the water company to discriminate between consumers of the same class. The city council of each municipality is by the constitution, art. 14, § 1, made the legislative body upon which is devolved the duty of fixing the rates to be collected for the use of water supplied to the inhabitants of any city. Its act in fixing these rates is a legislative act, and when performed is to receive all the presumptions and sanctions which belong to acts of legislative bodies generally. It must be assumed that the council, in fixing the rates for any year, have adopted such a measure of compensation as will be just towards the rate-payer as well as the company, and that the mode of collection is that which, in the judgment of this legislative body, will best subserve the interest and rights of both parties. The power of the court to disregard the terms of the ordinance has not been discussed by counsel, but, if we should concede that the court, in a controversy between the water company and a rate-payer, has any jurisdiction to inquire into the propriety of the terms of the ordinance, where the ordinance is not void upon its face, we do not think that the facts shown in the present record authorize such inquiry. The ordinance in question does not, upon its face, show that the rates to be collected, where the amount of consumption is ascertained by a meter, are different from those collected from persons who are rated by the use to which they apply the water. It may be assumed that, for the purpose of fixing the rates in any year, the city council would, as a preliminary consideration, determine the gross amount of compensation to be allowed the water company for the estimated quantity of water to be furnished by it, and would fix the rates so that this compensation would be realized. For this purpose it would establish some unit of quantity as the standard by which the rates to be collected should be fixed, and would then, in its rating for specific uses, estimate what portion of this unit would be consumed in the several specific uses for which rates are established. This unit of quantity is found in the second section of the ordinance, and, whenever the supply is determined under the provisions of that section, the compensation is in strict accordance with the standard so fixed. Recognizing the fact, however, that to furnish and keep in order meters for all its consumers increases the expenses of the company, and indirectly the rates to be borne by the consumers, the city council, in order to avoid this increase of cost, has in the first section adopted a schedule of rates to be collected for certain specific uses of water. As the rates to be collected by the water company are properly in accordance with the amount of water furnished, and not for the use to which it is applied, the council, for the purpose of determining these rates, would ascertain from such sources of information as were available what portion of the unit of quantity fixed in the standard for compensation would, under ordinary circumstances, be supplied for each of these specific uses, and would fix the rates accordingly. Necessarily the same amount of water will not be consumed by each individual, even for the same specific uses, and these rates may not produce the same compensation to the company as it would receive under the second section of the ordinance; and while this provision of the city council for rates in the absence of exact measurement, will only as a general rule be equivalent to the rates charged by measurement, and may result in an inequality of individual rates, it affords only another illustration that in practical legislation absolute perfection is unattainable.

These rates are not, however, permanently conclusive upon either the consumer or the company. If the consumer is of the opinion that they call for greater compensation than is authorized by the amount of water which is actually supplied to him, he has the right to have his exact consumption ascertained and rated; and if, on the other hand, the company is of the opinion that the consumer makes use of a larger amount of water than is justified under the estimate made in fixing the rates for specific uses, it can attach a meter and receive compensation for the exact amount consumed. In either case there is nothing unjust or inequitable to either party, since in each the company receives and the consumer pays for the exact amount of water supplied. Nor can it be said that the ordinance itself furnishes any opportunity for discrimination or distinction between its customers. The objection that the meter may be inaccurate in measurement cannot be considered. A meter is a measurer, and we must assume, upon the facts as alleged, that it correctly measures and determines the water which passes through it. With reference to the proposition of the respondent that the company has not the right or power to shut off the water from its consumer, when the consumer refuses to pay for the water supplied, we merely say, "as it is submitted without argument, it is overruled in like manner." Sharp v. Dangney, 33 Cal. 514. The appeal from the order of injunction made October 20, 1890, is dismissed. The judgment appealed from is reversed, and the cause remanded.

We concur: PATERSON, J.; GAROUTTE, J.

91 Cal. 165

SALLE v. MAYER. (No. 14,117.)

(*Supreme Court of California.* Sept. 12, 1891.)

CREDIBILITY OF WITNESS—CONTRADICTION — RECORD OF FORMER PROCEEDINGS—CROSS-EXAMINATION—HOSTILITY BEFORE TRIAL—EVIDENCE.

1. A tenant, in an action against his landlord for money expended and work done, testified on cross-examination that at the time of the landlord's entry he did not "claim to be in possession under a lease, because there was no lease." Thereupon, for the purpose of contradicting him by showing a former admission that his possession was that of a tenant, the landlord offered a transcript in a former action between them, wherein the tenant had recovered damages for the said entry. The witness was not asked what he had admitted or alleged in the former action; nor was his attention called to the transcript. *Held*, that it was not proper at that time for the purpose proposed.

2. Where a tenant, in an action against his landlord, produces a written statement of account, made nearly a year before the trial, the exclusion of an inquiry, on cross-examination, as to what his feelings towards the landlord were at the time he made the statement, is not prejudicial; since it was material, only, what his feelings were at the time he testified.

3. The testimony of the tenant that he was induced to go on the land by the verbal promise of the landlord that he would give him a five-years lease, and that after his removal he refused to execute it, but told him to go on and cultivate the land, and that he would pay him for the work, is not objectionable, as proving a lease for more than one year that is not in writing, where the tenant claimed nothing under a lease, and the testimony was intended only to explain how he came to be upon the land.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Assumpsit by Salle against Mayer. There was judgment for plaintiff, and defendant appeals. Affirmed.

Reymert, Orfila & Reymert, for appellant. *Elmer E. Rowell* and *Willis, Cole & Craig*, for respondent.

VANCLIEF, C. This action is of the nature of a common-law action of *assumpsit*. The complaint contains three counts: (1) For goods sold and delivered; (2) for money paid for the use of the defendant; and (3) for labor performed by plaintiff for the defendant. As to the first count, defendant's answer admits the sale of the goods, but pleads payment. As to the second, the answer merely denies that the defendant "is indebted to plaintiff in the sum" demanded, or in any other sum. As to the third count, the answer simply denies that plaintiff performed the alleged labor, or any labor, for defendant "at his instance and request." The answer alleged counter-claims against the plaintiff for money paid for plaintiff's use, for money loaned, for personal property of defendant converted by plaintiff to his own use, and for pasturing plaintiff's cow. The balance of plaintiff's demand, after crediting defendant with payment of $129.39, is $873; and the amount of defendant's counter-claims is $673. The case was tried by a jury, whose verdict was for plaintiff in the sum of $500, upon which judgment was rendered. The appeal is from the judgment, and from an order denying defendant's motion for new trial.

1. The point that the evidence was insufficient to justify the verdict is not sustained; for, although the evidence is conflicting, that on the part of the plaintiff sufficiently tends to prove that a balance of $500 was due from defendant to plaintiff, to justify the verdict.

2. It appears that plaintiff, with his family, was residing on defendant's land—a tract of 115 acres—from December, 1887, until February, 1889, during which period the alleged indebtedness of defendant to plaintiff accrued. The plaintiff testified that he was induced to go on the land by a verbal promise of defendant that he would execute to plaintiff a lease of the land for a term of five years; that after his removal the defendant refused to execute the lease, but told plaintiff to go on and cultivate the land, and that he (defendant) would pay for the work. Defendant's counsel moved the court to strike out "all the testimony in regard to the contract for the lease, * * * on the ground that the lease was for more than a year, and not in writing." It is insisted that the denial of this motion was error; but the testimony was not intended to prove a lease, but only to explain how plaintiff was induced to remove his family upon defendant's land. Plaintiff claimed nothing under the lease which he said had been promised by defendant, but distinctly testified that it was never executed. The testimony, therefore, was not objectionable on the ground stated.

3. While testifying in his own behalf, plaintiff produced a written statement of accounts between himself and defendant, which he said he had made nearly a year before the trial. This statement was marked, "Plaintiff's Exhibit One." On cross-examination defendant's counsel asked the following question: "What were your feelings toward the defendant at the time you made plaintiff's Exhibit One?" The court sustained an objection to this question, and it is claimed that the ruling was prejudicial error. But, conceding that it was error, I think it was harmless. It was material that the jury should have been informed what were the feelings of the witness towards the defendant at the time he was testifying. What they were 9 or 10 months before could have been material only by virtue of the *prima facie* presumption that unfriendly feelings usually continue 9 or 10 months. But, without the aid of this presumption, it must have appeared to the jury that the feelings of the plaintiff and defendant towards each other were hostile at the time of the trial, and this was doubtless considered by the jury in estimating the credibility of plaintiff's testimony.

4. Before the defendant opened his case, and upon cross-examination of the plaintiff, defendant's counsel asked the following question: "Did you, on February 13, 1889, when defendant threw your things out, claim to be his tenant, and in possession of that place as his tenant?" The court sustained an objection to this question, but the witness answered the question as follows: "At that time I did not claim, and could not claim, to be in possession under a lease, because there was no lease." Thereupon, "for the purpose of showing the relation of plaintiff and defendant, February 13, 1889, and the character of plaintiff's possession," and to show a former admission of plaintiff that he was in possession as tenant, defendant's counsel offered in evidence what he called the "judgment roll" from a justice's court in a former action between the parties to this action, wherein the plaintiff herein recovered from the defendant $50 damages on the following complaint: "(1) That on the 13th day of February, 1889, the defendant entered the premises of the plaintiff in the town of Rincon, and unlawfully and willfully and maliciously broke open the plaintiff's barn, and turned out the plaintiff's horse, which became estrayed; and said defendant also willfully and maliciously entered a building used and occupied by plaintiff as a cook-house and storehouse, and took therefrom the farming tools, consisting of shovels, hoes, etc., and otherwise willfully and maliciously trespassed upon said premises. Plaintiff further alleges that, without giving legal notice, the defendant ordered plaintiff's family to quit said premises, and abused the wife of the plaintiff with rude and violent language, inspiring her with terror, and causing her great mental suffering. (2) That the plaintiff was damaged by said unlawful act of defendant in the sum of two hundred and ninety-nine dollars and costs." The answer to this complaint was merely a denial of each and every allegation of the complaint. Upon objection to the introduction of this transcript from the justice's court, the court ruled that it was not proper to introduce it at that time for the purposes proposed, and said: "It might be competent at some other time. You simply ask a witness a certain question, and then wish to contradict him at this time." In this there was no error. The witness had not been asked any question as to what he had admitted or alleged in the action in the justice's court; nor had his attention been called to the transcript of the case. If that transcript contained evidence relevant for the defense, it was not proper for defendant to introduce it at that time for the purposes proposed. It was afterwards offered, however, at a proper time, and excluded by the court; but the defendant did not except to the ruling of the court in finally excluding it.

5. The instructions of the court to the jury were as favorable to the defendant as he was entitled to ask, and there was no exception to any instruction given.

The instruction asked by defendant and refused by the court was not applicable to the evidence. There was no evidence tending to prove such an agreement or understanding as that stated in the instruction refused. I think the judgment and order should be affirmed.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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91 Cal. 87

LATTIN *et al.* v. HAZARD. (No. 14,266.)

(*Supreme Court of California.* Sept. 5, 1891.)

SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY.

An agreement to convey land in consideration of the vendee building a dummy railroad through and by the vendors' premises, and operating the same for a period of 10 years, fare not to exceed a certain sum, cannot be enforced until the vendee has performed his part of the agreement by operating the road for the time specified, and at the fixed rate; since Civil Code Cal. § 3386, provides that "neither party to an obligation can be compelled specifically to perform it unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation."

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by Emma J. Lattin and others against Henry T. Hazard for specific performance of an agreement to convey land. Judgment for defendant on demurrer. Plaintiffs appeal. Affirmed.

Dooner & Burdett, for appellants. *O'Melveny & Henning*, for respondent.

TEMPLE, C. Plaintiffs appeal from a judgment against them on demurrer to their complaint. It is their second appeal, the former (85 Cal. 58, 24 Pac. Rep. 611) being from a similar judgment. The complaint was amended so as to avoid the defect then pointed out, and is now questioned upon other grounds. The action is to enforce specific performance of an agreement between James McLoughlin, as party of the second part, and a number of persons, who apparently owned severally various tracts of land in Los Angeles or the vicinity. Some of them agreed to convey to him certain lands and to give him the right of way for a street railroad, in consideration of which he agreed to extend and operate his steam-dummy railroad through and by their lands on a route designated. The party of the second part further stipulated "that the road shall be well and substantially built, and operated by steam-dummy motive-power, for a period of not less than ten years, and shall have a carrying capacity and speed equal to all the requirements of the said section and the business thereof." He further agreed that the fares should not exceed certain specified rates, "and that the rate so established shall not be raised for a period of ten years." It was stipulated that the subscriptions by those who gave land should be by their several grants of land, contiguous to the line of the railway, severally conveying a clear title in every case, at the date of the agreement, or within 20 days thereafter, to be held in escrow until the completion and operation of the railroad. It is averred that the contract had been fully performed by McLoughlin. The contract was dated the 9th day of March, 1887. It does not appear when the suit was commenced, but the amended complaint was filed November 26, 1890. It is evident that some parts of the contract have not yet been performed by McLoughlin, as whose assignee plaintiff brings this suit.

The first point raised on the demurrer is that specific performance cannot be decreed, because, in the nature of things, the remedy is not mutual; that the contract could not be specifically enforced against McLoughlin, and has not been fully performed by him, "or nearly so;" and that the want of entire performance cannot be fully compensated in damages, because such damages cannot be estimated, nor does the plaintiff offer such compensation. The appellant does not contend that specific performance could have been enforced against McLoughlin, but contends that the deeds were to be delivered upon completion of the work, meaning the extension of the road, and that the road has been so constructed. As to the agreement to operate the road in a certain stipulated mode, with a stipulated efficiency, and at specified rates for 10 years, she says that is an independent covenant, upon which an action might lie for a breach. Unfortunately, that is an argument against her right to specific performance. Section 3386 of the Civil Code seems decisive of this point. Unless the remedy be mutual, specific performance will not be decreed, except where the other party has performed everything to which the other is entitled under the same obligation, or nearly so, and full compensation for any want of entire performance is made. The continued operation of the road was an important part of the consideration for the deed. The contract therefore is not nearly performed. Indeed, except by the general allegation that McLoughlin has fully performed, there is no averment that the road is now being operated. McLoughlin may be fully entitled to a conveyance, according to the terms of his contract, without being able to maintain this action. The rule upon this subject is sufficiently stated in the section of the Code cited, and the authorities may be found collected in Pomeroy on Specific Performance of Contracts, § 162 et seq. It makes no difference whether the covenants are concurrent or not. The agreement that McLoughlin will operate the road for the stipulated period in the mode agreed upon is a substantial and important part of the obligation, which has not been performed, and of which specific performance cannot be enforced by a decree. Cooper v. Pena, 21 Cal. 403; Vassault v. Edwards, 43 Cal. 458. Damages are not claimed in the complaint, nor is there an averment of an assignment of such a cause of action to plaintiff. Taking this view of the first point presented on the demurrer, it becomes unnecessary, and perhaps it would be improper, to discuss the other important questions suggested. We think the judgment should be affirmed.

We concur: Vanclief, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

90 Cal. 603

Garnsey *et al.* v. Gothard *et al.* (No. 14,025.)

(*Supreme Court of California.* Aug. 31, 1891.)

Trusts in Land—How Created.

1. A daughter gave her father an absolute deed to lands, and the next day made a writing intended as a will, but which was void for irregularity, declaring that she deeded the land to her father for certain purposes therein stated. In a subsequent action concerning the land, the father filed a verified answer, averring that the land was conveyed to him in trust. *Held*, that this answer was sufficient to satisfy Civil Code Cal. § 852, which provides that no trust in relation to land is valid unless created or declared by a written instrument signed by the trustee.

2. The deed was not invalidated by the void will.

In bank. Appeal from superior court, Los Angeles county; H. K. S. O'Melveny, Judge.

Action by Garnsey and others against George Gothard and Thomas Edwards for specific performance of contract, and to determine which defendant was entitled to payment of the contract price. The case turned entirely on the latter point. Judgment for defendant Gothard, and an order denying defendant Edwards a new trial, from which he appeals. Reversed.

Samuel Minor and *Minor & Woodward*, for appellants. *Wicks & Ward* and *Scarborough & Waterman*, for respondents.

Sharpstein, J. This action is for the specific performance of a contract whereby defendant Gothard and his late wife, Elizabeth Jane, agreed to convey to the plaintiffs a certain tract of land, and 40 shares of water stock appurtenant thereto, upon their paying the stipulated price therefor, in certain installments, all of which, excepting the last, had been paid before the commencement of this suit, as stipulated; and the plaintiffs are ready and willing to pay the last installment to such person or persons as the court may determine is or are entitled to receive the same. The defendants, Gothard and Edwards, each claim to be entitled to receive said last installment. And defendant Gothard claims that he is also entitled to the installments which have been paid to defendant Edwards since the death of said Elizabeth Jane. The contest is wholly between the defendants, Gothard and Edwards, as to which of them is entitled to receive and hold the proceeds of said sale. The decision and judgment were in favor of Gothard and against Edwards, and the latter appeals from the judgment, and order denying his motion for a new trial.

The facts found by the court are that the allegations of the plaintiffs' complaint are true. That entitled them to the relief prayed by and granted to them. The residue of the findings are upon the issues raised by the answers of defendants, Gothard and Edwards, as to their respective claims to the money paid and to be paid by plaintiffs under their contracts with the Gothards.

The first finding upon the issue is that "Elizabeth Jane Gothard (the wife of the defendant George Gothard, and mother of B. T. Gothard) on the 11th day of January, 1887, made, executed, and delivered to the defendant Thomas Edwards a conveyance of her interest in the real estate described in the plaintiffs' complaint herein. The conveyance was made in view of the approaching death of said Elizabeth J. Gothard, and for the purpose of putting the legal title to said realty in said Edwards, to collect the money then due on the contract for the sale thereof in said complaint set out, and hold the same in trust for Bertrude Gothard alone, and with an oral understanding then and there with said Edwards to that effect, and without other consideration than such understanding." The next finding is "that thereafter, to-wit, on the 12th day of January, 1887, the said Elizabeth Jane Gothard, in anticipation of death and *cum animo testandi*, made and signed" a paper, of which a copy is inserted in said finding, and among other things contains the following: "I deed to my father, Thomas Edwards, all interest in that property at Anaheim that I now own, being the same that was given me by deed of gift, except $1,200 to pay the mortgage thereon; also $500 that we received on the sale of the said land now due. $3,100 which I request be used as follows: $200 to be paid to Mr. Melrose, commission fees for selling the said place; $100 to my husband, being in lieu for the $100 that he has paid out of the $500 that I gave him from my separate property; $1,200 to be used to the best advantage in buying a lot for my remains, and erecting a good stone thereon, fencing the said lot in good shape; also to pay what portion of my funeral expenses shall be left unpaid. The remainder, which is $1,600, is to be kept for the use of my child, Bertrude Thomas Gothard, until he becomes 21 years old; all interest on the same to be invested and added to the principal, with the exception of ten or fifteen dollars a year to keep my grave and lot in good condition. If he dies before the age of 21 years, then to my brothers' and sisters' children. It is also my desire that my burial lot shall be put in my child's name. [Signed] Elizabeth J. Gothard." The court finds that the paper was not olographic, but was written by said Edwards, and was only subscribed by said Elizabeth Jane Gothard, and was without attesting witnesses; and that she died within less than twelve hours thereafter; and said paper "was intended by said decedent as her last will and testament, but that she died intestate and leaving no estate, and said attempted will was worthless for any purpose, and that she left no heirs at law other than the said George Gothard, her surviving husband, and said Bertrude T. Gothard, her minor child." From the foregoing facts the court finds, among others, the following conclusions of law: "That the said sum of $1,398.95 so due from plaintiffs shall be paid by them into the hands of said George Gothard, guardian; that the defendant Thomas Edwards is indebted to the estate of the minor B. T. Gothard in the sum of $1,971, less $211."

It is only on the supposition that the court lost sight of the fact before found, that said Elizabeth Jane Gothard conveyed her interest in said property to defendant Edwards, that we can account for the finding of these conclusions of law. There is nothing in the findings of fact, much less in the evidence, to base such a conclusion upon. The finding is that "Elizabeth Jane Gothard, on the 11th day of January, 1887, made, executed, and delivered to the defendant Thomas Edwards a conveyance of her interest in the real estate described in the plaintiffs' complaint." That imports a deed absolute on its face, as the evidence proves it to be. But the evidence *aliunde* the deed, at least, tends to show that it was made, as the court finds it was, for the purpose of putting the legal title to said realty in said Edwards, to enable him to collect the money then due on the contract for the sale thereof in said complaint set out, and hold the same in trust. If the evidence is sufficient to establish a trust, there is nothing in the evidence or findings of fact to support the decision that Edwards, under the trust, is not entitled to hold all of the money paid and receive all to be paid by the plaintiffs for a conveyance to them of the land described in their complaint. *A fortiori*, if a trust has not been established, he is entitled to receive and hold it. We think, however, that a trust is established; and that the objects for which it was created are specified in the paragraph above quoted from the writing, which the court finds was made and signed on the 12th day of January, 1887, the day following the execution of the deed to Thomas Edwards. We do not overlook the provision of the Code that "no trust in relation to real property is valid unless created or declared by a written instrument, subscribed by the trustee or by his agent thereto authorized by writing." Civil Code, § 852. The defendant Edwards, by his verified answer in this action, has declared in a written instrument, in the most solemn manner, that the property in controversy was conveyed to him in trust. We think that a sufficient declaration in writing to satisfy the requirements of the Code.

The contention of counsel for respondent Gothard is that the writing of the date of January 12, 1887, was intended as a will, and, being so intended, it nullified the deed of January 11, 1887; that the deed, which is properly executed, was vitiated by a subsequent futile attempt to make a will; that the two instruments are so blended as to constitute but one; and that both must stand or fall "with the sufficiency or insufficiency of the execution of the testamentary paper dated January 12, 1887." There are cases in which it is held that a deed and will made upon the same day constitute one testamentary act; and other cases in which deeds have been held to be testamentary. But we are unable to find any case in which it has been held that a deed, otherwise valid, is rendered invalid by a void instrument subsequently made by the grantor. The theory of respondent Gothard's counsel does not appear to have been adopted by the court below. But we can conceive of no sounder or more plausible theory upon which the decision of the court below could be sustained. We think the decision clearly erroneous, and would modify or direct a modification of the judgment in accordance with the views above expressed, were it not for the fact that there is no finding on one of the material issues. By the contract between the Gothards and the plaintiffs the former agreed to convey with the land described therein a "water-right thereunto appertaining, viz., forty shares." In his answer defendant Gothard states that he is the owner of said forty shares of water stock, and that it "is distinct and separate, a distinct property from said land." This presents an issue upon which there is no finding, and, under our view of the case, a complete determination of it could not be had in the absence of such a finding. We think appellant is entitled to receive and hold all the moneys paid or to be paid for the land conveyed to him by Elizabeth Jane Gothard. But if the water stock is owned by George Gothard he is entitled to the money paid or to be paid for that. And it is necessary that the court should find who owns the water stock, and what proportion of the money paid or to be paid by the plaintiffs is for said water stock. So much of the judgment only as adjudges "that on payment of the money remaining due by plaintiffs on the contract of purchase set up in plaintiffs' complaint, to-wit, the sum of $1,398.95, the said Thomas Edwards and said George Gothard convey to plaintiffs herein the land and water stock in the complaint described," is affirmed. With that exception the judgment is reversed, and the cause remanded, with directions to the court below to try and find upon the issue raised by the allegation of defendant George Gothard that he is the owner of said 40 shares of water stock, and upon the trial of said issue the respective parties will be allowed to introduce any evidence pertinent to said issue.

We concur: HARRISON, J.; PATERSON, J.; MCFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.

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91 Cal. 1

STANTON v. QUINAN *et al.* (No. 14,049.)

(*Supreme Court of California.* Sept. 2, 1891.)

RIGHTS OF VENDOR—RESALE BY VENDEE.

1. On May 13, 1887, A. contracted with B. for the sale of land for $1,000 cash, $1,000 May 12, 1888, and $1,500 May 12, 1889; deed to be executed on second payment; balance secured by mortgage on the land. On May 17, 1887, B. contracted to sell the land to C. On December 16, 1887, A. executed a deed to B., and took a mortgage on the land to secure the deferred payments. One note for $1,000 was made payable May 16,

1888, and one for $1,500, May 16, 1889. All parties were fully informed as to the contracts of May 13th and 17th. *Held*, that A. did not lose his lien by changing the form of the security and the date of payment.

2. The equities acquired by C. in the land were no greater than those of his vendor.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Action by William F. Stanton against George Quinan, Thomas W. Grimes, and others to foreclose a mortgage. Decree for plaintiff. Defendants appeal. Affirmed.

Elmer E. Rowell and *Willis & Cole*, for appellant. *Harris & Gregg*, for respondent.

TEMPLE, C. This action is to foreclose a mortgage executed by defendant Quinan to one Salton. The appeal is upon the judgment roll. May 13, 1887, Salton contracted in writing with Quinan for the sale of the property described in the mortgage for $3,500,—$1,000 payable at once, $1,000 on or before May 12, 1888; and $1,500 on or before May 12, 1889. When the second payment was made, Salton was to convey to Quinan, receiving a mortgage on the property for the last payment. May 17, 1887, Grimes purchased the property from Quinan for $4,000, payable $1,500 in cash; $1,900, May 16, 1888; and $1,500, May 16, 1889. The contract was in writing, and contained a stipulation to the effect that upon full payment Quinan would convey the premises to Grimes free from all incumbrances. The two deferred payments were secured by negotiable promissory notes. December 16, 1887, before any of the deferred payments in their contract became due, Salton conveyed the property to Quinan, and took from him a mortgage to secure the money then due on the contract, made payable according to two promissory notes, being the mortgage and notes sued upon in this action, —one note for $1,055.90, due May 16, 1888, with interest at the rate of 10 per cent. per annum; the other for $1,574.38, payable May 16, 1889, with interest at 10 per cent. The rate of interest is the same as in the original contract; the notes became due four days, respectively, after the payments were to have been made under the contract. Before the execution of the mortgage, Salton knew of the purchase by Grimes, and the terms of his agreement with Quinan, and of the payment made by him; and the plaintiff purchased the mortgage with full knowledge of such facts. Grimes, also, at the time of his purchase, knew all the facts with reference to the contract between Salton and Quinan.

Appellant contends that Salton took the mortgage subject to his equities as purchaser from Quinan, and in this we agree with him; but we do not agree with his further contention that his interest in the land is not subject to the lien of the mortgage. Appellant was entitled to such rights with reference to the property as Quinan had under his contract. Salton and Quinan could not rescind it, or make its conditions more onerous. Had he asked for such relief, perhaps he would have been entitled to a decree that, upon paying the amount due upon the contract, the mortgage should be satisfied, and a deed made to him for the property. But he does not propose to pay anything. The difference between the amount due on the contract and the mortgage is but trifling, and is due to compounding the interest before it was due. The appellant is not complaining of that, but contends that by the change in the form of the debt and security Salton lost his lien. In this he is mistaken. There is no merit in the objection made to the complaint; and, if there were, such an objection could only be made by special demurrer. We think the judgment should be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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91 Cal. 63

FERGUSON v. McBEAN *et al.* (No. 13,953.)

(*Supreme Court of California.* Sept. 5, 1891.)

CONTRACTS — PAROL EVIDENCE TO VARY — PRIVILEGED COMMUNICATION.

1. One who in writing assigns a written contract to another, knowing that a third person was to be equally interested with the assignee in the rights assigned, cannot show by parol that such third person was intended to be bound by an agreement which he did not sign, executed by the assignee in consideration of the assignment.

2. Evidence that the contract assigned was really owned by another person than the assignor was properly excluded as immaterial.

3. Communications to an attorney, which were intended to be imparted by him to others, are not privileged.

In bank. Appeal from superior court, San Bernardino county; JOHN R. AIKEN, Judge.

Action by M. L. Ferguson against Alexander McBean and A. V. Bills on contract for the sale of lands. Trial to the court. Judgment for plaintiff, and defendants appeal. Reversed.

E. Crossman and *Hendrick & Younken*, for appellants. *Rowell & Rowell* and *Hunsaker & Britt*, for respondent.

BEATTY, C. J. In order to a proper understanding of the various questions involved in this appeal it is necessary to state pretty fully the facts out of which the case arises. On June 7, 1887, the plaintiff, a married woman, living separate from her husband, entered into a written contract with the Colton Land & Water Company, whereby said company agreed to sell and she agreed to purchase certain real estate, situate in San Bernardino county, for the sum of $57,000, to be paid $1,000 cash on the delivery of the agreement, one-third of the balance in 15 days, and the remaining two-thirds in 6 and 12 months. It was stipulated that time was of the essence of the contract, and that failure by the vendee to comply with its terms should release the vendor from all obligation to convey, and work a forfeiture of all sums paid. It was further stipulated that at the time of paying the first one-third of the purchase money the vendee should procure from one P. A. Raynor a release and settlement of certain claims of Raynor against the vendor then in litigation. In pursuance of the contract, and at the date of its delivery, Mrs. Ferguson made the cash payment therein provided of $1,000, and thereafter obtained the consent of the vendor, indorsed in writing on the contract, extending the time for making the second payment to and including the 12th day of July, 1887. At the time of obtaining the extension she assigned the contract to the defendant McBean,—that is to say, her written assignment was to McBean alone; but she claims that it was in fact made to the defendants McBean and Bills jointly, such being the understanding and intention of the parties. In consideration of said assignment she received from McBean a contract in writing, signed by him alone, in the following terms: "It is hereby agreed on the part of Alexander McBean, of Oakland, California, to and with Mrs. M. L. Ferguson, that in case the said Alexander McBean shall sell or purchase the interest of the Colton Land and Water Company in and to certain lands, water, and agreements held in common with P. A. Raynor, under and by virtue of an agreement by and between said company and M. L. Ferguson, dated June 7, 1887, or any extension of time granted by said company or which may be given to said McBean, that he will pay to said Mrs. M. L. Ferguson or assigns the sum of three thousand dollars at the time of the consummation of said sale or purchase. Witness my hand and seal this 30th day of June, 1887. [Seal.] ALEXANDER McBEAN." But, although executed only by McBean, the plaintiff claims that this was understood to be and was equally the contract of Bills. Bills is a step-son of McBean, and it clearly appears that they were not only connected very closely in their personal relations, but that they were at and about this time engaged in the same kind of speculation in the same locality, and generally conversant each with the doings of the other; but they both deny that Bills had anything to do with the transaction betweeen McBean and the plaintiff. Shortly before the time for making the second payment, McBean, who had gone to San Francisco, as he says, for the purpose of raising money or interesting parties with means to conclude the purchase, telegraphed to Colton announcing his failure, whereupon the plaintiff exerted herself, as she claims, to procure money for Bills, in order that he might make the second payment, and prevent a forfeiture of the contract. She claims that she did raise this money, and that Bills used it in making the second payment, and in obtaining a conveyance of the property in pursuance of the contract. The defendants deny this, and claim on the contrary that the money procured through the exertions of plaintiff was obtained for P. A. Raynor, who, in conjunction with Bills, subsequently purchased the same property mentioned in the contract, not, however, in pursuance of its terms, but under a separate and independent agreement entered into between them and the owner after the expiration of the time, as extended for plaintiff's second payment. As to all these matters, the evidence is extremely conflicting, but it is not disputed that on the 12th day of July, the very last day for making the second payment under plaintiff's contract, Bills went to the office of the Colton Land & Water Company, and proposed to purchase the identical property described in the contract, and offered to pay on the purchase the same amount stipulated in the contract as a second payment. The company refused to entertain his proposition unless he produced the release of Raynor's claims, as provided by the contract. He offered to comply with this condition if they would give him until the next day to get the release, to which offer the company assented; and accordingly, on the following day, July 13th, Bills delivered Raynor's release, paid the sum of $19,000, and received a conveyance of the land to himself. In making the purchase he claimed and received credit for the $1,000 originally paid by the plaintiff; that is to say, he was credited on the purchase price of $57,000 with the full sum of $20,000, although he paid but $19,000, and gave his notes for the balance of $37,000, secured by mortgage on the land. After the conclusion of the purchase, and on the same day, he conveyed a half interest in the land to P. A. Raynor. The plaintiff thereafter demanded of each of the defendants payment of the sum of $3,000, as provided in the written contract of June 30th, above quoted, and, payment being refused, she brings this action to recover that sum, with interest.

In her complaint, after setting out her agreement for the purchase of the land, and alleging the payment of $1,000 at the date of its delivery, she proceeds as follows: "That on the 30th day of June, A. D. 1887, plaintiff, at the special instance and request of defendants, assigned to them the contract aforesaid, and all her interest therein, the said defendants and each of them promising and agreeing that in case they or either of them should purchase or sell the property of the said Colton Land and Water Company, and make the payments to said company as in said contract specified, and within any extension of time granted in which the same might be made, that they or either of them would pay to plaintiff the sum of three thousand dollars. And at the time of the making of said agreement between plaintiff and defendants it was agreed that the written evidence thereof should be between plaintiff and defendant McBean, but that defendant A. Bills should be equally interested therein, and that such written agreement should be binding upon both of defendants alike. And in case of either of the defendants purchasing or selling the said property of the said Colton Land and Water Company they would pay to plaintiff the sum of three thousand dollars. And that pursuant to said understanding defendant Alexander McBean drew and signed the instrument in writing of which the following is a copy, [here follows a copy of the contract of June 30th, above quoted:] And that the consideration for which said assignment was so made to defendants was their agreement to pay said sum of three thousand dollars, as aforesaid." She then alleges a purchase of the property by defendants on July 12th; demand on them for payment of $3,000, as provided by the contract of June 30th, and their refusal to pay; and prays judgment for that sum and interest. To this complaint each of the defendants demurred, generally for the want of facts, and specially on the ground of misjoinder of defendants, in that it appeared that Bills was not a party to or interested in the contract set out in the complaint. Their demurrers being overruled, the defendants answered separately, McBean denying that he ever bought any of the lands described in the contract, and Bills denying any connection with the contract of June 30th, or that he ever bought any land under or by virtue of plaintiff's contract with the Colton Land & Water Company. But neither defendant denied that said contract had been assigned to them. Upon these pleadings the parties went to trial, but during the progress of the trial, and after most of the evidence was in, the defendants, by leave of the court, filed amended answers, in which they separately denied any assignment of the contract of the Colton Land & Water Company to Bills, amplified their original denials on other points, and set up two additional defenses: *First.* That plaintiff was at the commencement of the action the wife of one J. B. Ferguson, and that the action did not concern her separate property. *Second.* That plaintiff was never the real owner of the contract of June 7th, which she pretended to assign to McBean, but that said contract, with all its rights and privileges, belonged to P. A. Raynor; and that plaintiff, knowing that Raynor was such owner, in making said pretended assignment was willfully and knowingly attempting to defraud McBean out of the sum of $3,000. The case was tried by the court without a jury, and the findings and judgment were for the plaintiff. Defendants moved for a new trial, which was denied, and they unite in an appeal from the judgment and said order.

The most important question involved in the appeal is as to the liability of Bills on the contract upon which the action is founded. This question is raised not only by the demurrers to the complaint, but by numerous exceptions taken at the trial to rulings of the superior judge admitting oral testimony to the effect that Bills, although not named therein, was nevertheless a party to said contract. According to plaintiff's testimony, she knew at the time of the assignment of her contract that Bills was to be equally interested with McBean in the rights assigned, and was to be equally bound to pay the $3,000. According to all the testimony, Bills was then present in San Bernardino, and in direct communication with the plaintiff. His interest, in other words, was fully disclosed at the time; and no reason existed —at least none is alleged—why he was not named as an assignee, and as a party to the agreement to pay for the assignment. In short, it appears by the testimony more fully than by the complaint, though we think not more plainly, that the plaintiff deliberately chose to accept a contract in writing which did not name, nor by any of its terms bind, one of her intended assignees. Can she, under such circumstances, claim that he is bound? This is a question upon which there is a great conflict of authority in this country and England, and an adequate review of the cases in which it has been agitated would require a volume. We have neither time nor inclination to enter upon any such review, but content ourselves with saying that in our opinion the better reason and sounder policy are against the proposition. In England the rule seems to be pretty well settled, after much debate, the other way; but in the United States the weight of authority seems to be against the English rule. The cases in which the question has arisen are those in which an agent has contracted in his own name, and his principal has afterwards sued or been sued on the contract; and Judge Story, in his work on Agency, § 160*a*, says that the doctrine maintained in the more recent authorities is that, "if the agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, he, the agent, will be liable to be sued and be entitled to sue thereon, and his principal also will be liable to be sued and be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it." But an examination of the authorities cited in support of this statement shows that they do not support it, as has been frequently pointed out. It is undoubtedly true that when the principal is undisclosed he may sue or be sued, but not when he is known, and especially not when he is present at the making of the contract. For a full and able discussion of the whole subject, see Chandler *v.* Coe, 54 N. H. 561, and Gillig v. Road Co., 2 Nev. 216, and cases therein cited. Considered independent of authority, we think sound policy requires the enforcement, in cases such as these, of the general rule that a writing cannot be varied by parol. It is as important to know who has made a contract as to know its terms, and when the parties put it in writing there is no more reason or excuse for omitting the name of a known party, whom it is the intention to bind, than there is for omitting its most important stipulation. To allow such a practice opens the door in every case to such conflicts of evidence as this case illustrates upon a point which can be easily and forever set at rest by simply making the written evidence of the contract conform to the mutual understanding of the parties as to matters fully within their knowledge. We think the superior court erred in overruling the demurrers and in admitting the testimony referred to. This error compels a reversal of the judgment and order appealed from; but, as a new trial will be necessary, it is proper that we should dispose of some other questions likely to arise in the further progress of the case.

Although the plaintiff cannot recover on this contract against Bills, we see no reason why she may not recover against McBean upon pleadings properly amended. All the evidence in the record indicates pretty clearly collusion between McBean and Bills and Raynor, by means of which the two last named obtained the benefit of plaintiff's assignment to McBean. If in fact McBean turned the contract over to Bills and Raynor without a formal assignment of it, and they got the benefit of the assignment, and especially if McBean was a participant in their purchase, he became liable on his promise to pay the $3,000.

The court erred in sustaining an objection to the offer to prove what plaintiff told Crossman, on the ground that it was a privileged communication. Crossman, as to that matter at least, was not the attorney, if he was her attorney at all; and, moreover, the statement, if made, was not intended to be confidential, but was made with the purpose of having it communicated to others.

The court did not err in excluding evidence that the contract with the Colton Land & Water Company was the property of Raynor. Whether it was or not is a question between Raynor and the plaintiff, to be litigated by them or their representatives. McBean got a valid assignment, and cannot be excused from paying the price because some one else may have a right to claim it from his assignor.

There is barely sufficient, but certainly not very satisfactory, evidence to sustain the finding that the plaintiff was, at the beginning of the action, living separate and apart from her husband, by reason of his desertion of her. There is no positive or direct evidence that he went away without or against her consent. And the evidence is likewise rather unsatisfactory on the point of the contract being her separate property, but we cannot say that it does not support the finding.

Other points made in the briefs are comparatively unimportant, and need not be particularly referred to. Judgment and order reversed, and cause remanded, with directions to the superior court to sustain the demurrers to the complaint, with leave to the plaintiff to amend as she may be advised.

We concur: DE HAVEN, J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.; HARRISON, J.; GAROUTTE, J.

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91 Cal. 41

ALANIZ v. CASENAVE *et al.* (No. 14,156.)

(*Supreme Court of California.* Sept. 5, 1891.)

CANCELLATION OF DEED—FRAUD—PLEADING—CONFLICTING EVIDENCE.

1. A complaint for the reconveyance of real estate, which alleges that defendant, while acting as plaintiff's agent, proposed that she convey all her real estate to him for the purpose of managing the same, promising to reconvey on demand, that she was induced by his representations and promises to make the conveyances, and that at the time of making the promises he had no intention of performing them, but made them with the fraudulent purpose of inducing her to put the property in his hands that he might cheat and defraud her, sufficiently sets out the facts which constitute the alleged fraud.

2. The conveyance, under such circumstances, was without consideration.

3. Where a general fiduciary relationship exists, and confidence was reposed in the grantee, it is not necessary to allege or prove that the conveyance was taken with a fraudulent intent, in order to establish a constructive trust.

4. Where one, by means of a parol promise to reconvey, obtains an absolute deed without consideration from one to whom he stands in a fiduciary relation, the violation of the promise is constructive fraud.

5. Where the evidence is conflicting, the supreme court will not disturb the findings of the trial court.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action by Concepcion Alaniz against Pierre Casenave and Cayetana Casenave, his wife, for an accounting and reconveyance of real estate. Judgment for plaintiff. Defendants appeal. Affirmed.

Brousseau & Hatch and *W. F. Williams*, for appellants. *Smith, Howard & Smith* and *Smith, Winder & Smith*, for respondent.

TEMPLE, C. This action is for an accounting and to compel the reconveyance of real estate. The complaint charges that defendant Pierre is the husband of the other defendant, who is the niece and adopted daughter of plaintiff; that after their marriage, in 1870, defendant Pierre took charge of plaintiff's business, and has ever since continued to manage and control the same, as her agent; that in 1874 plaintiff sold some property, and placed the proceeds, about $22,000, in the hands of said Pierre to manage for her; that with a portion of the money he purchased certain lots in Los Angeles, taking the deeds in her name, but retained the larger portion of the money; that on the 17th day of June, 1875, he proposed to her that for the purpose of managing her business she should convey all the lands to him, promising to manage and control the same for her, and reconvey on demand, and thereupon she conveyed all of the lands to him for the purposes mentioned; that she was living in the family of defendant at the time, had unlimited confidence in him, and was entirely under his control in business matters, being herself an illiterate and ignorant woman, entirely unacquainted with business, and was induced by his representations and promises to make the conveyances, and she is informed and believes that at the time of making the promises he had no intention of performing them, but made them with the fraudulent purpose of inducing her to put the property in his hands, that he might cheat and defraud her; that she had requested a reconveyance, which he refused to make; that he is indebted to her in a large sum, the amount of which she is unable to state, for portions of the money unexpended, and for rents received by him, and the proceeds of her property sold by him; that said defendant pretends that he never received from her, or for her use, any money whatever, and that he did not receive said lands in trust, but purchased the same from her; that on the 22d day of May, 1888, said defendant conveyed said lands to his wife, the other defendant, by a deed of gift; that the said Cayetana was privy to all the fraudulent designs of her husband, and took the deed for the sole purpose of defrauding the plaintiff, and preventing the assertion of her rights, and in trust for the use and benefit of her husband.

The answer admits the relationship of the parties set out in the complaint, but denies that defendant Pierre was ever the agent of plaintiff, or managed any business for her in any capacity. Denies receiving any money for her. Denies that the lands were conveyed to him in trust, and avers that he purchased them for a valuable consideration. They deny that plaintiff was ignorant, illiterate, or unacquainted with business, or was under the control of said defendant, or was induced by any representations or promises to make the conveyances, or that he took the lands in trust or with any fraudulent intent. They also deny the indebtedness. They also charge that plaintiff had full knowledge of the conveyance to defendant Cayetana at the time it was made, and approved of it. That the deed was not made with any fraudulent intent, but in good faith, for the purpose of vesting the title in said Cayetana. All the facts alleged in the complaint are found by the court, except that the defendant Pierre, at the time he made the promises which induced plaintiff to convey the property to him, had no intention of fulfilling them, but made them simply with the fraudulent purpose of inducing her to put the property in his hands. On the other hand, the court finds: "Said defendant, at the time he made such representations and promises, had the intention in good faith of fulfilling the same, but afterwards conceived the design of claiming the same as his own." There is also a finding to the effect that said defendant still has in his hands $23,700, money received for the use of plaintiff.

On this appeal the defendants make three points: *First*, the complaint does not state facts sufficient to constitute a cause of action; *second*, the judgment should have been for defendants on the findings; and, *third*, the evidence does not sustain the findings.

Under the first point the objection is that the facts which constitute the alleged fraud are not specifically set out, but we cannot agree with this proposition. A general fiduciary relation between the parties is averred; and that plaintiff reposed in the principal defendant unlimited confidence, and was entirely under his control, being herself ignorant and unaquainted with business; that he proposed the conveyances to enable him more conveniently to manage her business, and promised to hold and manage it for her, and to reconvey upon request. If the rule laid down in Brison v. Brison, 75 Cal. 525, 17 Pac. Rep. 689, is to be upheld, these facts, with the others, constitute a cause of action. It is not expressly alleged in the complaint that the conveyances were without consideration, but such is the clear and necessary conclusion from the facts which are stated. The objections to the findings are necessarily of the same character, except that the court has failed to find the one fact of fraudulent intent existing at the time of the conveyance, but, on the contrary, finds that such fraudulent intent did not exist. But in the case of Brison v. Brison, supra, it was held that where a general fiduciary relation exists, and actual confidence is also reposed in the trustee, it is not necessary to allege or prove such fraudulent intent in order to establish a constructive trust, and the case of principal and agent is cited as an example of a fiduciary relation. In Feeney v. Howard, 79 Cal. 525, 21 Pac. Rep. 984, also written by Mr. Commissioner HAYNE, it is said, referring to the above case, that it was held: "If, by means of a parol promise to reconvey, a party obtains an absolute deed without consideration from one to whom he stands in a fiduciary relation, the violation of the promise is constructive fraud, although at the time of the promise there was no intention not to perform." The fiduciary relation, it is said, is one of the facts constituting the fraud, meaning that it was a necessary element in the case. See, also, Broder v. Conklin, 77 Cal. 330, 19 Pac. Rep. 513; Adams v. Lambard, 80 Cal. 426, 22 Pac. Rep. 180. This doctrine was again affirmed in the second appeal of Brison v. Brison, (Cal.) 27 Pac. Rep. 186.

The objection that the findings are not sustained by the evidence is based on several grounds. It is contended that the evidence does not show that the relation of principal and agent existed between the parties. The evidence on this point is not altogether satisfactory, owing chiefly to the confused and contradictory testimony of the plaintiff herself, but it cannot be said that there was no evidence to sustain the finding. Other parts of plaintiff's testimony tended strongly to prove the relation and absolute actual trust and confidence reposed in the male defendant, and she is corroborated by other witnesses. There is testimony, it is true, contradicting this testimony, but that was a matter for the trial court. The same is true of the question whether the parties did really intend to create a trust or not. It is also said that the evidence shows that the conveyances were made to defraud third parties, and the court should have so found. It seems that she feared that some heirs of her father might assert some kind of a claim against her which would compel her, as she says, "to come and go," and she did not wish to have the trouble. Thereupon the defendant, her son-in-law and agent, proposed that she convey to him, and he would take the trouble of the defense off her hands. She testifies that she did not fear any claim that her father's heirs might prefer, and that she so stated at the time. There is no evidence that the claims were asserted against her or her property, or could have been. The defendants deny the entire proposition. If such had been the nature of the conveyance, defendants certainly would have known it, and could have defended on that ground. Courts will not allow a trust to be proven by a party to the fraud, if the trust was created for a fraudulent purpose, but before it will deny relief upon that ground there should be proof that some one was to be defrauded. Here there is no proof of a claim which it was intended to defeat, or that any creditor or claimant of any kind existed. As to the amount of money received, we do not understand that it is objected to as too much if the trust were properly established. We advise that the judgment and order be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

91 Cal. 23

PEOPLE *v.* STAPLES. (No. 20,796.)

(*Supreme Court of California.* Sept. 3, 1891.)

COMPLAINT—WARRANT OF ARREST—NECESSITY OF DEPOSITION — SUFFICIENCY OF INFORMATION—BRINGING STOLEN PROPERTY INTO STATE—VENUE —EVIDENCE—HEARING ON APPEAL.

1. Pen. Code Cal. §§ 811–813, provide that when an information is laid before a magistrate he must take the depositions of the informant and his witness, if any; that the depositions must set forth the facts tending to prove the offense, and the guilt of defendant; that, if the magistrate is satisfied therefrom that an offense has been committed, and there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest. *Held*, that when the information is positive in its allegations of every fact necessary to support the charges laid, it is a sufficient deposition within the meaning of the statute, and a warrant may be issued thereon.

2. Where one charged with committing a felony is examined, and evidence adduced sufficient to justify the magistrate in holding the accused to answer the charge, an irregularity in the warrant of arrest is immaterial, since thereafter the accused is held under the commitment, which authorizes the filing of an information.

3. Under Pen. Code Cal. § 872, concerning commitment for public offenses, which provides that, if it appears from the examination that a public offense has been committed, the accused must be held to answer to the same, the fact that the offense charged in the information is different from that laid in the complaint does not affect the sufficiency of the information.

4. Under Pen. Code Cal. § 789, which provides that the jurisdiction of a criminal action for stealing in any other state and bringing the property into this state is in any county into or through which such property has been brought, an information which charges the defendant with having stolen property in Arizona, and that he did bring the same into the county of Los Angeles, charges an offense within the jurisdiction of the court of Los Angeles county.

5. Where the larceny was committed at or near the line between Arizona and California, on a moving train, it was proper to admit evidence that it was committed immediately after crossing the line into California, as the variance was not material, as taking the stolen property into Los Angeles county was a part of the offense, and it was immaterial whether it was stolen before or immediately after coming into the state.

6. The fact that the information alleged that the larceny was committed in Arizona, does not require the state to prove that the offense charged is defined by the laws of Arizona as larceny.

7. Where the evidence as to the value of the property stolen is conflicting, the verdict of the jury upon that question is conclusive.

8. Pen. Code Cal. § 1252, which provides that "all appeals in criminal cases must be heard and determined by the appellate court within sixty days after the record is filed in said appellate court, unless continued on motion or with the consent of the defendant," is merely directory, and a failure to determine a case within the time mentioned does not entitle the defendant to a discharge.

In bank. Appeal from superior court, Los Angeles county; WILLIAM A. CHENEY, Judge.

Information against M. N. Staples, for grand larceny. Verdict of guilty. Defendant appeals. Affirmed.

Hugh J. & Wm. Crawford, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

BEATTY, C. J. The defendant was convicted in the superior court of Los Angeles county of the crime of grand larceny, and appeals from the judgment and from an order denying a new trial.

His first assignment of error is upon the order of the superior court overruling his motion to set aside the information. One ground of the motion was that the magistrate before whom his examination was had issued his warrant of arrest without having taken any depositions of witnesses in support of the charge laid in the complaint, thus violating,—as he claims,—the provisions of sections 811–813 of the Penal Code.[1] In support of this point he cites and relies on the case of Ex parte Dimmig, 74 Cal. 164, 15 Pac. Rep. 619. But that case lends no support to his contention for two reasons. In the first place, the complaint in this case—unlike the complaint against Dimmig—is positive and direct in its allegation of every fact necessary to support the charge laid, and is therefore, in itself, a sufficient deposition within the doctrine of the Dimmig Case. In the second place, the want of jurisdiction to order an arrest becomes immaterial when the warrant of arrest is *functus officio*. In Dimmig's Case the objection was raised while the warrant was the only authority for holding him, and, the warrant being held invalid, he was necessarily discharged. But when a prisoner has been examined, and evidence adduced sufficient to justify the magistrate in holding him to answer on a charge of felony, the infirmity in the warrant of arrest, if any there be, ceases to be of any consequence, since he is thereafter held under the commitment, which of itself authorizes the filing of an information. The regularity of the information does not depend on the complaint, but upon the order holding the defendant to answer. People v. Velarde, 59 Cal. 458; People v. Wheeler, 65 Cal. 77, 2 Pac. Rep. 892. This view also disposes of the second ground of the motion, viz., that the complaint alleged the larceny to have been committed in San Bernardino county, and the stolen goods to have been brought into Los Angeles county, whereas the information charges a larceny in Arizona territory, and a subsequent bringing of the stolen goods into Los Angeles county. Even if the offense charged in the information was, as claimed, totally different from that laid in the complaint, it would not affect the sufficiency of the information, since, as we have seen, the information does not depend on the complaint, but upon the commitment, and it does not appear that the order of commitment differed in any respect from the information. It is not claimed, and it cannot be, that the commitment must follow the complaint, for the statute and the decisions of this court, are directly to the contrary. It is the duty of the magistrate to hold the defendant to answer for the offense proved, whatever may have been the offense charged. Pen. Code, § 872;[1] People v. Wheeler, 73 Cal. 255, 14 Pac. Rep. 796. Therefore, if the evidence showed that the goods were stolen in Arizona territory, it was the duty of the magistrate to hold him for that offense, if it was in fact or law a different offense from that charged; and, if he failed to do so, it was, nevertheless, the duty of the district attorney, in drawing the information, to charge the offense according to the facts disclosed by the depositions, ignoring to that extent the form of the commitment. People v. Vierra, 67 Cal. 231, 7 Pac. Rep. 640; People v. Lee Ah Chuck, 66 Cal. 662, 6 Pac. Rep. 859. But in truth there is no substantial difference between the charge laid in the original complaint and that set out in the information. Each charges in effect a larceny in Los Angeles county. When goods are stolen in one jurisdiction and carried into another, in legal contemplation the crime of larceny is committed in both jurisdictions, and may be punished in either. Our statute on that point (Pen. Code, §§ 497, 786, 789,) merely re-enacts the law as it was before. People v. Mellon, 40 Cal. 654; State v. Brown, 8 Nev. 212. Or, perhaps, it is more correct to say that our statute has adopted one of the two views upon which the courts of other states have divided in deciding upon the common-law rule. It follows that in both the complaint and information the defendant was charged with an offense committed in Los Angeles county. The place where the goods were alleged to have been stolen—San Bernardino or Arizona—was a mere circumstance, and a wholly immaterial one, of the offense. The superior court did not err in refusing to set aside the information.

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[1] Sec. 811. When an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them. Sec. 812. The deposition must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense and the guilt of the defendant. Sec. 813. If the magistrate is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest.

Nor did the superior court err in overruling the demurrer to the information. If we understand the position of appellant's counsel with reference to the demurrer, it is that the information does not charge an offense within the jurisdiction of the superior court of Los Angeles county, although no such objection is stated in the demurrer. The information charges in plain, direct, and unequivocal terms that the defendant did, in the territory of Arizona, unlawfully, willfully, and feloniously take, steal, and carry away from the possession of one Margaret McGregor a watch and chain, of the value of $75, then and there being the personal property of said Margaret McGregor; and that, after having so unlawfully taken and stolen said watch and chain, he did bring the same into the county of Los Angeles. This states the exact offense defined in section 497 of the Penal Code, the jurisdiction of which is, by section 789,[2] conferred upon any county of the state, into or through which the stolen property has been brought.

Several instructions asked by the defendant were refused by the court. The only question worthy of consideration raised by the assignments of error upon these rulings is this: Was it essential to prove that the original larceny was committed in Arizona, as alleged in the information? The defendant was porter on a sleeping-car, upon which the owner of the stolen property, Mrs. McGregor, was traveling as a passenger from Chicago to this state. The watch and chain were stolen from her berth just about the time the train crossed the Colorado river from Arizona to San Bernardino county in this state. The evidence left it somewhat doubtful upon which side of the boundary the theft occurred, and the defendant asked the court to instruct the jury that they must acquit unless they were satisfied that the larceny was committed in Arizona. These requests to charge were refused, and the question is whether such refusal was error. We do not think it was. Whether the original larceny was committed in Arizona or across the line in San Bernardino, the taking of the stolen property into Los Angeles county was equally criminal; and not only was it equally criminal, it was the same offense, punishable in the same manner, to the same extent, in the same jurisdiction, under the same law. The precise spot at which the criminal act was initiated was a mere circumstance of the offense, properly enough stated in the information, but not essential to be proven as stated. If the information had charged a larceny in Los Angeles county, proof of an original taking in San Bernardino or in Arizona would have been admissible. The only real question is whether evidence of a larceny on the west bank of a river is such a substantial variance from the charge that it was committed on the east bank as to be inadmissible. Under the circumstances of this case, where the theft occurred on a moving train in the act of crossing the river, we do not think the variance was material.

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[1] Sec. 872. If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the deposition an order, signed by him, to the following effect: "It appearing to me that the offense in the within depositions mentioned [or any offense, according to the facts, stating generally the nature thereof] has been committed, and that there is sufficient cause to believe the within-named A. B. guilty thereof, I order that he be held to answer to the same, and committed to the sheriff of the county of."

[2] Sec. 789. The jurisdiction of a criminal action for stealing in any state the property of another, or receiving it, knowing it to have been stolen, and bringing the same into this state, is in any county into or through which such stolen property has been brought.

As to the other instructions refused, it is sufficient to say of them generally that, so far as they were correct, they were given in better form in the charge of the court and in other instructions asked by the defendant and allowed.

It is contended that the evidence does not sustain the verdict, because—*First*, there was no evidence as to the laws of Arizona defining larceny; and, *second*, because the evidence clearly showed that the stolen goods were worth less than $50. As to the first objection, we say that the laws of Arizona have no bearing upon the question whether our laws have been violated. We do not assume to punish offenses against the laws of other states and territories. When we undertake to punish as larceny the bringing into this state goods that have been stolen in another state or country, we mean goods that have been stolen according to our definition of larceny, for which we look to our own laws exclusively, and not the laws of other countries. As to the second objection, it is sufficient to say that there was some evidence that the watch and chain were worth more than $50, and therefore the verdict of the jury on that point is conclusive.

There is no error in the record, and the judgment and order appealed from must be affirmed, unless a motion now made by the defendant to reverse the judgment and discharge him from custody must be granted on the ground that his appeal has not been decided within 60 days after the filing of the transcript here, as required by section 1252 of the Penal Code.[1] But no such consequence is annexed to a failure to comply with that provision, in which respect it differs from section 1382, which is mandatory in its requirement that a criminal prosecution must be dismissed, unless good cause to the contrary is shown, when the defendant is not brought to trial in the superior court within 60 days after the filing of an indictment or information. It is to be noted also that the latter section prescribes the means, and the only means, of enforcing the constitutional right of the accused to a speedy and public trial. Const. art. 1, § 13; People v. Morino, 85 Cal. 515, 24 Pac. Rep. 892. We do not, however, rest our denial of this motion upon any distinction between a constitutional and statutory right,—between the right to a speedy trial and a speedy determination of an appeal,—but solely upon the ground that one provision is merely directory and the other mandatory in substance and in terms. Motion to reverse denied, and judgment and order affirmed.

We concur: SHARPSTEIN, J.; PATERSON, J.; DE HAVEN, J.; HARRISON, J.; GAROUTTE, J.; MCFARLAND, J.

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90 Cal. 627

PACIFIC ROLLING-MILL CO. *et al.* v. RIVERSIDE & A. RY. CO. (No. 14,333.)

(*Supreme Court of California.* Sept. 2, 1891.)

SPECIFIC PERFORMANCE — CONCLUDED CONTRACT.

Defendant offered to buy plaintiffs' street railroad at an agreed price, "offer based on a clear title." Plaintiffs prepared an agreement to be signed, and forwarded it to defendant, the title to be examined "before signing the agreement." Defendant's attorney objected to the title, and defendant notified plaintiffs thereof, who thought the title good, and wished to know what defendant would "finally conclude to do." Defendant refused to purchase. *Held*, that there was no such concluded contract as could be specifically enforced.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Action by Pacific Rolling-Mill Company and San Pedro Lumber Company against Riverside & Arlington Railway Company, to enforce specific performance of an alleged contract. Decree for plaintiffs. Defendant appeals. Reversed.

Goodcell & McIntyre, for appellant. *Byron Waters* and *Lyman Evans*, for respondent.

VANCLIEF, C. Action to enforce specific performance of an alleged contract by which the plaintiffs agreed to sell, and the defendant to buy, a certain street railway, situate in the city of Riverside, county of San Bernardino, and known as "Seventh Street & Grandview Railroad." Judgment for plaintiffs. Defendant appeals from the judgment, and from an order denying a new trial. At the time the agreement is alleged to have been made the plaintiffs did not have the legal title to the road they offered to sell, but held a certificate of purchase at a sheriff's sale, made under a decree enforcing a lien for the price of materials furnished to construct the road. The only evidence of the agreement is a written correspondence between the parties by mail, the letters from plaintiffs being dated at San Francisco, and those from defendant at Riverside. The appellant contends, among other things, that the correspondence does not prove a completed contract of sale. The first letter of the correspondence is from defendant, dated October 22, 1888, as follows: "Will you sell your Seventh-Street road for $5,000 on six months' time, with interest at the rate of eight per cent. per annum? Note of undeniable value." In answer to this plaintiffs wrote November 15, 1888: "The rolling-mill company would sell the Seventh-Street road for $6,500, on the following terms, namely: $1,500 in cash and the balance in six months at eight per cent. interest, secured by good paper, or mortgage on the other road." From defendant to plaintiffs, November 23, 1888: "We will pay you for the road and equipments as it stands, title, etc., to be subject to examination of our attorney, $5,750, one-half in six months, and one-half in one year, to bear interest at eight per cent. per annum; said notes to be secured by a mortgage upon all of our lines as well as upon the Seventh-Street line." Plaintiffs to defendant, November 27, 188—: "The price you offer is not enough. The time, terms, and security proposed will not be objected to if you will come to the price asked in former letter to you, to-wit, $6,500. * * * There is another party figuring on the purchase of this railroad, and we hold ourselves at liberty, notwithstanding this offer to you, to sell to the first one who comes to our price. I note that your offer was for the road and equipments. We don't own the rolling stock or motive power." Telegram from defendant to plaintiffs, November 30, 188—: "We will agree to your price, and accept offer of 27th. Have written." Letter, of same date as telegram, is as follows: "We will agree to your price and accept your offer of the 27th. If you will send us the papers, we will have our attorney examine your title, and prepare the notes and mortgage. Our offer is based on a clear title." Plaintiffs to defendant, December 4, 188—: "Dear Sir: Your telegram of 30th ult. was received, and your letter of same date was received this A. M. We note that your 'offer' is based on a clear title. Our title comes through a sheriff's sale under execution and order or decree of court in the case of V. S. Runnels & Sons et al. vs. J. A. Studabecker et als., superior court of San Bernardino county. We have the sheriff's certificate dated October 16, 1888. And six months after that date we or our assigns will be entitled to a deed, unless the property is in the mean time redeemed. If you are not satisfied to take our title as it now stands, and close the matter, you must give us some assurance that you will take our complete title when we get it. I supposed that some of your people knew that we took title through the sheriff's sale in October last, and hence I concluded that you would only be assured of the regularity and effectiveness of the proceedings up to that time. Let me hear from you." Defendant to plaintiffs, December 8, 188—: "Dear Sir: Yours of the 4th is at hand and contents noted, and in reply would say that we will be satisfied with a sheriff's deed. We are willing to close the matter up at the present time on the terms stated. If you will prepare a contract, we will submit it to our attorney. The contract to state the facts, and when the six months from the date of your purchase have expired the notes and mortgages can be made. Notes dating from date of our contract and purchase. We understand the above to be your wish, and we are willing to make such a paper." Plaintiffs to defendant, December 13, 188—: "Dear Sir: Inclosed find an agreement for your company to execute in regard to the purchase of the Seventh-Street Railway. Inasmuch as your company may change its board of directors before the six months expire, and inasmuch as the emergency may arise which would induce you to mortgage or sell your road before the six months expire, and this agreement gives us no lien on any property, we request that you have Mr. Evans and J. G. North and some other one of your stockholders sign the guaranty attached to the agreement. You will note that the agreement says nothing about title. So you must make your investigations about title, if you wish, before signing the agreement. You can take a week to examine the title if you wish. I suppose I have your correct corporate name. Upon signing the paper as requested, and returning the same, the rolling-mill and lumber company will execute, and send you a duplicate." Defendant to plaintiffs, December 22, 188—: "Dear Sir: Yours of the 13th came duly, and the same was referred to our attorney. To-day we got his reply as inclosed. Can you give us any points that would set the matter at rest, and which could be submitted? We thought it was all right, and still hope you can make it clear to us." The opinion of defendant's attorney, inclosed in this letter of December 22d, was to the effect that the sheriff's deed would not convey the franchise, for the reason that the franchise had been granted to an individual person solely, and not to his assigns. Plaintiffs to defendant, December 27th: "Dear Sir: Yours of the 22d at hand. I have been trying to find time to send your attorney a list of authorities and memoranda, etc., but am still busy. I think, though, that I can remove your attorney's doubts. *First.* Our supreme court has decided that a right of way to maintain and operate a street railroad through the streets of a city is an easement and an interest in the land, (North Beach & M. R. Co.'s Appeal, 32 Cal. 506–512,) and therefore subject to execution. *Second.* The 7th-St. Railway was sold, not only under execution, but under the decree and order of the court. (See the decree.) The sale would have been good under the decree without execution. *Third.* The decree was made in a foreclosure suit of a mechanic's lien in which the city of Riverside and Studabecker were parties, and therefore bound by the judgment which decreed a sale of the franchise or right of way. We deny that the ground of the rejection of the title is good. But let us know what you finally conclude to do without delay, so that we know where we stand. You must be on or entirely off." On January 14, 1889, the defendant wrote: "We decline to purchase the 7th-Street franchise."

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[1] Sec. 1252. All appeals in criminal cases must be heard and determined by the appellate court within 60 days after the record is filed in said appellate court, unless continued on motion, or with the consent of the defendant.

It seems clear that the correspondence does not prove such a concluded contract as may be specifically enforced by a court of equity. It does not appear that either party intended to be bound until a written contract expressing all the terms of the agreement should be executed. Wristen v. Bowles, 82 Cal. 84, 22 Pac. Rep. 1136; Pom. Spec. Perf. §§ 58, 63, and authorities there cited. It is contended, however, for respondents, that all the terms of the contract were assented to and the contract completed, by defendant's letter of December 8th, in answer to that from plaintiffs of December 4th, in which plaintiffs say: "We note that your offer is based on a clear title. * * * If you are not satisfied to take our title as it now stands, and close the matter, you must give us some assurance that you will take our complete title when we get it." In answer to this defendant's letter of December 8th says: "We are willing to close the matter up at present on the terms stated. If you will prepare a contract, we will submit it to our attorney. The contract to state the facts," etc. Plaintiffs' letter (of December 13th) in reply to this shows that they did not understand that negotiations had terminated in a complete contract, and indicates that they knew defendant's ultimate decision depended upon whether or not it should be satisfied with the title derived through the sheriff's sale. This letter contained a draft of the agreement as then proposed by plaintiffs, (which does not appear in the record,) and says: "You will note that the agreement says nothing about title. So you must make your investigations about title, if you wish, before signing the agreement. You can take a week to examine the title, if you wish." Besides, this letter proposed, and the inclosed draft contained, a material new term to the agreement, viz., the personal guaranty of "Mr. Evans and J. G. North and some other one of your stockholders." No such guaranty had been asked or offered before. Plaintiffs' letter of December 4th asked "some assurance" that defendant would take their complete title when they should get it, but no kind of assurance was specified; and the only kind of assurance mentioned was that of a mortgage on defendant's roads. As contended by plaintiffs' counsel it seems to have been understood that plaintiffs would undertake to convey only such title as they got by the sheriff's sale; but it was quite as well understood that if, upon examination, the defendant was not satisfied with that title, it was not bound to purchase; otherwise, plaintiffs' letters of December 13th and 27th are unaccountable. In the latter plaintiffs undertook to answer the objections of defendant's attorney to their title, and close by saying: "We deny that the ground of the rejection of the title is good. But let us know what you finally conclude to do without delay, so that we know where we stand. You must be on or entirely off." This seems inconsistent with the alleged understanding of plaintiffs at the date of this lettter, that the agreement had been completed by defendant's letter of December 8th. If the agreement to purchase only such title as plaintiffs had derived through the sheriff's sale had been closed 19 days before, why were plaintiffs concerned to vindicate that title? and why ask to be informed without delay what defendant finally concluded to do? and how could defendant be "entirely off?"

From a careful reading of the whole correspondence, I conclude (1) that plaintiffs proposed to sell only such title as they acquired through the sheriff's sale; (2) that it was not intended nor understood that the negotiations should be considered closed, and the contract completed, until, upon examination, the defendant should become satisfied with that title, nor until a formal written contract should be executed by both parties; and (3) as it appears that defendant was not satisfied with the title, and that no formal or final written contract was executed by the parties, the fourth finding of the court to the effect that the agreement had been concluded, considered as matter of fact, is not justified by the evidence; and, as matter of law, it is a misconstruction of the written correspondence. In the process by which these conclusions have been reached the question discussed by counsel, as to whether or not the sheriff's deed would convey a perfect title, has not been considered material; and this accords with the construction contended for by respondents' counsel. Yet it may not be out of place to remark that it does not appear that the title was not rejected by defendant in good faith. I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

90 Cal. 532

BURKETT v. GRIFFITH. (No. 14,254.)

(*Supreme Court of California.* Aug. 21, 1891.)

SLANDER OF TITLE — WHEN ACTION LIES — CONTRACT OF SALE — ENFORCEMENT — COMPLAINT — SPECIAL DAMAGES.

1. An averment that a certain person offered to buy plaintiff's land, and that the offer was accepted, but that, after the purchaser was informed of the false statements of another regarding the title, he was "deterred from carrying out his agreement," indicates that there was a valid contract enforceable against the purchaser; and no action, therefore, is maintainable for the slander.

2. A complaint for slander of title referred to certain leases, annexed as exhibits for the purpose of identifying the lands, in which plaintiff had a "leasehold interest, with option and privilege of purchase;" but failed to allege the nature and covenants of the leases, or the terms of the option, or the nature of plaintiff's rights thereunder, or whether such covenants and option were those contained in the exhibits. *Held* that, inasmuch as the alleged defamatory statements referred to the covenants of the leases, and plaintiff's rights thereunder, it was necessary to allege facts sufficient to show what such rights and covenants were; and exhibits attached to the complaint, merely to identify the land, were not sufficient for this purpose.

3. A complaint for slander of title alleging that a certain purchaser was informed of the false statements of a third person, and withdrew his offer, without alleging that such person made the statements to the purchaser, or directed them to be communicated to him, or that any one to whom they were communicated repeated them, or by whom he "was informed" of them, fails to show that the alleged damage was the natural and direct result of such statements.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Frank Burkett against G. J. Griffith to recover for slander of title.

There was judgment for defendant, and plaintiff appeals. Affirmed.

John Robarts and *John D. Bicknell*, for appellant. *Stephen M. White* and *George W. Knox*, for respondent.

Harrison, J. The plaintiff brought this action against the defendant to recover the sum of $25,000 damages caused by certain false and malicious statements alleged to have been made by him concerning certain property of the plaintiff. The defendant demurred to the complaint upon the grounds of insufficiency and uncertainty, and from a judgment entered upon an order sustaining the demurrer the plaintiff has appealed.

Although the term "slander" is more appropriate to the defamation of the character of an individual, yet the term "slander of title" has by use become a recognized phrase of the law; and an action therefor is permitted against one who falsely and maliciously disparages the title of another to property, whether real or personal, and thereby causes him some special pecuniary loss or damage. In order to maintain the action, it is necessary to establish that the words spoken were false, and were maliciously spoken by the defendant, and also that the plaintiff has sustained some special pecuniary damage as the direct and natural result of their having been so spoken. As words spoken of property are not in themselves actionable, it is necessary to allege the facts which show wherein the plaintiff has sustained damage; and, as special damage is the only ground upon which the action can be maintained, it is essential that such damage be distinctly and particularly set out in the complaint. Linden v. Graham, 1 Duer, 670; Swan v. Tappan, 5 Cush. 104; Malachy v. Soper, 3 Bing. N. C. 371. It is not actionable to speak disparagingly of the title of another unless he is damaged thereby. The utterance of a mere falsehood, however malicious, will not sustain an action unless damage has resulted therefrom, (Add. Torts, 25;) and the damage which can be recovered is only such as is the direct and natural result of the utterance of the words. As in all other cases dependent upon special damage, there must be both injury and damage. The slanderous words, false in fact and maliciously uttered, constitute the injury, and give the right of action; and the pecuniary damage sustained is the measure of recovery. If the words uttered are not false, or if there be no malice, there is no right of action, and there can be no recovery unless some special pecuniary damage has resulted from their utterance. In order to show that the words uttered have caused injury to the plaintiff, it is generally necessary to aver and show that they were uttered pending some treaty or public auction for the sale of the property, and that thereby some intending purchaser was prevented from bidding or competing. Folk. Starkie, Sland. § 128; Odger, Sland. & Lib. 138. "This action lieth not but by reason of the prejudice in the sale." Per Fenner, J., in Bold v. Bacon, Cro. Eliz. 346. If the plaintiff has merely a general intention to sell, or if the words uttered do not reach any intending purchaser, or if they do not prevent any sale, or are uttered after the sale is completed or agreed upon and contracted for, the plaintiff does not suffer any damage from their utterance.

It is alleged in the complaint that in August, 1888, the plaintiff was the owner of a certain leasehold interest, with option and privilege of purchasing two certain tracts of land in Los Angeles county, and that one Arthur Sketchley was then negotiating and treating with him for the purchase of, and offered to purchase from him, an undivided one-half of the same for the sum of $25,000, "and that the plaintiff accepted said offer;" that the defendant, well knowing the premises, did willfully, maliciously, and without probable cause, during the period that the said Sketchley was so negotiating and making the offer aforesaid, and prior and subsequent thereto, publicly state to divers persons, (naming them,) and to the plaintiff, "that the plaintiff had broken the covenants of his said leases, and had forfeited all rights thereunder and by virtue thereof," and that the defendant would not sell to the plaintiff, or to any person purchasing from him, the lands described in said leases, or execute a deed therefor on the tender of said purchase price; that the said statement and declarations were false, and were made by the defendant for the purpose of preventing the plaintiff from disposing of said leasehold interests and option, and that said Sketchley was informed of the said statements, and was intimidated, dissuaded, and deterred from carrying out his agreement with plaintiff, and withdrew his offer to purchase, and refused to purchase the same; that, but for said statements by defendant, Sketchley would have completed said purchase; and that by reason of the said statements plaintiff has been unable to sell said property to Sketchley, and has been thereby damaged in the sum of $25,000. The averment in the complaint that Sketchley offered to make the purchase from the plaintiff, and to pay therefor the sum of $25,000, and that "the plaintiff accepted said offer," must, for the purposes of the demurrer, under the familiar rule that the pleading is to be construed *contra proferentem*, be regarded as an allegation of a valid and efficient offer and acceptance, and that by virtue thereof a complete and executed contract of purchase and sale was entered into between them. This construction is corroborated by the subsequent averment that, after Sketchley was informed of the statements of the defendant, he was "intimidated, dissuaded, and deterred from carrying out his agreement with plaintiff," and shows that it was the intention of the pleader to allege such contract. This acceptance by the plaintiff of Sketchley's offer, and the agreement between them for the purchase and sale of the property, terminated the "treaty," and gave to the plaintiff a contract capable of being enforced against Sketchley, and on which he can recover any damages he may have sustained from its violation. The subsequent refusal by Sketchley to carry out his agreement did not give the plaintiff the right to recover in this action the damages thus sustained. In an action like the present, the plaintiff can recover only such damage as he may have sustained by reason of an intending purchaser being prevented from making the contract; but the complaint herein shows that whatever statements or declarations were made by the defendant prior to the making of the contract did not have the effect to prevent Sketchley from entering into the same, and those which he made thereafter have not caused the plaintiff any damage which can be said to have resulted therefrom. We know of no case in which it has been held that, when the plaintiff has a valid contract of sale, he can recover damages for its breach against one whose words, however false and malicious, have induced the other contracting party to violate such agreement. In Morris v. Langdale, 2 Bos. & P. 284, in an action for defamation, the special damage alleged was that certain persons had refused to fulfill their contracts with the plaintiff in consequence of the words spoken; but Lord ELDON said: "Now, if the plaintiff has sustained any damage in consequence of the refusal of any persons to perform their lawful contracts with him, it is damage which may be compensated in actions brought by the plaintiff against those persons; and the law supposes that in such actions the plaintiff would receive a full indemnity." A similar principle is laid down in Townsh. Sland. & Lib. § 206; Kendall v. Stone, 5 N. Y. 14; Vicars v. Wilcocks, 8 East. 1; Paull v. Halferty, 63 Pa. St. 46; Brentman v. Note, 3 N. Y. Supp. 420. It is not shown by the complaint whether the plaintiff accepted the refusal of Sketchley to complete his purchase as a termination of the contract, or whether he still holds his right of action to enforce the contract. From the averment that "the said Sketchley was then and there, and at all times since has been, able and willing to purchase" the property contracted for, it would seem that Sketchley is still bound by the contract; and, if so, the complaint fails to show that the plaintiff has sustained any damage. In any action against Sketchley founded upon the contract, it would be no defense that he had been induced to refuse to complete his purchase by reason of the statements of the defendant alleged herein; and as, in such action, the plaintiff can recover all the damages he has sustained, he has no right of action herein against this defendant. If, on the other hand, the plaintiff has released Sketchley from the obligations of his contract, or does not desire to enforce the same, whatever damage he has suffered is the result of his own voluntary act, and cannot be visited upon this defendant. Kendall v. Stone, supra.

2. The complaint fails to show that the statements and declarations alleged to have been made by the defendant could have caused any damage to the plaintiff. It was necessary for the plaintiff to set forth and describe in his complaint the property respecting which the defamatory statements had been made, as well as to aver his title thereto, so that it might be shown wherein the defendant had done him any injury. The defamatory statements alleged to have been made by the defendant are "that this plaintiff had broken the covenants of his said leases, and that plaintiff had forfeited all rights thereunder and by virtue thereof." The only leases referred to in the complaint are those which are annexed to it as exhibits for the purpose of identifying the lands in which the plaintiff had a "leasehold interest, with option and privilege of purchasing." The plaintiff has not alleged the nature or extent of his leasehold interest, or the terms of his option, or what were the covenants of his leases, or the nature of his rights thereunder; nor has he alleged that the covenants or the option are those which are contained in the exhibits. As the statements alleged to have been made by the defendant referred to the "covenants of his said leases, and his rights thereunder," it was necessary to aver facts sufficient to show whether he had any rights, or whether there were any covenants to be violated or broken. The exhibits attached to the complaint are made a part thereof only for the purpose of identifying the lands referred to, and do not satisfy this requirement of pleading. Argumentative pleading is no more permissible under the Code than it was at common law. Matters of substance must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading. Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint. Los Angeles v. Signoret, 50 Cal. 298. The only property to which the plaintiff alleges that he had any title is the leasehold interest and option to purchase. He does not allege that the defendant denied his title to this property, but charges him only with disparaging certain rights which the complaint does not allege that he possessed. The allegation that the defendant had stated that he would not sell the lands described in the leases cannot be regarded as any slander of his title, even if the complaint had shown any right to make a purchase from the defendant. The plaintiff, moreover, does not allege that Sketchley was informed of this declaration of the defendant.

3. The complaint also fails to show that the special damage alleged to have been sustained by the plaintiff is the natural and direct result of the statements and declarations made by the defendant. This action is governed by the same rule that obtains in the ordinary action of slander, viz., that, if the words are not actionable in themselves, the originator of the slander is only liable for such damage as is the direct and natural result of his act, and that he is not liable for the subsequent repetition of those words by another without his direction or authority. Folk. Storkie, Sland. § 642; Add. Torts, 795; Parkins v. Scott, 1 Hurl. & C. 153; Ward v. Weeks, 7 Bing. 211; Terwilliger v. Wands, 17 N. Y. 54; Gough v. Goldsmith, 44 Wis. 262; Hastings v. Stetson,

126 Mass. 329. This is but the application of the general rule that, when special damages are to be recovered, they must be the legal and natural consequence arising from the tort itself, and not from the wrongful act of a third party, remotely induced thereby. Crain v. Petrie, 6 Hill, 524. The only special damage which the plaintiff has alleged is that Sketchley was informed of the statements and declarations made by the defendant, and withdrew his offer to purchase, and that the plaintiff thereby sustained damage. It is not alleged that the defendant ever made any statement or declaration to Sketchley, or in his presence, or that he directed or authorized any of his statements to be communicated to him; nor is it alleged that either of the persons to whom the defendant made such statements repeated them to Sketchley, or by whom or in what manner Sketchley "was informed" of the statements. The only connection between the statements by the defendant and their reaching Sketchley is that the defendant made them for the purpose of circulating the rumor and conveying the impression that the plaintiff had violated the covenants and conditions of his leases. This, however, is too remote to render the defendant liable. We are of the opinion that the complaint fails to state a cause of action, and that the demurrer was properly sustained, and the judgment is therefore affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

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90 Cal. 549

MILLER v. CUELHO, (two cases. Nos. 13,581, 13,633.)

(*Supreme Court of California.* Aug. 21, 1891.)

BOUNDARIES—OBLITERATION OF MONUMENTS—SUBSEQUENT SURVEYS—CONFLICT—EVIDENCE.

In an action for recovery of land, involving a dispute as to boundaries, it appeared that the township was partly surveyed in 1856, and the south-west corner of the section in controversy located and marked; that in 1871 the survey was completed on this corner; and that there was delineated on the plat, and mentioned in the field-notes, a certain road running north and south through the east half of the section. Afterwards the stakes and monuments of the original surveys became so far obliterated as to require restoration. Plaintiff's and defendant's surveys, starting from different points, were widely variant. Plaintiff contended that the only proper way to restore sectional corners was to go back to the nearest corner of the original survey east of the section in dispute; but neither party did this, and there was evidence that no such corners could be found. Plaintiff's survey started from the road mentioned in the survey of 1871. This survey, however, was entirely discredited by defendant's witnesses. Measuring from the south-west corner, which was undisputed, one mile east for the south-east corner, it was found to be nearly half a mile south-east of the point where plaintiff's survey located it. *Held*, that the jury were not bound to accept the measurements from the road as conclusive, and that a verdict for defendant was not unsupported by the evidence.

In bank. Appeal from superior court, San Luis Obispo county; T. H. REARDEN, Judge.

Action by Henry Miller against Bernardino Cuelho for the recovery of land. There was judgment for defendant, and plaintiff appeals. Affirmed.

Chas. E. Wilson and *W. H. Spencer*, for appellant. *J. M. Wilcoxon*, for respondent.

BEATTY, C. J. The plaintiff in this action prosecutes separate appeals, No. 13,591 from the judgment, and No. 13,633 from an order overruling his motion for a new trial. No error is assigned upon the first appeal, but in support of his appeal from the order denying a new trial plaintiff contends that the verdict is contrary to the evidence. The action is for the recovery of land, and the plaintiff is undoubtedly the owner of the legal subdivisions described in his complaint; the only question in the case being whether a certain spring in the possession of the defendant is situated within the limits of such subdivisions as originally surveyed by the government. The defendant claims that the spring is upon an adjoining subdivision, the government title to which is in him. It will be readily understood from this statement that the dispute arises out of the fact that the stakes and other monuments by which the section and quarter section corners of the official survey were originally marked have become so far obliterated as to require restoration by means of new surveys. As frequently happens in such cases, the different surveyors who have undertaken this task have arrived at widely variant results,—the surveyor for plaintiff locating his lines so as to include the spring, and those employed by defendant bringing it within his lines. We are asked to decide, as matter of law, that the verdict for defendant is wholly unsupported by the evidence, because his surveyor did not use a proper method in his attempt to restore the lost corners of the section in which the lands of both parties are included. It seems that the exterior lines of the township were surveyed by a deputy surveyor, named Freeman, in 1856, who at the same time surveyed some of its interior or section lines. It is conceded on all sides that Freeman was very careful and accurate in his work, both in measuring his lines and marking his corners. But the deputy who completed the survey of the section lines of this township in 1871 is said—by some of the witnesses, at least—to have been careless and inaccurate, and it does not appear that any of the stakes or monuments by which he marked his corners are now discoverable, although many of Freeman's stakes and other marks are still standing and easily found. The particular section (section 8) in which the premises in controversy are included was partly surveyed by Freeman; that is, he located and marked the south-west corner of the section, and set a quarter-post on its south line. Afterwards, when Read completed the survey of the township, he closed his survey of section 8 on these corners, and laid it down on the township plat as a regular section, one mile square, and containing 640 acres. The plat made and returned by him, and approved by the surveyor general, does not indicate the position of the spring, and his field-notes contain no reference to it; but there is delineated on the plat, and mentioned in the field-notes, a certain road extending north and south through the east half of the section, and thence north-east through the south-east quarter of section 5. In the field-notes the distance from the north-east and south-east corners of section 8, at which this road is intersected by the north and south lines of section 8 and the east line of section 5, is given. The surveyor for plaintiff, failing to discover Read's corners, has taken this road as the basis of his survey and the means of restoring the lost boundaries of section 8. He admits that the road is not now where it was in 1871, but its old *situs* is so satisfactorily proven by him and a number of other witnesses, that, if it is to control in the re-establishment of the section lines, the claim of plaintiff to the spring seems to be well founded. But the misfortune of plaintiff's case is that, if the defendant's witnesses are to be believed, Read's survey is completely discredited, and no more reliance can be had upon his notes as to the location of the road than upon other statements therein, which must be erroneous if those respecting the road are correct. As above stated, his survey of section 8 closes on Freeman's corners, and shows a regular square of 640 acres; but, measuring from Freeman's monument at the south-west corner (the location of which is undisputed) one mile to the east for the south-east corner, it is found to be nearly half a mile south-east of the point where plaintiff's survey locates it, measuring from the road. Such being the case, it cannot be said that the jury were bound to accept the measurements from the road as conclusive, for who can say whether Read's mistakes were made in those measurements or in his measurements to Freeman's corners? That he made an error, and a very serious error, in one or the other set of measurements is clearly proved if the witnesses for the defendant tell the truth; and for the purposes of this decision we must assume that the jury believed them, and were right in believing them. The appellant, ignoring the weakness of his own case, directs the whole force of his argument against the defendant's survey, which he claims is wholly unreliable, because it started from the wrong corner of the section. He contends that the only way to restore the lost sectional corners of a township survey is to retrace the lines as they were originally run, from south to north and from east to west, going back for this purpose to the nearest ascertainable corner of the original survey east of the section in dispute. But, conceding the correctness of this rule, the plaintiff, upon whom rested the burden of proof, himself disregarded it. He complains that defendant did not start from some of Read's corners east of section 8, but neither did he. Besides this, his evidence seems to show that no such corners could be found. If, therefore, plaintiff's survey was sufficient to make out a *prima facie* case for him, the defendant's survey was certainly competent for the purpose of rebuttal. We cannot see that the superior court erred in holding that the verdict of the jury was not in conflict with the evidence. Judgment and order affirmed.

We concur: HARRISON, J.; PATERSON, J.; MCFARLAND, J.; DE HAVEN, J; GAROUTTE, J.; SHARPSTEIN, J.

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3 Cal. Unrep. 430

TIBBETTS *et al.* v. CAMPBELL, Judge. (No. 13,996.)

(*Supreme Court of California.* Sept. 5, 1891.)

MANDAMUS TO JUDGE—REMEDY BY APPEAL.

Mandamus will not lie to compel the sustaining of a motion for judgment made by petitioner in an action in the trial court, and to permit him to prove certain allegations of his complaint; appeal being the proper remedy, if such rulings be erroneous.

In bank.

Application by Tibbetts and others for *mandamus* to compel John L. Campbell, judge of the superior court, to receive certain evidence in a pending suit. Writ denied.

Luther C. Tibbetts, for petitioners.

PER CURIAM. The affidavit in this case does not state facts sufficient to entitle the petitioners to a writ of mandate directing the respondent to do any of the things which it is alleged that he has refused to do. The overruling of petitioners' motion for a judgment in their favor in the case of Tibbetts et al. v. The Riverside Banking Company et al., and the refusal to allow the plaintiffs therein to prove certain matters alleged in their complaint, were decisions of questions of law arising during the trial. If there was any error in such rulings, the petitioners were afforded a plain, speedy, and adequate remedy by an appeal from the final judgment rendered in the action. Application for writ denied.

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91 Cal. 94

ONTARIO STATE BANK v. GERRY *et ux.* (No. 13,993.)

(*Supreme Court of California.* Sept. 7, 1891.)

HOMESTEAD—LIABILITY FOR DEBTS—UNRECORDED MORTGAGE.

Under Civil Code Cal. § 1241, subd. 4, providing that the homestead is subject to sale in satisfaction of judgments obtained on debts secured by mortgage on the premises executed and recorded before the declaration of homestead was filed for record, an unrecorded contract for the purchase of real estate, given to the husband, and assigned by him as security for a debt, cannot be enforced by the assignee against the wife's recorded claim of homestead in the land, although it was afterwards paid for by the husband, and the title taken in her name.

In bank. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Action by the Ontario State Bank against John Gerry and Eliza Gerry, his wife, upon a promissory note executed by defendant John Gerry, and to establish a lien on the homestead of defendants. Judgment for plaintiff, and defendants appeal. Reversed in part and affirmed in part.

L. E. Tubbs and *H. C. Rolfe*, for appellants. *Waters & Gird*, for respondent.

McFarland, J. On November 29, 1887, the defendant John Gerry made a promissory note to plaintiff for $1,500 and interest, payable in three months. Gerry was at that time the holder of a written contract from one Osborn, who was then the owner of the lot of land and premises described in the complaint, by which Gerry was entitled to a conveyance of said lot upon his payment of certain money; and when Gerry gave said note to plaintiff he assigned said contract to plaintiff as security for the payment of said note. Afterwards Gerry paid to Osborn all the money due on said contract; and, at Gerry's request, Osborn executed a deed of conveyance of said lot to the defendant Eliza Gerry, who was and is the wife of said defendant John Gerry, which deed was recorded July 3, 1888. The defendants were residing on said lot, and on July 10, 1888, the defendant Eliza duly executed and had recorded a declaration of homestead on said premises. At that time she had no knowledge (if that be material) of the said assignment of said contract to plaintiff. Said assignment was never recorded; nor was there any record of any claim of lien of any character in favor of plaintiff against said premises. This present action was commenced March 7, 1889, to recover a judgment against John Gerry for the amount due on said note, and also to enforce a lien for the same on said premises against both defendants. The defendants answered, setting up their homestead right. The court below gave judgment against John Gerry for the amount of the note, and also decreed the sale of the premises and the foreclosure of all the right and title of both defendants in and to the same; and defendants appeal from the judgment.

The part of the judgment which decrees the sale of the premises is erroneous. The court seems to have acted upon the theory that, as the wife was not a subsequent purchaser for a valuable consideration, therefore, as against her, the prior unrecorded mortgage was valid. But the doctrine that unrecorded deeds and mortgages are good except as against subsequent purchasers for a valuable consideration, does not apply to homesteads. Rights to homesteads are defined by the provisions of the Code which directly deal with that subject. "The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead;" and a declaration of a homestead is not a "conveyance," as that word is used generally in the Code. Section 1241 of the Civil Code enumerates the cases where a homestead may be taken for a debt, and it can be so taken in no other instance. The only subdivision of that section upon which respondent could rest with any plausibility is the fourth, which is as follows: "On debts secured by mortgages on the premises executed and recorded before the declaration was filed for record." It makes no difference that the mortgage (if it was a mortgage on the land) in the case at bar was executed by the husband before the legal title vested in the wife; the mortgage was not recorded "before the declaration of homestead was filed," and therefore cannot be enforced against the wife's claim of homestead; and the wife has a right in the homestead which she can protect, not only against the husband's creditors, but against the husband himself. The respondent could have protected his mortgage by simply recording it. There is no question here about the morality of the transaction. It is simply a matter of statutory provision. The judgment, so far as it adjudges the sale of the premises described in the complaint and the foreclosure of appellants' interest therein, is reversed. In all other respects it is affirmed.

We concur: Beatty, C. J.; Garoutte, J.; De Haven, J.; Harrison, J.; Sharpstein, J.

(91 Cal. 101)

Mines d'Or de Quartz Mountain Societe Anonyme *et al.* v. Superior Court of Fresno County. (No. 14,420.)

(*Supreme Court of California.* Sept. 8, 1891.)

Writ of Prohibition—When Issued.

Where a court having jurisdiction of the subject-matter ordered service of summons by publication, defendant was not entitled to a writ of prohibition to stay proceedings until he should enter a general appearance or be personally served with summons, appeal from the judgment being the proper remedy.

In bank.

Application by the Mines d'Or de Quartz Mountain Societe Anonyme for writ of prohibition to the superior court of Fresno county. Application denied.

Daniel Titus, for petitioners.

De Haven, J. The petitioners are nonresidents of the state of California, and an action against them is pending in the superior court of Fresno county, in which that court made an order directing that the summons therein be served upon petitioners by publication. Thereafter the petitioners appeared specially in the action, and moved to vacate and set aside that order upon the alleged ground that the action is *in personam*, and therefore not one in which summons by publication is authorized. The motion was denied. After this petitioners again entered a special appearance in said action, and moved for an order staying all proceedings therein, until the summons should be personally served upon petitioners, or until such time as they should enter their general appearance. This motion was also denied, and the petitioners now ask that a writ of prohibition issue out of this court commanding said superior court to refrain from further proceeding in said action until petitioners shall enter their general appearance therein, or are personally served with the summons in the action.

We do not deem it either necessary or proper to determine at this time whether the action now pending against petitioners in the superior court is one in which the summons can be legally served by publication. That court has jurisdiction of the subject-matter of the action, and whether it has jurisdiction over the persons of petitioners is a question which it must determine for itself before entering judgment in the action, and which it has the same authority to pass upon as any other question of law or fact which may arise during its progress, and, if in the decision error shall be committed to the prejudice of petitioners, the law affords them a plain, speedy, and adequate remedy by an appeal from any judgment which may be entered against them. Agassiz v. Superior Court, 27 Pac. Rep. 49, and cases cited. Application for writ denied.

We concur: BEATTY, C. J.; GAROUTTE, J.; MCFARLAND, J.; HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.

91 Cal. 107

PRESTON v. FREY *et al.* (No. 14,279.)

(*Supreme Court of California.* Sept. 9, 1891.)

SLANDER—EVIDENCE—MITIGATION OF DAMAGES—MALICE—PRIVILEGED COMMUNICATIONS—HARMLESS ERROR.

1. In an action for slander, evidence that the defamatory statements made by defendant were common reports in the place where plaintiff formerly lived is inadmissible in mitigation of damages.

2. Where, in an action for slander, a witness testifies to the defamatory words, which were spoken in his presence, and which clearly imputed want of chastity to a female, it is harmless error to allow him to state what he understood to be the import of the words, since they were actionable *per se*, within the provisions of Civil Code Cal. § 46.

3. In an action for slander, defendant, upon cross-examination, was asked, "Hadn't you told some things about her [plaintiff] prior to that time?" referring to the date on which the defamatory words were spoken; and, "Had you made the statements prior to that time?" *Held*, that the answers were properly admitted for the purpose of showing malice.

4. In an action for slander, it appeared that the defamatory words were spoken voluntarily, in a spiteful and malicious manner, to one W., who repeatedly told defendant that he did not want to hear them. The parties had met for the purpose of compromising their troubles, upon plaintiff's request, at W.'s house. W. was not retained by either party as counsel or attorney. *Held*, that the statements did not constitute privileged communications.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Action to recover damages for slander by Laura F. Preston, an unmarried woman, against Sarah F. Frey and Edward S. Frey, her husband. Trial to the court. Judgment for plaintiff. Defendants appeal. Affirmed.

Waters & Gird, for appellants. *L. Gill* and *Trippett & Neale*, for respondent.

BELCHER, C. This is an action to recover damages for slander. The plaintiff is an unmarried woman, and the defendants are husband and wife. The complaint alleges "that on the 7th day of October, 1889, in San Diego county, Cal., the defendant Sarah F. Frey maliciously spoke and published, in the presence and hearing of J. F. Walker, of and concerning the plaintiff, the false, unprivileged, scandalous, and slanderous words following, to-wit," then setting them out; "and that said defendant thereby intended and did impute to plaintiff a want of chastity, and the defendant was so understood thereby by those who heard her, to plaintiff's damage in the sum of twenty thousand dollars." The defendants answered, specifically denying the said allegations of the complaint, and for a separate defense pleaded, in substance, that prior to said 7th day of October certain controversies and differences, set forth in the answer, existed between plaintiff and the defendant Sarah F. Frey; that the said Walker was an attorney at law and justice of the peace at Perris, in the county of San Diego; that at the request of plaintiff, and pursuant to agreement between plaintiff and defendants and said Walker, plaintiff and defendants met at the office of Walker for the purpose of making an amicable and peaceable settlement of said matters of difference and controversy, Walker then and there being the mutual adviser and counselor of both plaintiff and defendants; and that all the statements made by defendants concerning plaintiff were made, in the course of an attempted settlement, to Walker, as their mutual counselor and adviser, without malice, in reply to allegations and demands of plaintiff, and to the end that an amicable settlement might be had, and for no other purpose; and that all of said statements were privileged. They further allege that all of said slanderous statements were made as matters of common report only. The case was tried by the court without a jury, and the findings were that all the allegations of the complaint were true, and all the allegations of the answer were untrue; that the defendant Sarah F. Frey, at the time and place named, maliciously spoke and published, in the presence and hearing of J. F. Walker, of and concerning the plaintiff, the false, unprivileged, scandalous, and slanderous words set forth, and that the plaintiff had been damaged thereby in the sum of $1,000; and that the parties prior to said speaking and publication had not agreed to submit the matters of grievance between them to said J. F. Walker. Judgment was accordingly entered in favor of the plaintiff for the sum of $1,000 and costs, from which and from an order denying a new trial the defendants appeal.

It is argued for appellants that the judgment should be reversed because of several errors committed by the court in the reception and rejection of evidence, and because the findings were not justified by the evidence. It appears that the parties formerly lived in the state of Kansas, and had been living in the town of Perris, in San Diego county, for some three years. The plaintiff had heard that Mrs. Frey was speaking disrespectfully of her, and circulating slanders, and she wished her to retract the slanders, and to sign a paper to that effect. At plaintiff's request, the parties met at Walker's office to talk the matter over, and, if possible, settle their troubles. Mrs. Frey refused to sign any paper, and proceeded to make the statements complained of in regard to the plaintiff's past life. These statements were that the plaintiff had been in a house of prostitution; had been afflicted with a venereal disease; had given birth to an illegitimate child; and that she was in love with a young man named, and had exposed her person, laid down on a bed, and wanted him to go to her. Walker testified that when she commenced he said: "'Mrs. Frey, I don't want to hear this story at all; compromise this matter, and stop it.' I asked her not to tell it, but she went on without any answer being made." And again: "As Mrs. Frey was repeating her story, I repeatedly told her I didn't want to hear it, and that it was not what I was there for. No one there requested her to state what she did say. It was entirely voluntary on her part. It was said in a spiteful, malicious manner. She may have said, and I think she did say, that those things were reported, but she several times turned to Miss Preston, and said: 'Fanny, you know it is so;' and 'that she could prove these allegations by any quantity of witnesses.'" Mrs. Frey testified: "I don't know whether the reports were true. I know that there were such reports out against her. No one at that meeting asked me to repeat these things. I did so voluntarily. At the time I made these statements to Mr. Walker and Miss Preston, in Mr. Walker's office, I believed the reports to be true. I did not state that the reports were true, but said that I had heard them."

One of the errors assigned was the refusal of the court to allow defendants to prove that the statements made by Mrs. Frey were common reports in the state of Kansas. The evidence was objected to as irrelevant, immaterial, and incompetent, and we think the ruling proper. The law on this subject is stated as follows in Newell on Defamation, Slander, and Libel, (page 893, § 70:) "Evidence of previous publication by others is inadmissible in mitigation of damages. The fact that others besides the defendant have defamed the plaintiff is a wholly irrelevant matter. And so is the fact that on such former occasions the plaintiff did not sue the publisher, or take any steps to contradict the charges made against him. And when the falsehood thus unchallenged grows to a persistent rumor or general report, which the defendant hears, believes, and repeats, it is not regarded in law as a mitigating circumstance. Evidence of any such rumor is altogether inadmissible." And see the same author, p. 350, §§ 3, 4; also, 13 Amer. & Eng. Enc. Law, p. 441; and Wilson v. Fitch, 41 Cal. 384.

It is claimed that other errors were committed in the reception of, and in the refusal afterwards to strike out, portions of the testimony of Walker. He was permitted to state all that was said and done in his presence, and that he understood from the language used that Mrs. Frey intended to impute to the plaintiff a want of chastity. It is argued that some of the statements made by the witness were in relation to matters not within the issues made by the pleadings, and were therefore irrelevant and immaterial for any purpose, and that the understanding of the witness as to the import of the words was of no consequence, and proof of it therefore wholly inadmissible. We see no material error in the rulings. All of the statements testified to were made on the same occasion, and were parts of one transaction. It was proper, therefore, for the plaintiff to prove all that was said by Mrs. Frey, and how it was said. And if it was error to allow the witness to state what he understood to be the import of the words spoken, it was error without harm. The words imputed a want of chastity beyond question, and were actionable *per se*. Civil Code, § 46.

A similar objection is made to some of the testimony given by Mrs. Frey on cross-examination. She was asked: "Hadn't you told some things about her [plaintiff] prior to that time?" (October 7, 1889;) and, "Had you made the statements prior to that time?" The answers to the questions were properly admitted for the purpose of showing malice. "It is always competent in an action for defamation to prove a repetition of slanderous charges for the purpose of showing malice, and it is wholly unnecessary to plead the repetition of the words." Newell, Defam. p. 349, § 1.

The claim that the findings were not justified by the evidence is rested upon the assumption that the slanders were spoken under circumstances which made them privileged communications. A privileged communication is one made "without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information." Civil Code, § 47, subd. 3. Here the words were spoken "in a spiteful, malicious manner," to one who was not interested therein, and who repeatedly told the speaker that he did not want to hear them. They were spoken voluntarily, as shown by the testimony of Walker and admitted by Mrs. Frey, no one at the meeting having asked her to repeat them. Walker says he "had been retained by neither one of them in any way, shape, or form, as a counsel or lawyer." Under these circumstances, the statements complained of were, in our opinion, rightly held by the court below to be malicious slanders, and not privileged communications. See Newell, Defam. p. 515, §§ 114, 115. It follows that the judgment and order should be affirmed, and we so advise.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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91 Cal. 30

PERRI v. BEAUMONT. (No. 13,737.)

(*Supreme Court of California.* Sept. 3, 1891.)

SWAMP LANDS—CONTEST—INSUFFICIENCY OF COMPLAINT — DETERMINATION OF ENTIRE CONTROVERSY.

The complaint, in a contest concerning the purchase of swamp land, alleged that defendant, in 1873, filed an application of purchase, and received a certificate, but that the land had not then been surveyed as swamp land; that in 1888 plaintiff filed a like application, and also a protest against the issuance of any further evidence of title to defendant; and that plaintiff was at that time, and is now, an actual settler having valuable improvements on the land, and possessing all the personal qualifications entitling him to purchase it. There was no allegation that the land had been surveyed when plaintiff's application was filed. *Held*, that it was the duty of the court to determine the entire controversy, under Pol. Code Cal. §§ 3414, 3415, which provide that, in certain contests, the surveyor general must refer the matter to the district court, and that, after such reference, either party may bring an action to determine the conflict; and that plaintiff was entitled to a judgment as to the validity of defendant's application, even though the complaint failed to show the survey necessary to validate his own. Urton v. Wilson, 65 Cal. 11, 2 Pac. Rep. 411, overruled.

In bank. Appeal from superior court, Kern county.

Action by Perri against Beaumont to determine a contest regarding the purchase of swamp and overflowed land. There was judgment for defendant, and plaintiff appeals. Reversed.

J. B. Lamar and *E. Rousseau*, for appellant. *Hagan & Van Ness*, (*Geo. C. Gorham, Jr.*, of counsel,) for respondent.

De Haven, J. This action is based upon an order of reference made by the surveyor general of the state referring to the superior court of Kern county a contest concerning the right to purchase certain swamp and overflowed land. It is averred in the complaint, in general terms, that the defendant, Beaumont, filed with the surveyor general, in 1873, his application to purchase the land in controversy, and that in 1874 a certificate of purchase was issued to him thereon, and that at the time of filing said application the land had not been surveyed or segregated as swamp and overflowed land. The complaint further alleges that plaintiff, in the year 1888, filed in the office of the surveyor general of the state his application to purchase said land, and at the same time filed a protest against the issuance of any further evidence of title based upon defendant's application and certificate of purchase. The complaint also alleges that at the date of his application the plaintiff was and still is an actual settler on the land applied for, and has valuable improvements therein, and that he possesses all the personal qualifications to entitle him to purchase the said land. It is not averred, however, that the land was surveyed at the date of plaintiff's application. The defendant demurred to the complaint upon the general ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiff failing to amend, the court rendered judgment that he take nothing by the action, and that defendant recover from plaintiff his costs. The plaintiff appeals from this judgment.

It is clear that, upon the facts stated in the complaint, the plaintiff was not entitled to a judgment directing the approval of his application to purchase, as it is not alleged that the land applied for was surveyed at the date it was made; but, although the plaintiff may not have been entitled to all the relief demanded, still if, upon the facts alleged, he was entitled to any relief against the defendant, the demurrer was improperly sustained, and the judgment in favor of defendant for his costs is erroneous. The complaint does allege facts showing the defendant's application and the certificate of purchase issued thereon to be invalid, and consequently that he has no right by virtue thereof to acquire a patent from the state. The question is thus presented whether, in view of these facts, the judgment rendered by the court against plaintiff, and in favor of defendant for his costs, was proper. It is urged by respondent that, inasmuch as the complaint does not show that the land in controversy was subject to sale at the date of plaintiff's application, he is not entitled to a judgment as to the validity of defendant's application upon the facts alleged, and is therefore in no position to complain of the judgment appealed from; and this contention of respondent seems to have been upheld by this court in the case of Urton v. Wilson, 65 Cal. 11, 2 Pac. Rep. 411, and perhaps, also, in Millidge v. Hyde, 67 Cal. 5, 6 Pac. Rep. 852, and it may be that there are *dicta* in other cases which also support this view. The decisions, however, have not been uniform, and, upon full consideration, we are of the opinion that the rule announced in Urton v. Wilson, supra, should not be followed. The jurisdiction of the superior court in this class of cases is special, and is conferred by sections 3414 and 3415 of the Political Code,[1] and when invoked it is the duty of the court to proceed and determine the entire controversy referred to it for decision. Garfield v. Wilson, 74 Cal. 175, 15 Pac. Rep. 620. In this latter case the court also said: "But though the plaintiff had no right to purchase the land, and even if he had not sought to purchase it, he could still contest the right of the defendants to purchase it." This is in accordance with the law as declared in the earlier and well-considered case of Cunningham v. Crowley, 51 Cal. 128, in construing section 17 of the "Act to provide for the management and sale of lands belonging to the state," (St. 1867-68, p. 511,) a section which does not materially differ from the above-cited sections of the Political Code. In that case, in speaking of the object and scope of the action to determine conflicts arising in the office of the surveyor general, the court said: "The purpose of the action is not to annul the certificate of location or purchase, or other evidence of title; but, if both of the parties are applicants for the purchase of the lands, the purpose is to procure a determination of the question as to which applicant has the better right to purchase them; or, if the contest has its origin in a protest, filed by a person who is not seeking to purchase the lands from the state, the purpose of the action is to determine whether the party against whom the protest is filed has the right to purchase the lands; and the annulment of the certificate of purchase, or other evidence of title, is merely a consequence of the determination that the party holding it was not entitled, as against the other party, to effect a purchase of the lands. In other words, the statute provides a mode by which, and the parties in whose name, an action may be instituted to determine which party has the better right to purchase the lands, where there are contesting applicants, or to determine, in case of a mere protest, whether the party against whom the protest is filed is entitled to make the purchase." The court in this case, as well as in that of Garfield v. Wilson, supra, was speaking of a contest properly originating in the office of the surveyor general, and referred to the court for decision. It is unnecessary at this time to determine whether sections 3414 and 3415 authorize a mere volunteer, who does not seek to purchase the land himself, and who does not possess the personal qualifications entitling him to do so, or one who is without any interest in the land, to be affected by a sale by the state, to originate a contest by filing a protest against the issuance of title to a prior applicant. This is not such a case. Upon the facts stated in the complaint, the plaintiff was a person authorized by law to initiate this contest, and it was the duty of the court to decide as to all the matters involved therein, and referred to it for decision; and one question so referred was as to the right of the respondent to receive from the state a patent for the land involved in this action. It cannot be said that the plaintiff is not aggrieved by the failure of the court to decide this part of the controversy, and adjudge defendant's application void. The plaintiff is an actual settler upon the land, and has valuable improvements thereon. In addition to this, he is possessed of all the personal qualifications which would entitle him to purchase, if the land were surveyed, and it is alleged that he desires to purchase it. It is clear, therefore, that he has an interest in preventing defendant from acquiring the legal title from the state. But the judgment in this case leaves the defendant free to proceed upon his present application, and acquire such title, and it cannot be assumed that he may not be able to do so. A patent, although based upon an invalid application, is conclusive as against all persons other than those who have prior to its issuance initiated a valid right to purchase from the state; and, upon the facts alleged, the plaintiff was entitled to a judgment which would make it impossible for the defendant to clothe himself with such a title by virtue of his present application. The judgment must be reversed, and, we think, it would be proper for the court to still permit the plaintiff to amend his complaint by adding thereto an averment that the land in controversy was surveyed at the date of his application, if he so desires.

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[1] Sec. 3414. When a contest arises concerning the approval of a survey or location before the surveyor general or concerning a certificate of purchase or other evidence of title before the register, the officer before whom the contest is made may, when the question involved is as to the survey, or one purely of fact, or whether the land applied for is a part of the swamp or overflowed lands of the state, or whether it is included within a confirmed grant, the lines of which have been run by authority of law, proceed to hear and determine the same; but when, in the judgment of the officer, a question of law is involved, or when either party demands a trial in the courts of the state, he must make an order referring the contest to the district court of the county in which the land is situated, and must enter such order in a record-book in his office.

Sec. 3415. After such order is made, either party may bring an action in the superior court of the county in which the land in question is situated, to determine the conflict; and the production of a certified copy of the entry, made by either the surveyor general or the register, gives the court full and complete jurisdiction to hear and determine the action.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; McFARLAND, J.; PATERSON, J.; HARRISON, J.; GAROUTTE, J.

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91 Cal. 103

MILLER v. HIGHLAND DITCH Co. *et al.*

(No. 14,170.)

(*Supreme Court of California.* Sept. 9, 1891.)

TAXATION OF COSTS—BURDEN OF PROOF—NECESSARY DISBURSEMENTS.

1. Where the prevailing party inserts a charge in his memorandum of costs which does not appear upon its face to be a necessary and proper disbursement, the burden of proof is upon the claimant.

2. A charge of $500 for a map in a bill of costs is not a necessary disbursement, appearing as such on its face, which, unless controverted, will control the court on taxation.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Action by George Miller against Highland Ditch Company et al. Defendants appeal from an order refusing to retax plaintiff's costs. Order reversed. For former report, see 25 Pac. Rep. 550.

Waters & Gird and *George E. Otis*, for appellants. *Willis, Cole & Craig* and *Harris & Gregg*, for respondent.

BELCHER, C. This is an appeal from an order of the court below refusing to retax the plaintiff's costs. It appears from the bill of exceptions that a duly-verified memorandum of costs, a copy of which is set out, was filed by the plaintiff in proper time. One of the items in the memorandum is as follows: "Paid J. B. Pope for map introduced in evidence, adopted by judge in his findings, and made part thereof, $500." Other items are for the attendance of witnesses a stated number of days. The defendants served, and filed in due time, notice of motion to retax the costs, and their objection to the item above quoted was: (1) That the same is not a proper charge, nor authorized by law to be included in plaintiff's bill of costs. (2) That said charge is excessive, and far beyond the value of said map; that said map is of not any greater value than $5, and could not have cost the plaintiff herein a greater sum." The objections to the other items were that the charges were for a greater number of days than the witnesses were actually in attendance. "Thereafter the defendants' said motion came on regularly for hearing before the court, both parties appearing by counsel, and plaintiff introduced no evidence whatever, whereupon the court refused to strike out any part of any of the said items of costs, and denied defendants' said motion; to which ruling the defendants did then and there duly except." The respondent contends that, in a case like this, the burden is upon the party moving to strike out, and that, as no evidence was offered at the hearing of the motion as to the circumstances under which the map was made and introduced in evidence, or as to its value, it must be presumed that the court below did not abuse its discretion in allowing the charge therefor to stand as made; and in support of this position Barnhart v. Kron, 26 Pac. Rep. 210, is cited. In that case a cost-bill was filed, and all the items in it were for the attendance of witnesses, and the fees of the sheriff, clerk, and reporter. A motion was made to retax the costs, by striking out each and every item thereof, upon the ground that none of the items were incurred by the respondent in establishing his defense to the action, but that each of them was incurred by his co-defendant. The motion was denied by the trial court and on appeal it was held that the allowance or disallowance of items for the expenses and disbursements incurred upon the trial of an action must be left, in nearly every instance, to the discretion of the judge before whom the cause was tried; that there was nothing in the record showing that the court did not properly exercise its discretion in refusing to strike out the items objected to; and that the memorandum of costs was properly verified, "and unless controverted, should control the decision of the court." This is undoubtedly the correct rule where the charges appear on their face to be for proper and necessary disbursements in the action. The rule, however, ought not to be extended, and, in our opinion, it should not be applied where the charges do not appear on their face to be proper and necessary. In such cases the burden should be on the claimant, and not on the moving party, and, if he fails to introduce evidence to justify and sustain his charges, they should be stricken out on motion. For example, if the prevailing party should put in his cost-bill charges for the services of an expert accountant, or of a surveyor in the field, such charges would not appear on their face to be necessary disbursements, (Faulkner v. Hendy, 79 Cal. 265, 21 Pac. Rep. 754; Haynes v. Mosher, 15 How. Pr. 216; Mark v. City of Buffalo, 87 N. Y. 189;) and he ought not to be permitted to rest on his oars and say, because the court may have appointed the expert or directed the survey, that his verified memorandum, unless controverted by proofs on the other side, must control the decision. In this case we think the charge for the map comes within the exception above stated. Presumably the map was made for the plaintiff and at his request, and the burden was therefore upon him to show that the disbursement was a necessary and proper one in the action. We advise that the order be reversed, and the cause remanded, with instructions to the court below to sustain the motion of defendants to strike out from the cost-bill the item of $500 above mentioned.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is reversed, and the cause remanded, with instructions to the court below to sustain the motion of defendants to strike out from the cost-bill the item of $500 above mentioned.

(91 Cal. 129)

PICO v. COHN *et al.* (No. 13,892.)

(*Supreme Court of California.* Sept. 10, 1891.)

VACATION OF DECREE—FRAUD—BRIBING WITNESS.

A decree will not be vacated merely because the prevailing party obtained it by bribing a witness to swear falsely. Affirming 25 Pac. Rep. 970.

On rehearing.

Anderson, Fitzgerald & Anderson, De Valle & Munday, and *Smith, Winder & Smith*, for appellant. *A. Brunson* and *Stephen M. White*, for respondent.

PER CURIAM. After a full consideration of the argument presented upon the rehearing in this cause, we are satisfied with the former decision rendered in February, (25 Pac. Rep. 970,) and for the reasons there given the judgment appealed from is affirmed

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(91 Cal. 91)

PEOPLE v. PARKER. (No. 20,806.)

(*Supreme Court of California.* Sept. 7, 1891.)

BURGLARY—INFORMATION — COMPLAINT AND COMMITMENT—SURPLUSAGE.

1. A magistrate who committed a person on the charge of burglary returned to the superior court only the sworn complaint, upon which was indorsed the order of commitment. The complaint alleged that the accused "entered a barn with intent to commit larceny, said barn being located on the Simmons ranch," etc. The commitment was as follows: "It appearing to me that the offense in the within deposition mentioned has been committed, and that there is sufficient cause to believe" "the accused guilty thereof," etc. *Held*, that Penal Code Cal. § 809, providing that when a defendant has been thus committed the district attorney shall file an information "charging the defendant with such offense," did not authorize an information charging that the accused feloniously entered a barn, "the property of one G. W. Ditman," since the information must be based entirely on the commitment or the facts stated in the depositions. Following People v. Lee Ah Chuck, 66 Cal. 663, 6 Pac. Rep. 859, and People v. Vierra, 67 Cal. 231, 7 Pac. Rep. 640.

2. In the absence of any other description of the barn, the allegation of ownership was necessary.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Prosecution for burglary against Flem Parker. Defendant before plea moved to set aside the information, which being denied, he appeals. Reversed.

J. S. Clack and *Charles G. Lamberson*, for appellant. *Maurice E. Power, Atty. Gen. Hart*, and *Wm. H. Layson*, for respondent.

GAROUTTE, J. An information was filed charging the defendant with the crime of burglary. Before pleading he moved to set aside the information upon the ground "that he had not been legally committed by a magistrate." Upon the hearing of the motion it was shown that G. W. Ditman filed a sworn complaint before a magistrate, alleging "that one Flem Parker, on or about the 20th of November, 1890, and before the filing of this complaint, at the county of Tulare, state of California, did willfully and unlawfully enter a barn with intent to commit larceny, said barn being located on the Simmons ranch, in said Kaweah township," etc. There were no other depositions in the case, and upon the complaint was indorsed the following commitment: "It appearing to me that the offense in the within deposition mentioned has been committed, and that there is sufficient cause to believe the within-named Flem Parker guilty thereof," etc. The information charges that "the said Flem Parker, on or about the 20th day of November, 1890, and before the filing of this information, at the county and state aforesaid, did willfully, unlawfully, and feloniously enter a certain barn, the property of one G. W. Ditman, with intent then and there and therein to commit the crime of larceny."

The motion to set aside the information should have been granted, for the foregoing record discloses that the defendant was never committed by a magistrate for the offense charged in the information. Under the law, as declared in People v. Lee Ah Chuck, 66 Cal. 663, 6 Pac. Rep. 859, and People v. Vierra, 67 Cal. 231, 7 Pac. Rep. 640, the district attorney is allowed to file an information based either upon the offense set out in the commitment or upon the facts disclosed by the depositions, and that is the limit of his authority.[1] This information is based neither upon the commitment nor the facts set out in the complaint or deposition. It alleges that the defendant entered a certain barn, the property of one G. W. Ditman, with the intent, etc. The record is entirely silent as to any such state of facts, and the district attorney in framing his information is bound by the record.

It is insisted that the allegation of ownership of the barn in G. W. Ditman is immaterial, and therefore harmless. While in charging the offense of burglary it may not be necessary in all cases to allege ownership of the property entered, yet, in this case, it was a necessary allegation, for it constituted the entire and only description of the barn which the defendant is charged with feloniously entering. Let the judgment be reversed, and the cause remanded, with directions that the information be set aside.

We concur: BEATTY, C. J.; DE HAVEN, J.; SHARPSTEIN, J.; MCFARLAND, J.; HARRISON, J.

PATERSON, J. If the question were an open one, I should say that an information could not be sustained unless it charged the offense charged in the complaint, and for which he was examined and committed by the magistrate. Such it appears to me is the view of the supreme court of the United States in Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 292. Our own cases, however, hold that the district attorney may prosecute for any offense shown by the depositions taken on the preliminary examination. I therefore concur.

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91 Cal. 124

SAN BERNARDINO NAT. BANK v. COLTON LAND & WATER CO. *et al.* (No. 14,330.)

(*Supreme Court of California.* Sept. 10, 1891.)

NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER—INDORSEMENT BY CORPORATION—NOTICE TO HOLDER—FINDINGS.

1. In an action on a note signed by a corporation, and by its president and one other director individually, the corporation alone answered, alleging that it was merely an accommodation maker, that the execution of such a note was in excess of its corporate authority, and that the payee, and the bank to which it was transferred after maturity, had knowledge of the fact at the time of the execution and transfer. The president testified that he told the payee he wanted the money for his individual use, and that he would give the corporation as security. The payee testified "that he knew nothing about who was the principal debtor, or for whose use the money was obtained." The evidence showed also that the note was made under a resolution of the directors of the corporation to "borrow" the money; that the resolution, which was written by the president, was delivered by him to the payee at the time he received the money; and that the signature of the corporation appeared first upon the note. *Held* that, as the evidence was conflicting, and there was nothing on the face of the transaction to indicate that it was not in the ordinary course of business, a judgment against the corporation would not be disturbed.

2. A finding that the note was executed for a valuable consideration was admitted by the answer, and was not inconsistent with a finding that the defendant corporation received no part of the consideration.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Action by San Bernardino National Bank, a corporation, against the Colton Land & Water Company, a corporation, and others, to recover on a promissory note. There was judgment for plaintiff, and defendants appeal. Affirmed.

Goodcell & Leonard, for appellants. *Frank F. Oster*, for respondent.

FITZGERALD, C. This action is brought to recover on a promissory note for $2,500, executed by the defendants to the Farmers' Exchange Bank, a corporation, and by it indorsed to plaintiff after maturity. The note, which is joint and several, is dated July 28, 1887, and is signed by the defendants in the following order: "Colton Land and Water Company, by A. B. Hotchkiss, Pres't. A. B. Hotchkiss. J. C. Peacock." The demurrer to the complaint was properly overruled. The Colton Land & Water Company alone answered, alleging that it was merely an accommodation maker; that such execution of the note was in excess of its corporate authority; and that the plaintiff and its assignor had knowledge of the fact at the time of the execution and transfer of the note. Judgment was rendered in favor of plaintiff, and the defendants the Colton Land & Water Company and A. B. Hotchkiss appealed from the judgment. Subsequently an appeal was taken by the defendant corporation from the order refusing a new trial, but it is stipulated that both appeals be heard as one upon the same transcript. It appears that the note sued on was made by the defendant corporation in pursuance of the following resolution adopted at a meeting of the board of directors of the Colton Land & Water Company, held at Colton on the 27th day of July, 1887, at which five of the directors, including the defendants Hotchkiss and Peacock, were present: "Resolved by the board of directors that this company borrow $2,500, and execute its note therefor, at regular market rate of interest, to such person as might have the money to lend it." The following stipulation was entered into between the parties hereto: "That the articles of incorporation of the Colton Land & Water Company included no power of the corporation to make accommodation paper, or to sign paper as an accommodation maker or indorser, but the corporation had the power, under its corporate powers, to sign negotiable paper for the purpose of paying corporate indebtedness, or for in any way carrying out the purposes of the incorporation, as set forth in the answer, including the borrowing of money for its own purposes." Plaintiff offered no evidence, but rested its case on the pleadings. The defendant Hotchkiss was sworn as a witness for the defense, and testified substantially as follows: That he stated to Mr. Drew, the president of the Farmers' Exchange Bank, that he wanted the money for his individual use, and that he would give the Colton Land & Water Company as security; that he got the money on the note sued on, and used it for his own purposes, and that the Colton Land & Water Company was simply security thereon, as was Mr. Peacock; that the body of the resolution, in pursuance of which the note was given and the money borrowed, was in his handwriting; and that he delivered it with the note to Mr. Drew, when he received the money from the bank, at which time he was the president, and acting as such, of the Colton Land & Water Company. Mr. Drew was then called as a witness for the defense, and testified substantially "that he knew nothing about who was the principal debtor, or for whose use the money was obtained on the note." On cross-examination, he stated "that he understood the money was for Hotchkiss, but whether it was something the company was owing him, or whether it was borrowing for him, he was not clear." The statement by Hotchkiss that the defendant corporation signed the note merely as accommodation maker or surety, and that it was so understood and accepted by the Farmers' Exchange Bank, is contradicted by Drew, and is inconsistent with the act of the board of directors of the defendant corporation, by which it resolved to "borrow" the money, and with the fact that the resolution, which was written by Mr. Hotchkiss, who is an attorney as well as president of the corporation, was delivered by him with the note to the bank at the time he received the money, and with the further fact that the signature of the defendant corporation, by its president, Hotchkiss, should appear first on the note,—a rather unusual place, it must be conceded, for the signature of an accommodation maker or surety. It would appear, therefore, that, aside from the testimony of the defendant Hotchkiss, there is nothing that is even remotely suggestive of the slightest suspicion that the transaction, on its face, was not in the ordinary course of the business of the defendant corporation, and one that was clearly within the scope of its corporate authority. The court, in its decision, found that neither the plaintiff nor its assignor, the Farmers' Exchange Bank, had any knowledge whatever, either actual or constructive, that the defendant corporation executed the note in question as an accommodation maker or surety, and not as principal. As the evidence on this point is substantially conflicting, the finding thereon will not be disturbed on the ground of the insufficiency of the evidence to justify it. It is insisted by appellant that the fourth and ninth findings are contradictory. In this view we cannot concur. The fourth finding, that the note was executed for a valuable consideration, is admitted by the answer, and is in no respect inconsistent with the ninth finding, that the defendant corporation received no part of the consideration. We therefore advise that the judgment and order be affirmed.

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[1] Pen. Code Cal. § 809: "When a defendant has been examined and committed, as provided in section 872 of this Code, it shall be the duty of the district attorney, within 30 days thereafter, to file in the superior court of the county in which the offense is triable an information charging the defendant with the offense," etc.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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91 Cal. 74

PAINTER *et al.* v. PASADENA LAND & WATER CO. *et al.* (No. 14.064.)

(*Supreme Court of California.* Sept. 5, 1891.)

WATER-RIGHTS — RESERVATION IN DEED—VALIDITY.

1. A land and water company conveyed a tract of land through which ran a ditch, reserving the ditch and a strip of land 10 feet wide on each side of it; also the right to enter on the lands for the purpose of making repairs, and to tunnel or in any manner develop the waters on the lands. The reservation provided that the grantees were not to use any of the water in the ditch, nor use any water on the land, except for the purpose of irrigation and for domestic use. *Held*, that the reservation included about an acre of water-bearing land which was in the tract, and the undeveloped water therein, less the quantity required to irrigate the tract and for domestic use.

2. Where a deed described the land conveyed by courses and distances, and conveyed no specific number of acres, it was competent for the grantor to except a swamp or marsh from the operation of the deed.

3. Where it appeared from the deed that

part of the land was water-bearing land and part so dry that it required irrigation, the subject-matter supported the reservation of the water land, and the exception was not void for uncertainty because the boundaries of the excepted land must be shown by evidence.

4. The rights reserved were appurtenant to the ditch and water-rights, and passed by grant from the company to defendant, though the reservation contained no power of assignment or words of inheritance, since Civil Code Cal. §§ 1072, 1092, 1105, provide that no such words are requisite, and that a fee is presumed to pass unless the grant expresses a different intention.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Painter and others against the Pasadena Land & Water Company to enjoin it from entering upon certain lands and taking water therefrom. Decree for plaintiffs, and order denying a new trial. Order affirmed. Decree modified.

Anderson, Fitzgerald & Anderson, for appellants. *Lee, Gardiner & Scott*, for respondents.

PATERSON, J. On April 23, 1887, the Lake Vineyard Land & Water Association conveyed the land described in the complaint to plaintiffs' grantors. The deed contained the following provisions: "Provided, that the said A. Elliott and G. A. Richardson do not construct or allow to be constructed on the above-described land any work that will in any manner injuriously affect the waters or water-rights of this association. And it is distinctly understood that the said association reserves the right at all times to enter upon said lands for the purpose of making any repairs or for the development of the waters of this association. And a strip ten feet wide on each side of the water-ditch of said association is hereby expressly reserved from the above sale, and under no consideration is the above description, or anything in this resolution contained, to be construed as conveying any part or portion of the aforesaid water-ditch or waters, or of the land for ten feet on each side thereof. And the aforesaid Elliott and Richardson shall not, and in purchasing this land they agree not to, use any water for other than domestic purposes and for irrigating said land; neither are they to sell, give away, or allow to be wasted any water whatsoever. And under no consideration are they to use any water from the ditch of said association. And the said association reserves the right to tunnel, or in any other manner to develop the waters of said association on this land. And it is also clearly understood that the association reserves the right of way through the above-described lands for a wagon road,—either the present road or one as good." Plaintiffs have acquired all the rights of Elliott and Richardson, and the defendants have succeeded to all the rights reserved to the Land & Water Association which could be transferred by it to a third party. The statement on motion for a new trial shows: "That there was on this tract of land a marshy, swampy piece of water-bearing land of from a three-fourth acre to an acre and one-quarter dimension; that the water came to the surface and became running water in this piece of land 'only where it is trenched;' that when Richardson and Elliott first bought and took possession of the land there was no water running 'to amount to anything,' only 'sieping a little over the bank;' that an inch and two-thirds of water measured under a four-inch pressure has been developed by Elliott and Richardson and plaintiffs on this piece of marshy or swampy land, and has been and was at the beginning of this suit all used by plaintiffs for domestic purposes and irrigation of the tract of land conveyed by said deed to Elliott and Richardson. An unimpeached witness on behalf of defendants testified that in his opinion twenty inches of water measured under a four-inch pressure, over and above the water now being used, could be developed on said piece of marshy or swampy land." The defendants claim that the right to enter upon the land, dig trenches, and develop the water resting in the swampy portion referred to was reserved to the association in its deed to Elliott and Richardson, and that they succeeded to the same right through the deed from the association to them. They were proceeding to enforce such claim when this action was brought to restrain them from so doing. Plaintiffs contend that no such rights were reserved to the association, and, if they were, they were personal to the association, and could not be transferred to defendants or any other person. The court below sustained plaintiffs' contention, and gave judgment in their favor. Defendants have appealed from the judgment, and from the order denying their motion for a new trial.

Were the rights claimed by defendants reserved to the association? It is evident that the parties had under consideration certain waters other than those in the ditch, and intended to define what their respective rights to the same should be under the deed. It was stipulated that "under no consideration" were the grantees "to use any water from the ditch of said association," but of the other waters they were to have sufficient for "domestic purposes and for irrigating said land." Where were the waters other than those in the ditch from which the grantees might draw sufficient for domestic uses and irrigation? Manifestly they lay quiescent in the "marshy, swampy piece of water-bearing land" in which "the water came to the surface, and became running water only where it was trenched." There was about one acre of the land capable of producing over 20 inches of water. This is the water which the grantor retained the right to develop. There was no other water to develop. The association certainly did not desire to tunnel for, "or in any other manner to develop," water already running in its ditch. The grantor was a water association, and the owner of a large body of water-bearing lands, including the land described in the deed. A large portion of the tract conveyed was dry, but susceptible of cultivation when irrigated. The association wanted the water to assist in feeding the ditch which ran through the tract granted, and the grantees want·

ed the land, with water sufficient for domestic and irrigation purposes. The association conveyed the land, but reserved to itself the ditch and the water therein, together with a strip of land 10 feet wide on each side thereof, and all undeveloped water in the land conveyed, less the quantity required to irrigate the tract and for domestic purposes. It is clear that such was the intention of the parties, and it is expressed in language so plain that there is little, if any, room for controversy.

Were the rights thus reserved capable of assignment? It is claimed by respondents that rights like those reserved in the deed to Elliott and Richardson, and now under consideration, cannot be granted over unless the power of assignment is expressly given to the grantor, or the usual words of inheritance to pass the fee are used, showing an intent to extend the right beyond the present grantee; that the rights reserved were not made appurtenant to any land of the grantor, and were, therefore, mere rights in gross which are not assignable. We do not deem it necessary to discuss the legal and technical etymology of exceptions, reservations, or *profits á prendre.* A right reserved may be an exception though designated in the deed as a reservation. The strip of land 10 feet wide on each side of the ditch reserved in the deed is clearly an exception. The other rights reserved are either exceptions or *profits á prendre*, and, if exceptions, neither the word "heirs" nor express power of assignment was required to enable the grantor to transfer his rights to the appellants. Whitaker v. Brown, 46 Pa. St. 198; Emerson v. Mooney, 50 N. H. 319; Gould, Waters, § 310. Regarded as a profit or interest in the soil, or, as it was designated in the Norman-French, a right of *profits á prendre in alieno solo*, the same result follows. When such a right is reserved in a deed by which lands are conveyed, it is equivalent, so far as the creation of the right of common is concerned, to an express grant of the right by the grantee to the grantor, (Wagner v. Hanna, 38 Cal. 116;) and in this state words of inheritance are not requisite to transfer a fee in real property, (Civil Code, §§ 1072, 1092, 1105.[1]) These provisions of the Code were intended to change the common-law rule, not only with respect to a transfer of the fee, but of all other estates in real property. In cases of exception, where the grantor owns the fee, such words would be entirely superfluous, because the thing excepted never passed to the grantee; and, as a reservation of a right of *profits á prendre* was assignable at common law with words of inheritance, we think, under the provisions of the Code quoted, it may now be assigned without such words. The original and underlying principle of the old rule requiring words of inheritance in the grant conferring the fee—which was of feudal origin—was that the personal services of the grantee were the only consideration of the grant, and the estate, therefore, would not continue beyond the life of the grantee, unless the grantor expressly provided that it should extend to his heirs. The great changes which have occurred in the political and business relations of life, however, have done away with the reason for such a rule, and there is certainly no reason why an absolute estate should pass without words of inheritance, and the reservation of a right of *profits á prendre* should not. The cases cited by respondents which relate to water running on the surface do not aid us in determining the question before us in this case. There is a wide and apparent distinction between the water of a running stream and water which rests in the soil. The former assumes a distinct character from that of the earth; no exclusive property can be acquired in it while it is still flowing in its natural condition, distinct and separate from the land over which it runs; the latter is confined in the earth, and "has no distinctive character of ownership from the earth itself any more than the metallic oxides of which the earth is composed." Roath v. Driscoll, 20 Conn. 540; Cross v. Kitts, 69 Cal. 222, 10 Pac. Rep. 409. In Hanson v. McCue, 42 Cal. 309, the court said: "Water filtering or percolating in the soil belongs to the owner of the freehold, like the rocks and minerals found there. * * * The owner may appropriate the percolations and filterations as he may choose, and turn them to profit if he can." Being an integrant part of the realty, the right to take it away for use or profit is as much a *profit á prendre* as the right of fowling, fishing, hawking, or the common of turbary, or the common of estovers. Washburn, Easem. (2d Ed.) *10; Hill v. Lord, 48 Me. 100; Goodrich v. Burbank, 12 Allen, 459; Chatfield v. Wilson, 28 Vt. 49. In Trustees v. Youmans, 50 Barb. 319, the court, in speaking of subterranean waters, said: "The water belongs to the soil, is part of it, and may be used, removed, and controlled to the same extent by the owner."

Respondents claim that neither percolating nor standing waters can be granted without a grant of the soil above and below, and that, if the reservation under consideration be held to mean both water and soil, the exception is void because repugnant to the estate granted. We do not think this contention is sound. If the deed in express language had excepted all the water-bearing lands from the tract granted,—and that is practically though not precisely what was done, because the grantors reserved the right to enter and "to tunnel, or in any other manner develop the waters of the association on this land,"—the exception would not be repugnant to the grant. The grant was not of any specific number of acres. The land was described by courses and distances, and it was as competent to except from the operation of the grant the marsh or swamp as it was to except 10 feet on each side of the ditch. If a grant of land be for 20 acres, and 1 acre be excepted therefrom, the exception is void because repugnant to the grant. "So one may grant a farm, excepting the meadow: but to grant a pasture and meadow, excepting the meadow, would be repugnant and void." 3 Washb. Real Prop. (5th Ed.) 464. Nor can it be said that the exception would be void for uncertainty. It appears from the provisions of the deed that a portion of the tract conveyed is water-bearing land, and some of it is so dry that it requires irrigation to fit it for cultivation. The subject-matter, therefore, supports the exception, and the exception is not void because the boundaries of the part excepted must be shown by evidence. The evidence shows that out of the 32 acres granted there is only from three-fourths of an acre to an acre and one-quarter which can be used for the production of water, and that this small parcel is capable of yielding over 20 inches of water. It is apparent, therefore, that the quantity excepted can be easily located and defined, and that there is not much basis for the respondents' disquietude on account of what they term "such a tremendous and destructive power over their property * * * as that which is now claimed by appellants." Sections 801 and 802 of the Civil Code are cited to show that the rights reserved were mere servitudes in gross, and incapable of being granted over. There is no doubt that the servitudes enumerated in section 801 are real servitudes imposed for the benefit of the estate to which the right belongs, and resting upon the estate on which the obligation is imposed, and that those named in section 802 are personal, not attached to any dominant estate, and are not assignable. We cannot, however, regard the rights in question as mere servitudes, but, if they are, they were created as incidents or appurtenances to the ditch and water-rights of the company, and passed by the grant to appellants. At common law a *profit á prendre*, if granted in gross, was regarded as an estate or interest in the land itself. 6 Amer. & Eng. Enc. Law, p. 142. Such a right "has always been considered in law a different species of right from an easement," and, although capable of being transferred in gross, may also be so attached to a dominant estate as to pass with it by a grant transferring the land with its appurtenances. Huntington v. Asher, 96 N. Y. 610. As stated before, the intention of the parties is clearly expressed in the deed, and this being so, little weight should be attached to technical definitions of terms used. It matters but little what name we give to the rights reserved to the grantor in the deed. Attempts to create symmetry in the law by classification and designation of classes of different kinds of rights connected with and springing out of lands are always hazardous. From whatever stand-point we view the case, and whatever may be the true and technical term applicable to the rights reserved, we are led to a conclusion different from that reached by the learned judge of the court below.

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[1] "Sec. 1072. Words of inheritance or succession are not requisite to transfer a fee in real property."

"Sec. 1092. A grant of an estate in real property may be made in substance as follows: 'I, A. B., grant to C. D. all that real property situated in * * * county, state of California, bounded as * * * follows: * * * Witness my hand this * * * day of * * * 18—. A. B.'"

"Sec. 1105. A fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended."

It is claimed by respondents that all of the water on the land is necessary for irrigation and domestic purposes, and that the court found this contention to be true, but we do not so construe the findings. It is found that certain waters rise and flow from springs existing on the land which have been sufficient to furnish water for the irrigation of a large portion of the land; that about 10 acres of the land have been irrigated, plaintiffs "using therefor all of the said waters so rising and flowing on said lands; * * * and all of the water rising on said land was at all of the times herein mentioned needed for the proper irrigation of said land, and for proper domestic use thereon;" that defendants have dug and excavated ditches which have interrupted the flow of a portion of said waters "so rising and flowing as aforesaid," and prevented the same from flowing into the conduits of plaintiffs, "and plaintiffs have ever since the making of said excavation been and now are prevented from using said portion of said waters for the irrigation of said land or otherwise;" that defendants, "claiming they had the right to appropriate and take for their own use and benefit, and convey from said land, all of the waters so flowing in said trenches and ditches excavated as aforesaid, and at least four-fifths of the other waters rising and flowing on said lands as aforesaid, entered in and upon said land, and diverted all of said waters so flowing in said trenches and ditches excavated as aforesaid, and the greater portion, to-wit, at least four-fifths of said other waters rising and flowing on said land as aforesaid, * * * so that plaintiffs were then and there wholly deprived of all use thereof;" that plaintiffs have since said diversion turned the water back into their conduits, and used the same for irrigation and for domestic purposes, but defendants still unlawfully threaten to again divert, and at all times thereafter to appropriate and take, for their own use and benefit, all of the waters so diverted by defendants. These facts found by the court entitled the plaintiffs to an injunction restraining the defendants from diverting the water which plaintiffs needed for irrigation and domestic purposes, and to that extent the decree is correct; but the judgment went further, and declared that the defendants "have not, nor has either of them, any estate, right, or interest of, in, or to such land and waters, so owned as aforesaid by said plaintiffs, or any part thereof, nor of any easement or servitude upon or against said land, or any part thereof;" and adjudged that the defendants and those claiming under them be perpetually enjoined from appropriating or taking "said waters rising and flowing, or hereafter to rise or flow, upon said land so owned by said plaintiffs, or any part thereof, or from in any manner interfering with said plaintiffs' use, control, and possession of said waters, or from in any manner interfering therewith, or from entering in or upon said land owned by said plaintiffs, to excavate, dig, or bore thereon, or otherwise disturb the soil thereof." These latter provisions of the decree go beyond the relief to which the plaintiffs are entitled. The defendants are entitled to go upon the land for the purpose of making repairs, and to tunnel, or in any other reasonable manner to develop the water which may exist in the water-bearing lands of the tract, and which may not be required by plaintiffs for irrigation and domestic purposes. How many tunnels or how many ditches may be cut in the land by appellants cannot be determined in advance. All that can be said in that regard is that they will be held to a reasonable exercise of the right to develop the water remaining after the plaintiffs have secured enough for irrigation and domestic purposes. The order denying a new trial is affirmed, but the cause is remanded, with directions to the court below to modify its decree in accordance with the views we have expressed.

We concur: HARRISON, J.; GAROUTTE, J.

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91 Cal. 146

GOULD v. STAFFORD. (No. 14,273.)

(*Supreme Court of California.* Sept. 11, 1891.)

WATER-RIGHTS—CONVEYANCE—CROSS-EXAMINATION OF WITNESS.

1. In an action for damages, and to restrain an alleged wrongful and excessive diversion of water from a stream, the evidence showed that defendant was a riparian owner above plaintiff, and had let a tract of land, which was riparian to the stream, agreeing to construct a flume to it; that he employed one C. to construct it; that defendant agreed that C., in consideration of his work on the flume, should have a partial use of it, to convey water to his land, lying below the tract let; that there was no permanent dam across the stream to divert the water into the flume, but that the lessee and C. placed temporary obstructions in the stream at low stages of water, without any directions from defendant. *Held*, that a finding that defendant had diverted and misapplied water, or that he authorized such misapplication by others, could not be sustained.

2. The rights of a riparian proprietor to the flow of a stream of water over his land may be severed from the land by grant, and where such right has been conveyed without reservation the grantor cannot maintain an action to enjoin a diversion of water from the stream.

3. Where, in such case, the riparian rights had been conveyed to the Montecito Water Company, and an officer of the Montecito Valley Water Company testifies that the company is paying the expense of the litigation, it is error to rule that the witness cannot be asked on cross-examination, "Why does the company pay the expense of this litigation?" as it is proper to show the witness' interest, though it does not appear that the last-named company is identical with or the successor of the other.

Commissioners' decision. Deparment 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action by Fred S. Gould against O. A. Stafford for damages and to enjoin the diversion of water. Judgment for plaintiff. Defendant appeals. Reversed.

B. F. Thomas, for appellant. *John J. Boyce*, for respondent.

VANCLIEF, C. Action for damages resulting from the alleged diversion of water by defendant from Montecito creek, in the county of Santa Barbara, and for a perpetual injunction against such diversion in the future. Both parties claim to be riparian proprietors upon both sides of the creek, the defendant's land being about one mile above that of the plaintiff's. The complaint charges that in January, 1882, by means of a dam across a main branch of the creek, (the Cold Spring branch,) and certain flumes and ditches erected and maintained by the defendant, he "prevented a portion of the waters naturally flowing in said creek from flowing down to and reaching plaintiff's land and premises. That defendant wrongfully and unlawfully has continuously since said time appropriated and taken for his own use a large portion of the waters naturally flowing in said stream as aforesaid, and has wasted said water, and applied the same to unlawful purposes, and prevented the entire quantity so taken from again returning to the natural bed or channel of said Montecito creek, or any of its branches, and said waters have by means of said unlawful diversion been wasted and lost, and have not reached the land of plaintiff;" whereby plaintiff's land has been deprived of the flow of the water, and of the use thereof for necessary or any purposes, and in the seasons of scarcity of water the bed of said creek, within the premises of plaintiff, has become dry for a long period, and plaintiff has been deprived of the use of any water of said creek for domestic or other reasonable and lawful uses, to the damage of plaintiff in the sum of $5,000, and that defendant threatens to continue, and, unless restrained, will continue, such unlawful diversion, to the lasting and irreparable injury of plaintiff and his land. The amended answer of the defendant, on which the case was tried, denies that the waters of said creek naturally flow through plaintiff's land later than the month of June, except in extraordinarily wet seasons; and specifically denies all the wrongful acts charged in the complaint. The answer alleges the defendant's riparian ownership of land as above stated, and that on November 19, 1881, the defendant leased to Ah Young, a Chinaman, a part of his riparian land on the west side of the creek, and sets out the lease, as follows: "Agreement. In consideration of the sum of one hundred dollars ($100) per annum, to be paid semi-annually in advance, I agree to lease to Ah Young my field of eight (8) acres, more or less, lying on the west side of Cold Spring creek, formerly known as the 'Sanchez Land,' for the term of five (5) years from date of this agreement. I furthermore agree to build a six-inch flume to carry water from the creek to the land, he, Ah Young, agreeing to keep said flume and the fence now about the land in good repair, as they are at present. O. A. STAFFORD. Montecito. S. B. Co., Cal. [Chinese mark.] AH YOUNG. November 9, 1881." The answer further alleges that defendant did not agree to furnish the lessee any particular quantity of water, or any water except such as the lessee was entitled to by the terms of the lease, viz., so much as was appurtenant to the land leased by reason of its being riparian to the creek; that Ah Young took possession of the leased premises on November 9, 1881, and he and his assigns continued to occupy the premises under the lease until November 9, 1886. It is also alleged in the answer "that no notice was given to defendant before the commencement of this action to abate any dam in said creek, or that the waters of said creek which flowed into said flume were being or had been wasted or misapplied."

As to the alleged riparian ownership of defendant, and the lease and possession of the lessee under it, the court found the answer to be true. As to the alleged want of notice to defendant there is no finding. As to damages, the plaintiff withdrew all claim except for nominal damages, and the court found only nominal damages. But upon all other material issues the court found for the plaintiff, and gave judgment against defendant for nominal damages and costs assessed at $263.60, and perpetually enjoined and commanded him, substantially, as follows: *First.* From wasting, or permitting to be wasted, any portion of the waters of said creek or the branches thereof. *Second.* From diverting or using, or permitting to be diverted or used, any of said waters upon any other land than the riparian land of the defendant. *Third.* From diverting or permitting to be diverted, for the purposes of irrigation, all the waters of said creek or any of its branches, "at any season of the year, for purposes of irrigation, and from interrupting or interfering with the said supply of water so enjoyed by the plaintiff for domestic and household purposes, and for watering his stock; and from permitting the same to continue unrestored, and from permitting to continue on his land or at the dam erected by him, any means or appliances whereby the said uses of plaintiff therein are or may be diverted or interfered with." *Fourth.* In case the defendant should divert and use a portion of the waters of said stream for the purpose of irrigating his riparian land, he is commanded by "substantial and proper artificial means and methods" to conduct back to the channel of the creek, above the lands of plaintiff, all surplus water not necessary for such irrigation, and not being used therefor, so that the same may be restored to the natural channel above the lands of plaintiff, without waste or unnecessary diminution. *Fifth.* It is adjudged that the use by the defendant of the waters of said stream for the purpose of irrigation is subordinate to the right of the plaintiff to use the same for domestic and household purposes and the watering of stock. The case was here on a former appeal, (77 Cal. 66, 18 Pac. Rep. 879,) but the questions now presented are different from those decided on the former appeal. The defendant appeals from the judgment, and also from an order denying his motion for a new trial.

1. The appellant contends that the evidence does not justify the finding that the defendant by any means diverted, misapplied, or wasted any water from the Cold Spring branch of the creek; or that he caused, authorized, or promoted any such misapplication or waste by others. The evidence tends to prove no other wrongful or excessive diversion than that from the Cold Spring branch through the flume to the garden leased to Ah Young; and the only evidence claimed to have any tendency to prove that defendant caused or authorized such diversion, or any waste or misapplication of the water, is that he executed the lease to Ah Young, and constructed the flume according to the terms of the lease; and also that he employed one Chico to construct the flume, and agreed that Chico should have a partial use of the flume to convey water to his land, situate below the Chinese garden, in consideration of his work upon the flume. The flume tapped the stream above defendant's land, and defendant acquired the right of way for it upon the land of others. There never was any permanent dam across the stream to divert the water into the flume. In the early part of each season, when the stream carried a large quantity of water, very little, if any, obstruction was required to turn sufficient water into the flume to fill it. A few rocks thrown into the stream were then sufficient to turn water into the flume to its full capacity. Later in the season, as the water in the stream diminished, the obstruction was increased until the lowest stage of the water, when a dam composed of stones, brush, and mud was extended entirely across the stream. This dam was washed away in the winter or spring of each year. The defendant testified that the dam and obstructions by which the water was turned into the ditch were annually constructed by the lessee of the Chinese garden and Chico; and that he (defendant) neither assisted in their construction, nor directed or advised as to the manner or extent thereof, nor as to the quantity of water to be diverted thereby. This testimony is corroborated by that of other witnesses, and there is no evidence to the contrary. Nor is there any evidence tending to prove that Chico was the agent or servant of the defendant for any other purpose than the construction of the flume, or that defendant ever controlled, aided, or advised Chico in regard to diverting or using the water of the stream. It appears that Chico extended the flume from the Chinese garden to his place lower down the creek, where he irrigated a strawberry bed and an orchard of pear trees; but there is no evidence tending to prove whether or not he owned the land thus occupied and irrigated by him, or whether it was riparian to the creek, or how much water he used. Upon cross-examination of Packard, the principal witness for plaintiff, defendant's counsel asked him: "What portion of the water flowed into the flume that Chico used?" This question was objected to by plaintiff's counsel as irrelevant and immaterial, and the court sustained the objection. The defendant also testified that he was never notified before the commencement of this action that more water was being diverted by means of the dam and flume than his lessee and Chico were entitled to divert, nor that the water diverted by them was misapplied or wasted; and his

testimony in this respect was not disputed. There is no question that the Chinese garden was riparian to the creek, and that the owner thereof, or his lessee, was entitled to such reasonable use of the waters of the creek to irrigate the same as was consistent with the rights of other riparian owners. The evidence shows that the quantity of water that might be so used at any given time depended upon the stage of the water in the creek, which varied in different years, as well as at different seasons of the same year. It follows that defendant had a perfect right to construct a flume to convey water from the stream to his land, for his own use or the use of his lessee, of sufficient capacity to carry all the water that he or his lessees might be entitled to use at any season of any year. The mere capacity of the flume did not concern other riparian owners, as they could object to only an unlawful or excessive use of it. The flume was not a nuisance *per se;* and after the defendant leased it, he had no more power or right to control the use of it by the lessee, than he had to control the use of the land and other fixtures leased. The lessee alone was responsible for his wrongful use of it, by which others were injured. "A landlord is not responsible to other parties for the misconduct or injurious acts of his tenants to whom his estate has been leased for a lawful and proper purpose, when there is no nuisance or illegal structure upon it at the time of the lease." Kalis v. Shattuck, 69 Cal. 593, 11 Pac. Rep. 346, and authorities there cited. The relation of Chico to the defendant, after the flume was constructed, was either that of lessee or licensee of the flume alone, in consideration of his labor in constructing it; and since the defendant neither authorized nor participated in a wrongful use of the flume by Chico, he was not liable, unless the lease or license contemplated, or necessarily involved, a nuisance or a wrongful use. Gwathney v. Railroad Co., 12 Ohio St. 92; Wood, Landl. & Ten. § 539. As the flume was not a nuisance *per se*, and was, unquestionably, adapted to a lawful use, there can be no presumption against the defendant, in the absence of evidence, that he intended or contemplated an unlawful use of it by his lessee or licensee. For the reasons above stated I think the finding under consideration is not justified by the evidence.

2. Appellant's counsel further contends that the twelfth finding is not justified by the evidence. That finding is to the effect that by the diversions of the waters complained of "the plaintiff has suffered material damage, and the rights of plaintiff as a riparian proprietor have been infringed and injured, and are threatened with further irreparable injury, as far as said riparian rights are concerned." In support of this point it is claimed that the evidence shows that plaintiff had no riparian rights that could have been infringed or injured; that prior to plaintiff's purchase of the land described in his complaint as to which he claims riparian rights, his grantors had granted to Montecito Water Company (a California corporation) all riparian rights to water appurtenant to or parcel of said land, in consideration of certain shares of stock in that corporation, which shares of stock entitled the holder thereof to a certain quantity of water, in proportion to the number of shares, to be conveyed to the land through pipes or aqueducts by the corporation; and that, during the time the defendant is alleged to have diverted water from the creek, the Montecito Water Company, by virtue of that grant, was diverting water from the same stream, and conveying such portion of it to plaintiff's land as plaintiff was entitled to in consideration of the grant. To prove this alleged grant the defendant put in evidence a long and complicated written agreement between riparian proprietors on the creek (23 in number, including plaintiff's grantors) of the first part, and the Montecito Water Company of the second part. Among other things, this agreement purports to be a grant by the parties of the first part to the Montecito Water Company of all the rights of the grantors to the waters of the creek for the consideration above stated. In addition to this, the evidence tended to prove that the plaintiff regarded the agreement as valid and binding upon him; that, as successor to his vendors, he had applied to the corporation to have their stock transferred to him, and that it had been so transferred on the books of the corporation; and that he had received on his land water from the corporation for domestic and other uses during the time he complains of having been deprived of water by the defendant; but whether during all that time he received from the corporation as much water as he was entitled to by the agreement does not clearly appear. The agreement purports to be a substitute for a lost agreement, to which it refers, and, in some undefined respects, to be different from the lost agreement. Besides, it is not clear that all the parties to the lost agreement are parties to the substituted agreement. It is also quite apparent upon the face of the agreement that, in order to construe it and determine its effect, if any effect it can have in this action, it will be necessary to consider the circumstances under which it was executed, and the acts of the parties under it, of which there was not sufficient evidence upon the trial. Gould, Waters, § 319. In view of the record here, I think it cannot be said that the evidence does not justify the finding that the plaintiff has riparian rights which were infringed by the diversions of water complained of, or that the court improperly declined to give to the agreement above referred to, as presented on the trial, the effect claimed for it by counsel for appellant; although it may turn out, upon a proper construction of that agreement, (which is not attempted here,) in the light of all the circumstances which may be lawfully considered as aids to such construction, that the agreement may have the effect claimed for it by counsel for appellant; and for the purposes of a new trial, which must be granted upon other grounds, it is proper to pass upon some of the questions of law discussed by counsel relating to the grant of riparian water-rights, and the effect thereof. The

right of a riparian proprietor to the flow of a stream of water over his land is an incident of his property in the land, is annexed to the land, and considered part and parcel of it, (Civil Code, § 662; Water Co. v. Forbes, 62 Cal. 182;) but may be severed or "segregated" from the land by grant, by condemnation, or by prescription, (Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645; Water Co. v. Mayberry, 88 Cal. 69, 25 Pac. Rep. 1101; Washb. Easem. pp. 12 and 385; Ang. Water-Courses, §§ 96, 141, 146.) If, therefore, the grantors of the plaintiff, while they owned the land, granted to the corporation, (Montecito Water Company,) "its successors and assigns," all or any portion of their riparian rights to the waters of Montecito creek, they thereby, to the extent of such grant, severed from the land their riparian rights, and disabled themselves to grant such rights to the plaintiff; and, consequently, their grant of the land to the plaintiff did not pass the riparian rights theretofore granted to the Montecito Water Company, without which the plaintiff is not entitled to complain that those rights have been infringed by the defendant. In other words, the plaintiff is not entitled to maintain an action for the protection of rights which he has not. It is suggested, however, that even in this supposed hypothetical case, the plaintiff would have a reversionary right to be protected against the acquisition by defendant of a right by prescription; but this would depend upon the terms and conditions of the grant to the Montecito Water Company. If that grant is only for a limited term, or is upon a condition subsequent by which it may be terminated, the plaintiff would be entitled to maintain an action to protect his reversionary right; but if the grant is absolute and unconditional the plaintiff has no reversionary interest. That such a grant may be absolute and unconditional appears by the authorities above cited, but for reasons above stated it is not intended to intimate in this opinion what construction should be given to the written agreement above referred to, in any respect.

3. G. H. Gould was called as a witness for plaintiff, who, after testifying in chief to facts material to plaintiff's case, on cross-examination testified that he is the brother of plaintiff, and one of plaintiff's attorneys in this action; that he is a member and the president of the Montecito Valley Water Company, and that the last-named company pays the expenses of the litigation. Thereupon he was asked the following question: "Why does the Montecito Valley Water Company pay the expenses of this litigation?" Plaintiff's counsel objected to this question, on the ground that it was irrelevant and immaterial, and the court sustained the objection, to which ruling defendant's counsel excepted. It does not appear by the record that the Montecito Valley Water Company is identical with, or successor to, the Montecito Water Company, yet, for the purpose of showing the interest, bias, and prejudice of the witness the question was proper on cross-examination, and the court erred in sustaining the objection to it. Under the circumstances, a liberal cross-examination of the witness should have been allowed. I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: Belcher, C.; Temple, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

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91 Cal. 141

Behlow v. Shorb *et ux.* (No. 14,088.)

(*Supreme Court of California.* Sept. 11, 1891.)

Summons in Action for Money Only—Notice—Ambiguous Complaint—Appeal—Clerical Error in Judgment.

1. Under Code Civil Proc. Cal. § 407, subd. 4, which provides that, in an action arising on contract for the recovery of money or damages only, the summons shall contain "a notice that, unless the defendant so appears and answers, the plaintiff will take judgment for the sum demanded in the complaint, (stating it,)" a summons in an action for goods sold is sufficient which states that the "action is brought to obtain a judgment * * * for the sum of" $2,843.25, "with legal interest * * * until paid, alleged to be due plaintiff upon account, and for costs of suit. Reference is had to complaint for particulars."

2. A complaint in an action for goods sold and delivered is not uncertain or ambiguous because it fails to state where the goods were sold.

3. Where the judgment rendered was for $53 more than the amount found due, and was doubtless an error in computation of interest, which, if brought to the attention of the court below, would have been corrected, the objection being first made in the supreme court, the judgment will not be reversed, but will be ordered reduced by that amount.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William H. Clark, Judge.

Action by William Behlow against J. De Barth Shorb and wife on account for goods sold. Judgment for plaintiff. Defendants appeal. Affirmed.

Chapman & Hendrick, for appellants. *Gottschalk & Luckel*, for respondent.

Belcher, C. This is an action on account for goods, wares, and merchandise alleged to have been sold and delivered by plaintiff to defendants between the 1st day of May, 1887, and the 1st day of March, 1888, and to have been of the value of $2,843.25. The defendants moved the court to quash the summons issued in the action, and served upon them, upon the ground that it did not state the amount for which the plaintiff proposed to take judgment. The portion of the summons objected to as insufficient reads as follows: "The said action is brought to obtain a judgment of said court for the sum of two thousand eight hundred and forty-three 25-100 dollars, with legal interest thereon from March 1, 1888, until paid, alleged to be due plaintiff upon account, and for costs of suit. Reference is had to complaint for particulars. And you are hereby notified that if you fail to appear and answer the said complaint as above required, said plaintiff will cause your default to be entered, and take judgment as prayed for." The motion was denied, and an exception reserved. Shortly afterwards, the plaintiff, after due notice to defendants' attorney, moved that the summons be amended so as to meet the objections urged against it; but this application was resisted by the defendants, and thereupon denied by the court. After their motion was denied, the defendants demurred to the complaint on the ground (1) that it did not state facts sufficient to constitute a cause of action; and (2) that it was uncertain, ambiguous, and unintelligible, in that it did not appear therefrom where the said goods were sold. The demurrer was overruled, and the defendants answered. They averred that the whole sum sued for had been paid, and that no part thereof was then due or payable to the plaintiff. They also, by way of counter-claim, averred that they sold, and on the 23d day of August, 1888, conveyed, to plaintiff a certain piece of land for and in consideration of the sum of $5,900, and "that at the time of the execution of the said conveyance the said plaintiff had agreed to sell and deliver the goods, wares, and merchandise mentioned in the complaint, and to do certain work for the defendants; and, it being then uncertain what the amount and value of said goods or of said work and labor would be, it was agreed between the plaintiff and the defendants that when the said contract on the part of the plaintiff had been performed, if the reasonable value of the same amounted to less than the consideration for said land, to-wit, $5,900, the said William Behlow should pay to the defendants the difference between the value of said goods and labor; and if the value of said goods and labor amounted to more than the sum of $5,900, these defendants would pay to the plaintiff the difference between the said purchase price of said land, and the value of said goods and labor. And defendants further aver that no part of the consideration for said conveyance was paid by the plaintiff at the time, or at any other time, except under the contract aforesaid; and that after deducting the amount stated in the complaint as the value of the said goods, to-wit, $2,843.25, there remains due and owing to the defendants from the said plaintiff the sum of $3,056.75, no part of which has been paid;" and for the last-named sum and costs they prayed judgment. The case was tried by the court without a jury, and the findings were, in substance, that there were two distinct transactions between the parties; that between the dates named in the complaint the plaintiff sold and delivered to defendants the goods, wares, and merchandise sued for, and that the same were to be paid for in money, and the full and reasonable value thereof was the amount demanded, no part of which, or any interest thereon had ever been paid; that the conveyance of the land for $5,900 set up in the counter-claim was not in consideration of the sale and delivery of the goods sued for, but of other goods received from plaintiff by defendants at or about the time of the delivery of the said deed the value of which last-mentioned goods amounted to the sum of $6,039.96; that the value of all the goods sold and delivered by plaintiff to defendants was $8,883.21, and the total value of the land conveyed to plaintiff was $5,900, and that besides the land nothing was paid to plaintiff on account of said goods or otherwise by defendants or either of them; that nothing was due the defendants from plaintiff by reason of the matters set up in their counter-claim; and, as conclusions of law, that plaintiff was entitled to judgment against defendants for the sum of $2,843.25 with interest thereon at the rate of 7 per cent. per annum from March 1, 1888, until paid, and his costs. Judgment was accordingly entered on the 28th day of December, 1889, for the sum of $3,261.21 and costs, and that defendants take nothing by reason of their counter-claim. From this judgment, and an order denying a new trial, the defendants appeal.

1. The first point made for a reversal is that the court erred in refusing to quash the summons. It is said the notice in the summons was insufficient, because it did not state the amount for which judgment would be taken in case the defendants failed to appear and answer, as required by section 407, subd. 4,[1] of the Code of Civil Procedure. We think the summons in effect complied with the requirements of the statute.

2. It is claimed that the demurrer ought to have been sustained upon the ground that the complaint was uncertain and ambiguous. We see nothing in this point. It was not necessary for the plaintiff to state in the complaint where the goods were sold.

3. It is earnestly contended that the findings were not justified by the evidence; that the sales of the goods were not separate and distinct transactions; that plaintiff by splitting his demand, and suing for a part of it, waived any right to ever sue for the balance; and hence that defendants could interpose and maintain any defense to this action that they could have interposed and maintained to the whole demand if sued upon. It is unnecessary to state the evidence, which covers a hundred pages of the transcript. There was some conflict, but, after reading the whole of it, we are of the opinion that it was amply sufficient to justify the findings and decision of the court. The judgment cannot, therefore, be reversed on this ground.

4. Finally, it is suggested that the judgment is for $53 more than the amount found to be due, with the interest thereon at the rate and for the time allowed. This seems to be so, but the point appears to be made here for the first time. If the suggestion had been made to the court below, doubtless the error in the computation of interest would have been corrected at once. It follows, in our opinion, that the judgment and order should be affirmed, except that the court below should be directed to modify the judgment by striking therefrom the sum of $53; the

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[1] Section 407, subd. 4: In an action arising on contract for the recovery of money or damages only, the summons shall contain "a notice that, unless the defendant so appears and answers, the plaintiff will take judgment for the sum demanded in the complaint, (stating it.)"

costs of the appeal to be borne by the appellants.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed, and the court below is directed to modify the judgment by striking therefrom the sum of $53; the costs of the appeal to be borne by the appellants.

91 Cal. 157

KIRMAN *et al.* v. HUNEWILL *et al.* (No. 14,463.)

(*Supreme Court of California.* Sept. 11, 1891.)

APPEAL—WHEN TAKEN—SUPERSEDEAS.

1. In California, an appeal from a judgment taken more than one year from the entry thereof will be dismissed.

2. Whether *supersedeas* should be granted pending an appeal from an order denying a new trial will not be considered on motion to dismiss an appeal from the judgment.

In bank. Appeal from superior court, Mono county; O. F. HAKES, Judge.

Action by Kirman and others against Hunewill and others. Judgment for plaintiffs, and defendants appeal. Dismissed.

Wm. O. Parker, C. A. Schuman, and *Jas. E. Goodal,* for appellants. *Richard S. Miner,* for respondents.

PER CURIAM. Motion to dismiss appeal. The judgment in this cause was entered November 2, 1888, and the appeal therefrom was not taken until more than one year thereafter, viz., December 8, 1890. The motion to dismiss the appeal therefrom must therefore be granted. Whether the appellants are entitled to have the execution of the judgment stayed until the determination of the appeal from the order denying a new trial, cannot be considered upon this motion. See Fulton v. Hanna, 40 Cal. 278. The appeal from the judgment is dismissed.

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91 Cal. 187

ELY v. FERGUSON. (No. 13,283.)

(*Supreme Court of California.* Sept. 14, 1891.)

WATER-RIGHT—APPROPRIATION OF SPRINGS—PUBLIC LAND.

1. A rightful occupant of public land can acquire a water-right which will become appurtenant thereto, although the land was unsurveyed, and he had no legal title when the right was acquired.

2. Water flowing from springs may be appropriated under Civil Code Cal. § 1410, providing for the appropriation of "running water flowing in a river or stream or down a canon or ravine."

Commissioners' decision. Department 1. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Action by Benjamin Ely against Louisa J. Ferguson to restrain her from obstructing the flow of water in ditch owned by plaintiff. Decree for plaintiff, and defendant appeals. Affirmed.

R. W. Crump, (*Ira C. Jenks,* of counsel,) for appellant. *F. E. Baker,* for respondent.

BELCHER, C. The plaintiff brought this action to obtain a perpetual injunction restraining the defendant from obstructing the flow of water into a ditch constructed to convey the water to his land, to be there used for domestic and irrigating purposes. The court below granted the injunction as prayed for, and the defendant appeals from the judgment and an order denying a new trial.

The ditch referred to was constructed in 1862 by one Jamison, and it extended from the land now owned by plaintiff to that now owned by defendant. These two tracts of land were situate in Lake county, and were then public land of the United States, but were separately inclosed, and occupied by Jamison. On the land now owned by defendant there was a marsh containing about four acres, and on one side of it were hills, near the base of which several springs of water flowed out, carrying in the aggregate, during the summer and fall months, as estimated, about 24 inches of water measured under a 4-inch pressure. These waters flowed into the marsh, and thence through a natural channel to and across the land now owned by plaintiff. The ditch was constructed around the side of the marsh so as to take in the waters of all the springs and conduct them to plaintiff's land at points higher than they would otherwise have reached. In 1867 Jamison posted and had recorded a notice that he claimed all the water flowing from the different springs for purposes of irrigation. In 1870 he sold his possessory claim to the land now owned by defendant, and one-half of the water appropriated by him, to one Chambers, and reserved by his deed the other half of the water for use on the land now owned by the plaintiff, where he then lived. In 1872 he posted and caused to be recorded another notice of appropriation, in which he claimed one-half of the water flowing from the different springs, amounting to 12 inches under a 4-inch pressure, and the ditch already constructed. Chambers sold his possessory claim to R. K. Ferguson, the defendant's predecessor in interest, who in 1885 obtained a United States patent to the land, "subject, however, to any vested and accrued water-rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water-rights." Jamison continued to live on the land now owned by the plaintiff, and to use the water carried to it by his ditch for irrigating and other purposes, until 1872, when he conveyed the land with its appurtenances to one White, who in 1878 obtained a United States patent therefor. White conveyed to Getz in 1879, and Getz to the plaintiff in 1883, who has ever since been the owner of the land. Each of these deeds described the land and granted the title thereto, with its appurtenances. Each of the plaintiff's grantors, while they respectively owned the land, and afterwards the plaintiff, continued to claim and use thereon one-half of the water flowing from the springs until June, 1887, when the defendant obstructed the ditch, and thereby prevented any of the said waters from flowing through the same to plaintiff's land.

Only two points are made for a reversal of the judgment. It is claimed—*First*, that water flowing from springs cannot be appropriated, citing section 1410 of the Civil Code, which provides: "The right to the use of running water flowing in a river or stream, or down a canon or ravine, may be acquired by appropriation;" and, *second*, that, if Jamison did acquire a right to the use of the water of the springs and marsh, the land to which he conducted it was then unsurveyed public land, to which he had no semblance of title, and hence the water-right did not become appurtenant to the land, and could not be passed to another except by deed. We do not think either of these claims can be sustained. Water flowing from springs, as the evidence showed and the court found that this water did, may be appropriated. Cross v. Kitts, 69 Cal. 222, 10 Pac. Rep. 409; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, and 22 Pac. Rep. 198. And the fact that the ditch was constructed up to the mouth of the largest spring, as testified by some of defendant's witnesses, cannot affect the result.

So the fact that the land to which the water was taken by Jamison was at the time unsurveyed public land did not prevent the water from becoming appurtenant thereto. He was not a trespasser on the land, but a rightful occupant. All public lands are open to occupation and settlement by citizens of the United States, or those who have declared their intention to become such. He was living on the land, having an orchard and garden thereon, and farming a part of it. And from the earliest times in this state it has been customary to divert water onto the public lands for mining, agricultural, and other purposes, and this right was, in 1866, confirmed and approved by act of congress. See act and authorities cited in De Necochea v. Curtis, supra. The Civil Code provides: "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit; as in the case of a way or water-course, or of a passage for light, air, or heat, from or across the land of another." Section 662. And see Farmer v. Water Co., 56 Cal. 11. It follows, in our opinion, that the court below rightly granted the injunction, and that the judgment and order should be affirmed.

We concur: Fitzgerald, C.; Vancliff, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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91 Cal. 37

Marston v. White *et al.* (No. 14,323.)

(*Supreme Court of California.* Sept. 4, 1891.)

Foreclosure—Sale en Masse.

Where distinct parcels of land have been separately offered at a foreclosure sale without bids being received therefor, a sale *en masse* is not invalid under Code Civil Proc. Cal. § 694, providing that when the sale is of real property, consisting of several known lots or parcels, they must be sold separately, and that the judgment debtor, if present, may also direct the order in which the property shall be sold, when it consists of several parcels, or of articles which can be sold to advantage separately; and the sheriff must follow such directions.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; John R. Aitken, Judge.

Action by George W. Marston against Arville A. White and others to foreclose a mortgage. There was a decree of foreclosure, and a sale thereunder, which defendants afterwards moved to set aside. The court denied the motion, and defendants appeal from the order. Affirmed.

Conklin & Hughes, for appellants. *Luce, McDonald & Henderson*, for respondent.

Belcher, C. This is an appeal from an order refusing to set aside a sale of real property under a decree of foreclosure of mortgages upon the property. It appears from the bill of exceptions that the property described in the mortgages and decree of foreclosure consisted of two parcels of land known as "Lot D" and "Lot I" in block G, of Horton's addition to the city of San Diego. The decree was duly rendered on the 12th day of October, 1889, and thereafter, on the 3d day of March, 1890, when the sheriff of San Diego county, after due notice, was about to sell the property under an order of sale issued in pursuance of the decree, the appellant directed the sheriff, both orally and in writing, to sell the lots separately, and as to the order in which they should be sold. The sheriff offered the lots for sale separately, as directed, but received no bids for either of them, and he then offered them as a whole, and they were struck off and sold to the respondent, who was the highest bidder, and one of the mortgagees. A return to this effect was made on the writ, and a certificate of sale given to the purchaser. On the 14th of August, 1890, the appellant served upon the respondent her affidavit and notice of motion to set aside the sale upon the ground that the lots were not sold separately as required by section 694 of the Code of Civil Procedure, and as directed by her. When this motion came on to be heard, the appellant introduced in evidence her notice of motion and affidavit in support thereof, a copy of the notice served on the sheriff prior to the sale, the order of sale and the sheriff's return thereon, and then rested. After argument by counsel for the respective parties, the court denied the motion, and the appellant excepted to the ruling.

Section 694 of the Code of Civil Procedure provides that "when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or, when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately; and the sheriff must follow such directions." It has been held that this section is applicable to sales under a decree of foreclosure, when the decree is silent as to the manner or order in which the separate parcels shall be sold. Improvement Co. v. Bedford, (Cal.) 27 Pac. Rep. 39. It does not, however, render a sale of separate parcels *en masse*, in disregard of its requirements, absolutely void. Such a sale is voidable, and, on timely application, will ordinarily be set aside. San Francisco v. Pixley, 21 Cal. 57; Blood v. Light, 38 Cal. 654; Browne v. Ferrea, 51 Cal. 552; Vigoureux v. Murphy, 54 Cal. 346. But while the rule declared by the Code as above is controlling, and should be strictly followed, still it cannot be held to apply where each distinct parcel is first offered for sale separately, and no bids are received. In such case the property may then be offered and sold as a whole, and the sale will be upheld unless other reasons appear for setting it aside. The rule applicable to such cases is stated, and, as we think, correctly, in Freeman on Executions, § 296, as follows: "The rule that distinct parcels should be separately sold is not generally enforced to the extent of denying the right to sell when the sale can be made in no other way. Hence the officer, after offering the parcels separately, and in various combinations, without receiving any bids, may then offer and sell them *en masse.*" And see authorities cited. Here the lots were offered separately, as directed by the appellant, and the only ground urged for setting aside the sale was that they were then sold together. This, as we have seen, was not a valid ground, and hence it follows that the order appealed from was proper, and should be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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91 Cal. 282

MILLER v. SEARS *et al.* (No. 14,371.)

(*Supreme Court of California.* Sept. 19, 1891.)

ESCROW—INCOMPLETE CONTRACT.

Where a contract for the exchange of lands was not to be complete until the parties were satisfied as to the title, the deposit of a deed with a third person by one party for delivery to the other "when everything is all right and perfected," does not constitute a delivery in escrow

Department 2. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by Miller against Sears to recover possession of certain deeds and mortgages. Plaintiff was nonsuited, and appeals. Reversed.

Gould & Stanford, for appellant. *E. W. Sargent* and *Albert M. Stephens*, for respondents.

DE HAVEN, J. This is an action to recover the possession of certain described instruments, consisting of a note, mortgage, and two deeds, each signed by the plaintiff, and alleged to have been deposited with the defendants. The plaintiff was nonsuited, and the question before us is whether the testimony of plaintiff was such as to show that the documents in controversy were delivered by him to defendants in escrow, as claimed by them.

We think the fair import of the testimony is to the effect that plaintiff had made an agreement, subject to further consideration as to title, with one Stimson and a Mrs. Buttner for the purchase of certain property from them, and the sale by him of certain lots to them, and as part of this transaction the note, mortgage, and deeds of plaintiff and the deed of Stimson and Mrs. Buttner for plaintiff were signed and left with defendants to be delivered "when everything was all right and perfected." Upon this point the plaintiff testified: "I said to Mr. Sears: 'You take these papers, and when everything is all right and perfected, you give these papers to me, and these others to him.' That was the agreement. * * * The transaction was not completed on that day because we had no abstract of title at the time. We knew nothing about the titles, and we had to leave that to after-consideration. If it had been perfect, of course we should have handed over the papers." Upon this state of facts it cannot be held that plaintiff's papers were delivered to the defendants as an escrow. There was no contract of sale concluded between the plaintiff and the other parties to the negotiation, as the question of title remained to be settled to the satisfaction of the contracting parties. This fact alone is fatal to the contention of respondents that they held the documents in controversy as an escrow. The law upon this point is very clearly stated by Mr. Justice Rhodes in delivering the opinion of this court in Fitch v. Bunch, 30 Cal. 209, as follows: "An escrow differs from a deed in one particular only, and that is the delivery. Not only must there be sufficient parties, a proper subject-matter, and a consideration, but the parties must have actually contracted. * * * The actual contract of sale on the one side and of purchase on the other is as essential to constitute the instrument an escrow as that it be executed by the grantor; and until both parties have definitely assented to the contract the instrument executed by the proposed grantor, though in form a deed, is neither a deed nor an escrow; and it makes no difference whether the instrument remains in the possession of the nominal grantor or is placed in the hands of a third party pending the proposals for the sale or purchase." But, in addition to this, we do not think that it can be held, upon the facts above stated, that the defendants were given the right to deliver these papers without further direction from the plaintiff. The delivery was not absolute and beyond the control of the plaintiff. There was to be no delivery to the other parties until "everything was all right and perfected;" and, as there is nothing in the evidence to indicate that this matter was to be determined except by the future agreement of the parties themselves, it follows that defendants held the documents in controversy as mere depositaries, subject to the future direction of the plaintiff, and were not authorized to do anything with them until notified by plaintiff that he was satisfied with the title he was to receive. For this reason also it must be held that the evidence does not show a delivery of these instruments in escrow. James v. Vanderheyden, 1 Paige, 386. It follows from the foregoing views that the court erred in granting the motion for nonsuit. Judgment and order reversed.

We concur: Beatty, C. J.; McFarland, J.

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91 Cal. 48

Sappenfield v. Main St. & A. P. R. Co.

(No. 14,155.)

(*Supreme Court of California.* Sept. 5, 1891.)

Injury to Employe — Defective Appliances — Opinion Evidence.

1. Where the pin holding the single-tree to the draw-head of a street-car came out, releasing the horse, and the driver was dragged over the dash-board, it was error, in an action for the resulting injury, to charge that it is the duty of a master to furnish such appliances "as combine the greatest safety with practical use;" since a master need only furnish appliances reasonably safe, though better ones exist; and a subsequent charge, given at the master's request, which correctly states the law, does not cure the error.

2. Under Code Civil Proc. Cal. § 1870, subd. 9, which provides that a witness may give his opinion "on a question of science, art, or trade, when he is skilled therein," it is error to allow a witness, who for about two years has been a driver and conductor on the railway, to testify whether in his opinion the pin was "safe;" since he should have testified only as to facts, leaving it to the jury to draw inferences therefrom.

3. Evidence that soon after the accident the railway company substituted a new and safer pin in all its cars, is incompetent as an admission of prior negligence.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action for personal injuries by one Sappenfield against the Main Street & Agricultural Park Railroad Company. Verdict and judgment for plaintiff. Defendant appeals. Reversed.

Stephen M. White, for appellant. *Dupuy & Bentley* and *R. Dunnigan*, for respondent.

Harrison, J. The defendant is the proprietor of a street railroad in the city of Los Angeles, and the plaintiff was employed by it as a driver upon one of its cars. On the 22d of November, 1888, while engaged in the service of the defendant, the plaintiff was driving a horse called "Dan," which was hitched to car No. 4 of the defendant's line of street-cars, and while driving along Main street, near Tenth, the horse became detached from the car, and dragged the plaintiff over the dash-board, throwing him upon the track, where he was run over by the car, and received serious injury, necessitating the amputation of one of his legs. For the damage thus sustained he brought this action against the defendant, alleging that it had been caused by its negligence in furnishing him with an unsafe and ungovernable horse, and a car "whose appliances and attachments" were in an unsafe and dangerous condition. The case was tried by a jury, and a verdict rendered in favor of the plaintiff. From the judgment entered thereon, and from an order denying a new trial, the defendant has appealed to this court.

For the purpose of establishing that the appliances and attachments of the car were unsafe and dangerous, it was shown that the single-tree by which the horse was hitched to the car was fastened to the draw-head of the car by a straight pin. This pin had a ring at the top, through which a chain kept it attached to the draw-head, and was five and five-eighths inches in length and three-fourths of an inch in diameter, and the holes in the two bars in the draw-head, through which it was inserted for the purpose of holding the single-tree, were thirteen-sixteenths of an inch in diameter. Testimony was given at the trial to the effect that on a few occasions the straight pin had worked out of its hole while the car was in motion, letting loose the single-tree, and giving the horse an opportunity to escape; but it was not shown that any accident or injury had ever resulted therefrom prior to the present instance, although the cars made several hundred trips each day. It was also shown that there was another kind of pin in use, called a "safety-pin," which was provided with a device to prevent it from working out of the holes in the draw-head. This safety-pin was upon two of the cars of the defendant which it occasionally used, that had been manufactured for it in St. Louis a few months previous to the accident, and upon two other of its cars, which had recently been manufactured for it in Los Angeles. It was also shown that the straight pin had been in use by the defendant for several years, and was the same kind of pin that was generally in use upon street-cars, as well in San Francisco as in Los Angeles, although two of the lines in Los Angeles had a short time previously adopted the safety-pin upon a few of their cars.

1. The theory upon which the plaintiff's case was tried was that the defendant was negligent in continuing the use of the straight pin, and in not having furnished the car in question with the safety-pin; and at the close of the testimony the court, at his request, gave to the jury the following instruction: "It is the duty of one who employs another in his business to furnish to such employe such tools, implements, appliances, and machinery as may be needed in the work to be done for the employer, in good order, of sound material, and in safe condition for use, such as will be reasonably best calculated to insure safety in their use by the employe, and such as combine the greatest safety with practical use. The employe has the right to expect this, and in using such implements, appliances, or machinery the employe has the right to, and may, rely upon it that the tools, implements, and machinery given and furnished to him by his employer to use in his business are such as are required by the law." This instruction was erroneous in declaring that the obligation upon the master required him to furnish such appliances "as combine the greatest safety with practical use." By this the jury were told that the appliances required must be such as in practical use will be found to afford the greatest safety,—that is, those appliances which from experience are found to combine all the provisions for safety that are capable of being used. The instruction is substantially the same as one given in the case of Treadwell v. Whittier, 80 Cal. 599, 22 Pac. Rep. 266, which was approved by this court; but the circumstances which rendered such instruction proper in that case do not exist here. The court in that case was defining the duties of the proprietor of a passenger elevator, and likening them to the duties imposed upon the carrier of passengers, which require him to keep pace with modern improvement and invention, and adopt such newly-invented appliances as will secure the safety of those whom he carries. The relations of the defendant to the plaintiff in this case differ materially from those existing between the carrier and its passengers, for, instead of being in any respect an insurer of his safety, the defendant held to the plaintiff only the ordinary relations of a master to his servant. The relative liability of a carrier to its passengers and to its employes is stated by the court of appeals in New York in Warner v. Railroad Co., 39 N. Y. 471, as follows: "We are not now dealing, it must be remembered, with the liability which a railroad corporation assumes in respect to the safety and security of passengers transported on their road for a compensation, and in regard to whom they become absolute insurers against all defects which the highest degree of vigilance would detect or provide against. The liability here, if there is any, is measured by that lower standard which all the authorities recognize in the case of an employe, and which is answered if the care bestowed accords with that skill and prudence which men exercise in the transaction of their accustomed business."

The ground of the plaintiff's cause of action is negligence of the employer in failing to supply him with suitable appliances, with which to do the work for which he is employed. This liability of the master is based upon personal negligence,—that is, a negligence by himself or those to whom the matter has been delegated in the selection of suitable appliances for the use of the servant. He is not required to furnish appliances which are absolutely safe, nor is he bound to furnish the best that can possibly be obtained. He is, however, under obligation to exercise reasonable and ordinary diligence in their selection, and to furnish to his servant such as are reasonably safe, and adapted to perform the work for which they are designed, and which, with ordinary care and prudence on the part of the servant, render it reasonably probable that they can be used by him in the ordinary exercise of his employment without danger to himself. If the master has exercised proper care in their selection, —such care as a prudent man would exercise if his own person or life were exposed to the danger that would result from their use,—and has thereafter kept them in suitable condition and repair, he is not liable for an accident that may happen to the servant from their ordinary use. After the master has exercised this care, the incidental risks that result from the use of such appliances are assumed by the servant, and are supposed to have been taken into account in fixing the amount of his wages. Whether in any case the employer has been negligent in the selection or care of the appliances furnished by him to those in his service is a question of fact to be determined from all the circumstances and surroundings of that case. The burden is on the plaintiff to show some fault on the part of the master. The mere fact of the injury or accident does not raise a presumption of negligence; and, as his negligence is to be measured by his knowledge or means of knowledge, it must be shown that the master knew or had notice that the appliance was defective. It is not sufficient to show that there were better or safer ones to be had, but it must be shown that the one supplied had some radical fault, or that its use had become so generally obsolete, or supplanted by others of superior character, that its adoption or retention would itself indicate negligence. The master is not bound to adopt every latest improvement in machinery, nor is he liable for an accident which would not have occurred if such improvements had been adopted. If, at the time of its selection, the appliance in question was the only one in general use, or was the one which was generally used, and was reasonably adapted to the purpose for which it was employed, its selection or its subsequent retention would not of itself indicate negligence; nor would the fact that better ones were used by others, or that later devices had overcome defects that experience had shown this one possessed, be proof of negligence in the continuance of its use. Nor does the circumstance that the appliance has defects, which do not render it positively unsafe, indicate any negligence in its selection, unless it be also shown that when selected ordinary care would have either disclosed or could have obviated these defects. It is a well-settled rule that when an appliance or machine, not obviously dangerous, has been in daily use for a long time, and has uniformly proved safe and efficient, its use may be continued without the imputation of imprudence or carelessness. Wonder v. Railroad Co., 32 Md. 411; Railroad Co. v. McCormick, 74 Ind. 440; Railroad Co. v. Orr, 84 Ind. 55; Payne v. Reese, 100 Pa. St. 306; Coal Co. v. Hayes, 128 Pa. St. 294, 18 Atl. Rep. 387; Railroad Co. v. Propst, 83 Ala. 518, 3 South. Rep. 764; Burke v. Witherbee, 98 N. Y. 565; Probst v. Delameter, 100 N. Y. 266, 3 N. E. Rep. 184; Stringham v. Hilton, 111 N. Y. 188, 18 N. E. Rep. 870; Kern v. Sugar-Refining Co., 125 N. Y. 50, 25 N. E. Rep. 1071; Railroad Co. v. Gildersleeve, 33 Mich. 133; Railroad Co. v. Smithson, 45 Mich. 212, 7 N. W. Rep. 791; Railroad Co. v. Wagner, 33 Kan. 666, 7 Pac. Rep. 204; Wood, Mast. & Serv. §331; Civil Code, §1971. "When a master employs a servant to do a particular kind of work with particular kinds of implements and machinery, the master does not agree that the implements and machinery are free from danger in their use, but he agrees that such implements and machinery to be used by such servant are sound and fit for the purpose intended, so far as ordinary care and prudence can discover, and that he will use ordinary care and prudence in keeping them in such condition and fitness; and the servant agrees that he will use such implements with care and prudence; and if, under such conditions and circumstances, harm or injury come to the servant, it must be ranked among the accidents, the risks of which the servant must be deemed to have assumed when he entered into such service." Railroad Co. v. McCormick, supra. "An employer is not bound to furnish for his workmen the 'safest' machinery, nor to provide the 'best methods' for its operation, in order to save himself from responsibility for accident resulting from its use. If the machinery be of an ordinary character, and such as can with reasonable care be used without danger to the employe, it is all that can be required from the employer. This is the limit of his responsibility, and the sum total of his duty." Payne v. Reese, supra. "A master is not bound to change his machinery in order to apply every new invention or supposed improvement in appliances; and he may even have in use a machine or an appliance for its operation shown to be less safe than another in general use, without being liable to his servants for the consequences of the use of it. If the servant thinks proper to operate such machine, it is at his own risk, and all that he can require is that he shall not be deceived as to the degree of danger that he incurs." Wonder v. Railroad Co., supra.

The error in giving the foregoing instruction was not obviated by the instruction subsequently given at the instance of the defendant, wherein the law applicable to the case was properly presented. The jury could not determine which of the two propositions was correct. They were bound to accept all the propositions that the court instructed them upon as a correct statement of the law by which they were to be guided; and, if the several instructions are inconsistent or contradictory, it is impossible to tell which was adopted by them in reaching their verdict. Brown v. McAllister, 39 Cal. 573; Chidester v. Ditch Co., 53 Cal. 56.

2. One McNally was called as a witness by plaintiff, and testified that he had worked for the defendant about two years, mostly as driver and conductor, commencing in July, 1887, and continuing until the latter part of March, 1889; and, having testified with reference to the different kinds of coupling-pin used by the defendant, was asked by the plaintiff the following question: "From your experience in driving those cars and using those pins, would you say that was a safe pin, —the straight pin?" The defendant objected to this interrogatory, upon the ground that no foundation had been laid therefor, and because it was not a proper subject for expert testimony. The objection was overruled, to which the defendant excepted, and the witness thereupon answered: "It is not safe, for the reason that there is nothing to hold it in the draw-head of the car. They are liable to work out or bulge out at most any time, and in that case the chances are that the horse gets away." The defendant's counsel thereupon moved to strike out the answer of the witness to the effect that the chances are that the horse gets away, upon the ground that the matter therein involved is not a proper subject for expert testimony, and that the answer was incompetent, irrelevant, and immaterial. The court overruled the objection, to which the defendant excepted. Section 1870, Code Civil Proc., (subd. 9,) provides that the opinion of a witness may be given "on a question of science, art, or trade, when he is skilled therein." The general rule, however, is that witnesses must testify to facts, and not to opinions, and that, whenever the question to be determined is the result of the common experience of all men of ordinary education, or is to be inferred from particular facts, the inference is to be drawn by the jury, and not by the witness. When the inquiry relates to a subject whose nature is not such as to require any peculiar habits or study in order to qualify one to understand it, or when all the facts upon which the opinion is founded can be ascertained and made intelligible to the court or jury, the opinion of the witness is not to be received

in evidence. If the relation between the facts and their probable results can be determined without any special skill or training, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury. If the circumstances out of which the negligence is said to arise have been established by proof, or can be shown, the ultimate fact of negligence is an inference to be drawn therefrom by the jury, and is not to be established by the opinions of others. Shafter v. Evans, 53 Cal. 32; Enright v. Railroad Co., 33 Cal. 236; Ferguson v. Hubbell, 97 N. Y. 507; Hart v. Bridge Co., 84 N. Y. 56; City of Chicago v. McGiven, 78 Ill. 349; Glass Co. v. Lowell, 7 Cush. 321; White v. Ballou, 8 Allen, 408; Muldowney v. Railroad Co., 36 Iowa, 473. Whether this pin was "safe"—that is, unattended with personal risk to the driver—was an issue in the case for the jury to determine from all the circumstances that might be shown. All the facts upon which the opinion of the witness was founded could be readily laid before the jury, and they could draw the conclusion from these facts as readily and correctly as he. It required no special training or experience to determine whether a straight pin, put through the holes of the draw-head, was adapted to perform the duties for which it was intended. The pin, single-tree, and draw-head were all before the jury, and, as men of ordinary experience, they were capable of determining their sufficiency and safety. It required no peculiar education to determine the effect of the constant tension which the ordinary pulling of the horse would produce upon the pin while it was in the holes of the draw-head. It had been testified that while driving the car it had at times come out by working up under such tension, and it was open to their observation that it might work out, and the jury was capable of determining what would be the effect if it should come out. Whether, if it did come out, it was safe or unsafe, was a conclusion to be drawn by them, and the opinion of the witness was not to be substituted for theirs, nor was their verdict to be based upon his opinion. The fact that the court should allow the witness to give this testimony would of necessity have great weight with the jury, and have a tendency to overcome any doubt they might entertain as to the capacity of the pin, thus prejudicing the defendant by giving to the jury this inadmissible evidence as a ground for their verdict.

3. Against the objections of the defendant the court permitted the plaintiff to offer testimony that shortly after the accident the defendant caused the straight pin to be replaced by the safety-pin upon its several cars. There are some authorities, chiefly in Pennsylvania, which hold that evidence of this kind is admissible as being an admission by the defendant of his negligence in not having previously provided appliances of a suitable character; but the weight of authority is against its admissibility, and the reasons urged in its favor do not commend themselves to our judgment. The employer is chargeable with negligence in this regard only upon proof that he knew or had notice that the appliance which he had furnished was unsafe or unsuitable to its purpose, and it might be that the very accident which gave occasion for the suit first brought to his notice the defect or insecurity of the appliance. If, however, it be held that the fact of his immediately seeking to obviate this defect, or remove this insecurity, by a change in the character of the appliance, is evidence that the accident resulted from his negligence, we would have the contradiction of imputing to him a knowledge of such defect prior to the occurring of the accident, which he did not acquire until after the accident had occurred. The negligence of the employer, which renders him responsible for the accident, depends upon what he did and knew before the accident, and must be established by facts and circumstances which preceded it, and not by acts done by him after its occurrence. The knowledge on his part from which negligence is to be inferred must be established by evidence, independent of any subsequent act in changing the appliance; and any defect in such evidence cannot be supplemented by such act. It would be unjust to hold that, because the employer seeks by all the aid he gets from the light of experience to make his implement free from danger, he is therefore to be charged with negligence in the use of all prior appliances, even though they were adopted with the best light then under his control. We have seen that the employer is not chargeable with negligence merely because he does not adopt every new invention immediately upon its production, but the rule contended for by the appellant would make such adoption an admission that he was negligent prior thereto, although the improvement may have been for the first time thus brought to his knowledge, and its adoption may have had no connection with the accident. Such a rule puts an unfair interpretation on human conduct, and virtually holds out an inducement for continued negligence. It would be a harsh rule to hold that in all cases of accident resulting from defective appliances the employer is to be held accountable for a negligence which is established solely by his efforts to avoid its recurrence; that precautions taken subsequent to an accident are admissions that he was previously negligent. He may have exercised all the care which the law requires, and yet, in the light of a new experience, after an unexpected accident has occurred, he may adopt additional safeguards. To hold that the adoption of such new appliances, which experience has demonstrated are more efficient than those previously in use, or which invention has developed from observing the defects in those originally adopted, shall be an admission that he was negligent prior thereto, would prevent the very conduct in employers which they should be urged to follow. Nalley v. Carpet Co., 51 Conn. 524; Morse v. Railway Co., 30 Minn. 465, 16 N. W. Rep. 358; Corcoran v. Peekskill, 108 N. Y. 151, 15 N. E. Rep. 309. This subject and the authorities bearing thereon are very fully discussed in Nalley v. Carpet Co., supra, in which the court uses the following

language: "The fact that an accident has happened, and some person has been injured, immediately puts a party on a higher plane of diligence and duty, from which he acts with a view of preventing the possibility of a similar accident, which should operate to commend, rather than to condemn, the person so acting. If the subsequent act is made to reflect back upon the prior one, although it is done upon the theory that it is a mere admission, yet it virtually introduces into the transaction a new element and test of negligence, which has no business there, not being in existence at the time." For these errors the judgment of the court below and the order denying a new trial are reversed.

We concur: Garoutte, J.; Paterson, J.

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91 Cal. 136

Hinckley *et al.* v. Field's Biscuit & Cracker Co. *et al.* (No. 13,230.)

(*Supreme Court of California.* Sept. 10, 1891.)

Mechanics' Liens—"Owners" of Property—Who are Contractors.

1. Code Civil Proc. Cal. § 1183, relative to mechanics' liens, provides that, if the amount of a written contract between the "owner" and his "contractor" exceeds $1,000, the contract must be filed with the county recorder; otherwise it shall be wholly void. *Held*, that a trustee who holds the legal title to land under a contract whereby he is to build a factory on the land, and then convey the whole property to the *cestui que trust*, is the "owner," within section 1183, though he has already received the consideration of the contract.

2. A person who agrees to set up a steam plant in a factory under a written contract is not a "contractor" within section 1183, where the only work to be done on the premises is incidental to the delivery of the machinery and placing it in position.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by one Hinckley and another against Field's Biscuit & Cracker Company and another to enforce a mechanic's lien. Demurrer to the complaint sustained. Plaintiff appeals. Reversed.

Wm. H. H. Hart, (*Aylett R. Cotton*, of counsel,) for appellants. *Pillsbury & Blanding*, *R. Percy Wright*, and *Willard T. Barton*, for respondents.

De Haven, J. In the court below a demurrer to the complaint was sustained, and judgment thereupon entered in favor of the defendants. The plaintiffs appeal. The question to be considered here is whether the ruling of the court in sustaining the demurrer was correct. The demurrer was upon the general ground that the complaint did not state facts sufficient to constitute a cause of action, and also for ambiguity. The allegations of the complaint, so far as necessary to be stated, are: That on February 28, 1887, the defendant Field was the owner of record of the land upon which stands the building against which it is sought to enforce the lien, but that he held the same in trust for the Field's Biscuit & Cracker Company, a defendant herein; that upon that day said Field entered into a contract with said company, whereby, in consideration of the issuance to him of 800 shares of its capital stock, he agreed to complete and deliver to the company, equipped and furnished with the latest improvements, a factory, to be under his direction, constructed on said land, and, as soon as completed, the same, with its appurtenances, to be conveyed to it; that immediately after the execution of this contract the company issued and delivered to Field 800 shares of its capital stock in full payment for said land and for the building and machinery to be constructed thereon by him, and on November 5, 1887, the said Field conveyed to the company the land and improvements thereon. The complaint further avers that upon April 11, 1887, the said Field, "as such contractor of and for the said defendant Field's Biscuit and Cracker Company, employed plaintiffs herein to build, manufacture, and construct at their own works, and deliver and put in place upon foundations prepared by said Arthur Field in said structure, building, and factory," a steam plant, consisting of boilers, engine, heater, feed-pipes, etc., for the agreed price of $5,600, and that said contract was duly performed by plaintiffs. It is not alleged that this contract was recorded, but it is averred that the agreement between Field and the Field's Biscuit & Cracker Company was never recorded. Plaintiff's claim of lien was filed for record within the time given by law. The respondents insist that Field was the owner of the property upon which a lien is claimed at the time he contracted with plaintiffs to furnish for said factory the steam plant referred to in the complaint; and, as the price agreed upon to be paid therefor exceeded $1,000, and the contract was not recorded, that the contract was wholly void, under section 1183 of the Code of Civil Procedure, and no recovery can be had by plaintiffs thereunder.

1. Section 1183 of the Code of Civil Procedure provides that "mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists," etc., shall have a lien upon the property upon which they have bestowed labor or furnished materials; and, "in case of a contract for the work between the reputed owner and his contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons except the contractor to the extent of the whole contract price; and, after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor." The section then provides that all such contracts (that is, those between the owner and his contractor) shall be in writing when the amount agreed to be paid thereunder exceeds $1,000, and before work is commenced thereunder must be filed in the office of the recorder of the proper county; "otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto." The position assumed by respondents in support of their demurrer rests upon these two propositions: (1) That Field was the owner of the building he was constructing; and (2) that plaintiffs

were contractors within the meaning of section 1183 of the Code of Civil Procedure,—and the failure to sustain either is fatal to the judgment appealed from. We agree with respondents upon the first point, that Field was the owner, and not a contractor, as that word is used in the section of the Code just referred to. His relation to the Field's Biscuit & Cracker Company was that of vendor, and the factory was constructed for himself, that he might convey it, and the land upon which it stood, in accordance with his agreement to do so. It is very true that the Field's Biscuit & Cracker Company was the equitable owner, having paid the agreed price therefor, but, as the building was erected by its consent, and under agreement that its vendor should retain the legal title until its completion, he was, for all practical purposes pertaining to its construction, the owner within the meaning of the law relating to mechanics' liens, and the equitable estate was equally bound with the legal title to satisfy the liens of mechanics or material-men, growing out of contracts made with him in the construction of the building.

2. But, assuming this to be so, the question still remains, were the plaintiffs contractors, as that word is used in section 1183 of the Code of Civil Procedure, where it speaks of a "contract for the work between the owner and his contractor?" If so, their contract, not having been recorded, was wholly void, and the demurrer was properly sustained. We are of the opinion that upon the facts alleged plaintiffs were not such contractors, but were material-men. Although one may furnish materials to be used in the construction of a building under an express contract, he does not become a contractor, as that term is used in the law relating to mechanics' liens. That law recognizes a clear distinction between contractors, subcontractors, material-men, and mechanics, and these different words to designate distinct classes of persons. All are referred to as being entitled to liens, and the priority of their several liens is declared; and it is quite clear to us that the word "contractor," in sections 1183 and 1184 of the Code of Civil Procedure, does not refer to a material-man. The section, in requiring the contract "between the owner and his contractor" to be in writing, and recorded, has for its object the giving of notice of the terms of the contract to those who may be employed by or furnish materials to the contractor in the course of its performance, so as to enable them to judge whether the contract price to which they have a right to look for their security is sufficient for that purpose. But the reason for giving this notice does not apply to the case of one who contracts only to furnish materials, as his employes have no lien upon the price which he is to receive therefor, and for that reason the statute does not require that contracts under which materials are furnished shall be in writing and recorded. And this view of the law is sustained by the reasoning of Mr. Justice SHARPSTEIN, in the case of Sparks v. Mining Co., 55 Cal. 392, in defining the words "original contractor," as found in section 1187 of the Code of Civil Procedure. In this case there can be no doubt that the plaintiffs were simply material-men. Under their contract they were to manufacture at their own shop the boiler, engine, heater, feed-pipes, and necessary attachments, and deliver them finished and complete, and properly set them in the building; but the work done by them on the premises of defendants in placing them in position was only the completion of their contract to deliver such finished machinery, and did not convert them into contractors for the erection of the factory, or any part of it, within the true intent of the statute. The contract was essentially one to furnish materials for the factory, and not a building contract.

3. What has been said disposes of the second ground of demurrer, to the effect that the contract was void because not complying with section 1184 of the Code of Civil Procedure, as that section only refers to the contract of the contractor.

4. We do not think the complaint is ambiguous in the respects pointed out by the demurrer. We are satisfied that the complaint states a cause of action, and if the defendants have any defense to the action it is not disclosed by the complaint. In reaching this conclusion we have not overlooked the fact that the plaintiffs allege in general terms that Field was a contractor, and as such contracted with plaintiffs. But the complaint avers specifically all the facts in regard to the ownership of the property, and the relation to it of defendants Field and the Field's Biscuit & Cracker Company, and the allegation that Field was contractor may be disregarded. Judgment reversed, with directions to overrule the demurrers interposed by defendants.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

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91 Cal. 98

PEOPLE v. AH JAKE. (No. 20,738.)

(*Supreme Court of California.* Sept. 8, 1891.)

HOMICIDE — INSTRUCTIONS — BURDEN OF PROOF — CONFLICTING EVIDENCE.

1. In a prosecution for murder the court instructed that the burden of proof was on the defendant to show the absence of malice, unless the prosecution "shows that the crime only amounted to manslaughter, or that defendant was justifiable or excusable." *Held*, that while, standing alone, the instruction ignored the question of mitigating circumstances which may have been proved, yet, as the charge as a whole stated the law correctly, and that the evidence of the prosecution "tends to show" manslaughter, it was not erroneous.

2. The court instructed that "when the people rely upon circumstantial evidence to convict the defendant, every link in the chain of circumstances, necessary to a conviction, must be established by the people to a moral certainty, and beyond all reasonable doubt." *Held* that, where the instruction covered the subject-matter of a special instruction asked for, relating to the particular facts in the case, it was not error to refuse to give the special instruction.

3. Where the evidence upon which defendant was convicted is unsatisfactory, but was substantially conflicting, the verdict will not be disturbed on the ground that the evidence was insufficient to support it.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; EDWIN SHEARER, Judge.

Prosecution against Ah Jake for murder. Verdict of guilty of murder in the second degree, and judgment thereon. Defendant moved for a new trial, which being denied, he appeals from the judgment and the order denying the motion. Affirmed.

Gillis & Tapsgott, for appellant. *I. A. Reynolds* and *Atty. Gen. Hart*, for the People.

FITZGERALD, C. The defendant, who was accused by information of the crime of murder, was convicted of murder in the second degree, and sentenced to imprisonment in the state-prison for the term of 13 years. This appeal is taken from the judgment and the order denying his motion for a new trial.

The errors complained of relate to the rulings of the court upon the admission and rejection of testimony against the objections and exceptions of the defendant, and upon the giving of the second instruction for the people and the refusal of the fourth instruction asked for by the defendant.

The first of these instructions is claimed to be erroneous on the ground "that it does not state the law correctly," and the objection is especially urged against that part of it which reads as follows: "The burden of proof will be thrown on the defendant to show the absence or want of malice unless the proof on the part of the prosecution shows that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." While it is true that this isolated instruction ignores the circumstances of mitigation which may have been proved on the part of the prosecution, tending to show "that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable," yet the charge of the court must be considered as a whole, and when so considered, will be found, as we think, to state the law correctly, and to be clearly applicable to the facts of the case. The words "tends to show" were twice used in this same connection by the court in other portions of its charge to the jury.

The fourth instruction asked by the defendant, and refused by the court, is as follows: "Where circumstantial evidence is depended on by the people to convict a defendant, it is necessary for them to establish every link in the chain of circumstances, beyond all reasonable doubt, and to the entire satisfaction of the jury. Therefore, if the jury believe from the testimony that one of the necessary links in the necessary chain of circumstances in this case was that the deceased was killed without any club in his hand, then, before you can convict the defendant, you must be entirely satisfied that the deceased at the time he was killed had no club in his hand; and if you should find that he did have a club in his hand at the time he was killed then you will acquit the defendant, or if you should be in reasonable doubt as to whether or not he had a club in his hand at the time he was killed, then you will give the defendant the benefit of the doubt and acquit him. Or if you should find that one of the necessary links in the chain of circumstances necessary to convict in this case was that the defendant was seen running away from the deceased at the time of the killing, then you will have to be satisfied beyond all reasonable doubt that the witness Sing was the party who was in the house at the time of the killing, and who ran to the door immediately after the killing, and that he is the party who ran down to the claim and gave the alarm, and that he was not in the claim at the time of the shooting; or if you have any doubts as to his being the said party,—then you should give the defendant the benefit of the doubt and acquit him." This instruction was properly refused, as the subject-matter thereof was given to the jury in instruction No. 9, to-wit: "When the people rely upon circumstantial evidence to convict the defendant, every link in the chain of circumstances, necessary to a conviction, must be established by the people to a moral certainty, and beyond all reasonable doubt." It was for the jury to decide whether or not any special piece of evidence or circumstance was a necessary link in the chain, and, if decided that such evidence or circumstance was a necessary link, then the instruction just quoted plainly told them that to their minds as jurors such link must be established to a moral certainty and beyond all reasonable doubt. The exceptions taken by appellant to the rulings of the court upon the admission and rejection of evidence, and assigned as error, are very numerous; but, as they are either harmless or untenable, we do not deem it necessary to notice them. We are constrained to say, however, that the evidence upon which the defendant was convicted of the crime of murder in the second degree is not to our entire satisfaction, but, as it is on the whole substantially conflicting, the verdict, under the well-established rule of the court, will not be disturbed on the ground of the insufficiency of the evidence to support it. We therefore recommend that the judgment and order be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(91 Cal. 158)

GRANT v. OLIVER. (No. 13,104.)[1]

(*Supreme Court of California.* Sept. 12, 1891.)

LOST DEED—PRELIMINARY PROOF—ACKNOWLEDGMENT—MEXICAN GRANT—RECITAL IN PATENT.

1. The record of a deed could not properly be received in an action tried in 1888 without the preliminary proof then required by Code Civil Proc. Cal. § 1951, which provided that a certified copy of the record of an instrument affecting real estate, duly acknowledged, may be read in evidence with like effect as the original, on proof by affidavit or otherwise that the original is not in the possession or under the control of the party producing the certified copy; the preliminary proof having been dispensed with by an amendment of section 1951 in 1889.

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[1] Motion to modify judgment denied, 27 Pac. Rep. 861.

2. Where the execution of a deed is proved, and there is no question of actual or constructive notice involved, it is immaterial that the certificate of acknowledgment was not made by the notary until two years after the acknowledgment was taken, since the deed would be valid as between the parties without such certificate.

3. The fact that the lands on which a homestead claim was filed were within the exterior limits of a private Mexican grant will not invalidate the claim where it appears that the grant was a float, which was finally so located within such limits as to exclude the land claimed.

4. Where the land department has jurisdiction of the parties and subject-matter, its determination of their rights is final.

5. An offer by defendant to show that the land in controversy was within the exterior boundaries of a Mexican grant when the declaratory statement of plaintiff's grantor was presented, and not, therefore, subject to homestead entry, was properly excluded as too indefinite.

6. A recital in a patent that plaintiff's claim to the land in controversy was established "pursuant to the act of congress of May 20, 1862, to secure homesteads to actual settlers on the public domain, and the acts supplemental thereto," does not impose on him the burden of showing that the homestead was not acquired under laws requiring actual settlement and residence by the claimant.

Department 2. Appeal from superior court, Alameda county; NOBLE HAMILTON, Judge.

Action by Grant against Oliver to recover possession of real estate. Judgment for plaintiff, and defendant appeals. Reversed.

E. W. Ashby, (*Thompson & Thompson*, of counsel,) for appellant. *Moore & Reed*, for respondent.

PATERSON, J. This is an action to recover the possession of 80 acres of land situated in the county of Alameda. The answer denies all the allegations of the complaint. Defendant filed a cross-complaint, setting forth that he settled on the lands in controversy with his family, claiming the same under the pre-emption laws of the United States, prior to July 8, 1878, and continuously since that date has resided and made valuable improvements thereon. The defendant then proceeds to show that Thomas' application for a homestead was filed at a time when the lands in controversy were not subject to sale under the land laws of the United States because they were within the exterior boundaries of a Mexican grant; but, notwithstanding this fact, the claim of Thomas, plaintiff's grantor, was approved by the officers of the land department, in violation of law. It is alleged that the name of Thomas was fraudulently used for the benefit of one Benson, and that the commissioner of the general land-office and the secretary of the interior, in violation of the legal and equitable claim of the defendant, neglected to read, examine, or weigh the evidence taken before them on appeal from the decision of the register and receiver, awarding the land to Thomas, and without an examination of the record signed and filed written opinions adverse to the claim of defendant, which had been compiled and fabricated by clerks and subordinates. It is further alleged that Thomas never executed any power of attorney to Dey, who as attorney in fact executed and delivered to the plaintiff the deed upon which he relies. The prayer is that plaintiff take nothing by this action; that the patent from the United States to Thomas be declared void, and that, upon defendant making payment to the receiver of $200, the purchase price of the land in controversy, the president of the United States be required to issue and deliver to him a patent for the land.

There is no merit in the cross-complaint, and the plaintiff's demurrer to the same was properly sustained. There is nothing in the cross-complaint which takes the case out of the general rule that the action of the land department, acting within the scope of its authority, is binding. The land in controversy was within the jurisdiction of the land-officers; the merits of the defendant's claim were presented to the commissioner of the general land-office on appeal from the decision of the register and receiver awarding the lands to Thomas, and to the secretary of the interior on appeal from the decision of the commissioner, and both of those officers decided adversely to the claim. On July 8, 1878, the official plat of the township was filed in the land-office of the district in which the lands were situated; and on that day the application of Thomas for an additional homestead was filed with the register and receiver. Defendant's pre-emption claim was filed July 12, 1878. It is alleged that the lands were not subject to sale under the laws of the United States when Thomas' application was filed, because they were "within the granted and confirmed exterior boundaries of the well-known private Mexican grant, Laguna de los Palos Colorados;" but subsequent allegations show that on appeal to the circuit court from the decree of confirmation entered in the district court the grant was held to be a float of three square leagues, and no more, and that it did not attach to any specific land until it was located by the surveyor within the exterior boundaries of the larger tract described, and the survey was finally approved by the officers of the land department. The decree of the circuit court was entered December 4, 1874, and the field-notes and plat of the survey were approved by the commissioner of the general land-office in April, 1878, and by the secretary of the interior on August 10, 1878. The land in controversy was excluded from the survey. The grant being a float, only the quantity actually granted was reserved during the examination as to the validity of the grant, "the remainder was at the disposal of the government as part of the public domain." U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. Rep. 1177.

The allegations of the cross-complaint with respect to the conduct of the officers of the land department are so absurd that we do not deem it necessary to notice them. If they were true, and could be proved, the defendant would not be entitled to the relief he claims in this action

It is claimed that defendant's continuous possession of the land from a date prior to the filing of the homestead claim on behalf of Thomas prevented the initiation or acquisition of any homestead claim. These are matters, however, which the land department heard, considered, and determined. That department of the government had jurisdiction of the subject-matter and of the persons, and its adjudication is final. It is not a case of an entire want of power, like the cases cited by appellant.

The patent from the United States to Thomas recites that the claim of Thomas to the land was established "pursuant to the act of congress approved the 20th of May, 1862, 'to secure homesteads to actual settlers on the public domain,' and the acts supplemental thereto." If the homestead was acquired under section 2306, Rev. St. U. S., as the defendant states in his cross-complaint, the court did not err in overruling the objection to the power of attorney, and the title of Thomas passed by the deed from his attorney in fact to plaintiff. Rose v. Lumber Co., 73 Cal. 385, 15 Pac. Rep. 19. While we cannot consider the matters alleged in the cross-complaint in determining whether the court erred, we may safely assume, as the case must be reversed on another point, that defendant has stated the facts correctly. Furthermore, "pursuant to the act of congress approved May 20, 1862, * * * and the acts supplemental thereto," is a general recital, which doubtless was intended to cover all the acts of congress relating to homesteads. Certainly the recital did not throw upon the plaintiff the burden of showing that the homestead was not initiated and acquired under the laws requiring actual settlement and residence by the claimant.

The offer of the defendant to prove "that this property was within the exterior boundaries of a Mexican grant at the time of the presentation of a declaratory statement by Thomas," was properly rejected. Assuming that a patent can be attacked under the general issue of ownership in actions of this kind, the offer was too uncertain and indefinite to entitle it to consideration. If the Mexican grant was a float, as defendant has shown it to be in the cross-complaint, which was put out of the pleadings on demurrer, the fact he offered to show could have no effect. Standing alone it was immaterial.

Plaintiff, at the trial, offered in evidence the record of the deed from Thomas and wife, by Dey, their attorney in fact, to plaintiff. The county recorder was called as a witness, and identified the book as a record of his office. Defendant objected to the admission of the evidence on the ground that the original deed had not been accounted for, and on the further ground that the certificate of acknowledgment showed that the deed was acknowledged on August 24, 1885, and the certificate of the notary was not made until October 11, 1887. We do not think that the second ground of the objection stated was well taken. If the original deed had been offered in evidence, and its execution had been proved, as it was proved by the testimony of the notary and Dey, it would have been immaterial if there had been no certificate of acknowledgment whatever; the deed would be valid as between Thomas and the plaintiff, and there is no question of notice, actual or constructive, involved in the transaction. We think, however, that the court erred in admitting the record in evidence without proof of the loss of the original, or the inability of the plaintiff to produce it. In 1889 the legislature amended section 1951, Code Civil Proc., so as to permit proof of a private writing, acknowledged or proved by the introduction of the original record of such writing, "without further proof;" but at the time this action was tried—April 18, 1888—such a record was admissible in evidence only "on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy." Sections 1919, 1920, Code Civil Proc., cited by respondent, are not in point. They relate to proof of public writings. Where a private writing is required for any purpose to be recorded, proof of the public recordation may be made by the introduction in evidence of the record itself, or by a certified copy thereof, under section 1919, supra; but proof of the writing itself, where there is a question as to its existence or validity, must be made in the manner required by section 1951. Sections 1919 and 1920 have been in the Code from the time of its adoption. Section 1951 was added as a new section in 1874. Before the adoption of the new section—1951—in 1874, it was held that section 1919 applied to cases of this kind. Vance v. Kohlberg, 50 Cal. 348. As section 1951 applies specifically to "every instrument conveying or affecting real property, acknowledged or proved and certified," it is apparent that it was intended to change the rule laid down in the case cited. Judgment and order reversed, and cause remanded for a new trial.

We concur: McFarland, J.; De Haven, J.

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91 Cal. 191

Dyer v. Leach *et al.* (No. 13,844.)

(*Supreme Court of California.* Sept. 14, 1891.)

Trustee—Notice of Appointment—Rulings on Evidence.

1. Civil Code Cal. § 2287, provides that the "superior court may appoint a trustee whenever there is a vacancy and the declaration of trust does not provide a practical method of appointment." *Held*, that notice of an appointment by the court to fill a vacancy occasioned by the death of a trustee in a deed of trust was within the discretion of the court, and failure to give such notice to the trustor did not invalidate a sale by the trustee so appointed.

2. Whether the trial court erred in excluding the pleadings in another action will not be considered on appeal, where the nature of the action and the parties to it are not shown.

Department 2. Appeal from superior court, San Bernardino county; James A. Gibson, Judge.

Action of ejectment by O. T. Dyer against George Leach and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Paris & Fox and *W. J. McIntyre*, for appellants. *H. C. Hibbard* and *Curtis & Otis*, for respondent.

McFarland, J. Action of ejectment to recover a certain tract of land. Judgment went for plaintiff, and defendants appeal.

George Leach, being the owner of the land in question, executed a deed of trust of the same to E. Conway, trustee. The object of the trust was to secure a promissory note for $3,358, made by Leach to the Riverside Banking Company, as well as certain other moneys. It was provided in the deed that, if the money should not be paid when due, the trustee should sell the land, after notice, and in the manner provided therein, and execute a deed to the purchaser. It also provides that there shall be a trustee as successor of said Conway, in case of the death, resignation, or removal of the latter; but it does not provide for the manner in which such successor shall be appointed. Afterwards said Conway died; and, the money secured by the trust being due and unpaid, said banking company made written application to the superior court for the appointment of a trustee, and the court appointed as such trustee H. C. Hibbard. Hibbard proceeded under the trust and sold and conveyed the land to one Rosenthal, who conveyed to plaintiff Dyer. The defendants, other than Leach, are persons who claim parts of the land under him.

It is not contended by appellants that Hibbard did not sell the land in accordance with the deed of trust, or that he in any way violated it. It is contended, however, that all proceedings by him, and his sale of the land, were invalid, because his appointment was made by the superior court without notice to the trustor, Leach, or his grantees. It does not appear that any injustice has been done, and the point seems to be entirely technical. As the attack made here upon the order of the court appointing Hibbard trustee is collateral, it cannot be successful unless such order is absolutely void. But we do not think it void. The current of authorities is to the point that in such a case it is discretionary with the court what, if any, notice shall be given. Our Code requires no notice. Section 2287 of the Civil Code provides that "the superior court may appoint a trustee whenever there is a vacancy, and the declaration of trust does not provide a practical method of appointment." Section 2251 provides that "the mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission." Section 2252 provides that "when a trustee is appointed by a court * * * such court * * * is the trustor within the meaning of the last section." These are the only provisions applicable to the question to which our attention has been called. The theory of the law is that upon the death of the trustee the trust vests in the court, and, in the absence of a statutory provision, notice is not necessary to confer jurisdiction. In Milbank v. Crane, 25 How. Pr. 193, it is said that the jurisdiction in such a case is "a *quasi* jurisdiction *in rem*, a power over the trust, and is not acquired by the service of process upon the *cestui que trust* or other person interested in the trust fund or its preservation. It is undoubtedly proper and usual in most cases to call those more immediately interested before the court, that they may be heard in the appointment of a new trustee; but this is in the discretion of the court. * * * This being so, the appointment of the new trustee is valid, even though it should be thought to be irregular, or even improvident or indiscreet, to make the appointment without formal notice to and summons to those interested." To the same point are the cases of Hawley v. Ross, 7 Paige, Ch. 103, and In re Robinson, 37 N. Y. 261. We have considered the point upon the theory that no notice was given of Hibbard's appointment, but it is doubtful if the record shows such want of notice

Appellants contend that the court erred in sustaining an objection to their offer to introduce the pleadings in a certain action entitled "Riverside Banking Company vs. George Leach et als.;" the objection made being that it was not between the same parties and was irrelevant and incompetent; that there was no *lis pendens*, etc. As to this point it is sufficient to say that there is nothing in the record to show the character of that action, what it was about, or who the parties were. There are no other points necessary to be noticed. The judgment and order denying a new trial are affirmed.

We concur: De Haven, J.; Sharpstein, J.

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91 Cal. 15

Carty v. Connolly. (No. 14,340.)

(*Supreme Court of California.* Sept. 3, 1891.)

Setting Aside Deed — Constructive Fraud—Capacity of Grantor—Consideration.

1. In an action to set aside a deed for inadequacy of consideration it may be shown in defense that the consideration was different in kind from that recited therein.

2. A few days before her death, the grantor, in consideration of natural affection, executed a deed to her brother to all of a tract of land in which he owned an equitable half interest, the title being in her name, in order that he might then and there acquire an indefeasible title thereto. There was no expressed reservation in the deed or otherwise of any right in the property conditioned on the grantor's recovery or otherwise, nor any restriction as to its operation. *Held*, that it was not a gift *causa mortis*.

3. Where the grantor, at the time of executing a deed to her brother, was in full possession of her faculties, understood what she was doing, made the deed voluntarily and without persuasion or coercion, and because of her uninfluenced desire to do so, the deed will not be deemed constructively fraudulent as to other brothers and sisters because the grantor was in a weak physical condition, and the deed transferred all of her property to the brother then living with her, to the injury of the others, who resided at a distance.

Department 1. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Action by Ellen Carty against Patrick Connolly to set aside a deed executed by Mary Connolly to defendant. Judgment for defendant, and plaintiff appeals. Affirmed.

W. W. Foote and *Henley, Swift & Rigby*, (*James D. Thorton*, of counsel,) for appellant. *S. M. White*, for respondent.

Garoutte, J. This is an equitable action by the plaintiff, a sister of the defendant, asking that a certain deed to the premises described in the complaint be set aside upon the ground that at the time it was executed by Mary Connolly, another sister of defendant, she was acting under undue influence, and was also of such feeble mind as to be unable to understand the nature of the transaction. Upon August 26, 1887, Mary Connolly sustained serious injuries from an accidental burning, from which injuries her death resulted upon the 13th day of the following month. The deceased and her brother Patrick, the defendant, had resided upon the land in dispute for many years, and it had been acquired by their mutual efforts. The legal title to the entire property was vested in Mary, though Patrick had paid for one-half of it, and was the equitable owner thereof. At the time of the transfer to Patrick, which was the 7th day of September, a mortgage rested upon the property in the sum of $14,000, which by the terms of the deed the respondent assumed to pay. The value of the realty was $56,000, and there was no pecuniary consideration for the transfer other than the assumption of the payment of the aforesaid mortgage. The deceased died intestate, and the plaintiff is one of the heirs at law. Findings of fact were entered in favor of the defendant, and plaintiff has appealed from the judgment and order denying her motion for a new trial.

The grounds upon which she relies to set aside this conveyance are (1) constructive fraud; (2) undue influence. Constructive fraud is defined by section 1573 of the Civil Code to consist "(1) in any breach of duty which, without an actual fraudulent intent, gives an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, (2) in any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." The foregoing definition is in substantial accord with the views of standard authors upon the question. Appellant insists that constructive fraud is apparent in this transaction from the gross inadequacy of the consideration. The pecuniary consideration recited in the deed is five dollars, and, if we understand appellant's position, it is that, where a deed is attacked upon the ground of inadequacy of consideration, the party in defense of the deed will not be allowed to show the true consideration to be love and affection; or in other words a consideration different *in specie* cannot be proved. There is no merit in appellant's position upon this point, and the case of Coles v. Soulsby, 21 Cal. 81, cited in her brief, is conclusive against her. In that case, referring to this identical question, the court says: "It is not a valid objection to the admissibility of the evidence that it showed a consideration different from that expressed in the deed. The consideration clause of a deed is not conclusive. It estops the grantor from alleging that he executed the deed without consideration. It cannot be contradicted, so as to defeat the operation of the conveyance according to the purposes therein designated, unless it be on the ground of fraud; but with this exception it is open to explanation, and may be varied by parol proof. A limitation, it is true, is placed by some adjudicated cases upon the character of the proof admitted; that it must be restricted to establishing a consideration of the same species with that expressed, (citing cases.) The limitation, however, does not appear to rest upon any sound principle." In addition, it might be added, the defendant, grantee in the deed, assumed the payment of a $14,000 mortgage, and a promise to pay the debt due from the grantor to a third party is a valuable consideration. Gladwin v. Garrison, 13 Cal. 332; Saunderson v. Broadwell, 82 Cal. 133, 23 Pac. Rep. 36. The trial court found that the consideration for the deed to defendant was love and affection, and the assumption of the aforesaid mortgage. There is nothing, either in the facts or the law, to undermine the force and effect of such finding.

Appellant insists that the deed is of a testamentary character, and is inoperative unless proved as a will; in other words, the transaction was in the nature of a *donatio causa mortis*,—and insists that the following allegation of respondent's answer is an admission to that effect: "That on the 7th day of September, 1887, said deceased, believing that an injury from which she was then suffering would terminate fatally, and for the purpose of fully conveying to this defendant all of the interest in said property which was his as a matter of right, and for the purpose of further vesting in him all her interest in said property, did, in consideration of the premises, and in view of the circumstances surrounding said deceased and this defendant, make, execute, and deliver to defendant a grant," etc. We have serious doubts whether the complaint is broad enough to justify such proof. The theory of the complaint is that the deceased had not sufficient mental capacity to make the deed, and was acting under undue influence at the time, and no intimation can be found in any allegation thereof that the delivery of the deed was incomplete, or that the transfer was in the nature of a gift *causa mortis*, or that the instrument was intended as a will; but, aside from that, this allegation of the answer does not justify the effect insisted upon by appellant, and certainly is not sufficient to raise the implication that, in case of a recovery from such illness, the deed was to be void, or, in case of death, the instrument was to be deemed and treated as a last will and testament. The authorities are not in line with such conclusion, and we might advance our position to the point of saying that we know of no reason, either in equity or law, why a person of perfect mental capacity, acting freely and voluntarily, who is sick with mortal illness, is not entirely competent to make a voluntary conveyance of his property as fully and completely as when experiencing the enjoyments of perfect health, even though such conveyance should seem to the world unreasonable, unjust, and unnatural. It is not a question of physical condition, of pain or absence of pain, of long life or short life, but it is a question of mental capacity, and the free and untrammeled action of the mind. Those are the ultimate facts; and the belief existing in the grantor's mind that he is suffering from a mortal illness is but an incident throwing whatever light it may possess upon the true solution of the ultimate facts, and the power and brightness of that light will fluctuate with the varied circumstances and surroundings of each particular case. The findings of the court are full and complete, and upon this branch of the case, under present investigation, the court found "she [meaning the grantor] executed said deed to said defendant in consideration of the love and affection she bore him, and because it was her will and wish that he should own in fee-simple the whole of the property therein described, and that he should then and there acquire an indefeasible title thereto;" and again, the court found "there was no expressed reservation, either in said deed or by words used at the time of delivery, or prior or subsequent to the execution thereof, of any right in or to the property conveyed conditioned upon the grantor's recovery or otherwise." Nor was there any restriction of any character with reference to the operation of said deed, but the same was, upon being executed, duly delivered to defendant, and accepted by him, and the title to all the property therein described did thereupon vest in said defendant." The foregoing findings are fully supported by the evidence and completely dispose of this question, although, if authority were necessary, the case of Mowry v. Heney, 86 Cal. 471, 25 Pac. Rep. 17, and the authorities therein cited, conclude the subject.

If we clearly understand appellant's third position, it is that constructive fraud should be inferred in this case from the fact of the physical weakness of the deceased at and prior to the date of the deed; that she transferred all her property to the one brother who was living with her at the time, to the injury of brothers and sisters who were residing in distant places; indeed, that constructive fraud should be inferred from the conditions and relations of the immediate parties to the transaction. The law upon this subject of constructive fraud, so far as it bears upon the questions involved in this case, is clearly and concisely stated in 2 Pom. Eq. Jur. § 928: "The fact that a conveyance or other transaction was made without professional advice or consultation with friends, and was improvident, even coupled with an inadequacy of price, is not of itself a sufficient ground for relief, provided the parties were both able to judge and act independently, and did act upon equal terms, and fully understood the nature of the transaction, and there was no undue influence or circumstance of oppression. When the accompanying incidents are inequitable, and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like on the part of the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative. It would not be correct to say that such facts constitute an absolute and necessary ground for equitable interposition. They operate to thorw the heavy burden of proof upon the party seeking to enforce the transaction or claiming the benefits of it, to show that the other acted voluntarily, knowingly, intentionally, and deliberately, with full knowledge of the nature and effects of his acts, and that his consent was not obtained by any oppression, undue influence, or undue advantage taken of his condition, situation, or necessities. If the party upon whom the burden rested should succeed in thus showing the perfect good faith in the transaction, it would be sustained; if he should fail, equity would grant such relief, affirmative or defensive, as might be appropriate." In this case the court found, among other things: "The deceased, at the time of the execution of the deed last named, was in full possession of her mental faculties, and thoroughly understood what she was doing; made said deed voluntarily, and without any solicitation, coercion, influence, or persuasion; nor was said deceased, at the time of the making of said deed, or ever, under the control or dominion of this defendant or of any one, nor under any duress or fear occasioned by or through him, or otherwise, but she was at such time perfectly free, and knew she was perfectly free, to do what she wanted, and she did make said deed acting for herself, and because it was her uninfluenced desire so to do." There were other findings of a similar import, and they were all supported by the evidence, which largely preponderated in their favor. Under the law as laid down by Pomeroy, supra, when taken in connection with the findings of the court, which are warranted by the evidence, we conclude that the element of constructive fraud is no longer in the case, and as to actual fraud in the matter of undue influence the record fails to disclose it either in the evidence or findings. We have examined the errors of law relied upon by appellant as having occurred during the progress of the trial, and find them not well taken. Let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

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91 Cal. 119

IRWIN v. McDOWELL. (No. 14,303.)

(*Supreme Court of California.* Sept. 10, 1891.)

ATTACHING MORTGAGED PROPERTY—LIABILITY OF SHERIFF—DAMAGES.

1. Under Civil Code Cal. §§ 2968, 2969, which provide that an officer cannot attach mortgaged personal property at the suit of a creditor of the mortgagor without first tendering to the mortgagee, or depositing for him, with the county clerk or treasurer, the amount due on the mortgage, a sheriff, who, at the suit of the mortgagor's creditor, attaches a mortgaged crop of grain, and places a keeper in charge thereof, makes himself liable as for a conversion, although he does not remove the same, and releases the attachment two

days after an action commenced against him by the mortgagee.

2. The measure of damages in an action by the mortgagee against the sheriff is the value of the property at the time it was taken and compensation for time and money expended in recovering it under Civil Code Cal. §§ 3336, 3338.

3. Where the findings of the court do not disclose whether or not the mortgagee had the benefit of the property after it was released from the attachment a judgment in his favor for one cent damages will be set aside.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by I. I. Irwin against S. A. McDowell, a sheriff, for conversion. Judgment in the court below being rendered in favor of the plaintiff on one count only, he appeals. Reversed.

M. S. Babcock and *M. L. Short*, for appellant. *Hunsaker, Britt & Goodrich*, for respondent.

Belcher, C. This is an action to recover from the defendant the sum of $3,000 and interest thereon, the payment of which is alleged to have been secured by a chattel mortgage. The facts stated in the complaint are in substance as follows: On the 23d day of November, 1889, one Robert L. Couts executed to the plaintiff a mortgage on a crop of wheat, barley, and oats, then being planted on land in San Diego county, and to be harvested in the year 1890. The mortgage was properly verified, acknowledged, and recorded, and was given to secure payment of the mortgagor's promissory note for $1,600 and interest, and such further advances as the mortgagee might make to the mortgagor, not exceeding $1,400. Further advances were made to the amount of $1,400, thus making the whole debt secured $3,000, no part of which, except a portion of the interest, had been paid. On the 13th day of August, 1890, the defendant, as sheriff of the county of San Diego, wrongfully and unlawfully levied upon the mortgaged crop a writ of attachment issued in favor of one Cave J. Couts against the mortgagor, and before making the levy he did not pay or tender to plaintiff, or to any one for him, nor deposit with the county clerk or treasurer, the amount of the mortgage debt, or any part thereof, nor had he ever done so. Therefore judgment was asked for $3,000 and interest. The defendant, by his answer, admitted most of the averments of the complaint, and then set up facts to excuse the levy, and exonerate him from damages. The case was tried by the court without a jury, and, among other things, the court found that there was due and unpaid on the mortgage debt, for principal and interest, the sum of $3,126.49; that the levy was made on the property by the defendant's deputy, and a keeper placed in charge thereof, on the 13th day of August, 1890; that on the next day the plaintiff demanded of the deputy the possession and return to him of the property attached, and that the deputy admitted he knew the property was mortgaged to the plaintiff, but refused to release it; that the action was commenced on the 15th day of August, 1890, and thereafter, on the 16th or 17th day of the same month, defendant directed his deputy to release the property, and thereupon it was delivered to the mortgagor, Robert L. Couts, and defendant notified one of the attorneys of the plaintiff that he had released it; that at the time the levy was made the property was situate in an open field where raised, and was never removed therefrom by defendant or by his authority, and that he had then no actual personal knowledge that it was covered by the mortgage; that the total value of the property atached did not exceed the sum of $650; and, as a conclusion of law, that plaintiff was entitled to a judgment for one cent damages and costs. Judgment was accordingly so entered, and the case is brought here for review on the judgment roll.

The appellant contends that personal property covered by a mortgage cannot lawfully be taken under process against the mortgagor without first paying or tendering to the mortgagee, or depositing for him, the amount of his mortgage debt, and that, if it be so taken, the detriment proximately caused by the seizure is the full amount of the debt; and hence that damages should have been awarded to the plaintiff for the sum found by the court to be due and unpaid, namely, $3,126.29. The statutory provisions bearing on the subject are found in the Civil Code, and are as follows: "Sec. 2968. Personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of the mortgagor. Sec. 2969. Before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee." "Sec. 3336. The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of the conversion, with interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and, (2) a fair compensation for the time and money properly expended in pursuit of the property." "Sec. 3338. One having a lien on personal property cannot recover greater damages for its conversion from one having a right thereto superior to his, after his lien is discharged, than the amount secured by the lien, and the compensation allowed by section 3336 for loss of time and expenses." From these sections it clearly appears that an officer has no right to take mortgaged personal property under process against the mortgagor, unless he first complies with the requirements of section 2969; and if he does so he makes himself liable as for a conversion. In Rider v. Edgar, 54 Cal. 127, which was an action of this kind, it was held that any unlawful interference with the property, or exercise of dominion over it, by which the owner is damnified, such as the levy of an attachment upon it and the appointment of a keeper, was a taking which made the officer liable, although the property was not moved or otherwise disturbed and though it was released before any demand from the plaintiff.

Assuming, then, as we must, that the defendant in this case made himself liable by his levy, the question is, what is the measure of the damages which can be recovered against him? In ordinary cases the measure of damages for a conversion is the full value of the property converted, with interest, compensation, etc. This rule, however, does not apply to its full extent in a case like this. When, as here, the action is brought by a mortgagee, he can recover only "the amount secured by the lien and the compensation allowed by section 3336 for loss of time and expenses," though the property may be of much greater value. What is the amount secured by the lien? The answer must be, the full amount of the mortgage debt, if the property is worth enough to pay it, and, if not, then such sum or amount only as it is worth. It would seem absurd to say, if the mortgage debt was a thousand dollars and the mortgaged property was worth only a hundred dollars, that the full amount of the debt was secured. As the court found that the total value of the property attached did not exceed the sum of $650, it follows, in our opinion, that the plaintiff was not entitled to recover from the defendant the full amount of the debt. The cases of Wood v. Franks, 56 Cal. 217; Wood v. Franks, 67 Cal. 32, 7 Pac. Rep. 50; and Sherman v. Finch, 71 Cal. 68, 11 Pac. Rep. 847,—relied upon by appellant, are not in conflict with what has been said. In neither of those cases was any question raised as to the value of the mortgaged property, or its sufficiency to pay the mortgage debt in full.

The plaintiff was, however, entitled to a judgment against the defendant, if he was damnified by the taking, for the amount of damages which he actually sustained. The levy of the attachment and the appointment of a keeper were sufficient, as we have seen, to constitute a conversion; and the action was commenced before the release. What became of the property after it was released does not appear. The court finds only that it was delivered to the mortgagor, and was never removed from the open field, where it was situate, by the defendant or by his authority. The plaintiff may have taken it back and applied its proceeds to the payment of his debt, or he may have refused to do so, and relied on his claim for damages. If he took it back he sustained no damages; and, if not, the damages could not have exceeded the value of the property. In the absence of any finding as to whether the plaintiff had the benefit of the property after its release or not, the judgment cannot be sustained. In our opinion, the judgment should be reversed, and the cause remanded for a new trial.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

DE HAVEN, J. I concur in the judgment and in the reasoning of the foregoing opinion. I think, however, the decision in this case cannot be reconciled with the cases of Wood v. Franks, 56 Cal. 217, and Sherman v. Finch, 71 Cal. 68, 11 Pac. Rep. 847. In my judgment, those cases were wrongly decided, and I have no hesitancy in concurring in this judgment, which, in effect, overrules them.

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91 Cal. 278

BOGART v. CROSBY *et al.* (No. 14,169.)

(*Supreme Court of California.* Sept. 19, 1891.)

LIMITATION OF ACTIONS—AMENDMENT OF COMPLAINT—MONEY HAD AND RECEIVED.

1. A real-estate agent by verbal authority negotiated a sale of defendant's land to plaintiff, which was afterwards rescinded by mutual consent, and plaintiff demanded the return of the money deposited on the contract. To avoid controversy with the agent as to his commission, defendant returned the money to him, telling plaintiff that he must settle with the agent. *Held*, that defendant was liable to plaintiff for the money deposited.

2. The complaint in an action against a firm of real-estate agents to recover money deposited on a verbal contract of sale which had been rescinded was amended by making the owners of the land defendants, and alleging that defendants were an association of two or more persons doing business under a common name. A second amended complaint was filed, alleging that only the agents constituted the association, and both amendments charged all the defendants with having received the deposit from plaintiff, and to his use. *Held*, that the last amendment did not state a new cause of action, and was not barred because not filed in two years from the time the cause of action accrued, under Code Civil Proc. Cal. § 339, subd. 1, providing that an action on an unwritten contract, obligation, or liability shall be brought within two years.

Department 2. Appeal from superior court, San Diego county; JOHN R. AIKEN, Judge.

Action by Bogart against Crosby & Van Haren and others to recover money received by defendants to plaintiff's use. Judgment for plaintiff, and defendants appeal. Affirmed.

H. D. Cassiday, for appellants. *Dakin & Story*, for respondent.

DE HAVEN, J. This appeal is by the defendants Remondino, Daggett, and Witfield from a judgment against them in favor of plaintiff. It appears that defendants Crosby & Van Haren were verbally authorized by appellants to sell for them a certain tract of land in San Diego, and, acting under this authority, they agreed to sell the same to plaintiff, and received from him the sum of $300 as a deposit on the contract. No deed could be made at the time on account of the absence of the appellant Remondino, the plaintiff being assured by defendant Van Haren that he would return within two weeks. After waiting about three weeks, the plaintiff notified Witfield, one of the appellants, that owing to the long delay and uncertainty as to the time when Remondino would return he would not complete the purchase, and demanded a return of the money paid by him as a deposit. Witfield made no objection to the refusal of the plaintiff to complete the purchase, for the reason, as he states, that he considered the land worth more than plaintiff was to pay for it, and so informed plaintiff that he would return his check to Crosby & Van Haren, and he might settle with them. The reason for this action seems to have been that appellants did not wish to pay their agents commissions for their services, and, to avoid controversy upon this point, turned the money over to them, and left the plaintiff to settle with such agents. The appellants soon thereafter sold the land to another person, and it does not appear that it was sold for any less than plaintiff was to pay, or that defendants have suffered any damage by reason of the refusal of plaintiff to complete the purchase. This action was first brought against Crosby & Van Haren alone. On October 19, 1889, an amended complaint was filed, by which appellants were also made defendants; this complaint alleging that "defendant is an association of two or more persons doing business * * * under the common name of Crosby & Van Haren." On October 24, 1889, a second amended complaint was filed, in which only Crosby & Van Haren were alleged to be an association under the name of Crosby & Van Haren, and all of the defendants were charged with having received from plaintiff, and to his use, the sum of $300.

It is claimed by appellants that the cause of action stated in the last amended complaint is, as against appellants, essentially different from that alleged in the first amended complaint, and that, as it was not filed within two years after the cause of action accrued, the same is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. We do not agree with appellants in this contention. The difference between the first and second amended complaints is not so marked that the latter can be deemed the statement of an entirely new and different cause of action against the appellants. In both amended complaints the appellants are charged with having received from plaintiff, and to his use, the money sued for, and with a refusal to pay it to plaintiff when demanded.

Upon the facts of the case there can be no doubt of plaintiff's right to maintain this action against appellants. The money of plaintiff came into their hands, and we know of no principle of law which will justify them in their refusal to return it to him upon the state of facts disclosed by the evidence in this case. The appellants were never legally bound to make any conveyance to plaintiff at all, and he certainly had a right to withdraw his offer to purchase at the time and under the circumstances shown, and was under no obligation to settle any claim for commissions which Crosby & Van Haren might have against appellants, growing out of their part in the transaction. Judgment and order affirmed.

We concur: Beatty, C. J.; McFarland, J.

91 Cal. 238

City of Pasadena v. Stimson *et al.* (No. 13,938.)

(*Supreme Court of California.* Sept. 16, 1891.)

Eminent Domain — Constitutional Law — Nuisance—Appeal.

1. Civil Code Cal. § 1001, provides that any "person" may, without further legislative action, acquire private property for any use specified in Code Civil Proc. § 1238, either by consent of the owner or by condemnation proceedings had under the provisions of Code Civil Proc. §§ 1238-1263. Civil Code, § 14, provides that the word "person" used in the Code shall include a corporation. St. 1883, p. 93, relative to cities of the sixth class, provides (section 870) that when it shall become necessary for the city or town to take private property for public use, "and the board of trustees cannot agree with the owner thereof," the trustees may direct proceedings to be taken under Code Civil Proc. §§ 1237-1263, to procure the same. *Held*, that St. 1883, p. 93, by prescribing a condition precedent to the exercise of eminent domain by cities of the sixth class, destroys the uniform operation of Civil Code, § 1001, in contravention of Const. Cal. art. 1, § 11.

2. Such statute is also repugnant to Const. Cal. art. 4, § 25, which provides that "the legislature shall not pass local or special laws in cases where a general law can be made applicable." People v. Henshaw, 76 Cal. 442, 18 Pac. Rep. 413, and Abeel v. Clark, 84 Cal. 226, 24 Pac. Rep. 383, distinguished.

3. Under Code Civil Proc. § 1244, providing that the complaint in condemnation proceedings for a right of way must show the "location, general route, and termini, and must be accompanied with a map thereof," a complaint to condemn land for a sewer already partially built, which states the termini of the whole sewer, need not state the exact spot to which it has been already constructed; and the phrase "along and east of the center line" of a certain avenue sufficiently shows the location of the proposed sewer.

4. Under Code Civil Proc., which provides (section 1238, subd. 8) that private property may be taken for sewerage in any city or town, whether incorporated or unincorporated, and (section 1241, subd. 2) that before property can be taken it must appear that the taking is necessary to a use authorized by law, it is only necessary to show that the property to be taken is necessary for the sewer, and not that the sewer is necessary for the town.

5. Under Civil Code, § 3482, providing that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance," a sewer, the construction of which is authorized by section 1238, though a necessary evil, is not a nuisance *per se;* and in proceedings to condemn land for a right of way therefor it is unnecessary to show that the proposed route is least injurious to private rights.

6. Where no motion for a new trial was made, and a specification of particulars does not appear in the bill of exceptions, but only in the brief of counsel, the supreme court will not consider the sufficiency of the evidence to sustain the judgment.

7. Code Civil Proc. Cal. § 1241, subd. 3, providing that before property already appropriated to some public use can be taken it must appear that the public use to which it is to be applied is a more necessary public use, does not apply to condemnation proceedings to subject a highway to a right of way for a sewer, since the second servitude will not disturb the first.

8. In condemnation proceedings by a city of 8,000 inhabitants the court will take judicial notice that the city was incorporated, and, though it was averred, it need not be proved.

9. Failure to show that the city attorney and special attorneys for the city who commenced such proceedings had no authority therefor, is immaterial when there is abundant evidence that their action was afterwards ratified.

10. Under the original complaint, which failed

to specify the kind of man-holes with which the proposed sewer was to be furnished, evidence was introduced that perforated man-holes allowed noxious and dangerous gases to escape. The complaint was then amended so as to provide that the man-holes should be so constructed as to prevent the escape of such gases "unless temporarily in making repairs." *Held*, that it was error to then strike out the above evidence, and direct a verdict of nominal damages only in favor of adjoining property, since the property might be substantially injured by the temporary escape of sewer-gas.

11. Evidence that the city had agreed to allow an hotel outside the city limits to use the sewer was properly excluded, since that fact would not render the proposed use less a public use.

12. Evidence that a witness had surveyed a route 1,432 feet shorter than that proposed, on a better grade, through lands not thickly settled, was admissible.

13. Evidence that the sewer farm to which the sewer was to extend would become a nuisance was inadmissible, as involving a question not in this proceeding.

In bank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Proceedings by the city of Pasadena against Charles W Stimson and another to condemn a right of way for a sewer. Decree for plaintiff. Defendants appeal. Reversed.

Graves, O'Melveny & Shankland, for appellants. *Haynes & Mitchell*, *A. R. Metcalfe*, and *F. J. Polley*, for respondent.

BEATTY, C. J. Proceeding under section 1237 et seq. of the Code of Civil Procedure, to condemn a right of way for an outfall sewer from the city of Pasadena to a tract of land outside of the city limits, known as the "Sewer Farm." Appeal by defendants from a decree of condemnation.

The city of Pasadena, a municipal corporation in the county of Los Angeles, for the purpose, as it alleges, of promoting the health, comfort, and convenience of its inhabitants, is engaged in constructing a system of sewerage, whereby it proposes to discharge the city sewerage upon a farm distant about four and a half miles from the city limits. It has obtained from the county of Los Angeles the right of way for the necessary outfall sewer along certain county roads, from the boundaries of the city to a point at or near the intersection of the Monterey road and Garfield avenue, which is the principal, or one of the principal, streets of the neighboring town of Alhambra. From this point the proposed route of the sewer is along said Garfield avenue, east of its center line, through the town of Alhambra, to another county road, and thence along said road to the sewer farm. This proceeding is against the owners of lots fronting on the east side of Garfield avenue, who, in support of their appeal from the decree of condemnation, assign numerous errors in the rulings of the superior court. They contend that the court erred in overruling their demurrer to the complaint, in denying their motion for a nonsuit, in admitting and excluding testimony at the trial, in permitting an amendment of the complaint after the plaintiff had closed its case, and in instructing the jury. Under each of these heads various particulars are specified. We shall not, however, be compelled to notice these separate points *seriatim*, as our views with respect to one or two general propositions will dispose of most of them, either by deciding them or demonstrating their immateriality.

One main proposition upon which the appellants rely is that a municipal corporation of the fifth or sixth class must, as a condition precedent to invoking the exercise of the power of eminent domain, make an unavailing effort to agree with the owner of the property or right which it seeks to acquire; and, consequently, that it must, in any condemnation proceeding, allege and prove that it has made such effort. The complaint in this case contained no allegation as to the class of corporations to which the plaintiff belongs, nor did it contain any allegation of an effort to agree. On the trial no evidence was offered to show how plaintiff was incorporated,—whether by special charter or under the general law,—nor to what class it would belong if incorporated under the general law; but the court, without evidence, took notice of the fact that Pasadena is a city of the sixth class, duly incorporated under the general law. St. 1883, p. 93. By section 870 of that law —which is one of the sections relating to cities of the sixth class—it is provided as follows: "Whenever it shall become necessary for the city or town to take or damage private property for the purpose of establishing, laying out, extending, and widening streets and other public highways and places within the city or town, or for the purpose of rights of way for drains, sewers, and aqueducts, and for the purpose of widening, straightening, or diverting the channels of streams and the improvement of water-fronts, and the board of trustees cannot agree with the owner thereof as to the price to be paid, the trustees may direct proceedings to be taken under section one thousand two hundred and thirty-seven and following sections, to and including section one thousand two hundred and sixty-three of the Code of Civil Procedure, to procure the same." The defendants, relying upon the condition mentioned in this section,—an inability to agree with the owner,—demurred to the complaint, specially for uncertainty, because it did not set forth the manner in which plaintiff was incorporated, nor to what class of corporations it belonged; and generally, on the ground that it did not state sufficient facts, because, assuming that it was a corporation of the sixth class, it did not allege an effort to agree. They also moved for a nonsuit at the close of plaintiff's case, upon the ground, among others, that there was no evidence of an effort to agree.

From this statement it is apparent that all these various points arising upon the orders of the court overruling the demurrer and denying a nonsuit will be effectually disposed of if it is held that the plaintiff was not bound to make an effort to agree with the owners of the land before instituting its proceeding to condemn. There is no doubt of the authority of the legislature in regulating the exercise of the power of eminent domain to make an unavailing effort on the part of the person in charge of the use, to agree with the owner of the property it seeks to acquire,—a condition precedent to the institution of any proceeding to condemn; and there is no doubt that an intention to impose such a condition has been inferred in many instances, in this state and elsewhere, from language no stronger than that which is contained in section 870 of the municipal incorporation act above quoted; so that, if the solution of the question before us depended solely upon the construction of that section, we should have no hesitation in holding that the superior court erred in overruling the demurrer and the motion for a nonsuit. But there is a question whether said section, in the sense in which appellants seek to apply it, is constitutional,—whether, in other words, it is not a special law, by which the legislature has attempted to make a forbidden discrimination against two classes of municipal corporations, by imposing upon them alone a burdensome condition to the exercise of a right common to all public and private corporations, and to all natural persons *sui juris* in the state. By section 1001 of the Civil Code it is provided as follows: "Any person may, without further legislative action, acquire private property for any use specified in section 1238 of the Code of Civil Procedure, either by consent of the owner or by proceedings had under the provisions of title 7, pt. 3, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title 'is an agent of the state,' or a 'person in charge of such use,' within the meaning of those terms as used in such title." A corporation, whether private or public, is a person. Civil Code, § 14.[1] It follows, therefore, that under this general law—general in the widest and fullest sense of the term—any public or private corporation, or any natural person, may, for any of the uses defined in section 1238 of the Code of Civil Procedure, acquire private property without the consent of the owner, by means of the proceedings prescribed in part 3, tit. 7, of said Code. Sections 1237–1263. It is conceded that there is no provision in this law requiring a previous effort to agree; and apparently it is not controverted that every person in the state, natural and artificial, is exempt from such condition, excepting only municipal corporations of the fifth and sixth classes. Can the legislature make such a discrimination? "All laws of a general nature shall have a uniform operation." Const. art. 1, § 11. "The legislature shall not pass local or special laws in cases where a general law can be made applicable." Id. art. 4, § 25. It seems to us perfectly clear that the clause of the incorporation act requiring cities of the fifth and sixth classes to make an effort to agree, while all other persons are exempt from such condition, is in plain and direct conflict with both of these constitutional inhibitions. It destroys the uniform operation of a general law, and is special in a case where a general law not only can be made applicable, but in which a general law had been enacted, and in which there is no conceivable reason for discrimination. It is true that the legislature is empowered by section 6 of article 11 of the constitution to classify cities and towns in proportion to population for the purpose of incorporation and organization, and it is undoubtedly true that a law limited to these purposes is not unconstitutional, because it makes different regulations for the different classes. But the mode of exercising the power of eminent domain, and the conditions upon which it may be invoked, are no part of municipal organizations. They are the subject of general laws applicable to every person alike, and the legislature has no power to make arbitrary discriminations in this respect between different classes of persons.

We do not regard the decision in People v. Henshaw, 76 Cal. 442, 18 Pac. Rep. 413, as being at all in conflict with this view. The only point involved in that case that touches the question under discussion was made in support of the proposition that the "Whitney Act"—so called—was local and special, for the reason that it applied to some cities and not to others. The author of the prevailing opinion answered this point by reference to the power conferred upon the legislature by the constitution to classify cities and towns according to population. He assumed that the class of cities to which the Whitney act was made applicable was identical with the second class, as defined in the general incorporation act, and upon that assumption concluded that, as cities having a large population require different legislation from those containing fewer inhabitants, the Whitney act, though applying to only one class, was nevertheless constitutional. But it must be borne in mind that the subject of the Whitney act (a police court) was peculiarly a matter pertaining to municipal organizations, and still more peculiarly a matter as to which cities of large population require different provision from that suitable to cities or towns of small population. It is to be observed, also, that the care taken by the court to distinguish People v. Henshaw from those cases in which laws had been held unconstitutional on account of arbitrary discriminations between persons standing in the same relation to the subjects of legislation, is an emphatic recognition of the doctrine we have announced.

Neither is the vaccination case—Abeel v. Clark, 84 Cal. 226, 24 Pac. Rep. 383—opposed to our views. A single expression in the commissioner's opinion in that case, separated from its context, and considered without reference to the point to be decided, might seem to warrant the proposition for which appellants are contending here, viz., that a law is not special if it applies equally to all members of any single class defined by the legislature, no matter how arbitrary and senseless the classification may be. But it is a familiar rule that expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and that they cannot be safely applied in their largest and most universal sense to dissimilar cases. Now, in Abeel v. Clark the court was considering the constitutionality of a law making previous vaccination a condition of admission to the public schools of the state. The public schools are an institution, the existence of which is recognized by the constitution itself. Those who attend the public schools stand in a relation to the institution different from that of persons who do not attend. This difference exists independent of legislation. In the nature of things, attendance upon the public schools must be subject to regulations necessary for the safety and welfare of the whole body of pupils, and a law which applies equally to all who seek admittance is in the fullest sense a general law, because it applies to all who bring themselves into the same relation with the state. There is a broad and palpable distinction between such a law and one which annexes to the exercise of a universal right by a particular class of persons, arbitrarily selected, conditions from which all other persons similarly situated are exempt. This distinction is, I think, clearly recognized in Ex parte Smith, 38 Cal. 710, and is entirely consistent with the decision in Brooks v. Hyde, 37 Cal. 366, where it was held that laws must operate uniformly upon all persons standing in the same relation to the law in respect to the privileges and immunities conferred by it or the acts which it prohibits. In Earle v. Board, 55 Cal. 489, and in Miller v. Kister, 68 Cal. 142, 8 Pac. Rep. 813, the decision went upon the ground that the legislature has no power to exempt classes of persons arbitrarily defined from the operation of a general law; and these cases were both carefully distinguished from People v. Henshaw, in the prevailing opinion in that case. The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law. From this conclusion it necessarily follows that cities of the fifth and sixth classes, equally with all other natural and artificial persons, may maintain proceedings to condemn private property for public use without a previous effort to agree.

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[1] Civil Code Cal. § 14, provides that the word "person" used in the Code shall include a corporation.

In reaching this conclusion we have not overlooked the argument of appellants that, since the plaintiff in such proceedings is always a mere agent of the state, and acting in its behalf, he cannot question the conditions upon which his principal authorizes him to act. We think this rather a fanciful argument, and that it is based upon a supposed analogy which has no real existence. It is, in a very modified sense, that the state is the principal and the plaintiff the agent in cases like this. Such may be the theoretical view, but practically it is the reverse of the truth. The party directly and beneficially interested is the person in charge of the use, or the particular community affected by the improvement; and the attitude of the state is merely passive. The law is designed for the benefit of local communities, and they have a right to enjoy it on equal terms.

Another ground upon which it is contended that the superior court erred in overruling the demurrer to the complaint is that the complaint does not show with certainty, so that the same may be identified, the location of the general route, or the termini, or either of them, of said sewer. But the complaint does clearly show that the termini of the sewer are the city of Pasadena and the sewer farm, which is described as consisting of certain subdivisions of the government survey. It also shows not only the general route, but the particular route, and is accompanied by a map of so much of the route as is involved in this proceeding. Code Civil Proc. § 1244, subd. 4.[1] The particular specifications of insufficiency under this head seem to rest upon the points—*First*, that the exact spot at or near the intersection of the Monterey road and Garfield avenue, to which the outfall sewer has already been constructed, is not described in the complaint, or delineated on the map; *second*, that the name of the county road from the opposite extremity of Garfield avenue to San Marino avenue is not given; and, *third*, that "along and east of the center line" of the avenue is not a sufficiently exact description of the location of the proposed sewer. We think these objections are without merit. There is no law and there is no reason requiring such minute exactitude in these particulars.

One ground of the motion for the nonsuit was that the necessity of the proposed sewer had not been shown. The legislature has defined the public uses for which private property may be taken, and, among others, is "sewerage of any incorporated city, city and county, or of any village or town, whether incorporated or unincorporated," etc. Code Civil Proc. § 1238, subd. 8. When a city or town decides for itself—as it may do—that a sewer is desirable, it is not bound to prove that such sewer is necessary, but only that the taking of the property it seeks to condemn is necessary for the construction of the sewer. When it shows that the use to which the property is to be applied is a public use, (and that is shown by the statute in this case,) the inquiry on that head is closed. Id. § 1241.[2] But the point of the objection here is that it does not appear from any official record of the proceedings of the board of trustees of Pasadena that they have ever adopted the plan of an outfall sewer from the city to the sewer farm. We think, however, that the terms of the two ordinances, Nos. 66 and 69, the matters submitted to the vote of the people, and the result of the voting, contain ample proof of the adoption of the system of sewerage described in the complaint. The first ordinance declares the necessity, among other things, of acquiring, constructing, and completing a system of sewers, and of borrowing money for the purpose. The second ordinance recites the passage and substance of the first, sets forth in detail the system of surveys which has been adopted, embracing the sewerage farm, and proceeds: "(4) Outfall sewer, to be located on Garfield avenue, or any other street to the track of the Southern Pacific Railway Co., south of Alhambra; thence running in a southeasterly direction to the sewerage farm." After setting forth the full details of the various proposed improvements, and an itemized estimate of their cost, the ordinance provides for a special election, at which the question of issuing bonds of the city shall be submitted. The evidence shows that such election was regularly held, and resulted in a vote of 197 for and 5 against the proposition. This, we repeat, furnishes ample proof of the adoption of the system described in the complaint. It was not necessary that the ordinance should be more specific than it was as to the route of the sewer from the city to the sewer farm. Indeed, it would have been improper for the city and its electors to tie themselves to a particular route, if, as appellants contend, the final selection of a route does not rest with them.

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[1] Code Civil Proc. Cal. § 1244, subd. 4, provides that the complaint in condemnation proceedings for a right of way must show the "location, general route, and termini, and must be accompanied with a map thereof."

[2] Code Civil Proc. Cal. § 1241, provides that before property can be taken it must appear that the use to which it is to be applied is authorized by law, and that the taking is necessary to such use.

Another ground of the motion for a nonsuit was that the proposed sewer will be a nuisance affecting injuriously the health of the people of Alhambra, and that there was no evidence tending to show that the proposed route along Garfield avenue was most compatible with the public good, and least injurious to private rights. There was no evidence that the sewer, as it was proposed to construct it, would be more of a nuisance than any sewer would be. So far as appears, the sewer was well planned, according to current sanitary views. Certainly there was nothing tending to show that it was an improper kind of sewer, and therefore it could not be regarded as a nuisance *per se*. A sewer in the neighborhood of dwellings may be an evil, but it is evident that the legislature regards it as a necessary evil, since it allows private property to be taken for the construction of sewers. Sewers are in fact a necessary evil; but when they are planned and constructed with reasonable regard to the results of sanitary teachings they are authorized by statute, and "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Civil Code, § 3482. In short, the plaintiff, being a city with sewage to dispose of, and having a sewer farm to which it has apparently a right to conduct it, has necessarily the right to construct such a sewer as the statute (section 1238, Code Civil Proc.) contemplates, and such a sewer cannot be a nuisance in the strict sense of the term. That it may occasion loss or injury to others for which they will be entitled to compensation is a different proposition, which will be considered in another connection.

We do not think a failure to prove that the location of the sewer was most compatible with the greatest public good and least private injury was a ground for a nonsuit. The state or its agents in charge of a public use must necessarily survey and locate the land to be taken, and are by statute expressly authorized to do so. Code Civil Proc. § 1242. Exercising, as they do, a public function under express statutory authority, it would seem that in this particular their acts should, in the absence of evidence to the contrary, be presumed correct and lawful. The selection of a particular route is committed in the first instance to the person in charge of the use, and unless there is something to show an abuse of the discretion, the propriety of his selection ought not to be questioned, for certainly it must be presumed that the state or its agent has made the best choice for the public; and if this occasions peculiar and unnecessary damage to the owners of the property affected the proof of such damage should come from them. And we think that when an attempt is made to show that the location made is unnecessarily injurious the proof ought to be clear and convincing, for otherwise no location could ever be made. If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so *ad infinitum*. The improvement could never be secured, because, whatever location was proposed, it could be defeated by showing another just as good. We think there was no error in denying the motion for nonsuit.

As to the alleged insufficiency of the evidence to sustain the judgment, we find no specification of particulars in the bill of exceptions, and do not think such specifications can be made for the first time in the brief of counsel, even if they could be reviewed in the absence of a motion for a new trial. But, waiving this objection, we do not think any of the exceptions of the appellants to the sufficiency of the evidence are valid.

1. It is not necessary to prove the incorporation of the plaintiff. Being a city or town of 8,000 inhabitants, it was immaterial whether the plaintiff was incorporated or not; and, if it had been material, the court was correct in taking notice of the fact without proof, and even without averment. Here, however, it was averred. St. 1889, p. 372.

2. This point—that there was no evidence that the taking was necessary—has been disposed of.

3. It was clearly shown that the sewer, when constructed, would not interfere with the use of the highway, and that during its construction such use would not

be seriously interrupted. Therefore it was not necessary to show that the new use was superior to the one to which the property was already appropriated. Section 1241, subd. 3, Code Civil Proc.,[1] has no application to a case where the same land can be subjected to a second servitude without disturbing the first.

4. This point—that there was no evidence that the route proposed was most compatible with the greatest public good and least private injury—has already been discussed, and we have held that, as to this matter, the burden of proof is on the defendants. We cite, as bearing upon this point, Railroad Co. v. Kip, 46 N. Y. 553.

5. It is objected that there is no evidence that the trustees of the city of Pasadena directed the commencement of these proceedings. But the proceeding was commenced by the city attorney and special attorneys for the city, whose authority need not be shown unless properly drawn in question. The attorney for a party is never required to prove his retainer or his instruction to commence a proceeding unless his authority is directly attacked, and this rule is just as applicable to suits instituted in the name and on behalf of municipal corporations as to suits by private corporations or natural persons. Besides, there is abundant proof of circumstances tending to show that, if the attorneys of plaintiff were not formally authorized in advance by resolution of the board of trustees to commence this proceeding, their action in so doing has been fully ratified.

As to the alleged errors in the rulings of the court upon offers of evidence, most of them have been disposed of in what has been already said. Some, however, remain to be noticed. It is unnecessary to decide whether the court erred in permitting the amendment to the complaint relating to man-holes. If it was an error we cannot see how defendants were injured by it, unless it operated as a surprise, which entitled them to a continuance. But it does not appear that they asked for any continuance on that ground, and it is to be presumed they were entirely willing to go on with the trial under the amended complaint.

But we think the superior court did err in striking out the evidence offered by the defendants of damages to abutting property. This ruling was made after the amendment to the complaint just referred to. The original complaint did not specify the character of man-holes with which the proposed sewer was to be furnished, but it seems to have been assumed at the trial that perforated man-holes, designed for ventilation of the sewer, were to be constructed, and the defendants introduced testimony of experts to prove that through these man-holes sewer-gas would escape and flow over the adjoining premises, producing effects certainly offensive, and probably dangerous. In view of this testimony, and for the purpose of obviating its effect, the plaintiff offered and was allowed to amend its complaint by adding the following: "That in the construction of said sewer along Garfield avenue from the Monterey road to the line of the Southern Pacific Railroad, man-holes will be constructed at reasonable distances, for the purpose of necessary repairs, or removing obstructions from the sewer, but such man-holes are to be constructed in such manner, and so closed, as to prevent the escape of noxious gases and odors, unless temporarily in making such necessary repairs, or in removing obstructions from the sewer, and for such time only as may be reasonably necessary for such purpose." The court thereupon struck out all the evidence of damage from sewer-gas, and by various rulings held that no question as to damages to adjoining property remained in the case, and instructed the jury to find a verdict for nominal damages to the land to be taken for the laying of the pipe. The error in this ruling did not, however, consist, as appellants contend, in assuming that the plaintiff could and would construct such a sewer as it described; for in this proceeding the plaintiff can acquire no right to construct any other sort of a sewer, and by the decree its right is strictly limited to the laying of a sewer in exact accordance with the specifications contained in the complaint. The court was so far right, therefore, in holding, as it did in effect, that the damage to the defendants could not be estimated upon the assumption that the sewer, when constructed, would cause greater discomfort or inconvenience than the sewer described in the complaint and in the decree. The plaintiff, in order to justify its future proceedings under any decree of condemnation in this suit, must construct its sewer in accordance with the terms of the decree, and it must operate it in a careful, skillful, and proper manner. If it does not, it will be liable for damages for its neglect in these particulars, and the persons damaged, though parties to this proceeding, will not be concluded by the damages allowed herein. Lewis, Em. Dom. §§ 481, 482; 1 Rorer, R. R. pp. 323, 324. The error of the court was in assuming that no damage to abutting property could arise from the construction and proper operation of the sewer proposed. The temporary escape of sewer-gas during the time reasonably necessary for making repairs to the sewer or removing obstructions may occasion substantial injury. At least it cannot be said as matter of law that it will not, and therefore it was error to strike out the testimony adduced by the defendants as to the offensive and dangerous properties of sewer-gas, and to instruct the jury to find merely nominal damages.

The court did not err in excluding evidence that the proposed sewer was to be used by the Raymond Hotel. The use is none the less a public use because the city has arranged to allow an hotel outside the corporate limits to share in the benefit of its improvement.

We think the court erred also in excluding the testimony of Gervaise Purcell. It would certainly have tended to prove that the route selected for the proposed sewer was not so good as one that might have been selected, and that it would cause a greater private injury. The offered testimony was to the effect that the witness had surveyed a route 1,432 feet shorter than that proposed, upon a better grade, through lands not thickly settled. We do not say that this testimony would have been conclusive, but it was competent and relevant to a material issue in the case, and should have been admitted, subject to the right of the plaintiff to introduce evidence in rebuttal.

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[1] Code Civil Proc. Cal. § 1241, subd. 3, provides that before property already appropriated to some public use can be taken, it must appear that the public use to which it is to be applied is a more necessary public use.

The superior court did not err in excluding the testimony offered for the purpose of showing that the sewer farm would become a nuisance by being made the receptacle of the sewerage of Pasadena. That is a question not involved in this proceeding. If the sewer farm ever becomes a nuisance, the decree in this proceeding will not stand in the way of its abatement.

Neither did the court err in refusing the request of certain defendants to decree to the plaintiff a limited use of the sewer in common with those whose lands were to be taken. The pleadings and proofs in the case would not have justified such a decree. For the errors above specified the judgment is reversed, and the cause remanded for a new trial.

We concur: SHARPSTEIN, J.; DE HAVEN, J.; HARRISON, J.; PATERSON, J.; GAROUTTE, J.

MCFARLAND, J. I concur in the judgment of reversal for the reasons which are given for such reversal in the opinion of the chief justice, but I am not prepared to concur in the whole of said opinion.

91 Cal. 213

PEOPLE *ex rel.* ROBERTS v. BEAUDRY *et al.*

(No. 14,172.)

(*Supreme Court of California.* Sept. 16, 1891.)

STREETS—DEDICATION—POWERS OF ATTORNEY GENERAL—EVIDENCE.

1. The attorney general has authority to maintain an action in the name of the people to abate a nuisance caused by obstructions in the streets of a city.

2. The record of an action by the city to recover possession of a street, in which the title was adjudged against it, is competent evidence in a subsequent suit by the attorney general against the same defendants and their grantees to declare such street a public highway, and to abate a nuisance caused by alleged obstructions therein maintained by defendants.

3. A city ordinance adopting an official map of the city in which a certain street is clearly marked out and defined through land owned by the city is sufficient evidence of the dedication of such street as a public highway in the absence of a contrary showing, though it was not actually constructed and made ready for travel at the time.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by the people of California, by George A. Johnson, attorney general, *ex rel.* John Roberts, against Prudent Beaudry and others, to declare a certain street in Los Angeles to be a public highway, and to abate an alleged nuisance, caused by obstructions therein. Decree for plaintiff, and defendants appeal. Reversed.

Chapman & Hendrick, for appellants. *W. H. Hart*, Atty. Gen., *R. Dunnigan*, and *Andrew Glassell*, for respondent.

BELCHER, C. It is alleged in the complaint in this case that a certain described strip of land was on the 1st day of October, 1868, and ever since has been, a part and portion of a public street in the city of Los Angeles, now commonly known as "Buena Vista Street;" that defendants, on or about the 1st day of April, 1871, erected and maintained, and still do maintain, on that part of the street described, certain buildings, posts, fences, and other things, which ever since they were so erected have obstructed, and still do obstruct, the said street, and hinder and prevent the people of the state of California from the free use thereof as a public street, and are public nuisances, and illegal obstructions thereon; and the prayer is that the strip of land described as being a part of Buena Vista street be declared and decreed to be a common public street and highway, free for the travel of all persons, and that the defendants be ordered and decreed to remove therefrom the buildings, houses, and fences and all obstructions whatsoever now obstructing or that may obstruct the free use of said street, and be enjoined from again erecting the same or any other obstructions thereon. The defendants Beaudry and Ramsaur alone answered. They deny that the land described in the complaint, or any portion thereof, is now or was on the 1st day of October, 1868, or ever was, any part or portion of the public street in the city of Los Angeles known as "Buena Vista Street," or of any public street or highway whatever; deny that on the 1st day of April, 1871, or at any other time, they erected and maintained, or still do maintain, on any part of Buena Vista street, or on any other street in the said city, any buildings, posts, fences, or other things; deny that any buildings, posts, fences, or other things erected or maintained by them have obstructed or do obstruct the said street or any other street, or hinder or prevent the people of the state, or any of them, from the free use of the same as a common public street, or at all.

When the case was called for trial, the defendants objected to the introduction of any evidence on the part of the plaintiff, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The objection was overruled, and an exception reserved. It was then admitted that a patent had been issued by the United States to the city of Los Angeles, conveying the lands within the city limits, upon confirmation of the claim of the city authorities that the city was the successor of a Mexican pueblo, and that the strip described in the complaint was within the boundaries of the lands so conveyed; also that the city was incorporated by an act of the legislature, passed April 4, 1850, according to the provisions of the general law for the incorporation of cities, and with all the rights which had formerly pertained to the said pueblo. The plaintiff then introduced in evidence a map, and an ordinance passed by the mayor and common council of the city, and approved November 17, 1868, adopting the map, and declaring it to be an official map of the city. There is written on the map: "Official map, No. 3, of Los Angeles city," and "map of a tract of land situate between Temple, Buena Vista, Eternity, and Short streets and the land of the Protestant Cemetery, in the city and county of Los Angeles, state of California, subdivided in July and August, 1868, by order of the mayor and common council of Los Angeles city." As represented, Buena Vista and Eternity streets are continuations of the same street, and the tract of land referred to lies on the westerly side of them, and is intersected by other streets, and subdivided into blocks and lots. All the streets are marked out by colored lines, and Buena Vista street has written on it, "N. 43¼, E. 60 feet wide." The map also shows another street called "New High Street," which runs parallel with Buena Vista and Eternity streets, and is easterly therefrom, but the land between the last-named streets is not subdivided or marked. The plaintiff also introduced in evidence a diagram, made by the city engineer, showing Buena Vista street as laid down on map No. 3, and the strip in controversy, on which defendants are alleged to have intruded. The strip is on the eastern side of the street, and at its south end extends into the street 21.97 feet, and at other points about the same distance. It was proved by the engineer that the diagram was a correct representation of the premises, and by him and other witnesses that the defendants had had the portions of the strip respectively claimed by them inclosed as parts of their adjacent lots for a considerable number of years. Upon this evidence the plaintiff rested, and it was claimed that the adoption and filing of map No. 3 constituted a dedication to the public as a public street of all the land represented thereon as Buena Vista street.

The defendants then introduced in evidence two deeds, made by the "mayor and common council of the city of Los Angeles" to Hiram McLaughlin, one in 1856 and the other in 1857. The deeds conveyed two adjoining parcels of land on the west side of New High street, which were described, and for a more particular description reference was made to a map made by one Waldemar, deputy county surveyor. And in connection with the deeds it was proved that defendant Beaudry, in April, 1868, succeeded through sundry mesne conveyances to the title of McLaughlin to the two parcels, and that about the same time he inclosed them with a fence. It was proved that the land was then hilly, wild, and unimproved, and that there was then no road of any kind where Buena Vista street is now located. The defendants next introduced in evidence the copy of a map of the tract of land conveyed to McLaughlin, as aforesaid, showing that the same had been subdivided into lots, two of which were marked lots 13 and 15. At the head of this map is a statement that the land was "subdivided August 29, 1868, under the direction of Mr. P. Beaudry, by George Hanson," the county surveyor; and at the foot of it is a certificate, signed by the county recorder, that the map is "a true copy of the original, recorded November 11, 1868, at 10 hrs., at request of P. Beaudry." It was then admitted that the defendant Beaudry still retained whatever title he had acquired to lots 13 and 15 in the tract which is now called the "Arcadia tract," and that the fence referred to as inclosing the said property claimed to be a part of Buena Vista street ran along the western boundary of the said lots. It was also admitted that defendant Ramsaur had succeeded to the title to another lot described on the map. The defendants next offered in evidence the judgment roll in an action commenced in the superior court of Los Angeles county on the 31st day of March, 1884, by the city of Los Angeles against Prudent Beaudry and Victor Beaudry. The complaint was in the ordinary form in ejectment to recover possession of lots 13 and 15 of the Arcadia tract. The defendants, by their answer, denied all the averments of the complaint, and to show that the plaintiff had no title to the demanded premises set up the conveyances to McLaughlin, hereinbefore referred to. They alleged that these conveyances were intended to and did include the demanded premises, and that they and their grantors had owned, possessed, and paid taxes on the same since the date of the deeds to McLaughlin. They further alleged that in one of the deeds to McLaughlin there was a mistake in one of the courses named, and they asked to have the deed reformed and corrected in this respect. After trial the court found all the facts as alleged in the defendants' answer, and on the 17th of April, 1885, judgment was entered reforming one of the deeds to McLaughlin as prayed for, and adjudging that one of the defendants was the owner of the lots sued for, and that the plaintiff take nothing by its action. In connection with the offer of this judgment roll in evidence counsel stated that "the defendants proposed to show that lots 13 and 15 of the Arcadia tract included the property, or a considerable portion of the property, in controversy in this action, and being the property next to Mr. Glassell's lot; that the line of the Arcadia tract on the westerly side corresponded with Mr. Beaudry's fence as it was located in 1868, and has been there ever since." The plaintiff objected to the offered evidence, upon the ground that the parties and the issues in that action were not the same as in this, and hence the evidence was inadmissible. The court sustained the objection, and the defendants excepted to the ruling. The case was then submitted for decision, and the court found that all the allegations of the complaint were true, and all the allegations of the answer were untrue, and entered judgment accordingly. From that judgment, and an order denying a new trial, the defendants Beaudry and Ramsaur appeal.

1. The appellants contend that the at-

torney general had no authority to institute the action, and hence that it should have been dismissed. But the obstructions complained of, if they were upon a public street, and of the character alleged, constituted public nuisances; and it has often been held that the attorney general may bring an action in the name of the people to enjoin or abate such nuisances. People v. Davidson, 30 Cal. 388; People v. Mining Co., 66 Cal. 138, 4 Pac. Rep. 1152; People v. Pope, 53 Cal. 437; People v. Blake, 60 Cal. 497; People v. Reed, 81 Cal. 70, 22 Pac. Rep. 474; People v. Loan Society, 84 Cal. 634, 24 Pac. Rep. 295. The four cases last cited were similar to this one, and this contention cannot, therefore, be sustained.

2. It is also contended that there was no evidence showing that Buena Vista street was ever dedicated to the public as a public highway. But the city had power to lay out and dedicate streets, and on map No. 3 Buena Vista street was clearly marked out and defined. It would seem, therefore, that when the ordinance was passed and the map adopted and filed as an official map of the city, it must have been intended that the streets represented on the map should thereafter be public streets of the city. It was not necessary that they should have been actually constructed and made ready for travel at that time. We think, therefore, if the city owned the land represented as Buena Vista street, that the ordinance and map, in the absence of any showing to the contrary, should be held sufficient evidence of a dedication of the land to the public as a public street.

3. It is further contended that the court erred in refusing to admit in evidence the judgment roll offered by appellants. The ruling seems to us erroneous for the following reasons: The principal question involved in that case was as to whether or not the deeds made by the city to McLaughlin in 1856 and 1875, conveyed the demanded premises, and it was conclusively determined by the judgment that they did. The reformation of one of the courses related back to the date of the deed, and made it read as it would have read if correctly written at the time. Now, if the land so conveyed included, as claimed, the strip of land in controversy here, then it necessarily follows that the city could not in 1868 dedicate that strip as a part of a public street, because it had no title to it. One of the issues in this case was whether or not the strip was a part of the street, and its determination depended upon whether the city owned the land at the time of its attempted dedication. Upon this issue the judgment roll in the other case, as it seems to us, was relevant evidence, and should have been admitted. In legal effect the parties and the issues in the two cases were the same. But counsel for respondent say: "It will be observed that this point only affects the case of the appellant Beaudry, as the other appellant, Ramsaur, was not in any respect a party in or to that judgment roll." It is true that Ramsaur was not a party to the former action, but he holds another lot of the same tract, under Beaudry, and his right to it depends upon the title which was then litigated. Under these circumstances, we think the record admissible in his favor as well as in Beaudry's. We advise that the judgment and order be reversed and the cause remanded for a new trial.

We concur: Vanclief, C.; Temple, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

Paterson, J., (*concurring.*) It is unnecessary to determine in this action whether a judgment entered in an action between the city and an individual is a bar to an action by the people against another or the same defendant, where the question at issue in each case is whether the land in controversy has been dedicated to public use as a street. The judgment referred to in the foregoing opinion was admissible, because it was one of the muniments of defendants' title.

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91 Cal. 223

Bonetti v. Treat *et al.* (No. 14,353.)

(*Supreme Court of California.* Sept. 16, 1891.)

Assignment of Lease—Liabilities of Parties.

1. Where the assignee of a lessee covenants "to pay all rent that may fall due from time to time by virtue of the provisions of the lease," and enters into possession of the premises by consent of the lessor, the relation of landlord and tenant is created between him and the lessor, and his holding is by privity of estate; and, his liability being created by the covenant of the lease, he cannot, by an abandonment of the premises, divest himself of such liability.

2. Nor does the acceptance by the lessor of the assignee as a tenant release the lessee from his covenant to pay rent, but his liability continues by privity of contract until the lease is terminated.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Bonetti against Treat and Porter for rent. Verdict and judgment for plaintiff. Defendant Porter appeals. Affirmed.

Philip Stewart and *Richards & Carrier*, for appellant. *B. F. Thomas*, for respondent.

Fitzgerald, C. Action for rent alleged to be due and unpaid on certain demised premises described in the complaint. The answer specifically denies the material allegations of the complaint, and avers the neglect and refusal of plaintiff to obtain his lessor's consent to the assignment, after having expressly agreed to do so, rescission of the lease, and surrender of the premises by the defendant Treat, and the acceptance of and entry thereon by plaintiff.

The facts disclosed by the testimony of the witnesses for the plaintiff are as follows: On the 9th day of January, 1889, the plaintiff executed to the defendant Treat, in conjunction with one Pierce, a written lease of the premises therein described for the term of five years from the 1st day of August, 1888, at the annual rent of $1,800 for the first year, and $2,000 for each and every year thereafter, payable in two equal installments, semi-annually, in advance, on the 1st days of February and August of each year during the term of the lease. Subsequent to the execution of the lease, but on the same day, Pierce executed, with the consent of the plaintiff, a written assignment of all his right, title, and interest in the demised premises to the defendant Porter, who, as part of the consideration "of such sale or transfer, agreed to pay all rent that may fall due from time to time by virtue of the provisions of said lease." Porter immediately entered into possession of the premises as assignee under the assignment of the lease, and paid by his individual check a part, if not all, of the first installment of rent. Treat and Porter continued their joint occupancy of the premises until the latter part of July of that year, when they, without the knowledge or consent of the plaintiff, wholly abandoned the possession of the same; and afterwards, upon demand being made for the rent due and payable on the 1st day of August, 1889, they refused to pay the same. The reason given by the defendant Treat to plaintiff for the abandonment of the possession of the premises and the refusal to pay the rent when it became due was to the effect that Porter declined to pay any further rent until plaintiff obtained the consent of his lessor to the assignment, and that he (Treat) could not do anything alone. The evidence shows that plaintiff never promised or agreed to furnish such consent to Porter or to any one for him. In the early part of August, 1889, the defendant Treat delivered the keys of the house and surrendered the premises to plaintiff, in pursuance of an agreement entered into between them, by which Treat agreed to turn over to him the "dairy fixtures" on the place, and to pay in addition thereto the sum of $200. Treat having failed and refused to perform any part of his agreement, the plaintiff handed the keys to his attorney, with instructions to turn them over to Treat, unless he complied with his agreement. The attorney called upon Treat, and made the demand of him, in accordance with such instructions, and, upon Treat failing to accede thereto, offered to return to him the keys, which he refused to accept, saying "that he did not want them; that he had surrendered them, and had no use for them." Afterwards, on the 2d day of September following, plaintiff served written notice on Treat and Pierce, mailed another to Porter, and posted one on the dairy-house on the premises, demanding the payment of the rent or the delivery to him of the possession of the premises on or before the 8th day of September, 1889. Plaintiff re-entered into possession about the last of October following.

At the conclusion of the plaintiff's testimony the defendant Porter moved for a judgment of nonsuit upon the following grounds: "The evidence shows that he is not a party to the lease of plaintiff to Treat and Pierce; that plaintiff refused and never did release Pierce from said lease as lessee, and defendant Porter never executed the same; that the plaintiff never accepted defendant Porter as lessee upon the original lease; that the defendant Porter, as well as the defendant Treat, surrendered the premises within one year from the date of their occupation of said premises upon the terms specified in said lease, having first paid all rents for the use and occupation thereof during said period; that defendant Porter's tenancy as assignee of said Pierce, if the court holds that he was such, before the 1st day of August, 1889, terminated, and he had then ceased to be beneficially or in any way interested in said leasehold, or said premises, the subject thereof; that by mutual consent of the parties the relations of landlord and tenant existing between plaintiff and defendants was determined, and said lease rescinded, and defendants surrendered possession of all the premises, and plaintiff went into possession thereof; that the plaintiff himself elected to rescind and work a forfeiture of said lease, and notified defendants to pay the accruing rent in advance, or to surrender possession of the premises, and did consummate and execute said rescission, and did take possession of said premises; that at the time of the commencement of this action said lease set forth in the complaint was fully rescinded, determined, and canceled, and no cause of action existed for the enforcement of its covenants. The court denied the motion, and the defendant Porter excepted." The case was tried by a jury, and a verdict found in favor of the plaintiff, and from the judgment rendered thereon this appeal is taken by the defendant Porter upon the judgment roll alone.

The only error complained of relates to the ruling of the court denying the motion of the defendant Porter for judgment of nonsuit. Porter's covenant, contained in the assignment to him, "to pay all rent that may fall due from time to time by virtue of the provisions of the lease," and his entry into possession as assignee under the assignment, created the relation of landlord and tenant between him and the lessor, and his holding was by privity of estate, and not by privity of contract, as claimed by respondent. The lessor was not a party to, nor was he in any way benefited by, the contract of assignment. The liability of Porter to the lessor was, therefore, created solely by the covenant of the lease to pay the rent, which is a covenant running with the land, and not by the contract of assignment, the nonperformance of which is enforceable only by the lessee. The assignee is answerable for the rent during his ownership of the term under the assignment, and his liability therefor arises out of the privity of estate, and this without reference to any obligation assumed by him in the contract of assignment. Nor did the assignment to Porter and the acceptance by the lessor of him as tenant release Pierce from his covenant to pay the rent, but his liability to the lessor continues, notwithstanding the assignment by privity of contract, to the end of the term of the lease, unless sooner terminated.

The evidence shows that Porter, shortly before the installment of rent sued for became due, abandoned the possession of the premises, and refused to pay the rent, upon the pretext that the plaintiff had failed to furnish, as he agreed to do, the consent of his lessor to the assignment. This, of course, was a mere subterfuge. The contention that by the abandonment of the possession of the premises by Porter he parted with the beneficial interest, and yielded the possession to the beneficial owner, is unsupported by reason or authority. The legal title and the possession of the leasehold were in Treat and Porter, and he (Porter) could only divest himself thereof and dissolve the privity of estate by a reassignment in writing to the lessee, or by assignment of his interest to another, accompanied by surrender of possession, or by the working of a forfeiture of the lease for breach of its covenants, and re-entry for such breach, as provided for by the terms thereof. The surrender of the premises by Treat was conditional, and the condition was never fulfilled, nor was it in writing, as required by the statute of frauds; therefore such surrender did not operate as a dissolution of the tenancy. As the tenancy was only terminated by the lessor's notice to quit or pay the rent, and re-entry of possession under the right reserved by the lease for breach of its covenants, the motion for judgment of nonsuit was properly denied, for the reason that there was evidence tending to show the liability of appellant for that part of the rent at least which had accrued up to the time of the re-entry, and the sufficiency of it was properly left to the jury.

The only error assigned, as we have stated, was the refusal of the court to grant the motion for a nonsuit. As the case was one which had to be submitted to the jury on the evidence, if defendants desired to limit the recovery in any event to the amount of rent which had accrued at the time of the re-entry, it was their duty to ask the court to submit to the jury proper instructions upon that matter. Upon the record before us no error can be predicated. We therefore recommend that the judgment appealed from be affirmed.

I concur: VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

PEOPLE v. CHUM CUM YOOK. (No. 20,668.)

(*Supreme Court of California.* Sept. 2, 1891.)

APPEAL—FAILURE TO FILE BRIEFS—AFFIRMANCE.

Where an appeal is submitted upon briefs to be filed, and the time for filing them has passed, and no briefs are filed by appellant, the judgment appealed from will be affirmed.

BEATTY, C. J. This cause having heretofore been submitted upon briefs to be filed by counsel, and the time within which such briefs were to be filed having long since passed, and no briefs on behalf of appellant having been filed, it is now, therefore, ordered the judgment and orders appealed from be affirmed.

91 Cal. 385

Hughes v. Dunlap. (No. 14,114.)

(*Supreme Court of California.* Sept. 26, 1891.)

Trial—Rejecting Findings of Jury—Injunction and Damages.

Since, in California, where a legal and an equitable remedy are sought in the same action, each remedy must be governed by the same law that would apply if the other remedy had not been asked, it is error for the court, in an action for an injunction and for past damages, to reject, without motion for a new trial, the findings of the jury as to both remedies, since, in so far as damages are asked, the remedy is legal, and plaintiff is entitled to a jury trial.

Department 2. Appeal from superior court, Kern county; R. E. ARICK, Judge.

Action by Hiram Hughes against Calvin Dunlap for an injunction and damages. Judgment for plaintiff. Defendant appeals. Reversed.

Alvin Fay, for appellant. *B. Brundaze*, for respondent.

MCFARLAND, J. In the complaint plaintiff avers that he is the owner and in possession of a large tract of land, valuable mainly for pasturage, for which purpose he has it inclosed by a substantial fence; that "during the last two months" defendant has torn down and destroyed said fence at various points, and threatens to continue to do so, to plaintiff's damage in the sum of $5,000. It is further averred that defendant is insolvent, and that if he continues to destroy and keep open said fence, he will cause plaintiff irreparable damage. The prayer is for judgment for $5,000 damage, and an injunction to restrain defendant from continuing said acts. The answer of defendant contains a denial of the averments of the complaint, and for a separate defense avers that there are, and for more than 25 years have been, certain public roads over and through said land; that recently plaintiff had built fences across said public roads; that defendant is road-overseer of the district; and that in discharge of his duties as such he had removed the said fences where they crossed and obstructed said roads, but had not interfered with said fences at any other place. At the trial a jury was impaneled on motion of defendant, and certain issues of fact were referred to the jury concerning the existence of public roads over the land; what damage, if any, was done plaintiff by the acts of defendant, etc. The jury retured a verdict on all such issues favorable to defendant, and found that there were certain public roads where defendant had removed the fences, and that plaintiff had suffered no damage. Afterwards the court made findings in which it states that it "refuses to adopt said findings of the jury, and rejects each and every thereof," and proceeds to find all the issues which had been passed on by the jury the other way and favorably to plaintiff, and finds that plaintiff was damaged by said acts of defendant in the sum of $100. Upon these findings judgment was rendered against defendant for $100 damage and costs, and perpetually enjoining him from opening or interfering with said fences. From this judgment, and from an order denying a new trial, defendant appeals.

The first point made by appellant is that the court erred in disregarding the verdict of the jury and setting it aside without the proceeding of a motion for a new trial. This point is certainly well taken; so far, at least, as the issue of damages is concerned. It has long since been held that under our system a legal and equitable remedy may be sought in the same action; but each remedy must be governed by the same law that would apply to it if the other remedy had not also been asked for. An action to recover damages for past trespasses is as clearly a legal remedy as any that could be named, and it is an action in which a party cannot be deprived of a jury trial. For this reason, therefore, the judgment and order must be reversed.

The question whether or not the defendant was entitled to have other issues in the case submitted to a jury has not been discussed by counsel for appellant; and it is a question too important to be finally disposed of without the fullest argument and consideration. There is a disposition to assume that the right to a jury trial is determined entirely by the form of action which the plaintiff chooses to adopt. We had occasion, in Donahue v. Meister, (Cal.) 25 Pac. Rep. 1096, to say that such a position is not tenable. If two coterminous owners of land have a dispute about the ownership of a piece of land lying along the common boundary, and one brings an action of ejectment to recover it, undoubtedly the other would be entitled to a jury on the trial of the cause. But suppose he chooses to bring an action for an injunction, averring that the other party is cutting timber, or committing some other waste, on the disputed territory, and praying to have him enjoined from so doing, without asking for damages; would the defendant, in that case, be deprived of the right to a jury trial? In the case at bar, if the plaintiff had merely asked for damages caused by the alleged acts of the defendant, the action would have been the common action of trespass; in which defendant, of course, would have been entitled to a jury. Does the fact that he also prayed for an injunction take away from him the right to have the real issues of fact tried by a jury? Of course, it is always for the judge sitting as a chancellor to determine whether, when certain rights are established, he will grant an equitable remedy prayed for, or compel a party to be satisfied with his legal remedy; but when the asserted rights upon which any remedy must rest are legal rights, and cognizable in a court of law, must not those rights be determined according to the methods of a common-law court? And, in such a case, can a party be deprived of his constitutional privilege of a jury? "The writ of injunction, being largely a preventive remedy, will not ordinarily be granted when the parties are in dispute concerning their legal rights, until the right is established at law; and if the right for which protection is sought is dependent upon disputed questions of law which have never been settled by the courts of the state, and concerning which there is an actual and existing dispute, equity will withhold relief until the questions of law have been determined by the proper courts." High, Inj. § 8. In Pom. Eq. Jur. § 116, it is said, on the subject of the blending of legal and equitable remedies under our system, as follows: "A complete amalgamation, however, is not possible, so long as the jury trial is retained in legal actions. There is certainly no impossibility, nor even difficulty, in requiring a jury to decide the issues of fact upon which the right to many kinds of equitable remedies depends. This is the province of a jury in legal actions; the court pronouncing the judgment upon their verdict. A jury is clearly incompetent to frame and deliver a decree according to the doctrines and methods of equity; but there can be no real obstacle in the way of its ascertaining the facts by its verdict, and leaving the court to shape the decree and award the relief based upon these facts, in many species of equitable remedies."

We have made the above remarks and quotations for the purpose of calling attention to the subject; for the right of a jury trial in cases in form equitable has not been very clearly defined. The action for trespass upon real property, with a prayer for an injunction, was very common in the early history of this state. It was frequently used to determine mining and water rights, and it was generally conceded that either party had the right to a jury trial. See Gates v. Kieff, 7 Cal. 124; Mining Co. v. Clarkin, 14 Cal. 543; More v. Massini, 32 Cal. 594. The general subject is, no doubt, full of difficulties, and we have thus alluded to it, so that we may not be considered as holding, in the case at bar, that the issue of damages is the only one as to which the appellant was entitled to a jury. There are no other points in the case necessary to be noticed. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; DE HAVEN, J.

(91 Cal. 307)

JOHNSON v KING *et al.* (No. 14,321.)

(*Supreme Court of California.* Sept. 21, 1891.)

FORECLOSURE—DEFICIENCY JUDGMENT—APPEAL-BOND—LIABILITY OF SURETY.

Where a deficiency judgment on foreclosure was rendered against the mortgagor, and an appeal was taken by a defendant who was in possession and desired to prevent a sale pending the appeal, the surety on an appeal-bond, stipulating that appellant will pay any deficiency arising on the foreclosure sale, is liable for such deficiency under Code Civil Proc. Cal. § 945, providing that a judgment of foreclosure shall not be stayed unless there be an undertaking "on the part of the appellant" that he will not commit waste during his possession of the property, and that, "when the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency."

Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Action by Nat Johnson against King and others on an appeal-bond. Judgment for plaintiff, and defendants appeal. Affirmed.

Chas. R. Gray, for appellants. *Harris & Gregg*, for respondent.

MCFARLAND, J. This is an action against the sureties on an undertaking on appeal. Judgment was rendered for plaintiff on the pleadings, and defendants appeal. The action on which the undertaking was given was brought by plaintiff herein against one Winders, one McDuffee, and several other defendants, to forclose a mortgage executed by said Winders to plaintiff. McDuffee was in possession of the mortgaged premises at the time the action was commenced. Judgment was rendered in that action, foreclosing the mortgage against all the defendants, with the usual provisions for a deficiency judgment against the mortgagor. McDuffee appealed from the judgment and from an order denying a new trial; and for the purpose of staying execution the defendants in the present action executed an undertaking in the statutory form on the part of said McDuffee, in which they undertook that, if the judgment should be affirmed, or the appeal dismissed, "said appellant will pay any deficiency arising upon the sale of the premises described in said judgment." The judgment and order appealed from were afterwards affirmed, and after the sale of the premises there was a deficiency within the penal sum of the undertaking, for which the judgment in the case at bar was rendered.

The only point made by appellant which seems necessary to be noticed is that, because McDuffee was not the mortgagor in the foreclosure suit, and because no deficiency judgment could be rendered against him, therefore the parties on the undertaking are not liable to pay such sufficiency. It seems to be contended that such an undertaking can be legally given only by the party against whom the deficiency judgment could be rendered. But the undertaking is an independent obligation, founded on the provisions of the statute which apply to the "appellant," whoever he may be. Section 945, Code Civil Proc. provides that a judgment of foreclosure shall not be stayed unless there be an undertaking "on the part of the appellant * * * to the effect that during the possession of such property by the appellant he will not commit waste," etc.; and that, "when the judgment is for the sale of mortgaged premises and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency." This language clearly applies to a defendant who appeals, whether he be the mortgagor or a party who claims the mortgaged premises and desires to prevent a sale and enjoy the property during the pendency of the appeal. There are no other points made by appellants which require special notice. Judgment affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.

(91 Cal. 194)

FOSS *et al.* v. HINKELL. (No. 14,014.)

(*Supreme Court of California.* Sept. 14, 1891.)

PUBLIC LANDS—MEXICAN GRANTS—LANDS SUB JUDICE.

Where the claim to the Mexican grant of Rancho San Jose was confirmed in 1854, and its boundaries established, the lands, being within the exterior limits of the claimed grant, but outside the fixed boundaries, were not *sub judice*, because the patent was not issued until 1875; and a patent of such outlying lands, issued to the S.

P. R. Co., under Acts Cong. July 27, 1866, and March 3, 1871, is valid. McFarland, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action of ejectment by Carrie L. Foss and Frank Foss against Joseph Hinkell. Judgment for defendant. Plaintiffs moved for a new trial, which being denied, they appealed from the judgment and the order denying the motion. Reversed.

Edwin Baxter, for appellants. *Will D. Gould* and *James H. Blanc*, for respondent.

Harrison, J. Upon the former appeal in this case (78 Cal. 158, 20 Pac. Rep. 393) the cause was remanded, with directions to the court below "to find on the testimony already introduced, and such further testimony as may be introduced by either party, whether or not the land in suit was, on the 3d day of April, 1871, within the exterior boundaries of the Rancho San Jose, as granted by the Mexican government, and on such findings to enter judgment." In pursuance of this direction, the court, upon such evidence as was offered upon this issue at the subsequent trial, found "that the land in suit was, on the 3d day of April, 1871, within the exterior boundaries of the Rancho San Jose, as granted by the Mexican government," and rendered judgment for the defendant. Plaintiffs moved for a new trial, and from the order denying their motion, as well as from the judgment, they have appealed to this court.

It is insisted upon the part of the respondent that this court, by the following language, used in its opinion upon the former appeal, viz.: "What the exterior limits of such granted rancho were must be determined by the *expediente* of the grant issued by the Mexican government, including petition, diseño, and grant, the boundaries designated in which may be identified by parol evidence,"— thereby limited the testimony upon which the court below was to make its finding upon this issue. These were, however, words of definition, rather than of enumeration, and must be read in connection with the subsequent direction to the court to make its finding "on the testimony already introduced, and such further testimony as may be introduced by either party." The former appeal was taken upon the judgment roll alone, and, as the "testimony already introduced" was not then before this court, it cannot be presumed that it intended to make any reference to the character of the evidence already taken, or to limit the character of the "further testimony" which might be introduced by either party for the purpose of enabling the court below to make its finding upon this issue. It then appeared from the findings that on the 3d day of April, 1871, the date when the route of the Southern Pacific Railroad was definitely located, the land in question was within the "claimed exterior limits" of a valid Mexican grant of the Rancho San Jose, and by reason thereof was *sub judice*. This finding was based upon another finding that by the Thompson survey, made in 1868, the lands in controversy were included within the exterior limits of said rancho until said survey was rejected in 1875; while by the Hancock survey, which had been previously made, and which was afterwards substantially approved, and a patent thereon issued in 1875, the lands were excluded from the exterior limits of the rancho. This court, in its opinion, held that whether the land in controversy was *sub judice* was the ultimate fact which the court below should have found, saying: "The exterior limits of the rancho do not depend on any survey made of it." The record then before this court did not disclose the character of the grant,— whether it was a grant of quantity within exterior limits, or a grant of a specific tract, either by name or with definite boundaries; and the court, in its direction, did nothing more than indicate that the issue could be found upon any competent evidence.

By the record which is now brought before us on this appeal it appears that the grant was of a specific tract of which juridical possession had been given by the Mexican government, and that the final decree of confirmation by the United States was of the land embraced within the boundaries described in said juridical possession. From the testimony before the court it appeared that in April, 1837, the Mexican government made a grant to Ygnacio Palomares and Ricardo Vejar of the "place called 'San Jose,'" and that in August of that year juridical possession thereof was given them, with the following specific boundaries, viz.: "Commencing at the foot of a black willow tree, which was taken for a corner, and between the limbs of which a dry stick was placed in the form of a cross; thence from east towards the west 9,700 varas to the foot of the hills called 'Las Lomas de la Puente,' taking for a landmark a large walnut tree on the slope of a small hill on the side of the road which passes from the said San Jose to La Puente, making a cut [*caladura*] on one of its limbs with a hatchet; thence in a direction about from south to north 10,400 varas to the arroyo [creek] of San Jose, opposite a high hill, where a large oak was taken as a boundary, in which they fixed the head of a beef, and chopped some of its limbs; thence in a direction from west to east 10,600 varas to the arroyo [creek] of San Antonio, taking for a corner some young cotton-wood trees which are near each other, marking crosses in the bark; thence about from north to south 9,700 varas to the foot of the black willow, the place of beginning." In 1852 the grantees presented to the land commission their petition for a confirmation of the grant, and on the 31st of January, 1854, the commission adjudged the claim to be valid. From this decision the United States took an appeal to the district court for the southern district of California, and that court affirmed the decision of the land commission, in its decree specifically designating the lands of which confirmation was made by the same boundaries as those given by the act of juridical possession. The attorney general having given notice that the United States would not prosecute an appeal therefrom, the district court, at its December term, 1858, decreed that the claimants might proceed upon its said decree as upon a final decree, and thereafter, viz., January 20, 1875, a patent for said lands was issued to the claimants.

Upon this testimony, as soon as it was shown to the court that the land in controversy is not included within the lines of the patent, the court should have found that it was not, on the 3d day of April, 1871, "within the boundaries of the Rancho San Jose, as granted by the Mexican government." The only lands which were "granted" by the Mexican government are those which were included within the natural boundaries fixed by the juridical possession. That was a segregation or location by the Mexican government, and a determination by that government of the land within the limits of the diseño, which it had granted, and was binding upon this government. "By this proceeding—called in the language of the country 'the delivery of juridical possession'—the land was separated from the public domain, and what was previously a grant of quantity became a grant of a specific tract. The record of a proceeding of this nature must necessarily control the action of the officers of the United States in surveying land claimed under a confirmed Mexican grant." Graham v. U. S., 4 Wall. 259. "This proceeding involved an ascertainment and settlement of the boundaries of the lands granted by the appropriate officers of the government specially designated for that purpose, and has all the force and efficacy of a judicial determination to bind the former government, and is equally binding upon the officers of our government." U. S. v. Pico, 5 Wall. 536. "Where the original grant does not locate the subject of the grant, as where a number of square leagues is granted to be located within a certain district, the delivery of possession within the district renders the title complete, and defines the location of the grant. The cases referred to by the plaintiff were grants of specific ranches, plantations, or places having well-known names; and the boundaries designated in the acts of possession ascertained their actual extent and limits, and hence were controlling when a question of title arose." Pinkerton v. Ledoux, 129 U. S. 346, 9 Sup. Ct. Rep. 399. In the decree of confirmation, rendered by the district court, these lands were specifically described by the same natural boundaries as those designated in the act of juridical possession; and this decree was a final determination by the United States that these boundaries were the exterior limits of the grant, and that the lands outside of those limits were, so far as the claimants were concerned, public land. "Where the grant was by metes and bounds, or where proceedings before the Mexican authorities, such as took place upon a juridical delivery of possession, had established the boundaries, or where from any other source, pending the proceedings for a confirmation, the boundaries were indicated, it was proper for the board to declare them in its decrees." U. S. v. Sepulveda, 1 Wall. 104. Where the decree of confirmation is by metes and bounds, the survey must conform to the decree. Higueras v. U. S., 5 Wall. 827. "The decree is a finality, not only on the question of title, but as to the boundaries which it specifies." U. S. v. Halleck, 1 Wall. 439. The subsequent survey, upon which the patent was issued, was the ascertainment of these natural boundaries. It was necessary that they should be delineated upon the surface of the earth with their relation to the sectional lines of the government surveys before the patent could issue, but the issuance of the patent upon the lines of that survey became the authentic record that those lines were the correct boundaries of the grant as made by the Mexican government. Although the patent was not issued until 1875, yet the boundaries of the land for which it was issued were definitely fixed when the district court rendered its decree of confirmation, and at no time thereafter was the land in question *sub judice*.

This evidence, viz., the act of juridical possession, the decree of confirmation, in which the land confirmed was specifically described, and the patent issued thereon, was conclusive upon the court in determining the issue before it. All the other evidence that was offered could have no weight or effect in impairing its conclusiveness. By the *expediente* it appeared that the land granted was a place within the boundaries of the diseño; and after the juridical possession was given, the diseño ceased to have any function in determining the land that was granted, but for all purposes connected with the grant was merged in the act of juridical possession. Neither the Hancock survey nor the Thompson survey, nor the evidence of any surveyor, was competent to defeat the effect of the patent, or to show that any lands not included therein had been granted by the Mexican government, for the reason that it had already been established by the decree of the court that only the lands embraced in the patent had been so granted. It may be observed with reference to the testimony of the surveyors Moore and Bernell, that they did not testify that the land in question was within the boundaries of the juridical possession, or of the land described in the decree of the district court; their testimony being that it was within the limits of the diseño, the map of partition, and the Thompson survey.

It is urged by the respondent that notwithstanding it appears from the terms of the decree of confirmation, as well as from the patent, that the Rancho San Jose, "as granted," did not include the land in controversy, yet the grant including this land was *sub judice* until the final rejection of the Thompson survey, for the reason that it was included therein, and therefore was claimed to be within the exterior limits of the grant. We cannot assent to this proposition. Lands are not *sub judice* unless the claim to them is pending and undetermined before some tribunal competent to pass upon their validity. The question of the extent to which a claim for lands under a Mexican grant would render them *sub judice* was discussed in Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. Rep. 1228, and in the opinion of the court in that case Justice MILLER says: "Those Mexican claims were often described, or attempted to be described, by specific boundaries. They were often claims for a definite quantity of land within much larger out-boundaries, and they were frequently described by the name of a place or ranch. To the extent of the claim, when the grant was for land with specific boundaries, or known by a particular name, and to the extent of the quantity claimed within out-boundaries containing a greater area, they are excluded from the grant to the railroad company. Indeed, this exclusion did not depend upon the validity of the claim asserted, or its final establishment, but upon the fact that there existed a claim of a right under a grant by the Mexican government which was yet undetermined, and to which, therefore, the phrase 'public lands' could not attach, and which the statute did not include, although it might be found within limits prescribed on each side of the road when located." From this opinion it will be seen that the claim, in order to render the land *sub judice*, must be based upon a right yet undetermined, and must also be limited to the lands within the boundaries of the grant, whether it be for quantity or for a specific tract. The mere claim that lands are within the exterior limits of a grant, after there has been a final determination that they are not so included, will not make them *sub judice*. As a claim for lands outside of the exterior boundaries of a grant of quantity would have no effect, so, where the grant is for a place with specific boundaries, no right can be created by a claim for lands not included within those boundaries. In the ordinary case of a grant of quantity within exterior limits the claim will embrace all the lands within those boundaries until the segregation of the quantity which was granted by the Mexican government, for until then, although the validity of the claim has been established, its extent has not been fixed. In U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, it was held that in such a case the treaty obligations of the government are satisfied so long as it reserves within these exterior limits a quantity sufficient to satisfy the claim, and that in the mean time the United States may make valid grants of the residue. When, however, the grant is of all the land within certain natural boundaries, or when juridical possession with natural boundaries has been given of the land granted, the claim must be limited to the land within those boundaries; and when the boundaries, as well as the validity of the grant, have been determined by the decree of confirmation, the claim is thereafter limited to those boundaries. By such decree the claim passes into a judgment, and the subsequent survey is but the execution of that judgment. The Fossat Case, 2 Wall. 649. In the present case the lands in controversy are more than a mile distant from the lines established in the decree, and there could be no *bona fide* claim that they could be included within any survey of the grant as defined in the decree of confirmation. It follows that after the decree of confirmation of the Rancho San Jose became final, in 1858, no claim under that grant to any lands outside of the boundaries named in the decree would render them *sub judice*, or prevent their passing to the railroad company on the 3d day of April, 1871, as a portion of the public land granted to it by the United States. The judgment and order denying a new trial are reversed, and the cause is remanded, with directions to the court below to make the finding directed by this court at the former trial, in conformity with the principles contained in this opinion, and thereupon to enter judgment.

We concur: BEATTY, C. J.; PATERSON, J.; GAROUTTE, J.

MCFARLAND, J. I dissent, and adhere to the opinion rendered in department, February 2, 1891, affirming the judgment. 25 Pac. Rep. 762. On the former appeal (78 Cal. 158, 20 Pac. Rep. 393) this court reversed the judgment, with directions to the court below to find on the one issue whether the land in contest was within the exterior boundaries of the Rancho San Jose, as granted by the Mexican government; and it stated certain principles by which the lower court should be governed in determining that issue. The court below followed those directions, and was governed by those principles, and found that said land was within said boundaries; and I do not think that the evidence was insufficient to support that finding. It may be the law that the exception in railroad grants applies only to Mexican grants, which expressly designate a certain quantity of land within larger exterior boundaries; and it may be that in other cases, where the boundaries named in the original grant are uncertain and vague, although the grant has been in good faith claimed, possessed, and recognized up to certain lines for more than a quarter of a century, still the railroad grant will take all that is excluded from the final United States patent. The opposite views of this question are fully presented in the two separate opinions of Judges SAWYER and ROSS (involving this same San Jose grant) in U. S. v. Railroad Co., 14 Sawy. 620, 45 Fed. Rep. 596; and I do not think that it has been yet definitely settled by Doolan v. Carr, or any other adjudicated case. But that question need not be discussed in the case at bar, for the law of this case was declared on the former appeal. I think that the judgment should be affirmed.

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3 Cal. Unrep. 431

MARSH v. HENDY, (LANGLEY *et al.*, Interveners. No. 14,147.)

(*Supreme Court of California.* Sept. 19, 1891.)

SWAMP LAND—APPLICATION BEFORE SEGREGATION—ACTUAL SETTLERS.

1. The swamp lands granted to the state are not subject to application for purchase until they have been segregated to the state by a United States survey, and an application filed prior to such segregation confers no rights on the applicant. Buchanan v. Nagle, 26 Pac. Rep. 512.

2. Const. Cal. art. 17, § 3, providing that state lands which are "suitable for cultivation" shall be granted only to actual settlers, applies to swamp lands granted to the state when such lands are suitable for cultivation, and can be reclaimed and cultivated by an actual settler. Fulton v. Brannan, 26 Pac. Rep. 506, followed.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action by Archibald Marsh against John H. Hendy to determine a contest as to the right to purchase from the state certain swamp lands. J. R. Langley and others intervene. Judgment being entered in the court below against both plaintiff and defendant, each moved for a new trial, which being refused, they appeal from the judgment and orders denying the motions. Affirmed.

Freeman & Gates, for appellant. *Garber & Bishop*, for respondent. *W. B. Wallace*, for interveners.

BELCHER, C. This is an action to determine a contest, arising in the state land-office, as to the right to purchase from the state a certain section of swamp and overflowed land in Tulare county. During the pendency of the action other parties were permitted to intervene for the purpose of showing that neither the plaintiff nor defendant was entitled to make the purchase. After trial the court below found, among other things, that when the defendant made his application to purchase the section in controversy the land had not been segregated as swamp and overflowed land by authority of the United States; that when the plaintiff made his application to purchase the section the land was, and ever since had been, suitable for cultivation; that neither the plaintiff nor defendant had ever been an actual settler upon the land; and, as a conclusion of law, that neither of them was entitled to purchase the same from the state. Judgment was accordingly so entered. Both parties moved for a new trial, and their motions were denied, and they then appealed from the judgment and orders denying their motions. Since the appeals were taken several other cases involving all the questions arising herein have been considered and passed upon by this court. See Wren v. Mangan, 88 Cal. 274, 26 Pac. Rep. 100; Fulton v. Brannan, 88 Cal. 454, 26 Pac. Rep. 506; McNee v. Lynch, 88 Cal. 519, 26 Pac. Rep. 508; Buchanan v. Nagle, 88 Cal. 591, 26 Pac. Rep. 512; Belcher v. Farren, 26 Pac. Rep. 791. These cases are decisive of this, and upon their authority we advise that the judgment and orders appealed from be affirmed

We concur: TEMPLE, C., VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

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91 Cal. 206

MONTGOMERY v. SAYRE. (No. 13,911.)

(*Supreme Court of California*. Sept. 15, 1891.)

SETTING ASIDE SPECIAL FINDINGS.

Code Civil Proc. Cal. § 625, provides that, in an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. Section 624 declares that a special verdict is that by which the jury find the facts only, leaving the judgment to the court. Section 662 provides that the verdict of a jury may be vacated and a new trial granted by the court on its own motion, when there has been such a plain disregard by the jury of the instructions of the court or the evidence in the case as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice. *Held*, that where, in an action on a note, the record shows that, after the jury had made special findings fatal to plaintiff's recovery, the trial proceeded before the judge upon issues not submitted to the jury, and more evidence was introduced, the judge had no authority, in the absence of an express waiver of the findings by defendant, to set them aside, and render judgment for plaintiff, without first granting a new trial. 25 Pac. Rep. 552, reversed.

In bank. On rehearing.

Action on a promissory note by A. Montgomery against A. L. Sayre, executor. Judgment for plaintiff. Defendant appeals. Affirmed. A rehearing was granted. Reversed. For prior report, see 25 Pac. Rep. 552.

GAROUTTE, J. This cause was originally decided by the court in department, and, a rehearing having been granted, it is now before the court in bank. It was an action on a promissory note executed by defendant's testator to the plaintiff. It was given to secure the payment of the note of the Pioneer Gold Mining Company to the plaintiff for $110,000. This last note was indorsed by William S. Chapman. It was further secured by a mortgage on the Pioneer mine, executed by said company. The above facts appear, and are not disputed. It further appears that there was a prior mortgage executed by the company on the Pioneer mine, on which a suit for foreclosure was brought, and in this suit the plaintiff, who was one of the defendants therein, filed a cross-complaint, asking that his mortgage be foreclosed. This was done, and an order of sale issued directing the proceeds of the sale of the mine under the decree to be applied, first, to the payment of the prior mortgage, and the remainder upon the plaintiff's mortgage. The sheriff's return of sale showed a deficiency due on the second debt to plaintiff amounting to $61,534.13. Judgment for this deficiency was docketed against the mortgagor company and W. S. Chapman. This action was brought on the note to recover the amount claimed to be due thereon, to be paid by defendant in due course of administration. It is set up in the answer that the $110,000 note had been fully paid, and it was denied that any sum remained due and unpaid thereon. Other allegations of the complaint were denied. These need not be stated.

As an affirmative defense, the defendant set up by his answer the following: "(1) That a transcript of the docket of the deficiency judgment docketed against the Pioneer Mining Company and W. S. Chapman, the maker and indorser of the mortgage note, was filed with the recorder of Fresno county in November, 1887, and thus the judgment became a lien upon all the real property of said W. S. Chapman in said Fresno county. (2) That at and before the filing of said transcript Chapman owned certain real property described, situated in said county, which was held in the name of W. F. Goad, trustee for plaintiff, Montgomery, for further security for debts due Montgomery from Chapman. (3) That the said lien of said judgment was never enforced against said property of said Chapman, but that said Montgomery, Chapman, and Goad, after the death of said A. L. Sayre, sold and conveyed by deed to Thomas E. Hughes all of said real property for $95,000, paid by Hughes to Montgomery, which was received by Montgomery as payment from Chapman to him in full for all obligations, except the judgment aforesaid, which then amounted to less than $36,000, and that Montgomery thereupon released said land from the lien of said judgment. (4) That said real estate was then worth $140,000, and if sold at its real value would have realized enough to pay all debts due Montgomery from Chapman, including said deficiency judgment. (5) That said Montgomery released said land from the lien of said judgment, and released said Chapman from the obligation of said judgment, without the consent of defendant."

The case was tried by a jury on the 24th of April, 1889, and the following verdict rendered: "Question 1. What was the value, May 15, 1888, of the following lands, viz., [referring to the lands of Chapman in Fresno county]? Answer. $136,800. C. C. HARRIS, Foreman. Q. 2. Did the plaintiff, A. Montgomery, on or about May 15, 1888, release W. S. Chapman from all liability under the judgment in the complaint herein mentioned? A. Yes. C. C. HARRIS, Foreman."

This verdict, it appears, was in answer to special questions, embracing special issues, submitted to the jury by the questions above given. There was no other verdict, and no general verdict, nor does it appear that any general verdict was demanded by either party. It appears from the record that the trial proceeded after the return of the verdict, both parties introduced evidence, and on the 24th and 25th of April, 1889, it is stated, "said trial was completed, and submitted to the court for decision and judgment, with the privilege to the parties to file briefs herein, which was done." The court subsequently rendered its decision finding on all the issues in the case, disregarding the verdict, treating it as non-existent, and in fact finding contrary to the answers of the jury on the questions submitted to them, and rendered judgment for plaintiff for a sum of money. The defendant appeals from such judgment.

The foregoing facts are taken from the record, and upon them the merits of this appeal must be determined. The findings of fact by the court upon which the judgment in this action is based are directly opposed to the special findings of the jury. The jury found that the lands of Chapman in Fresno county were worth $136,800. The court found that $95,000 was the reasonable value of said lands. The jury found that plaintiff, A. Montgomery, did release W. S. Chapman from all liability under the judgment in the complaint mentioned. The court found that plaintiff, Montgomery, did not agree to release, and did not release, said Chapman from all or any liability under said judgment. These are vital issues in the action, for Sayre was in law a surety, and "a guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." Section 2819, Civil Code. And section 2840, subd. 1, provides that "a surety is exonerated in like manner with a guarantor."

If the court had the power to make the findings that it made upon these questions, then the judgment has ample support, but, if the verdict rendered is to be given any effect, then the judgment must be for the defendant. This is an action for the recovery of money, an action strictly at law, the defenses are legal defenses, and the verdict cannot be deemed as merely advisory to the court, as is the practice in equity cases. It seems from the record that all the issues involved in the case were not submitted to the jury, and for that reason the verdict may be termed an incomplete and imperfect special verdict. Section 624, Code Civil Proc.[1] If the court had adopted the special findings of the jury, and then had proceeded to take evidence and make findings upon the remaining issues in the case, and had made its judgment based upon all of such findings, it would have been presumed that a jury had been expressly waived as to the issues tried and determined by the court. This was the *status* of the record in Shepherd v. Jones, 71 Cal. 224, 16 Pac. Rep. 711, and the court said: "Conceding that this method of procedure was irregular, still no objection appears to have been taken to it by either side, and we must presume that it was adopted by consent." This being an action at law, the defendant was entitled to have the issues made tried by a jury. A jury was impaneled, tried some of these issues, and found facts fatal to plaintiff's right of recovery; and it is only upon the one theory that, after this verdict was rendered, defendant stipulated that it should be set aside, a jury trial waived, and the entire cause tried by the court, that the judgment in this action can be sustained. If the question were, did the defendant waive his right to a trial by jury? the record being silent upon the question, and the case having been tried and determined by the court, there would be no difficulty, for the authorities are explicit to the end that such would be the presumption. Tunnel Co. v. McKenzie, 67 Cal. 490, 8 Pac. Rep. 22. But this is not a question of a waiver of a jury trial, for a jury was had, evidence taken, and a verdict rendered upon vital issues. This court will indulge in all proper intendments necessary in order to support the validity of a judgment where an appeal is presented to us solely upon the judgment roll; but we think upon the face of this record there is sufficient to indicate that this trial in the lower court took not only a novel, but inconsistent and unlawful, course. To support this judgment we are required to presume that defendant voluntarily relinquished the verdict of a jury, which verdict formed a perfect legal defense to plaintiff's right of recovery, then waived a trial by jury, and risked the chances of adverse findings upon the same issues with others by the judge. We think the presumption violent, and entirely too weak to form a foundation upon which to test the merits of a cause involving large property rights.

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[1] Code Civil Proc. Cal. § 624, declares that a special verdict is that in which the jury find the facts only, leaving the judgment to the court. Section 625 provides that, in an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict.

A fair interpretation of the recitals in the record is that both parties proceeded and introduced evidence upon the issues not submitted to the jury, but which were necessary to a full and final determination of the cause, in accordance with Shepherd v. Jones, supra. If such were the fact, this verdict was alive at the conclusion of the evidence, and could only have been rendered nugatory by some act of the court subsequent to that event, and, allowing the court all the power that the law allows, it was still wanting in power to render a judgment at the time contrary to the verdict. Section 662 of the Code of Civil Procedure[1] provides "that a verdict of a jury may be vacated and a new trial granted by the court in which the action is pending on its own motion, when," etc. In this case a jury was impaneled, and a verdict rendered as to certain issues, and it is unnecessary to closely scrutinize that verdict to ascertain whether it is defective and informal, or complete and perfect. It was the verdict of a jury placed in the box to try the cause, and it cannot be disregarded until set aside and vacated by the court. And we have already seen the court made findings directly contrary to this verdict, and this action of the court was, in effect, to vacate and set it aside. It is immaterial whether such action was had by reason of defects and informalities in the verdict, or whether the evidence was such as to indicate that it was rendered through passion or prejudice; the result would be the same, and that result would be that a new trial should have been ordered. Such is necessarily the law, for if it were otherwise parties would be deprived of their right to a trial by jury. When the court set aside and vacated the verdict it was its duty to order a new trial. It had no power to proceed to determine the cause. "As the court cannot enter a verdict contrary to the will of the jury," (Hine v. Robbins, 8 Conn. 347,) so it cannot substitute its judgment for theirs, and assume the power to decide issues of fact once submitted to the jury. We conclude, therefore, that the verdict was set aside and vacated by the court, and that the court had no power to proceed and determine the cause, but should have ordered a new trial. Let the judgment be reversed, and the cause remanded.

We concur: BEATTY, C. J.; DE HAVEN, J.; MCFARLAND, J.; PATERSON, J.; HARRISON, J.

91 Cal. 260

VISHER v. SMITH *et al.* (No. 14,104.)

(*Supreme Court of California.* Sept. 18, 1891.)

CLAIM AND DELIVERY—PLEADING—TITLE AND POSSESSION.

1. In an action against warehousemen to recover a quantity of barley, the complaint alleged that plaintiff delivered the barley to defendants for storage, and set out the warehouse receipt, which recited that the barley was deliverable to plaintiff on return of the receipt; that plaintiff tendered the storage charges; and that on a certain day he presented the receipt to defendants, and demanded a return of the barley, which defendants refused, without giving any reason therefor. *Held*, that the complaint was not objectionable on the ground that it did not allege that plaintiff was the owner and entitled to the possession, since it stated the particular facts which entitled him to possession, and thus specially pleaded his title.

2. Where the complaint set forth the receipt and contract of defendants to deliver the barley, and alleged defendants' refusal to redeliver on demand without their offering any excuse, the complaint is not subject to the objection that it does not allege that, at the commencement of the action, defendants were actually or constructively in possession of the property.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; JOSEPH H. BUDD, Judge.

Action by P. Visher against J. W. Smith and H. E. Wright, copartners, for the possession or price of a quantity of barley stored with the defendants. Judgment for defendants. Plaintiff appeals. Reversed.

Carter & Smith, for appellant. *Loutitt, Woods & Levinsky*, for respondents.

FITZGERALD, C. The complaint in this action substantially alleges that the defendants were at the times named therein engaged as copartners in the business of warehousemen, and as such doing a general storage business. That "prior to the 3d day of July, 1888," plaintiff delivered to the defendants for storage, and stored with them, 1,040 sacks of barley, in consideration and acknowledgment of which the defendants then and there executed to plaintiff a receipt and contract in the words and figures following, to-wit:

"No. 36. Stockton, Cal., July 3, 1888.

"Received on storage in Bagg's warehouse, awaiting transportation for account of P. Visher, the following described merchandise, at the rate of $0.75 per ton, for the season ending June 1, 1889, deliverable (damage by the elements excepted) only on the return of this receipt and charges paid.

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[1] Code Civil Proc. § 662, provides that the verdict of a jury may also be vacated and a new trial granted by the court on its own motion, "where there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice."

Marks.	Pile No.	One thousand and forty
	151.	sacks of barley, weighing one hundred thousand and fifteen lbs.

"Sacks 1,040.
"Weighing 100,015 lbs.
"[Signed] SMITH & WRIGHT."

—That plaintiff is now, and ever since its delivery to him by defendants has been, the owner and holder of said receipt. That storage was paid by plaintiff on the barley for the season ending June 1, 1889. That on or about the 2d day of September, 1890, he produced said receipt, and presented it to the defendants, without any indorsement thereon, and in the same condition as when executed, and at the same time tendered to them all charges due for storage on said barley for the seasons ending June 1, 1890, and June 1, 1891, and then and there demanded the delivery of the barley to him, also offering to surrender and give up the receipt upon the delivery thereof. The defendants refused to deliver the barley without giving any excuse or reason therefor. Plaintiff demands judgment against the defendants for the recovery of the possession of the barley, or for the sum of $1,350, the alleged value thereof, in case delivery cannot be had. The complaint was demurred to on the ground that it "does not state facts sufficient to constitute a cause of action." The demurrer was sustained by the court, and, upon plaintiff refusing to amend his complaint, judgment final was rendered in favor of the defendants. The case comes here by appeal upon the judgment roll alone. It is objected by respondents that the complaint is insufficient, "because it contains no averment that at the time of the commencement of the action plaintiff was the owner and entitled to the possession of the property claimed." The complaint, instead of alleging generally that plaintiff is the owner and entitled to the immediate and exclusive possession of the barley, states the particular facts which entitle him to such possession, and thus specially pleads his title thereto.

It is further objected "that the complaint does not allege that defendants at the time of the commencement of the action were in the possession, either actually or constructively, of the property claimed." The possession of the barley by the defendants, and their obligation to redeliver, is shown by the receipt and contract set out in the complaint, from which, and their subsequent refusal to deliver it upon plaintiff's demand without giving any excuse or reason therefor, the law will presume the barley to have been in the defendants' possession at the time of the commencement of the action, and the wrongful detention thereof follows as a necessary conclusion from the refusal to deliver under such circumstances. While the complaint is not in all respects as artificially drawn nor as precise and direct in its statement of facts as it might have been, and while there are defects of form that could have been taken advantage of by special demurrer, still, upon the facts stated, we are of the opinion that the complaint is sufficient as against a general demurrer. We therefore recommend that the judgment be reversed, with directions to the court below to overrule the demurrer.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, with directions to the court below to overrule the demurrer.

98 Cal. 86

McDANIEL *et al.* v. PATTISON *et al.* (No. 14,280.)

(*Supreme Court of California.* Sept. 16, 1891.)

EQUITY JURISDICTION—PROBATE OF WILL—SETTING ASIDE DEED.

A bill in chancery by certain devisees of a will alleged that another devisee fraudulently suppressed the will, and altered a deed, whereby testator had conveyed to him a small portion of land, so as to include the entire property of the testator, and demanded that the deed be set aside and the property distributed in accordance with the will, which, it was alleged, could not be probated under Code Civil Proc. Cal. § 1339, providing that no will shall be proved as lost or destroyed unless its provisions are clearly and distinctly proved by at least two credible witnesses. *Held,* that the chancery court has no jurisdiction to probate a will, though such relief is sought only incidentally to the main equitable relief; and the fact that the devisees are also heirs at law will not enable them to obtain the relief demanded, since, having alleged a will, their rights arise only from it.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKINLEY, Judge.

Action by Sarah E. McDaniel and others against J. H. W. Pattison and another, to set aside certain deeds, etc. Judgment for plaintiffs. Defendants appeal. Reversed.

J. L. Murphey and *Anderson, Fitzgerald & Anderson*, for appellants. *Chapman & Hendricks*, for respondents.

GAROUTTE, J. Plaintiffs are the daughter and children of another daughter of A. M. Pattison, deceased, and the defendants are the widow and son of said deceased. This was an action to cancel and annul certain deeds, to-wit: (1) A deed executed by A. M. Pattison (now deceased) to J. H. W. Pattison, except as to two certain lots in the Orchard tract; (2) a deed executed by defendant J. H. W. Pattison and wife to defendant Mary Pattison, widow of A. M. Pattison, deceased; (3) a deed executed by Mary Pattison, widow, to J. H. W. Pattison. In addition to the foregoing, plaintiffs also asked that the property belonging to A. M. Pattison at the time of his death be declared vested in the plaintiffs and defendants, as follows: "That said Mary Pattison, widow, shall have a life-estate therein, and after her death that the same shall vest in the children of herself and said deceased in equal undivided one-third interests." There is other relief prayed for, concerning an accounting for moneys of the said deceased, held by J. H. W. Pattison, unnecessary to mention in detail.

Among other matters, the complaint alleges "that A. M. Pattison died April 5, 1885, a resident of Los Angeles county.

Cal., and plaintiffs and defendants are his heirs at law; that upon the 4th of March, 1885, said Pattison was seised in fee of valuable real estate in Los Angeles city, and in Carthage, Mo.; that on the 5th day of September, 1884, said Pattison made a will, by which all of his property was left to his widow for life, and after her death to pass in three equal shares, one to plaintiff McDaniel, one to plaintiffs the children of a deceased daughter, and the third to defendant J. H. W. Pattison: that said will was his last will and testament, was unrevoked at the time of his death, and has not been probated, but was fraudulently destroyed or suppressed by defendant J. H. W. Pattison; that upon the 4th day of March, 1885, said deceased made a deed to defendant J. H. W. Pattison, conveying two lots in the Orchard tract, and said defendant fraudulently altered said deed, so as to include all the real estate of his father, said Pattison, deceased, both in Missouri and California; that afterwards, said defendant Pattison made a deed to his mother, defendant Mary Pattison, purporting to convey all of the property fraudulently inserted in the said prior deed, and that subsequently thereto the mother, Mary Pattison, made a deed purporting to convey a portion of said property back to her son, the said defendant; that the said mother was old and feeble, under the influence of her son, and that these deeds were altered, made, and procured to be made by said son, J. H. W. Pattison, for the purpose of defrauding plaintiffs; that said defendant has taken possession of six thousand dollars in money of the estate, and has made no account thereof," etc. The defendants jointly answer, and deny the allegations of the complaint, especially those pertaining to the alleged fraud of the defendant J. H. W. Pattison. Judgment was rendered for the plaintiffs as prayed for, and this is an appeal from that judgment, and the order denying defendants' motion for a new trial.

We have in the complaint in this case an allegation that plaintiffs are heirs at law of the deceased, Pattison, and also the further allegation that they are devisees under an unprobated fraudulently destroyed last will and testament. In this cause plaintiffs appear to have relied chiefly upon their standing as devisees under this alleged will, rather than as heirs at law, and it is from this position that the trial court viewed the action, for we find its decree vesting title to the property of A. M. Pattison, deceased, according to the alleged provisions of the will. Counsel for appellants, with great vigor and learning, assail the jurisdiction of the court to hear and determine the matters involved herein, "insisting that an adjudication of such matters necessarily involves the probate of a will and distribution thereunder; that the trial court did in fact probate the will, and according to its provisions decreed title thereunder; that these are matters solely and exclusively within the jurisdiction of the superior court as a court of probate; and that a court of equity had no jurisdiction whatever to adjudicate upon them." Respondents insist "that this action is not brought for the purpose of probating a will; that is a matter, while necessary for the determination of the case, merely incidental to the main relief sought, to-wit, the annulment of certain deeds and a decree quieting title. They insist that an heir has fraudulently destroyed or suppressed a will and fabricated a deed, and thereby made it appear that the testator has conveyed to him all the property he had in the world; that owing to the peculiar facts of this case, as disclosed by the evidence, it is impossible that this destroyed will could ever be proved in the probate court; that the title of these plaintiffs, as devisees, vested immediately upon the death of the testator, and without the probate of the will; and when the defendant J. H. W. Pattison, by fraud, attempts to deprive them of it, under the circumstances as here disclosed, a court of equity has jurisdiction to administer relief."

Thus it will be seen that the jurisdiction of a court of equity to hear and determine these matters is the pivotal point in the case. While there was no demurrer filed to the complaint, yet appellants insist that plaintiffs do not state a cause of action, and that, therefore, the decree has not sufficient support upon which to stand. The evidence is much broader than the pleading, and conditions often arise where an inherently defective pleading may be cured by the evidence and findings of the court, but such is not the present case, for the findings of fact follow the pleading rather than the evidence. Plaintiffs rely upon their *status* as devisees under the will of A. M. Pattison, deceased, for the right to maintain this action. Their title to the realty, their right of action, the relief demanded and decreed, are all based by the complaint and judgment upon the alleged will, yet the complaint alleges that the will was not probated; neither does it give any reason or excuse why probate had not been had. To be sure it states that defendant J. H. W. Pattison had destroyed and suppressed it, but that adds no weight to their position, for the law expressly provides for the probating of lost and destroyed wills. Code Civil Proc. § 1338 et seq. In Wood v. Mathews, 53 Ala. 1, it was decided that "courts of law and equity in this country will not take cognizance of testamentary papers, or of the rights dependent on them, until after proper probate." And again, the court said: "The law of this state confers upon the courts of probate original and exclusive jurisdiction, not only of the probate of wills of personalty, but of realty; and the only evidence of the existence of such will, which can be received in any other forum, is the sentence of that court declaring its authenticity and validity." In Shepherd v. Nabors, 6 Ala. 637, the question presented was whether the legatee of personal property could recover it at law until the will had been admitted to probate in the proper forum. The court quoted approvingly the following declaration of Lord Kenyon, in Rex v. Inhabitants of Netherseal, 4 Term. R. 258: "We cannot receive any other evidence of there being a will in this case than such as would be sufficient, in all other cases, where titles are derived under a will, and nothing but the probate or letters of administration with the will annexed are legal evidence of the will in all cases of personalty." To the same effect is Armstrong v. Lear, 12 Wheat. 169; Campbell v. Sheldon, 13 Pick. 22; Fotheree v. Lawrence, 30 Miss. 416; Olney v. Angell, 5 R. I. 198.

In the case of Castro v. Richardson, 18 Cal. 480, this court said: "We understand it to be the settled doctrine of the courts of this country that, where the proceedings in probate are conclusive of the validity or the invalidity of the will, it cannot be received in evidence to maintain a title founded upon it until it has been admitted to probate." And again: "It is unnecessary for us to accumulate authorities upon this subject; there is no doubt that this is the prevailing doctrine wherever similar statutes exist and the matter has undergone consideration by the court." That case was an action of ejectment, and one of the links relied upon by plaintiff in setting out his chain of title was an unprobated will, and this court said, "The facts stated in the complaint do not make out a title in the plaintiff," and the judgment was reversed. By the same line of reasoning, how can it be said that plaintiffs, as devisees under an unprobated, destroyed will, have such title to realty as to maintain an action to set aside and cancel deeds to such realty upon the grounds of fraud? Their title rests upon this alleged unprobated will,—a will that has been fraudulently destroyed,—a fact in itself that weakens their position, for the difficulties arising in establishing its probate are largely increased. It is plaintiffs' muniment of title, yet until stamped as genuine by the seal of the proper tribunal it cannot be received in evidence in other courts, and no rights can be asserted under it. Of itself it can have no more effect in transferring or vesting title than a deed without delivery. Conceding it would fortify plaintiffs' position if facts were stated in their complaint showing why this will has not been probated, and why it cannot be probated by the regular course of proceeding in the tribunal established for such purposes, yet they have entirely failed so to do. Respondents' counsel insist that, even if they have not shown a right of action as devisees, yet they have alleged themselves to be heirs at law, and are therefore entitled to maintain the action in that capacity. In this case the coincidence arises that the heirs at law and devisees under the will are identical, still it does not follow, if the will under which they claim to hold as devisees has not been probated, that they have any rights to the testator's property as heirs at law. Plaintiffs allege that they are devisees under an unprobated will. If it had been a probated will, their position as heirs at law would have had no value whatever, and the fact that it has not been probated does not add strength to their position. As against the pleader, we assume this document to be a valid, genuine will, which would be probated in the regular way if presented to the probate court; and until presented and probate rejected these plaintiffs, as heirs at law, have no rights in the property which can be maintained either in courts of law or equity. We conclude, therefore, that the complaint does not state a cause of action, and consequently the decree has no sufficient support.

Inasmuch as, if the case were reversed solely upon the foregoing ground, it would be remanded to the lower court for a new trial, with permission to the plaintiffs to amend their pleading, if they deemed such a course advisable, we feel constrained to take a broader view of this question, and determine whether a court of equity, under any state of facts, and especially under the state of facts as developed by the evidence in this case, viewed by the light of the laws of California, has jurisdiction to set up and prove a will, either directly or as incidental to other relief sought. The authorities already cited and principles announced oppose such doctrine, but let us look further. The right of jurisdiction in this case rests upon the following facts, which respondents insist are disclosed by the evidence: That A. M. Pattison died leaving a last will and testament; that defendant J. H. W. Pattison, a son, in pursuance of a scheme to defraud plaintiffs of their interest in the property, after his father's death destroyed the will; that in furtherance of this scheme he made false deeds to himself of the property, and procured, by undue influence, his mother, who was old and feeble, to make certain other deeds therefor; that the aforesaid will has not been probated, and cannot be probated in the regular channel, as there are only two persons acquainted with its provisions, and one of these is the defendant in fraud, who will not testify truthfully thereto, the statute requiring that its provisions be proven by the evidence of two credible witnesses. It appears from the foregoing that the plaintiffs are in a very unfortunate position, and that the defendant J. H. W. Pattison is a very bad man; yet is this the proper proceeding, in the proper court, to right these wrongs and punish the offender? It is difficult to comprehend why the power of the probate court has not been invoked to prove this will; its powers are full, ample, and complete; machinery is provided to force the truth from a false and scheming witness; and, finally, if probate were denied, as heirs at law, plaintiffs' rights would be amply protected, and thus their situation is much more pleasant than though they were not in the direct line of succession. We do not see how this action can be maintained even under the facts claimed.

In this state the provisions of the Code form a complete and perfect system, in relation to the probate of wills, whether those wills are in existence, or lost or destroyed. In the Broderick Will Case, found in 21 Wall. 517, the supreme court of the United States, in speaking of the law of California relating to probate of wills, said: "In view of these provisions, it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth." In note 3 to section 1158 of Pomeroy's Equity Jurisprudence, the author says: "On the contrary, the doctrine seems to be general, if not universal, throughout the states, that a court of equity will not recognize nor act upon a will of land or of personal property until it has been admitted to probate." The case of Gaines v. Chew, 2 How. 619, a leading case upon this question, declares that, before any title could be set up under the will, it must be probated in the probate court, holding that in Louisiana the probate court had exclusive jurisdiction of those matters. In the opinion Justice McLean suggested that, if all other remedies failed, "it might be a matter of grave consideration, whether the inherent powers of a court of chancery might not afford a remedy, when the right was clear, by establishing the will of 1813." In the Broderick Will Case, 21 Wall. 503, referring to this language, the supreme court of the United States said: "Of course, the latter expressions were *obiter dicta*, and can scarcely be said to have the support of any well-considered case." And again, the court say in the same case, referring to the law of this state: "On the establishment or non-establishment of the will depended the entire right of the parties, and that was a question entirely and exclusively within the jurisdiction of the probate court. In such a case a court of equity will not interfere, for it has no jurisdiction to do so. The probate court was fully competent to afford adequate relief."

The cause at bar is in the nature of an action to quiet title, yet in Pomeroy's Equity Jurisprudence, § 1158, the author says: "The rule is settled in England that a devisee in possession is entitled at any time to maintain a suit against the heir at law of the testator, for the purpose of establishing the will, * * * although the will creates no trusts, but gives the devisee a purely legal estate, and although it is not necessary to administer the estate under the direction of the court of chancery. * * * In both instances the suit is in the nature of a bill to quiet title. For obvious reasons, no such jurisdiction probably exists in any of the states, certainly not in the great majority of them." In the case of Morningstar v. Selby, 15 Ohio, 345, in which state the court of common pleas answers to our superior court, having both an equity and probate department, it was attempted to probate a fraudulently destroyed will upon the equity side of the court, there being no statutory provision, as in this state, providing for probate of lost and destroyed wills. After an exhaustive examination of the law upon the question, the court said: "Those authorities, carefully examined, will show that a court of chancery has no inherent power, either in England or America, to establish a lost will;" and, under the provisions of a constitution very similar in these respects to ours, held, that the probate court had exclusive jurisdiction of all matters pertaining to probate proceedings, and denied the application. This is the first instance arising in this state where it has been sought to prove a will otherwise than by a decree of the probate court, and to that extent we move on untrodden ground. The fact that this will has been suppressed or destroyed in fraud, rather than lost through accident or mistake, does not affect the question of jurisdiction. No such distinction is recognized by the provision of the Code of Civil Procedure, and fraud, accident, and mistake demand equal attention, when knocking at the doors of a court of equity. In Rosenberg v. Frank, 58 Cal. 403, it was decided that, as to the probate of a will, the jurisdiction of the probate court is exclusive. At the same time in that case a divided court held that a court of equity had jurisdiction to construe a will, thereby encroaching upon the jurisdiction of the probate court to an extent not equaled in any other decision found in the Reports of this state. We might add, the correctness of the law there found, as to the jurisdiction of a court of equity to construe a will under the laws of this state, is not only doubted, but the effect of the decision is very much limited in Siddall v. Harrison, 73 Cal. 562, 15 Pac. Rep. 130.

The principles laid down and reasoning had in Morningstar v. Selby, supra, and cases there cited, also militate strongly against the doctrine. In Re Bowen, 34 Cal. 689, in speaking of the provision of our former constitution, the court said: "This is a comprehensive grant of probate jurisdiction, and, as there is nothing in the article granting concurrent jurisdiction, the grant to the probate court must be held exclusive." In Castro v. Richardson, previously cited, the court said, in speaking of probate of wills: "It was intended that the mode of proof pointed out by the statute should be uniformly pursued, and, to give effect to that intention, it is necessary to maintain the exclusive authority of the probate court." In State v. McGlynn, 20 Cal. 271, the court, in speaking of decrees in the matter of probate of wills, said: "It is necessary for the repose of society that it should be definitely settled by one judgment, and not be left to be buffeted about by different and possibly conflicting judgments of different courts." Respondents' counsel insist that the decree in this case simply probates the will for the purposes of this case, and as incidental to the main relief sought, yet, if the probate court has exclusive jurisdiction of the matter and the will has no life until probated, the decree would *pro tanto* repeal those principles of law. The conflict is irreconcilable, and the decree must fall.

It is quite evident that, if a court of chancery cannot entertain direct jurisdiction to establish a will, it can possess no jurisdiction to do so as incident to jurisdiction over other matters. Such a course would lead to grave complications, would destroy the uniformity contemplated in the mode and manner of proof, and would be opposed to the system established by the constitution and statutory laws of California. Respondents insist that as the will has been destroyed, and as they are unable to prove its contents by two witnesses, as required by section 1339 of the Code of Civil Procedure, and for that reason have no standing in the probate court, the court of chancery should take jurisdiction and admit it to probate. Conceding the jurisdiction of such court, we are not prepared to say the rule of evidence would not be the same, for, if it were otherwise, the safeguard thrown around the rights of heirs would be lost, and the statute rendered entirely nugatory. But the court has no such jurisdiction. A judgment of probate being a judgment *in rem*, a judgment binding every one who has any interest, it is of the soundest policy that one tribunal should have vested in it exclusive power to hear and determine, no matter what may be the nature or character of the will, and no matter what may be its situation or condition. Such, undoubtedly, was the end and object sought to be attained by the framers of our law in the enactment of a full, complete, and comprehensive probate procedure. Respondents have cited many cases holding that the fraud of the spoliator affords ground for the intervention of a court of equity, but we do not think they are the better authority, and the weight of authority is the other way. But whatever may be the conflict in the decisions of courts of other states, we think the doctrine contended for has no sufficient support in this state, and is opposed to the spirit of her jurisprudence upon probate matters. The law in this state does not look that way. Let the judgment and order denying a new trial be reversed, and the cause remanded.

I concur: HARRISON, J.

PATERSON, J. I concur. If the plaintiffs were heirs at law, I think they could maintain an action to set aside the deed under section 1452, Code Civil Proc. From their own showing, however, they are not heirs at law, but devisees; and until the will has been probated, and their *status* as devisees has been judicially fixed by the probate of the will, they cannot maintain an action. It is alleged in the complaint that the will was "fraudulently destroyed, or concealed, or suppressed, and was never admitted to probate or filed in the court, and is now in the control of said J. H. W. Pattison, unless the same has been destroyed by him." The finding of the court is in the same disjunctive, equivocal form. It may be that on petition for letters the defendant will produce the will. It does not appear that any attempt has been made to secure its production, and, taking the pleadings most strongly against the pleader, we must assume that it can be produced.

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91 Cal. 231

KIESSIG v. ALLSPAUGH *et al.* (No. 14,405.)

(*Supreme Court of California.* Sept. 16, 1891.)

CONTRACTORS' BONDS—RIGHTS OF SURETIES.

In an action on a bond, it appeared that the principals and surety had executed it to plaintiff to secure him against claims or liens for labor or material used in the construction of a building which the principals in such bond had contracted to erect. The contract and bond were unrecorded. Plaintiff, by the contract referred to in the bond, was authorized to retain one-fourth of the price of construction until final settlement of the parties thereto. Upon completion of the building, plaintiff paid the contractors the full amount. There was no evidence of the surety's assent to such payment. At the time of such payment there were existing valid liens for labor and material used in constructing the building, which plaintiff subsequently paid. Plaintiff sued the obligors in the bond for the amount of these liens. *Held*, that the surety was not liable, since the sum which the contract authorized plaintiff to retain was charged with a trust in favor of the surety, as security against the liens, and without his consent it could not be paid to his principals.

Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Action by Kiessig against Allspaugh and Hall as principals, and Lundeen as surety, on a building contractor's bond. Judgment for plaintiff. Defendant Lundeen appeals. Reversed as to Lundeen.

Parish, Mossholder & Lewis, for appellant. *Carl Schutze*, for respondent.

DE HAVEN, J. The defendant, Lundeen, was a surety for his co-defendants, Allspaugh and Hall, upon a bond executed to plaintiff to indemnify and save him harmless against any claims or liens for material or labor used or employed by his principals in the construction of a building, which they had theretofore contracted to erect for plaintiff. The contract price for the construction of the building was $8,000, and by the terms of the building contract the plaintiff was authorized to retain one-fourth of that sum in his hands until final settlement between the parties thereto. The complaint alleges "that after the time said house had been finished, and when final settlement was made as per contract aforesaid, there were good and valid claims and demands and liens for material and labor expended and used in the building, construction, and finishing said house, in excess of the contract price of said building, to the amount of one thousand eight hundred seventeen 25-100 dollars;" and that by reason of the failure of the contractors to discharge them the plaintiff was compelled to pay the same after having paid the full contract price for the house. This action is brought against the principals and sureties on the bond referred to, to recover the amount so paid by plaintiff. The plaintiff recovered judgment in the superior court, and from that judgment the defendant Lundeen prosecutes this appeal. The judgment cannot be sustained upon the facts. The appellant Lundeen was a surety, and as money sufficient to satisfy all of the liens mentioned in the complaint was, or ought to have been, in the hands of the plaintiff at the time of his settlement with the contractors, he should have so applied it, instead of paying it to the contractors. This balance was to be retained in his hands as an additional security against liens upon the building, and in equity he held the same also for the benefit of the sureties. It was a special fund to which they had a right to look for their indemnity, and in view of which it must be supposed that they assumed the obligation of sureties, as the original contract is referred to in the bond as the inducement or consideration for its execution, and the plaintiff was not authorized to surrender it without their knowledge or consent, and, having done so, the appellant was discharged. Bragg v. Shain, 49 Cal. 131; Taylor v. Jeter, 23 Mo. 244. In this latter case the court used this language: "The contract duty of this builder was to furnish the materials and do the labor, and he failed in both respects when he allowed the building to be incumbered with these liens. The owner, having notice of them, and paying what, by the substantial terms of the contract, he was entitled to retain until they were removed, voluntarily abandoned an ample fund, which, according to the conditions of the contract, was to accumulate in his own hands as the primary security for its due performance, and in which the surety had an equal interest with himself. He must, therefore, bear the loss occasioned by his own negligence or folly." This is an elementary rule of law governing the relation of principal and surety, and is thus stated by the master of the rolls in Law v. East India Co., 4 Ves. 829. "It cannot be contended, upon any principle that prevails with regard to principal and surety, that when the principal has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety can be called upon." The failure of the plaintiff to retain this balance, or to apply it for the satisfaction of the obligation for which the appellant was surety, does not present the case of a mere neglect upon the part of a creditor to insist upon a set-off in his favor, arising out of some other transaction, before paying what might be due on a particular contract, but was the neglect to resort to a fund already in his hands for his own protection, in the very matter for which the defendant was a surety, and which fund was therefore charged with a trust in favor of appellant, and its surrender without his consent constitutes a defense to this action. Judgment reversed as to appellant Lundeen.

We concur: McFarland, J.; Sharpstein, J.

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91 Cal. 285

BLAISDELL v. McDOWELL. (No. 14,344.)

(*Supreme Court of California.* Sept. 19, 1891.)

VALIDITY OF CHATTEL MORTGAGE — SECURING PURCHASE PRICE.

Civil Code Cal. § 2955, provides that "mortgages may be made upon * * * furniture in hotels, lodging or boarding houses, when mortgaged to secure the purchase money of the articles mortgaged." *Held*, that a mortgage given to secure money advanced to purchase the hotel furniture covered by the mortgage was valid.

Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Action by S. G. Blaisdell against S. A. McDowell. Judgment for plaintiff. Defendant appeals. Affirmed.

L. L. Boone, for appellant. *M. S. Babcock*, for respondent.

McFARLAND, J. The main question in this case—and the only one requiring notice—is whether a certain mortgage of hotel furniture executed by George W. Butterfield and William P. Baker to Bryant Howard is valid, under section 2955 of the Civil Code. The facts in the case are these: Butterfield and Baker, being desirous of purchasing about $1,500 worth of furniture for the Arlington Hotel, in San Diego, made arrangements with Bryant to advance the money with which to buy the furniture, agreeing to give him a mortgage on the same as security. It was specially understood between them that the money to be advanced by Bryant was to be used by Butterfield and Baker in purchasing said furniture. For this purpose Bryant deposited $1,500 in bank to their credit, and they paid for the furniture by drawing checks against said deposit. When the furniture was in the hotel they gave the mortgage to Bryant, the mortgage being in form as provided by the Code, and duly recorded. Said section 2955 of the Civil Code provides that "mortgages may be made upon: * * * *Eighth*, upholstery and furniture used in hotels, lodging or boarding houses, when mortgaged to secure the purchase money of the articles mortgaged;" and appellant (defendant in the court below) contends that the mortgage here in question was not given to secure the "purchase money" within the meaning of that section. His contention is that as, under the general rule, mortgages of personal property are void unless there is a change of possession, the statutory provision which alters that rule must be strictly construed, and applied only to cases where the mortgage runs directly from the purchaser to the seller to secure the amount agreed to be paid by the former to the latter. But, if the statute is to have a literally strict construction, it is difficult to see why the phrase "to secure the purchase money" does not as closely apply to money by which the purchase was made as to the case of a debt where no money was used. But the section of the Code in question should have a reasonable construction with a view of executing the evident design of the legislature in enacting it. While the language used should not be strained to include cases clearly not embraced by it, the meaning to be given to it should not be so narrowly circumscribed as to exclude cases clearly within it. The evident intent of the legislature was to encourage certain kinds of business by allowing persons to procure certain personal property necessary to the business, by giving a mortage lien upon the property itself; and money advanced for the express and special purpose of procuring such property is as much within both the spirit and letter of the law as a debt incurred immediately to the seller. If Bryant had gone through the form of buying the furniture from the sellers, and selling it again to Butterfield and Baker, there could have been no question about the validity of the mortgage; but surely the law does not require such a vain thing to be done when it so clearly appears that the advance of the money and the purchase of the furniture were substantially one transaction. No other state has a statute similar to the one here under review; but one or two authorities have been cited where, with respect to property exempt from execution, "purchase money" has been given a meaning similar to that contended for by appellant. We think, however, that the case at bar should be governed by the principle applied in Lassen v. Vance, 8 Cal. 271, which was a contest between a homestead claimant and one holding a mortgage for the money which he had advanced for the purchase of the land. In that case the court say: "The money of the plaintiff paid for the lot, and it would be an exceedingly harsh rule of law that would defeat his mortgage upon the very property purchased with the money furnished by himself." It is true that the court said that the deed and the mortgage were "simultaneous acts," but the same was practically the case with the purchase of the furniture in the case at bar. Judgment affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.

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91 Cal. 274

STANTON v. FRENCH. (No. 14,319.)

(*Supreme Court of California*. Sept. 19, 1891.)

EXEMPTIONS—PEDDLERS—ATTORNEY'S FEE.

1. Where the debtor's principal business is that of a peddler, the fact that he occasionally uses in other ways the team and wagon employed therein will not deprive him of the benefit of Code Civil Proc. Cal. § 690, subd. 6, exempting from execution the two horses, wagon, and harness by the use of which a peddler habitually earns his living.

2. A bread-box, used by a debtor in his business as a peddler of bread, is not exempt, as it is not named in the list of articles exempted by Code Civil Proc. Cal. § 690.

3. In an action for the conversion of personal property, plaintiff asked judgment for $350 as the value of the property alleged to have been converted, together with interest on such amount, and $150 for attorney's fees incurred in the pursuit of the property. The court charged that before plaintiff could recover any amount as attorney's fees he must show by a preponderance of evidence that such amount was reasonable for the services rendered. There was no evidence as to the reasonableness of the attorney's fee. There was a verdict for plaintiff for $375, which was less than the amount claimed as the value of the property and interest. *Held*, that it would be presumed on appeal that the jury followed the instructions of the court, and rejected the claim for attorney's fees.

Department 1. Appeal from superior court, Merced county; C. H. MARKS, Judge.

Action by John Stanton against H. W. French for conversion. Verdict and judgment for plaintiff, and defendant appeals. Modified and affirmed.

J. K. Law and *Tupper & Tupper*, for appellant. *Frank H. Farrar*, and *Breckinbrenbridge & Peck*, for respondent.

GAROUTTE, J. This is an action in conversion, brought to recover the value of two horses, a wagon and harness, and a bread-box. The property was taken and sold by defendant as constable, under an execution against plaintiff and his wife. Plaintiff demanded a return of the property as exempt from execution, under subdivision 6, § 690, Code Civil Proc.,[1] claiming that as a peddler of bread he habitually earned his living by the use of said property. This is an appeal by defendant from the judgment and order denying his motion for a new trial. It is the second appeal to this court, the former decision being found in 83 Cal. 194, 23 Pac. Rep. 355.

Plaintiff bases his claim for exemption upon his *status* as a peddler of bread. In the list of property allowed peddlers by statute as exempt from execution we find no article answering in name or use to a bread-box, and a debtor's claims are limited by the words of the statute.

Upon an inspection of the record in the previous appeal, we find no material difference in the evidence there and that which is now before us, upon the matter of the ratification by plaintiff of the sale by the officer, and the former decision upon that point establishes the law of the case. It appears that plaintiff and his wife conducted a bakery upon a limited scale in the town of Merced; that they sold bread at the shop, and also the plaintiff daily peddled bread throughout the town and at the railroad depot upon the arrival of trains, etc. In the interim the plaintiff did odd jobs with his team for hire, but his principal business was peddling bread, with the use of his horses and wagon. Can it be said that plaintiff habitually earned his living by peddling? Webster defines "habitually" as "customarily;" "by frequent practice or use." It does not appear to mean "exclusively" or "entirely," and the fact that plaintiff may have to a limited extent applied his team to other uses, or that some portion of his living, however slight that portion might be, came from some other avenue of industry, would not deprive him of his rights as a peddler under the statute. This question, as well as the question as to the ownership of the bay horse, were questions of fact, and were submitted to the jury under proper instructions. There is sufficient evidence upon both matters to support the verdict, and it will not be disturbed by this court.

It does not seem necessary to enter into a discussion as to the liability of defendant for plaintiff's attorney's fees in this action. Plaintiff claimed the value of the property converted to have been $350, and in addition thereto asked judgment for legal interest thereon from January 27, 1887, and damages in the sum of $150 for attorney's fees incurred in the pursuit of the property. In his testimony he placed a value of $35 upon the bread-box. The jury returned a verdict in favor of plaintiff for $375. The court instructed the jury that before the plaintiff could recover any amount as attorney's fee he must show by a preponderance of evidence that such amount was a reasonable fee for the services rendered. There was no evidence whatever as to the reasonableness of the attorney's fee claimed, and it must be presumed that the jury followed the instruction of the court, and by their verdict rejected all claims in that respect. Especially should such be deemed the fact when the evidence as to the value of the property converted, considered in connection with the interest due, would support a verdict for an amount considerably greater than the sum returned by the verdict of the jury. The matters already passed upon dispose of many of the exceptions to instructions refused by the court. The instructions given appear to be a full and complete presentation of the law upon all matters involved, and we see no ground upon which a successful exception thereto can be based. Let the cause be remanded, with directions to the lower court to modify the judgment by striking therefrom the sum of $35, and in all other respects let the judgment and order be affirmed.

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[1] Code Civil Proc. Cal. § 690, subd. 6, provides that there shall be exempt from execution "two horses * * * and their harness and one wagon, * * * by the use of which * * * a peddler * * * habitually earns his living. * * *"

We concur: Harrison, J.; Paterson, J.

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91 Cal. 170

Winterburn *et al.* v. Chambers *et al.*
(No. 13,405.)

(*Supreme Court of California.* Sept. 14, 1891.)

Tenants in Common—Ouster and Adverse Possession—Color of Title—Appeal.

1. It appeared, in partition proceedings, that the husband of the deceased owner had theretofore sold the land as administrator under authority of an act of the legislature; that the sale had been approved by the court, and the price paid and deed given; that the purchaser had taken possession, and sold half of it at its full value; that he had inclosed the remaining half with a substantial fence, and occupied and cultivated it for eight years before his death; that he had paid the taxes, and caused it to be surveyed and assessed in his own name; and that he had made a testamentary disposition of it, as well as frequent and open declarations of his ownership of the entire tract. *Held* that, though he took only the one-third interest of the husband under the deed, his acts were nevertheless sufficient to charge the heirs with notice of his intention of ouster, and their titles were therefore extinguished.

2. A finding that the purchaser entered into and took possession of the land in his own right, and as owner of the entire tract, and not as a tenant in common with the heirs, and that he ousted and amoved the said heirs, was not by its terms limited to an ouster resulting from the entry under the deed; but the finding of ouster must be regarded as distinct in itself, and, if there be evidence to support it, it must be upheld, and referred to such evidence, rather than to the finding.

3. The adverse possession of the grantees of such a purchaser was referable to the latter's ouster, and it did not need a finding that the grantees made an additional ouster.

4. The court found that the administrator was authorized to sell the "real estate of the deceased," and that he made a contract of sale "embracing all the land" in controversy, and gave a deed to the purchaser "purporting to convey to him the said land." It found also that, though the deed made him a tenant in common only with the heirs, this was without his knowledge or consent, and his entry was of such a character as to effect an ouster of said heirs. *Held*, that under these facts the deed was sufficient to give color of title to his entry, though the authority under which it purported to have been made was insufficient for that purpose.

5. Such findings must be assumed to have been sustained by the evidence, since no objection was made on that ground in the bill of exceptions.

6. The entry and claim of the purchaser were sufficient to constitute an ouster, though no notice thereof was brought home to the other tenants; and the fact that some of the tenants were minors at the time was immaterial, because of the running of the five-years statute of limitations after the last attained his majority.

Department 1. Appeal from superior court, city and county of San Francisco; M. A. Edmonds, Judge.

Action by Winterburn and others against Joseph L. Chambers and Charles R. Chambers for partition. There was judgment for defendants, and plaintiffs appeal. Affirmed.

Edward J. Pringle, for appellants. *E. B. & J. W. Mastick, J. D. Redding, W. F. Goad*, and *W. C. Belcher*, for respondents.

Harrison, J. The plaintiffs seek in this action partition of a tract of land which belonged to their mother, of which they allege that the defendants are tenants in common with them by reason of conveyances from other heirs of their mother. The land in controversy belonged to Josefa Soto de Stokes, who died intestate September 18, 1855, leaving a husband, James Stokes, and 14 children, surviving her. An act of the legislature was passed March 25, 1857, authorizing her administrator to sell her real estate subject to the approval of the probate court of Monterey county, in which the administration of her estate was pending, and upon such approval to convey the same to the purchaser. March 16, 1858, "said James Stokes, professing to act under the authority of the said act, and as the administrator of said Josefa, made and entered into a contract with one R. J. Walsh, by the terms whereof he, as administrator of the estate of said Josefa Soto de Stokes, contracted to sell to said Walsh, and said Walsh contracted to buy," the tract of land described in the complaint, subject to the approval of said probate court. Upon receiving the report of said sale, said probate court approved the same; "and after such approval, and on the 21st of April, 1858, the said Stokes, still representing himself to be, and professing to act and acting as, administrator of the estate of his said deceased wife, and in his own right, made, executed, and delivered to said R. J. Walsh a deed of conveyance purporting to convey to him the said land in consideration of the sum of $14,376.43." The said purchase price was the full value of the land at the time of the said sale, and the deed therefor was recorded in the office of the county recorder for Colusa county on the 12th day of August, 1858. At certain dates thereafter, viz., March 31, 1860, and June 11, 1863, Walsh took deeds purporting to convey the land from persons who had received conveyances from other heirs of Josefa, which were also recorded in said county recorder's office. Walsh, upon receiving the deed from the administrator, immediately entered into and took possession of the said land thereunder, and on the 13th day of August, 1858, sold the northerly half thereof to J. W. McIntosh, at the same price per acre at which he had purchased the same, and received from him a portion of the purchase money, and by a written contract agreed to convey the same to him upon the payment of the balance of the purchase money, and at the same time delivered to him the possession of the said northerly half. No conveyance of the land was made to McIntosh until October 23, 1867, after the death of Walsh, when his executors, under the order of the probate court, conveyed this northerly half to him; but the court finds that "immediately upon his purchase from R. J. Walsh the said J. W. McIntosh entered into and took possession of the northerly half of the said tract of land, and during the years 1858 and 1859 inclosed all of said half except about 150 acres in a triangular shape on the westerly or back side, with a good, substantial fence, and thereafter continuously, up to the 23d day of September, 1868, kept the same so inclosed, and used the same for cultivation and pasturage, and paid all taxes and assessments levied thereon;" and also finds that such possession of said northerly tract was thereafter maintained by the defendant Lewis H. McIntosh, to whom John had sold and conveyed the same, September 23,1868. Walsh died testate April 30, 1866, and thereafter, viz., March 12, 1872, the probate court of Colusa county, in which administration of his estate was had, distributed the southerly half of said land to the defendants, Joseph L. Chambers and Charles R. Chambers, in accordance with the provisions of his will. The court also finds that "during the year 1858 said Walsh inclosed the southerly half of the said land with a good, substantial post and plank fence; and thereafter, up to the time of his death, maintained and kept the same so inclosed, and kept and held the open, notorious, actual, and exclusive possession of all the said southerly half of said land, adversely to all the world, and used the same for cultivation and pasturage, and paid all taxes and assessments levied theron, and dealt with and used the same as his own property;" and also that after the death of Walsh his executors kept and maintained a similar possession until the entry of the decree of distribution in his estate, and that thereafter such possession was kept and maintained by the defendants Chambers. The court further finds: "(32) The said R. J. Walsh entered into and took possession of the land purporting to be conveyed to him by the said deed of April 21, 1858, in his own right, and as owner of the entire estate, and not as a tenant in common with the plaintiffs, or any or either of them, or with any other person, and ousted and amoved the plaintiffs, Josephine Winterburn, Lucy Mills, Catherine Sherwood, Louisa Johnson, William Stokes, and Domingo Stokes, and all other persons having or claiming any right, title, or interest in or to such tract of land, or any part thereof, from the possession of said land, and every part thereof. (33) More than five years, to-wit, more than six years, elapsed between the time when the youngest of the plaintiffs arrived at majority, and the time of the commencement of this action, during all which time the defendants, Joseph L. Chambers and Charles R. Chambers, had and held, and claimed to hold, in their own right absolutely, as the devisees of the said R. J. Walsh, deceased, and under the said decree of distribution made by the probate court of the county of Colusa, all the southerly half of the said land, and were at the time of the commencement of this action the owners in fee thereof; and all which time the defendant Lewis H. McIntosh had and held, and claimed to hold, absolutely in his own right, as the grantee of said Walsh, and under mesne conveyances sufficient in form to convey the whole title, all the northerly half of the said land, and he was at the time of the commencement of this action the owner in fee of the said northerly half." The present action was commenced on the 20th day of May, 1878, and at the time of its commencement the plaintiffs were of the following ages: Louisa Johnson, 47 years; Catherine Sherwood, 34 years; Josephine Winterburn, 31 years; Lucy Mills, 28 years; William Stokes, 32 years; and Domingo Stokes, through whom the plaintiff Eugene Sherwood claims, 38 years. As conclusions of law, the court found that, by virtue of such ouster and adverse possession, the title of the plaintiffs was extinguished, and their right of action barred by the statute of limitations. It also found the following as one of its conclusions of law, viz.: "That the said R. J. Walsh, under his deed of April 21, 1858, acquired title to only the undivided one-third of the land in his deed described, and became by operation of law, but without his consent or knowledge, a tenant in common with the children of the said Josefa Soto de Stokes, deceased; but that by his entry under said deed into the absolute and exclusive and adverse possession of said land, and his ouster of all his said co-tenants from the possession thereof, and by the maintenance of such exclusive and adverse possession by said Walsh, his grantees, administrators, devisees, and assigns, openly, notoriously, and continuously, under claim of absolute title, for more than five years after each and all the plaintiffs, and each and every of the surviving children of the said Josefa Soto de Stokes, had attained majority, all the right, title, and interest of the said plaintiffs, and of each of them, was extinguished. * * *" Judgment was entered in favor of the defendants. A motion for a new trial made by the plaintiffs was denied, and from the judgment and order denying said motion the plaintiffs have appealed.

The basis of the judgment by the court below is that the plaintiffs were ousted from the land more than five years prior to the commencement of the action, and that, an adverse possession having been maintained under such ouster for more than said period of five years, their right of action is barred. This decision is assailed by the appellants upon two grounds, viz.: that the finding of ouster is, by the terms of the finding itself, limited to an ouster resulting from the entry by Walsh, under the deed of the administrator; and, *second*, that the evidence fails to show facts sufficient to constitute an ouster. We cannot agree with counsel for appellants that it was the intention of the court by its finding of an ouster, in finding 32 above quoted, to limit such finding to an ouster by the mere entry by Walsh under the deed. The court does not in the finding itself limit the ouster to the mere entry and claim under the deed, nor does it, after finding such entry and claim, find that he thereby ousted and amoved the plaintiffs, but the ouster is found as a fact distinct from such entry and claim. The court, moreover, in its conclusion of law above quoted, finds that Walsh, "by his entry under said deed into the absolute and exclusive and adverse possession of said land, and his ouster of all his co-tenants from the possession thereof, and by the maintenance of such exclusive and adverse possession," extinguished the title of the plaintiffs. It thus appears that the ouster found by the court does not depend upon the mere entry and claim; that, while the entry and claim are elements therein, they do not solely constitute the ouster. The findings must be read as a whole, and not merely according to their numerical division. Because it may be impracticable to embrace all the facts in a case under a single finding, it does not follow that each fact that is separately found is to be considered distinct and disconnected from all the others. Especially when a fact is the ultimate fact resulting from several others, is it improper to limit such conclusion. If the fact found may be sustained by evidence in the case, it must be referred to such evidence for its support, and not limited to the immediate connection in which it is placed in the findings, unless the language in which it is expressed compel such limitation. The finding of ouster must be regarded as a finding distinct in itself, and, if there is evidence in its support, it must be upheld and referred to such evidence, rather than to the facts in the finding in which it is declared. An ouster of one cotenant by another is produced by acts of the same character as will produce any other ouster. In either case it is the "wrongful dispossession or exclusion of a party from real property who is entitled to the possession." In each case the same kind of possession is required, and it must be taken and held with the same hostile intent. In the case of a dispossession by a stranger, the fact that such stranger takes the actual and exclusive possession of the land is of itself a notice of the character of such possession, and of the intent with which it was done. In the case of the co-tenant, however, the intent with which the possession is taken is not manifested by the mere fact of possession, but must be established either by actual notice, or by acts or declarations so open and notorious, and of such a nature, that it may readily be presumed that the co-tenant out of possession is informed thereby of the hostile intent with which the possession is held. It is the intent which determines the character of the possession, but it is essential that this intent be in some mode, either by actual or presumptive notice, directly or indirectly, communicated to the other cotenant. This intent is not the secret purpose of the occupants, but is the purpose which the acts themselves manifest, and the acts done must be manifested to the person against whom the ouster is directed. It is not necessary that actual notice be shown to have reached the co-tenant in order to charge him with the effect of the ouster. The ouster must be complete, and it must be found that notice thereof was given; and, inasmuch as ouster is the ultimate fact to be found by the court, it is sufficient if it is sustained by the evidence, or is the necessary result from the probative facts which are found. Being a fact to be found from evidence, it is entitled to the same presumptions of correctness as attend any other finding of fact depending upon the weight or sufficiency of evidence.

It appears from the record herein that in March, 1858, Walsh made a contract with the administrator of the estate of Josefa for a purchase of the whole of the land described in the complaint at its full value, subject to the approval of the probate court of Monterey county; that the sale was approved by said court, and that in pursuance thereof a conveyance was made to him in the succeeding month, and that he paid the whole of the purchase price to the said administrator; that he thereupon immediately took possession of the whole tract of land, and in August following sold to McIntosh the northerly half of the tract at its full value, executed to him a contract of sale therefor, gave him the possession, and thereafter received from him the price for the same; and that McIntosh, upon receiving said contract of sale, took possession of the tract, and thereafter occupied the same as in his own right; that Walsh inclosed the southerly half of the tract with a substantial fence, and occupied and cultivated it openly and exclusively until his death in 1866; caused it to be surveyed, and also to be assessed in his own name, paid all the taxes thereon, made a testamentary disposition thereof, as well as frequent and open declarations of his purchase and ownership of the entire tract. These acts were sufficient to clearly indicate the intent on his part to claim the entire estate as his own to the exclusion of all other persons, and were also acts of such character and performed with sufficient publicity and notoriety to justify a presumption that they were communicated to and known by the plaintiffs. The fact that the deed to Walsh was not placed upon record until after he had made his contract of sale with McIntosh, and the entry by McIntosh upon the northern portion of the tract, is immaterial, and it is equally immaterial, for the purpose of characterizing his entry, whether the deed was recorded or not. The entry into possession of the tract by Walsh was itself a notice to the plaintiffs that he had some claim to the land. The mere possession was not of itself evidence of his claim, but it was notice to them sufficient to put them upon inquiry, and to charge them with the knowledge that would have been received from such inquiry. They knew that he was not one of the heirs of their mother, and that the immediate source of his claim to the land was different from theirs, and, when they saw him in possession of the land, they were charged with notice of the character and purpose with which such possession was taken. They were not at liberty to presume that he was a claimant under one of their co-tenants, any more than that his entry was hostile to them all. Being informed of his entry, and presumptively of its character, they were charged with a knowledge of all the facts attending it which an inquiry would have called forth. "The possession of other persons than [their co-tenants] was enough to put [the plaintiffs] on inquiry, under the rule in Fair v. Stevenot, 29 Cal. 486. If they had inquired, they would have discovered the hostile character of the possession. This means of notice constituted notice." Unger v. Mooney, 63 Cal. 596. His entry upon the land was open and notorious, and it was as much a notice to them that he was entering with bow and spear as it was that he entered under a deed of conveyance. Being thus put upon inquiry, and charged with the knowledge of the facts which such inquiry would have disclosed, they were informed that he had taken possession of the land under the purchase by him of the entire interest therein held by their mother at her death in accordance with the terms of the contract of sale made by him with the administrator of her estate, and that the same had been approved by the probate court, and that he had paid for the land its full value. Even if it be conceded that the deed to him purported to convey only the interest of Stokes, and although, in the absence of any other facts, his entry might have been presumed by them to have been in accordance with the deed, this fact would not have lulled them into the belief that he had succeeded to only that interest, and was their co-tenant, for the deed was not placed upon record until several months afterwards. His entry was an act distinct from the deed executed to him, and they were charged with notice that such entry was with hostile intent, and with a claim to the entire and exclusive ownership of the land. By such notice there was imputed to them information of not merely the language and terms of the deed, but of all the facts connected with his entry. The possession of Walsh did not appear to them to be that of one whom they knew to be a co-tenant, and they were not entitled to presume that his acts of possession were in recognition of their rights. A co-tenant out of possession, in order to avail himself of the presumption attending the acts of a stranger in possession, must show that such stranger is his co-tenant. There is no presumption of such co-tenancy, and, in the absence of such showing, he is chargeable with notice of the real character of his claim. Being chargeable with such notice, he is also chargeable with the knowledge that the acts done by him are done in consistency with his entry and his claim, whatever the same may be. The purchase by Walsh in 1860 and 1863 of other interests did not impair the character of his entry in 1858. He did not enter into possession of any portion of the land under the subsequent conveyances, and his original entry can neither be qualified, nor his title impaired, by such purchase. He was buying in an outstanding claim, not as a co-tenant with the plaintiffs, but with a claim hostile to them from the beginning. After the ouster by Walsh, the adverse possession taken by the defendants under conveyance from him was referable to such ouster, and it was not requisite to find that they had made any additional ouster to that which was to be inferred from the ouster by Walsh, under whom they entered. Their possession under such entry was the adverse holding of a stranger to the title, and not referable to the entry of a co-tenant. Their entry was the basis of a new title, and, with an adverse holding for five years after the plaintiffs had attained majority, tolled their rights. We do not understand that appellants controvert the proposition that, if the evidence is sufficient to establish the ouster by Walsh, as found by the court, there has been an adverse possession thereunder for more than five years prior to the commencement of this action. We are of the opinion that the character of the acts of Walsh, as well as their notoriety, were such as to justify the court in a presumption that the plaintiffs had notice thereof, and that they constituted a sufficient basis for its finding of the ouster by Walsh. Freem. Co-Ten. §§ 221, 223; Warfield v. Lindell, 30 Mo. 282; Lodge v. Patterson, 3 Watts, 77; Dikeman v. Parrish, 6 Pa. St. 227.

It is, however, contended on behalf of the appellants that, inasmuch as by the terms of the deed from the administrator to Walsh, it must have appeared to him that there was thereby conveyed only an undivided interest in the land, his entry must be deemed to have been in accordance with the terms of the deed, and that his acts thereunder, being consistent with such entry, did not manifest any intent to claim the entire ownership. We think, however, that the facts presented by the record do not uphold this claim of the appellants. It may be conceded that the conveyance by Stokes as administrator, under the authority of the legislative act, was utterly unavailing to transfer to Walsh any title to the lands in controversy, and that the court correctly found that the only interest therein which he obtained by the deed was that which passed by the conveyance of Stokes in his own right, which was in fact the one-third which he took as surviving husband of Josefa. The court, however, found that, although by operation of law this deed made him only a tenant in common with the children of Josefa, yet such effect of the deed was without his knowledge or consent, and that his entry was of such a character as to operate as an ouster of said children. The court also found that under the act of the legislature Stokes was authorized as administrator to sell "the real estate of the deceased," and that, professing to act under the authority of that act, he made a contract with Walsh to sell a tract of land "embracing all the land involved in this action;" and that, after the approval of the sale by the probate court, he gave to Walsh a deed of conveyance "purporting to convey to him the said land." Under these facts the deed to Walsh was sufficient to give color of title in support of his entry, notwithstanding the fact that the act under whose authority it purported to have been made was insufficient to confer authority therefor.

We must assume that these findings of fact are sustained by the evidence which was presented at the trial, as the plaintiffs have not in their bill of exceptions made any specifications of insufficiency in that respect. Upon an appeal it must be assumed by us that all findings of fact against which the bill of exceptions contains no specification of their being unsupported by the evidence have been correctly found. The fact that there is some evidence in the record bearing upon such finding, which is not in itself sufficient to support it, cannot be considered. It is only when the finding is directly challenged in this respect that we must assume that all the evidence bearing upon the subject before the court below which would sustain the finding is in the record. If the finding itself has not been objected to, there is no occasion for inserting such evidence in the bill of exceptions, and the respondent is not to be prejudiced by any failure to have it included therein. The appellants in their specifications of insufficiency of evidence do not question the correctness of the foregoing findings of fact, their specification being "the insufficiency of the evidence to justify the finding of fact that R. J. Walsh entered and took possession of the land purporting to be conveyed to him by said deed of April 21, 1858, in his own right, and as owner of the entire estate, and not as a tenant in common with the plaintiffs, or any or either of them, or with any other person." It is only the entry and taking possession in his own right which they allege is not sustained by the evidence, but, as the entry and taking possession are fully established by the evidence, their argument is limited to the character in which said entry was made, and the possession thereunder held and taken. Upon this point they urge that, although the entry may have been made with a purpose on the part of Walsh to oust the plaintiffs, yet such purpose is insufficient to constitute an ouster, unless notice thereof is brought home to the other tenants, so that they may be informed thereof and protect themselves; and they further urge that, inasmuch as some of the plaintiffs were infants both at the time of Walsh's entry and at his death, no notice to them could be available; and that consequently, as the only ouster found by the court is an ouster by Walsh, it is not sustained by the evidence.

The fact that some of the plaintiffs were infants at the time of the entry did not diminish the effect of the ouster. The entry by Walsh, and his subsequent acts under such entry, were not deprived of their hostile character, and did not fail to constitute an ouster, merely because the plaintiffs were at that time minors. An infant can be ousted from his possession by either a stranger or a co-tenant. The ouster does not depend upon the fact that the notice of the entry with hostile intent has been either understood or comprehended by the disseised, whether such entry be by a stranger or by a co-tenant. If in either case the disseisor should declare to the infant his intent to exclude him from the possession, and should physically remove him from the land, and thereafter hold the same openly and adversely, the ouster would not be suspended until the infant had attained majority, but would be complete at the date of the act and declaration. The effect which the notice will produce is not the test of its sufficiency, and the same acts and declarations which constitute an ouster apply to an infant as well as to an adult, whether such notice be actual or presumptive. The sufficiency of their notoriety is to be judged from the character with which they are made or performed, and not from the manner in which they are perceived. "To constitute a disseisin, it was never held to be requisite that notice should be sent to the disseisee, or that it must be proved that he had knowledge of the entry and ouster committed on his land." Lodge v. Patterson, supra. Ouster sets the statute of limitations running in favor of the disseisor, but protection is given to the infant by the provision of the statute that the adverse holding must continue from that date until the expiration of five years from his attaining majority. The sufficiency of the notice on the part of the disseisor at the time it was given is not to be diminished by anything occurring subsequent thereto. The knowledge that the infant would have had from the notice, if he had been capable of comprehending the same, is imputed to him as of the date of the notice as fully as if he were an adult, but the effect of such knowledge is suspended until his majority. The judgment and order denying a new trial are affirmed.

We concur: Paterson, J.; Garoutte, J.

(91 Cal. 234)

Kiessig v. Allspaugh *et al.* (No. 14,325.)

(*Supreme Court of California.* Sept. 16, 1891.)

Contractors' Bonds—Enforcement.

Code Civil Proc. Cal. § 1183, provides that a building contract which is not recorded before work is commenced thereunder, when the contract price exceeds $1,000, shall be void, and no recovery shall be had thereon by either party thereto. *Held*, that a bond in the sum of $5,000, given by a contractor, with sureties to the obligee, who is the owner of a building, to secure him against any claims, demands, or liens for labor or materials furnished in the construction of such building, and which refers to a written contract, that has not been recorded, made between the principal obligor and obligee, is not within the meaning of the statute, and may be enforced without violating the provisions of the above section.

Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Kiessig against Allspaugh, Hall, and others to recover on a building contractor's bond. Judgment for plaintiff. The defendant Hall, a principal on the bond, appeals. Affirmed.

Luce & McDonald, for appellant. *Carl Schutze*, for respondent.

DE HAVEN, J. On October 14, 1887, the plaintiff and the defendants Allspaugh and Hall entered into a contract, whereby said named defendants agreed to construct a house for the plaintiff, and furnish all materials therefor; and on the following day, and before the commencement of work under the building contract, they executed to plaintiff a bond with sureties, in these words: "Be it remembered that whereas, on the 14th day of October, 1887, Charles Kiessig, a resident of the said state and city, and A. M. Allspaugh and M. S. Hall, contractors and builders, also residents of said state and city, entered into a contract whereby, for a certain valuable consideration, the said A. M. Allspaugh and M. S. Hall, builders and contractors, have to build, construct, and finish a certain house, as is more fully set out and described in the contract, plans, and specifications signed and entered into on the day and year first aforesaid, all of which said contract, plans, and specifications are made a part hereof: Now, therefore, we, A. M. Allspaugh and M. S. Hall, as principal, and H. V. Poser and N. P. Lundeen, as sureties, bind ourselves, our heirs, executors, and successors, in the sum of five thousand dollars, to forever save and hold harmless the said Charles Kiessig against any claims, demands, or liens of all characters whatsoever for material or labor expended or used in the building, construction, and finishing said house." This bond was not recorded, nor was the building contract therein referred to. The contractors, however, completed the building according to the specified plans, and plaintiff paid them the full contract price therefor; but there were liens filed against it to the amount of $1,817.25, which the contractors, Allspaugh and Hall, failed to discharge, and the plaintiff was compelled to pay them. This action is brought on the foregoing bond to recover the amount so paid. The court below found the facts as above stated, and rendered judgment in favor of plaintiff. This appeal is from that judgment, and is taken by the defendant Hall alone.

The appellant contends that there can be no recovery on the bond, because of the failure to record the building contract to which it refers; that, the original contract being void under the statute, this bond, which was given to secure in part the performance of such contract, is equally void, and incapable of enforcement. This contention is based upon section 1183 of the Code of Civil Procedure, which provides that a building contract which is not recorded before work is commenced thereunder, when the contract price exceeds $1,000, "shall be wholly void, and no recovery shall be had thereon by either party thereto." But the bond upon which this action is brought is not the contract made between this plaintiff and appellant for the construction of the building, and is not within the letter of the section referred to. It was not made at the same time, has additional parties, and does not bind the contractors to erect any building. It refers to the prior contract as an inducement or consideration for its execution, and the parties signing it agree to hold the plaintiff harmless against certain liens which might be created by the principals in the bond in carrying out the other contract, and for which said principals would be personally liable to mechanics and material-men, but they do not undertake that the prior contract shall be fully performed by the contractors. They could have abandoned the work of construction at any time, or have failed to complete it within the time fixed or in the manner specified in the contract, and they would not have been liable for any damage therefor, by the terms of the bond, which is the foundation of this action. Indeed, its purpose is not to secure to plaintiff reimbursement for any damage, the right to recover which rests alone upon the building contract. Although the original contract could not be enforced, because not recorded, the contractor might nevertheless perform, and the plaintiff could accept such performance, and neither be guilty of any wrong in so doing; and, if in performing the appellant incurred a personal liability for labor or materials, which was discharged by the plaintiff, in order to remove a lien from his own property, or at the request of the appellant, the obligation to repay plaintiff is created by law, and would exist independently of the building contract, and is not affected by any defect therein, and is a sufficient consideration to support the express undertaking of defendant to repay; and the bond may therefore be deemed so far an independent undertaking that the right to enforce it does not depend upon the subsequent or continued validity of the building contract. As already stated, this bond is not within the letter of section 1183 of the Code of Civil Procedure, and it may be added that it is not within its reason or spirit, and its enforcement is not in conflict with the policy of that section. We do not think that the appellant, after delivering this bond as an independent security, and thereby inducing the plaintiff to make full payment of the contract price for the construction of the building, is in a position to deny his liability upon it, and if, in order to support this action, it is necessary that the bond should be based upon a valid building contract, we should hold that the appellant is estopped to dispute the truth of the particular recital contained in the bond as to such fact. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

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91 Cal. 265

PEOPLE v. JOHNSON. (No. 20,797.)

(*Supreme Court of California.* Sept. 18, 1891.)

EMBEZZLEMENT—EVIDENCE.

1. The evidence showed that defendant, pretending to illustrate the manner of drawings at the Louisiana Lottery, placed upon a table a paper covered with squares and figures, and induced witness to place his money upon the table with the understanding that it would be returned as soon as defendant had completed the illustra-

tion; that as soon as the money was placed upon the table defendant took the same, and refused to return it. *Held*, that the evidence established larceny, and would not support a conviction for embezzlement. BEATTY, C. J., and McFARLAND, J., dissenting.

2. It was error to allow an officer to testify as to a description of defendant furnished by the prosecuting witness before arrest.

In bank. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

Prosecution of George A. Johnson for embezzlement. Verdict of guilty, and judgment thereon. Defendant moved for a new trial, which being refused, he appeals from the judgment and order denying the motion. Reversed.

M. S. Horan, for appellant. *Atty. Gen. Hart*, for the People.

DE HAVEN, J. The defendant was charged wtih embezzlement, and convicted. He appeals from the judgment and order denying his motion for a new trial.

1. The court erred in admitting the testimony of the witness Briggs, as to the description of the defendant given him by the prosecuting witness before the arrest of defendant. This was hearsay, and, considered with reference to the other evidence in the case, relating to the identity of defendant as the person who took the money alleged to have been embezzled, was a material error.

2. The verdict is against the evidence, as upon the facts shown defendant was guilty of larceny, and nothing else. The following is the testimony of the prosecuting witness as to the manner in which the defendant obtained his money: "We went in to get a drink, and while we were at the bar a man came up to us, and asked us if we would like to buy a Louisiana Lottery ticket. I said no; that I did not care about it, as I never gambled. He said he was the agent of the Louisiana Lottery Company, sent out on purpose to this coast to explain the way the drawings were had to the people, and if we would go into the back room he would explain it. I did not want to go into the back room, but this other man who was with me said, 'Let's go in and see;' so we went in. When we got in the back room there was a table there, and the defendant spread a paper on the table full of squares and figures, and said if I would put down a half a dollar or some money on the table he would explain it to us. I did not want to put any money on the table, but this other man said he would put in a half a dollar, and so I did the same, and afterwards I put in a dollar. After that was lost, I put in five dollars, and lost that. I then wanted to get out, but there were other men there who said, 'Go on and play,' and I was afraid to go out, as I put up twenty dollars, and afterwards twenty dollars more. After that was lost, I asked for my money, and didn't get it. The defendant at all times told me that I would get my money back as soon as he had explained the game." It is sometimes difficult to determine upon a trial for larceny whether the offense is larceny or embezzlement, when there has been a bailment of property to the defendant, and thereafter a conversion by him. Upon such facts, when the charge is larceny, the prosecution is required to show that the defendant, when he received the property originally, intended to steal it. But no such difficulty is presented here, for there never was any bailment of the property, the prosecuting witness never consenting to part with the possession; indeed, even its bare custody for a temporary purpose was not given to defendant. The money was simply placed upon a table on some squares and figures, that defendant and his confederate might illustrate the manner in which the drawings of the Louisiana Lottery are had, and all of this was to be done in the presence of the prosecuting witness. He never contemplated or consented that the money should be taken from his sight by the defendant, or that it should be transferred from the table to the pockets of the defendant. Upon this state of facts, a finding that the possession of the money was intrusted to defendant by the prosecuting witness is entirely without any support, and the crime which defendant committed is described with absolute precision in Loomis v. People, 67 N. Y. 327: "It was a clear case of larceny, as marked and significant in its general features as if the prisoners had wrongfully seized and appropriated it when first produced." In the case of Com. v. O'Malley, 97 Mass. 585, the defendant was convicted of embezzlement, upon the following state of facts: The prosecuting witness had $38 in bank-bills; the defendant asked her to loan him a dollar, and she agreed to do so, and showed him the roll of bills which she had just received in payment of her wages. He then asked her to let him take the money and count it, she not being able or read or write, and she let him take it for that purpose. He counted it over several times in her presence, and then refused to return it to her, and went off with the money. The trial court instructed the jury as follows: "If they were satisfied that the defendant, when he took the bills from the hands of the witness McDonald, had the guilty intent of entirely depriving her of them, and of converting them to his own use, and his taking the money to count was only a trick or device to obtain possession of the same, it would be larceny, and they must acquit him; but if they were satisfied beyond a reasonable doubt that he had no such intent at the time, but received the bills by her permission for the purpose of counting them for her, and receiving the dollar which she had consented to loan him, and, after the money came into his hands, he then first conceived the guilty purpose of defrauding her, they might find him guilty." The conviction for embezzlement was set aside by the supreme court, in an opinion which states with great clearness the distinction between larceny and embezzlement. The court there said: "We are of opinion that there was no evidence to sustain the indictment for embezzlement, and that the conviction was wrong. * * * To constitute the crime of embezzlement, the property which the defendant is accused of fraudulently and feloniously converting

to his own use must be shown to have been intrusted to him, so that it was in his possession, and not in the possession of the owner. But the facts reported in the bill of exceptions do not show that the possession of the owner of the money was ever divested. She allowed the defendant to take it for the purpose of counting it in her presence, and taking from it a dollar, which she consented to lend him. The money is alleged to have consisted of two ten-dollar bills, three five-dollar bills, one two-dollar bill, and a one-dollar bill, amounting in all to thirty-eight dollars. The one dollar he had a right to retain, but the rest of the money he was only authorized to count in her presence, and hand back to her. He had it in his hands, but not in his possession, any more than he would have had possession of a chair on which she might have invited him to sit. The distinction pointed out in the instructions of the court between his getting it into his hands with a felonious intent, or forming his intent after he had taken it, was therefore unimportant. The true distinction, upon principle and authority, is that stated by the cases upon the defendant's brief, that if the owner puts his property into the hands of another, to use or do some act in relation to it, in his presence, he does not part with the possession, and the conversion of it, *animo furandi*, is larceny." The law as thus declared is sustained in the following cases: Smith v. People, 53 N. Y. 111; Loomis v. People, 67 N. Y. 322, People v. Call, 1 Denio, 120; and many more which might be cited to the same effect. Indeed, our attention has not been called to any case which holds to the contrary. Judgment and order reversed.

We concur: HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.

MCFARLAND, J. I concur in the judgment of reversal for admission of improper testimony, but I dissent from the view that the crime was necessarily larceny, and not embezzlement. It is contended by appellant that under the evidence he could not have been legally convicted of embezzlement, because the evidence, if it shows any crime, shows the crime of larceny, and not embezzlement. The distinction between larceny and the statutory crime of embezzlement is sometimes hard to draw. Our Code definition of the latter offense is very broad, being "the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503. The weight of the definition rests upon the word "intrusted." Where the property is taken forcibly or furtively, or when the possession is gained by a trick or artifice, and the owner had no intent to yield possession, and "intrust" the property to another,—in such cases there is no embezzlement. Now, appellant argues this case upon the theory that the prosecuting witness laid his money on a table upon the representation of appellant that he merely wanted to point out and explain a certain lottery or game, and that when the money was put there appellant suddenly took it without the consent of said witness. But the testimony does not clearly show such a state of facts. It is true that the witness says generally that defendant told him that he would get his money back; but he testifies that he first put in a half-dollar, "and afterwards I put in a dollar, and after that was lost I put in five [$5] dollars, and lost that." He then "wanted to get out," but was induced to "go on and play," and he "put up" $20, and $20 more, and so on until he had put up altogether $86.50; and then, as he says, "after that was lost, he asked for his money, but did not get it, except $10, which was returned to him." What became of the coins, as one by one they were bet and lost. I think that the jury had the right to find that appellant, with the consent of the prosecuting witness, had full actual possession of the money; and whether it was "intrusted" to him was, I think, under all the circumstances, a question to be determined by the jury, under proper instructions of the court. And I see no error in the instructions on that point. The bill of exceptions in this case is so meager that we can hardly suppose it to contain all the evidence upon the points contested. In People v. Fisher, 51 Cal. 319, it was held that in a bill of exceptions in a criminal case it is not necessary "to specify the respects in which the evidence is alleged to be insufficient to sustain the verdict." Under this rule, district attorneys are, no doubt, often misinformed as to what points the bill of exceptions should, by amendments, be made full; and an amendment to the Code requiring specifications of the grounds of the alleged insufficiency of the evidence would be in furtherance of justice.

BEATTY, C. J. I concur in the judgment of reversal upon the ground that the superior court erred in admitting the testimony of the witness Briggs. The evidence of the prosecuting witness that the defendant was the person who defrauded him was extremely weak and unsatisfactory. He admitted that, on the examination of the prisoner in the police court, a short time after the occurrence, he had been unable to identify him, but claimed that he was then (at the trial) certain that he was the same person. Evidently the prosecution thought it necessary to strengthen their case on this point, for they called the witness Briggs, (an officer,) who was permitted to testify, against the objection of the defendant, to a description of the culprit, which he stated had been furnished by the prosecuting witness before the defendant was arrested. This was, of course, hearsay and incompetent, and, as it related to a vital issue in the case, upon which other sufficient testimony was lacking, it was necessarily prejudicial. But I dissent altogether from what appears to me the extremely technical views of the court as to the insufficiency of the evidence to sustain the verdict. I admit that the evidence proves a clear case of larceny, but I cannot concur in the conclusion that because it proves larceny it does not prove embezzlement. Assuming the defendant to have been properly identified as the real culprit, the evidence shows that he fraudulently induced Wilkins to put his money on a table for the purpose of illustrating the mode of playing a game which he called the Louisiana Lottery, promising to give it back at the conclusion of the lecture. In pursuance of this plan, he first illustrated the loss of a half-dollar, next a dollar, then of five dollars, and finally of four twenty-dollar pieces in rapid succession. After this brilliant exposition of the beauties of the game, when Wilkins demanded his money back, according to the understanding upon which he had permitted the use of it, he was coolly informed by the defendant that the Louisiana Lottery did not do business in that way, and that if the money was returned they would surely put their business in other hands. Defendant did, however, magnanimously restore the sum of ten dollars when Wilkins threatened to call for the police. In short, the evidence leaves no room to doubt that the defendant intended from the beginning to make a felonious appropriation of the money, and the case cannot be distinguished in principle from that of People v. Rae, 66 Cal. 423, 6 Pac. Rep. 1, in which it was held that the facts constituted the crime of larceny. On the authority of that decision, it must be held, as appellant contends, that the evidence in this case made out a clear case of larceny. But does it follow that it will not sustain a conviction of embezzlement? "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503. According to this definition, a fraudulent intention to appropriate the property at or before the time of its receipt is not necessary to constitute the offense, but it is in no wise inconsistent with it. It merely superadds an ingredient not essential to constitute the crime. But is it any the less embezzlement because it is that and something more? Or, rather, will not evidence which proves every element of the crime of embezzlement sustain a conviction of that crime merely because it proves the additional element contained in the crime of larceny? Under an indictment for murder, the defendant may be convicted of manslaughter, because the offense of manslaughter is embraced in murder, *i. e.*, murder is manslaughter with the added ingredient of malice aforethought. Upon the same principle it cannot be doubted that under an indictment for larceny, specifically alleging the facts proved in this case, the defendant could properly be convicted of embezzlement, if, upon the evidence, it was reasonably doubtful whether the fraudulent intent existed at the time he received the money. Pen. Code, § 1159. The converse of these propositions must be equally true. Upon an indictment for manslaughter, a verdict of guilty is sustained by the evidence, notwithstanding it may appear that the killing was malicious; and, if so, an information for embezzlement is sustained by the evidence, notwithstanding it may appear that the crime committed was all of embezzlement, and something more. Of course, if larceny were an offense of lesser grade or subject to a lighter penalty than embezzlement, the conclusion would be different; but they are in fact of the same grade, and subject to precisely the same punishment. Pen. Code, § 514.

The particular kind of larceny proved in this case consists of three elements: (1) Money intrusted; (2) fraudulent conversion; (3) intent to defraud at the time the money is received. Embezzlement consists of two elements. (1) Money intrusted; (2) fraudulent conversion. That is to say, the two crimes are identical as to the first two ingredients. But it is held by the court that embezzlement is not proved, although both its elements are proved, because another element is proved which brings the offense within the definition of larceny; in other words, that, because the defendant might have been charged and convicted of a higher crime, he cannot be convicted of a lesser crime embraced in that which might have been charged. But the court holds that here there was never any "bailment" of the property. Possibly this is so, if the matter is regarded with reference to the civil rights and remedies of the parties. But the statute defining embezzlement does not speak of a "bailment." It only requires that property should be "intrusted" to another, and, in my opinion, it does not lie in the mouth of a thief, who has in fact been trusted in ignorance of his character and intentions, to say that, because he obtained possession of the property by a fraudulent trick, therefore he was not intrusted with it. I am aware that many cases may be found like those cited in the opinion of the court, in which the facts proved in this case have been held to constitute larceny, but, as I have endeavored to show, they also include embezzlement. The Massachusetts case is the only one that has ever been brought to my attention in which it has been decided that proof of the higher offense, or proof of the three ingredients of larceny, will not support a conviction of a crime composed of two of those ingredients. That decision may be accounted for by the fact that the defendant had been once acquitted on an indictment for larceny founded on the same facts afterwards proved on the trial for embezzlement; and it seems to have been assumed that the change made in designating the offense in the second indictment would prevent him from having the benefit of a plea of former acquittal. If this was so under the Massachusetts practice, it affords a ground of support to the decision which has no existence here. Under our law and practice, such fine-spun distinctions serve but one purpose. They do not tend in the slightest degree to shield the innocent, but only to furnish an additional loop-hole of escape for the guilty.

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91 Cal. 296

Barrett v. Southern Pac. Co. (No. 14,-331.)

(*Supreme Court of California.* Sept. 21, 1891.)

Railroad Companies—Injury to Child—Turn-Table—Negligence.

A railroad company is liable for injuries received by a child while playing upon a turn-table upon its premises near a public street, which was not protected by any inclosure nor guarded by its employes, though it was provided with the customary fastenings to keep it from revolving, and the child was invited to play thereon by other children.

Department 2. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Action by Barrett against Southern Pacific Company for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

John D. Bickell, for appellant. *Holloway & Kendrick* and *Victor Montgomery*, for respondent.

DE HAVEN, J. This is an action to recover damages for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The plaintiff recovered a judgment for $8,500, and from this judgment, and an order denying its motion for a new trial, the defendant appeals.

It was shown upon the trial that defendant maintained a railroad turn-table upon its own premises in the town of Santa Ana. This table was about 150 yards from defendant's depot, and near its engine-house, and distant 72 feet from a public street, and was not protected by any inclosure, nor did the defendant employ any person whose special duty it was to guard it. It was provided with a latch and slot, such as is in common use on such tables, to keep it from revolving. There were several families with small children residing within a quarter of a mile from the place of its location, and previous to the time when plaintiff was hurt children had frequently played around and upon it, but when observed by the servants of defendant were never permitted to do so. At the date of plaintiff's injury he was eight years of age, and on that day he, with his younger brother, saw other boys playing with the turn-table, and, giving them some oranges for the privilege of a ride, got upon it, and while it was being revolved plaintiff's leg was caught between the table and the rail upon the head blocks, and so severely injured that it had to be amputated. The defendant moved for a nonsuit, which motion was denied. This ruling of the court, and certain instructions given to the jury, present the questions which arise upon this appeal.

The appellant contends that it was not guilty of negligence in thus maintaining upon its own premises, for necessary use in conducting its business, the turn-table in question, and which was fastened in the usual and customary manner of fastening such tables; that the plaintiff was wrongfully upon its premises, and therefore a trespasser, to whom the defendant did not owe the duty of protection from the injury received, and that the court should have so declared, and nonsuited the plaintiff. This view seems to be fully sustained by the case of Frost v. Railroad Co., decided by the supreme court of New Hampshire, 9 Atl. Rep. 790. But, in our judgment, the rule as broadly announced and applied in that case cannot be maintained without a departure from well-settled principles. It is a maxim of the law that one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible consistently with its proper use. This rule, which only imposes a just restriction upon the owner of property, seems not to have been given due consideration in the case referred to. But this principle, as a standard of conduct, is of universal application, and the failure to observe it is, in respect to those who have a right to invoke its protection, a breach of duty, and, in a legal sense, constitutes negligence. Whether, in any given case, there has been such negligence upon the part of the owner of property, in the maintenance thereon of dangerous machinery, is a question of fact dependent upon the situation of the property and the attendant circumstances, because upon such facts will depend the degree of care which prudence would suggest as reasonably necessary to guard others against injury therefrom; "for negligence in a legal sense is no more than this: the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury." Cooley, Torts, 630. And the question of defendant's negligence in this case was a matter to be decided by the jury in view of all the evidence, and with reference to this general principle as to the duty of the defendant. If defendant ought reasonably to have anticipated that, leaving this turn-table unguarded and exposed, an injury, such as plaintiff suffered, was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. It is no answer to this to say that the child was a trespasser, and if it had not intermeddled with defendant's property it would not have been hurt, and that the law imposes no duty upon the defendant to make its premises a safe playing ground for children. In the forum of law, as well as of common sense, a child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to know this, and the law requires him to govern his actions accordingly. It is a matter of common experience that children of tender years are guided in their actions by childish instincts, and are lacking in that discretion which, in those of more mature years, is ordinarily sufficient to enable them to appreciate and avoid danger; and, in proportion to this lack of judgment on their part, the care which must be observed towards them by others is increased; and it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery, which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment interposes no warning or defense. The following are some of the cases in which this has been held: Railroad Co. v. Stout, 17 Wall. 657; Hydraulic

Works Co. v. Orr, 83 Pa. St. 335; Powers v. Harlow, 53 Mich. 507, 19 N. W. Rep. 257; Nagle v. Railway Co., 75 Mo. 653; Koons v. Railway Co., 65 Mo. 592; Railway Co. v. Fitzsimmons, 22 Kan. 686; O'Malley v. Railway Co., (Minn.) 45 N. W. Rep. 441; Whirley v. Whiteman, 1 Head. 610. These cases, we think, lay down the true rule. The fact that the turn-table was latched in the way such tables are usually fastened, or according to the usual custom of other railroads, although a matter which the jury had a right to consider in passing upon the question whether defendant exercised ordinary care in the way it maintained the table, was not, of itself, conclusive proof of the fact. Stout v. Railroad Co., 2 Dill. 294; O'Malley v. Railway Co., supra. Nor is the liability of the defendant affected by the fact that the table was set in motion by the negligent act of other boys. This is so held in some of the cases above cited, and the same principle was announced by this court in Pastene v. Adams, 49 Cal. 87, in which case it was held that a person who had negligently piled lumber, which had remained in that condition for a long time, was not exempt from damages sustained by one on whom it fell because the lumber was made to fall by the negligence of a stranger. We see no error in the second instruction given at request of plaintiff. The portion to which exception was taken is not very well expressed, but we think, taken as a whole, the instruction states the law correctly. Judgment and order affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.

(91 Cal. 288)

ETCHEPARE v. AGUIRRE, Sheriff. (No. 14,298.)[1]

(*Supreme Court of California.* Sept. 21, 1891.)

CLAIM AND DELIVERY — VERDICT — JUDGMENT— CHANGE OF POSSESSION—INSTRUCTIONS — CROSS-EXAMINATION.

1. In an action to recover possession of personal property, or the value thereof, the verdict was as follows: "We * * * find for the defendant, and fix the value of the property at $1,500." *Held*, that the verdict sufficiently complied with Code Civil Proc. Cal. § 627, which provides that if, in such actions, defendant by his answer claims a return of the property, the jury, if their verdict is in favor of defendant, and they "also find that he is entitled to a return thereof, must find the value of the property;" and it authorized a judgment for defendant "for a return of the property, or the value thereof," as prescribed by Code Civil Proc. Cal. § 667.

2. In an action to recover specific personal property, a judgment for defendant for the value of the property, or a return thereof, is defective, since judgment for the value can only be rendered where a return of the property cannot be had, under Code Civil Proc. Cal. § 667, providing that, if the property has been delivered to plaintiff and defendant claims a return thereof, judgment may be for a return of the property, or for the value thereof, in case a return cannot be had.

3. In an action for the possession of certain milch cows taken on attachment against plaintiff's vendor, it appeared that the vendor retained possession after the sale and continued to milk them and peddle the milk, and that he bought feed and managed and controlled the business as before. *Held* proper to refuse to charge that a delivery depends on the character of the property and the circumstances of each case; that it is not necessary for the purpose of delivery that the property sold should pass into the actual possession of the buyer; and that, when property is so situated that the buyer is entitled to and can rightfully take possession of it at his pleasure, he is considered as having actually received it as the statute requires.

4. Plaintiff requested an instruction that the fact that plaintiff employed the vendor after the sale was not conclusive, independent of other evidence, in determining the question whether there was an actual and continued change of possession of the property at the time of the alleged sale. *Held*, that it was properly modified by the court by adding that a party can employ the vendor, but if he leaves him in entire charge of the property, or in such apparently entire charge that it appears that there has been no open and apparent change of possession, no open and apparent means by which people about can take notice that there has been any change, then there is not such an actual change of possession as is required by law.

5. Cross examination of the vendor, as to what he did and said in regard to the cattle after the sale to plaintiff, was properly allowed, since such evidence was relevant to the issue of whether the sale was accompanied by immediate delivery, and followed by actual and continued change of possession.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. McKINLEY, Judge.

Action in replevin by M. Etchepare against Aguirre, sheriff. Verdict and judgment for defendant, and plaintiff appeals from the judgment, and from the order denying a new trial. Order affirmed, and judgment reversed.

M. V. Biscailus and *W. I. Foley*, for appellant. *W. J. Williams*, for respondent.

VANCLIEF, C. Action to recover the possession of personal property, or the value thereof, commonly called "claim and delivery of personal property." The defendant, as sheriff of Los Angeles county, seized the property in question by virtue of a writ of attachment, as the property of the defendant in the attachment suit, from whom the plaintiff claims to have purchased it before the levy of the attachment. It is alleged in the answer of the defendant that the sale of the property to plaintiff was fraudulent and void as to the creditors of the defendant in attachment, and this was the principal issue tried. The property was delivered to the plaintiff pursuant to section 514 of the Code of Civil Procedure, as a return thereof to the defendant was not required. The trial was by jury, whose verdict was as follows: "We, the jury in the above-entitled action, find for the defendant, and fix the value of the property at $1,500." Whereupon it was adjudged by the court "that said defendant have and recover from said M. Etchepare, the plaintiff herein, the sum of $1,500, or the return of the property described in the complaint herein, and his costs." The plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

1. It is claimed by appellant that the verdict is defective, in that it does not find "for the return of the property," and is not "in the alternative," since the answer of the defendant demands a return of

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[1] Judgment modified, 27 Pac. Rep. 929.

the property. The verdict for the defendant was special as to the value of the property, as required by the Code.[1] As to all other issues it was general. This was sufficient to justify a judgment for the return of the property, or for the value thereof in case a delivery could not be had. Such a judgment would have consisted entirely of pure conclusions of law from the verdict. The Code does not require the verdict to be special, except as to the value of the property, and the sole object of this exception is to enable the court to render an alternative judgment as required by section 667 of the Code of Civil Procedure. Waldman v. Broder, 10 Cal. 379; Hunt v. Robinson, 11 Cal. 262; Pico v. Pico, 56 Cal. 453.

2. But the judgment was not, in form or substance, in accordance with section 667 of the Code of Civil Procedure.[2] The defendant was not entitled to judgment for the value of the property, except upon the condition that a return of the possession thereof could not be had. The judgment should be "for a return of the property, or the value thereof, in case a return cannot be had." Washburn v. Huntington, 78 Cal. 577, 21 Pac. Rep. 305.

3. At the request of the plaintiff, the court gave to the jury the following three instructions: (1) "If you believe from the evidence that the plaintiff purchased the property in question in good faith and for a valuable consideration, and without any design to hinder, delay, or defraud any creditor of Jaureguy, and that the sale was complete and accompanied by an immediate delivery, followed by an actual and continued change of possession, then you must find a verdict for the plaintiff in this action." (2) "A *bona fide* sale of property by a judgment debtor to a person other than the judgment creditor in payment or satisfaction of a prior debt to such vendee is not fraudulent because such vendee may be aware, at the time of such *bona fide* sale, that it will have the effect of defeating the collection of other debts against his vendor." (3) "In determining whether there was an actual and continued change of possession of the property in question at the time of the alleged sale by Jaureguy to the plaintiff, while you are to consider the fact that the plaintiff employed Jaureguy after the alleged sale to plaintiff, still you are not bound, independent of other evidence, to regard this fact alone as conclusive of the question." But the court refused to give the fourth instruction asked by plaintiff, which is as follows: "What constitutes a delivery depends upon the character of the property sold and the circumstances of each particular case. For the purpose of a delivery, it is not necessary that the property sold should pass into the actual possession of the buyer. When property is so situated that the buyer is entitled to and can rightfully take possession of it at his pleasure, he is considered as having actually received it as the statute requires." After the court had concluded its instructions, a juror asked the following questions: "Can a party who purchases stock or any kind of goods keep in their employ the same parties that were there, and still be complying with the law, or is it necessary to move those goods or move?" In answer to these questions the court said: "I will read the instruction asked by plaintiff, but I will do it so that the jury can fully understand with regard to it." Then, after reading the third instruction given at request of the plaintiff, added to it the following: "A party can employ the person,—the person from whom they purchase,—but if they leave the person in the entire charge of the property, or leave them in such apparently entire charge of the property, that it appears to the world around about that there has been no change of possession, that there is no open and apparent change of possession, no open and apparent means by which people about can take notice that there has been any change, then there is not such an actual change of possession as is required by law."

It is contended for appellant that the court erred in refusing the fourth instruction asked by plaintiff, and in giving the addition to the third instruction given at request of plaintiff. It is true that the language of the fourth instruction requested by plaintiff was extracted from the opinion of Mr. Justice McKee in Williams v. Lerch, 56 Cal. 334; but the language extracted is only a part of what was said by Mr. Justice McKee in connection with the facts of that case, which were materially different from the facts in this case. In that case the property (horses) were in the care and custody of a third person (Drew) for the sole purpose of being pastured on a mountain range at a considerable distance from the residence of the owner, (Sotcher.) After executing a bill of sale of the horses to Williams, (plaintiff in that action,) Sotcher ordered Drew to collect them together, and deliver them to Williams. Accordingly Drew collected the horses, and informed Williams that they were ready for him. Thereupon Williams employed Drew to continue to pasture the horses for him, (Williams.) Some five months thereafter, while the horses were still being pastured by Drew, they were taken by a constable by virtue of an execution against Sotcher. Upon these facts, Mr. Justice McKee, immediately preceding the language of the requested fourth instruction, said: "Everything was done which was necessary to a sale. It was complete and perfect if Drew subsequently delivered the horses to plaintiff, or took charge of them for the plaintiff." And, after the language of the requested instruction, further said: "By delivering the bill of sale to the plaintiff, and giving direction to his agent to get the horses together, and keep them for the plaintiff, to whom they had been sold, Sotcher transferred them to the plaintiff; and when the agent, in obedience to the direction which he had received, collected them together in his pasture for the plaintiff, and wrote to him that they were ready for him, and to come and take them, and the plaintiff employed the agent to take charge of them and winter them for him, this was an actual delivery of the property, so far as the nature and condition of the property admitted it; and when the agent under his employment turned the horses out to pasture on their accustomed range, and kept them exclusively for the plaintiff until they were taken by the defendant, the requisitions of section 3440 of the Civil Code were fully satisfied." In the case at bar the cattle alleged to have been sold consisted largely of milch cows, and were in the actual possession of the seller, (Jaureguy,) who was milking the cows and peddling the milk, with the assistance of two servants. After the alleged sale he continued to milk the cows and to peddle the milk precisely as before, and the evidence strongly tends to show that he bought the feed for the cattle, and managed and controlled the business and the servants up to the time of the attachment, just as he had done before the alleged sale. Under this state of facts, the fourth instruction requested by plaintiff was not properly applicable, even conceding that it is good abstract law, which seems, at least, doubtful. The language of the instruction asked could not have been intended by Mr. Justice McKEE to be read by itself as abstract law, but concretely with its context and the facts of the case of Williams v. Lerch. The instructions given at the request of the plaintiff, with the explanation added by the court, were quite as favorable to the plaintiff as he was entitled to ask. The oral explanation given by the court, in answer to the question of a juror, is not so precise and explicit as doubtless it would have been had it been deliberately written; but, as given, I think it is substantially supported by the following cases: Stevens v. Irwin, 15 Cal. 503; Malone v. Plato, 22 Cal. 103; Cahoon v. Marshall, 25 Cal. 201; Bell v. McClellan, 67 Cal. 283, 7 Pac. Rep. 699.

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[1] Code Civil Proc. Cal. § 627, provides that, "in an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of defendant, they also find that he is entitled to a return thereof, must find the value of the property."

[2] Code Civil Proc. Cal. § 667: "In an action to recover the possession of personal property, * * * if the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had."

4. It is contended that the court erred in permitting Jaureguy to be cross-examined by defendant as to what he did and said in regard to the cattle after he executed the bill of sale of them to the plaintiff. But the testimony objected to was pertinent to the issue as to whether or not the sale had been accompanied by an immediate delivery and followed by an actual and continued change of possession, and therefore the court did not err in admitting it. I think the order denying a new trial should be affirmed, but that the judgment should be reversed, and that the court below should be directed to enter a judgment on the verdict in favor of defendant, in substantial accordance with this opinion.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order denying a new trial is affirmed; but the judgment is reversed, and the court below is directed to enter a judgment on the verdict in favor of the defendant, in substantial accordance with this opinion.

(91 Cal. 355)

ROCHAT v. GEE. (No. 13,810.)

SOMERS v. SOMERS.

(*Supreme Court of California.* Sept. 24, 1891.)

DISMISSAL OF ACTION—APPEALABLE ORDERS.

1. Under Code Civil Proc. Cal. § 581, which provides that the dismissal of an action by plaintiff "is made by entry in the clerk's register," and that "judgment may thereupon be entered accordingly," the filing by plaintiff of a written statement of abandonment of the action, and an entry thereof by the clerk in the register, does not operate as a dismissal, where no judgment of dismissal is entered, nor any order of the court made in relation to the matter of abandonment.

2. An order made pending an action to dissolve a partnership directing a receiver appointed therein to file an account is not appealable, since it is not one of the appealable orders enumerated in Code Civil Proc. Cal. § 963.

In bank. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Action by Rochat against Gee for dissolution of partnership and appointment of a receiver. Receiver appointed, and court directed receiver to file an account. Defendant objected to the allowance of some of the items therein. Account approved. Defendant appeals. Appeal dismissed.

Charles R. Gray, for appellant. *C. J. Perkins* and *H. C. Rolfe*, for respondent. *E. E. Rowell* and *C. J. Perkins*, for receiver.

PATERSON, J. This action was commenced by the plaintiff, June 27, 1888, for a dissolution of the copartnership existing between himself and defendant, for the appointment of a receiver, and for an accounting and settlement of the affairs of the partnership; and on that day the respondent, Somers, was appointed receiver "to take charge of, manage and control and dispose of, under the direction of this court, all that certain real property belonging to the copartnership of Rochat & Gee, and to have charge of, manage, control, and dispose of all personal property of the said firm of Rochat & Gee, upon his executing the bond as such receiver in the sum of twelve thousand dollars and qualifying according to law." He qualified, took possession of the property of the firm, and for about one month operated a lumber-mill belonging to the firm. The defendant filed an answer September 15, 1888, admitting the fact of copartnership, but denying the allegation on which plaintiff relied for the relief asked. On June 29, 1889, plaintiff filed a written abandonment of the cause in the following words: "Now comes the plaintiff, and, before the final submission of the above-entitled cause, the plaintiff hereby abandons said cause." The register of actions showed the following entry: "June 29, 1889. Filing abandonment of cause by plaintiff;" but no judgment of dismissal was ever made or entered, nor was any order of the court made in relation to the matter of abandonment. On September 2, 1889, the court directed the receiver to file an account. The account was filed November 12, 1889, and on November 29, 1889, the defendant filed written objections to the allowance of several of the items thereof. After hearing the testimony of the parties, the court approved the account as filed, and from this order the defendant has appealed.

The filing of the written statement of abandonment and the clerk's entry in the register of actions did not operate as a dismissal of the action. Code Civil Proc. § 581;[1] Page v. Page, 77 Cal. 83, 19 Pac. Rep. 183. Respondent has moved the court to dismiss the appeal, on the ground that the order is not appealable. We think the motion should be granted. The orders made before judgment which may be appealed from are named in subdivision 3, §§ 939, 963, Code Civil Proc. The order before us is not one of those specified in subdivision 3 of section 939, which is the same as subdivision 3 of section 336 of the practice act. Adams v. Woods, 8 Cal. 315. It is not a "special order made after final judgment," because there has been no final judgment in the action. It cannot be one of the orders named in subdivision 3 of section 963, because that class embraces only probate orders. Estate of Calahan, 60 Cal. 232. Appellant claims that the order is a final adjudication upon all matters involved in the report of the receiver, and being conclusive upon the parties, and for an amount exceeding $300, the constitution secures to him the right of appeal, whether the legislature has provided the method of taking the appeal or not. It is not a question whether one aggrieved by such an order has the right of appeal,—that right must be conceded,—but when it may be exercised. We have not found any case in which such an order has been reviewed before final judgment. No good purpose could be subserved by a rule authorizing an appeal from every order of this kind made during the pendency of the suit. It is the policy of the law to discourage litigation piecemeal. The order of the court concludes with the following direction: "It is further ordered that said receiver be and continue in charge of the property of said parties herein, and that he continue to act as receiver herein until the further orders of this court in the premises. Said receiver is hereby disallowed any compensation or attorney's fees until the coming in of his final report herein on final determination of this cause, such compensation and attorney's fees to be then fixed by the court, as it may be then advised." There are authorities holding that a receiver may appeal directly from an order made before judgment disallowing his final account; and it may be conceded that a party aggrieved by an order of the court made before judgment allowing a final account of a receiver may appeal without waiting for a final judgment in the case. That is not this case. The provision of the order quoted above shows that the receiver is still in possession of the assets of the firm, and acting on its behalf under orders of the court. There will be other reports to make. The final account will refer to previous reports filed, and when that is settled any one aggrieved will be fully protected by an appeal either from the final order or from the judgment. It may happen that those who object to the acts of the receiver during the first part of his administration will be entirely satisfied with the general result, and have no objection to the approval of his final account of the whole matter. Vinson v. Freeze, (Ky.) 1 S. W. Rep. 478; McCord v. Weil, (Neb.) 46 N. W. Rep. 152; Perkins v. Fourniquet, 6 How. 206; 2 Hayne, New Trial & App. § 188. The appeal is dismissed.

We concur: SHARPSTEIN, J.; HARRISON, J.; MCFARLAND, J.; DE HAVEN, J.

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91 Cal. 371

DE TORO *et al.* v. ROBINSON *et al.* (No. 14,180.)

(*Supreme Court of California.* Sept. 25, 1891.)

SPANISH AND MEXICAN GRANTS—SETTLEMENT OF BOUNDARIES—PLEADING.

1. In an action to obtain a decree declaring plaintiffs the equitable owners of a portion of a tract of land called "P.," alleged to have been included in a patent for a certain tract called "C." by the fraudulent extension of the latter tract, the complaint alleged that in 1833 the governor of California decreed one N., plaintiffs' predecessor in interest, to be the owner of three contiguous tracts of land, called the "C.," "A.," and "P." tracts, containing more than 17 leagues; that the governor, in 1834, made a grant of the C. tract, to N., as containing 10 leagues, and that others, under whom defendants claim, acquired title to the A. tract as containing 6 leagues; that defendants' predecessors afterwards fraudulently obtained confirmation of the grant and a patent of the C. tract as containing 11 leagues, instead of 10, and of the A. tract as containing 6 leagues. *Held*, that the complaint did not state a cause of action because it did not allege directly or by implication that the fraudulent extension of the C. tract made it include any of the P. tract, since the additional league may have been taken from some other contiguous land.

2. Act Cong. March 3, 1851, § 13, appointing a commission to settle private land claims in California, and providing that all lands the claims to which shall not have been presented to the commissioners within two years after the date of the act shall be held and considered as part of the public domain of the United States, applies to claims under grants from the Spanish or Mexican government, and, where such claim was not presented as required by said act, the successors of the Spanish or Mexican grantee have no interest in the land covered thereby which will entitle them to sue on the ground that defendant has acquired the legal title thereto by fraud.

Department 2. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

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[1] Code Civil Proc. Cal. § 581, provides as follows: "An action may be dismissed or a judgment of nonsuit entered in the following cases: (1) By the plaintiff himself at any time before trial upon payment of costs, provided a counterclaim has not been made or affirmative relief sought by the cross-complaint or answer of defendant. * * * The dismissal mentioned in the first two subdivisions is made by entry in the clerk's register. Judgment may thereupon be entered accordingly."

Action to obtain a decree declaring plaintiffs the equitable owners of land. Judgment for defendants. Plaintiffs appeal. Affirmed.

Frederick Hall, for appellants. *E. W. McGraw*, *W. A. Ryan*, and *Chapman & Hendrick*, for respondents.

De Haven, J. This action is brought to obtain a decree that the plaintiffs are the owners in equity of a certain named undivided interest in 50,444 acres of land within the tract called "Los Coyotes," and that the defendants hold the legal title to such undivided interest in trust for them. The defendants answered, and thereafter moved for a judgment upon the pleadings, which motion was granted, and judgment thereupon entered in favor of the defendants. The plaintiffs appeal.

A motion for judgment on the pleadings, such as was made in this case, is proper when the complaint does not state a cause of action. King v. Montgomery, 50 Cal. 115; Kelley v. Kriess, 68 Cal. 210, 9 Pac. Rep. 129. This motion, like a demurrer for the same cause, admits for its purposes all the facts alleged in the complaint, and the question, therefore, to be considered on this appeal is whether the complaint states a cause of action in favor of plaintiffs. The allegations of the complaint, so far as necessary to be stated, are, in substance, that the plaintiffs are the successors in interest of one Juan Jose Nieto; that upon July 27, 1833, Jose Figueroa, then governor of California, made a decree declaring said Nieto to be the owner of the places called "Los Coyotes," "Los Alamitos, and "Palo Alto," in the county of Los Angeles, and directing juridical possession and title thereto to be given him; that these places were contiguous, and contained within their exterior boundaries more than 17 leagues. It is also alleged that the governor thereafter, on May 22, 1834, made a grant of Los Coyotes to said Nieto, containing 10 leagues. The complaint further alleges that one Abel Stearns acquired the right and title of said Nieto to the Los Alamitos, and obtained from the land commission a confirmation of an alleged grant of the same to said Nieto for 6 leagues. It is also alleged that said Nieto conveyed Los Coyotes to one Leandry, as containing 10 leagues, August 31, 1839; and in 1852 Andreas Pico and Mrs. Ocampo, successors of said Leandry, presented their petition before the land commission for the confirmation of Los Coyotes, containing 10 leagues, and the same was confirmed. It is also alleged that the patent was issued to them for this rancho as containing 11 leagues, and one to Abel Stearns for Los Alamitos as containing 6 leagues, but in fact containing an excess of 1,398 acres. It is nowhere averred in the complaint that any formal grant of or title to Palo Alto was ever made to Nieto, unless the decree of July 27, 1833, can be construed as such; and it is alleged that no grant of the same to said Nieto, or to any other person, by "said Jose Figueroa, * * * or any other person authorized to make the same, or by the Spanish or Mexican government, has ever been produced before any commission or tribunal or public officer authorized by the government of the United States or of the state of California to ascertain or settle land claims in said state under grant from the Spanish or Mexican government." The complaint further alleges that in proceedings for the location and survey of Los Coyotes the said Abel Stearns, for the purpose of obtaining a patent therefor from the United States, and of defrauding the heirs and devisees under the will of Juan Jose Nieto of one square league of land, made false representations in a map produced by him as to the boundaries of Los Coyotes, and thereby induced the district court to approve a survey thereof as containing 11 leagues.

1. The motion for judgment on the pleadings was properly granted. It is clear from the allegations of the complaint that Juan Jose Nieto, the ancestor of plaintiffs, conveyed in his life-time his entire interest in the places Los Coyotes and Los Alamitos, and if said Nieto died possessed of Palo Alto there is no direct averment in the complaint that the boundaries of Los Coyotes and Los Alamitos, as the same are given in the patents of the United States therefor, include the place called Palo Alto. We understand this to be conceded by the attorney for appellants; but he contends that, though such fact is not directly averred, still it conclusively follows that such is the case, from other facts which are averred. If it should be assumed that a pleading which does not directly allege a material fact, but from which only the existence of such a fact may be argued, is sufficient as against a general demurrer, still this complaint would not be good, as everything therein alleged may be true, and yet no part of Palo Alto have been included within the patented boundaries of Los Coyotes and Los Alamitos. The facts upon which appellants rely to support the complaint on this point are that the 3 places only embraced 17 leagues, and that 2 of them had been sold as containing 16 leagues, and so confirmed; and that, as the survey of those 2 was fraudulently made to embrace 17 leagues and over, it must have been extended over the contiguous place called "Palo Alto," but this excess could just as well have been taken from other contiguous territory, and there is certainly no presumption arising from anything stated in the complaint that it was not.

2. But if the complaint could be construed as contended for by appellants, still it fails to state a cause of action, as it does not show that they are the equitable owners of any portion of the lands in controversy. Whatever equities or rights the plaintiffs have arise out of the decree of Gov. Figueroa, dated July 27, 1833, declaring Juan Jose Nieto the owner of the places called "Los Coyotes," "Los Alamitos," and "Palo Alto," and ordering juridical possession and title to be given him for the same; and as the complaint alleges that Nieto in his life-time parted with his ownership of all the lands except Palo Alto, it follows that plaintiffs could only succeed to his ownership of that place. But it is expressly averred, as we construe the above-quoted allegation of the com-

plaint, that the grant to Nieto of Palo Alto, if the above-referred to decree of Figueroa be so considered, was never presented for confirmation to the land commission appointed under the act of March 3, 1851, to ascertain and settle private land claims in this state; and it is declared by section 13 of that act that "all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act shall be deemed, held, and considered as part of the public domain of the United States." It has been held that this act requiring claims to be presented to the commission therein provided for applies to every claim "by virtue of any right or title derived from the Spanish or Mexican government," whether founded upon a perfect grant, or on an "imperfect and inchoate claim, where the initiation of the proceedings necessary to secure a legal right and title to the property had been commenced but not completed." Botiller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. Rep. 525. And the court in that case say: "There can be no doubt of the proposition that no title to land in California dependent upon Spanish or Mexican grants can be of any validity which has not been submitted to and confirmed by the board provided for that purpose in the act of 1851, or, if rejected by that board, confirmed by the district or supreme court of the United States." As no grant for or other claim to the place called "Palo Alto" was ever presented to the land commission appointed under the act of 1851, above referred to, it follows that at the end of two years from the date of said act the land embraced therein became a part of the public domain of the United States, and thereupon all rights of the appellants therein, as successors of Juan Jose Nieto, ceased. This being so, they cannot be heard to complain of the fraud alleged to have been perpetrated years afterwards, in the location and survey of the place called Los Coyotes, because such acts deprived them of no rights. The fraud, if perpetrated as charged, was against the United States alone, and consisted in fraudulently extending the boundaries of Los Coyotes over a portion of the public domain. This is a matter, however, with which appellants have no concern, and which cannot aid them in this action, as it cannot be said that their right to acquire the title now held by defendants was interfered with, or that but for such alleged fraud they would or could have obtained the legal title to any portion of the land so fraudulently included within said Los Coyotes as patented, and for this reason it must be held that they have not in their complaint stated a cause of action. This is a familiar principle, and the following are a few of many cases which might be cited to support it: Burrell v. Haw, 40 Cal. 373; Durfee v. Plaisted, 38 Cal. 80; Houck v. Kelsey, 17 Kan. 333; Bohall v. Dilla, 114 U. S. 47, 5 Sup. Ct. Rep. 782; Dunn v. Schneider, 20 Wis. 509. We find no error in the record. Judgment affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.

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91 Cal. 338

PEOPLE v. LOS ANGELES ELECTRIC RY. CO.
(No. 13,879.)

(*Supreme Court of California.* Sept. 21, 1891.)

CORPORATIONS—REMITTING FORFEITURE OF CHARTER — CONSTITUTIONAL LAW — ACTION TO FORFEIT.

1. Const. Cal. art. 12, § 7, provides that no act shall be passed extending the charter of any corporation or remitting the forfeiture of a franchise. During the pendency of an action to forfeit the charter of a street-car company operating under a city ordinance, Acts Cal. 1891, cc. 18, 19, were passed, one amending Civil Code § 497, so as to invest municipal corporations with power to authorize street railways to use electricity as a motive power; the other ratifying existing ordinances granting such power. *Held,* that the acts did not extend the company's franchise or charter, and, as there had been no decree of forfeiture, there was none to remit, and therefore the acts were not repugnant to the constitution.

2. Civil Code Cal. § 502, provides that work on the construction of a street railway must be commenced within a year from the date of the ordinance granting the right of way and the filing of the articles of incorporation, and be completed within three years thereafter. *Held* that, where the complaint in an action to forfeit a charter did not state when the company commenced the construction, and thereby show that the three years had elapsed within which the work must be done, it failed to state a cause of action.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by the people against Los Angeles Electric Railway Company to forfeit its franchise. Defendant demurred to the complaint. Demurrer was overruled, and defendant neglecting to answer, judgment was entered as by default. Defendant appeals. Reversed.

Brunson, Wilson & Lamme, for appellant. *W. H. Hart,* Atty. Gen., for the People.

SHARPSTEIN, J. This action is brought to have it determined that the defendant has forfeited, and that it be excluded from, all rights, privileges, right of way, and franchises acquired by it under a municipal ordinance passed by the city of Los Angeles on the 28th day of January, 1886. A copy of said ordinance is annexed to and made a part of the complaint. In the complaint two causes of action are separately stated. "The first," in the language of respondent's brief, "is based upon the theory that the law does not permit any incorporated city or town in this state to grant authority to any individual or corporation to lay railroad tracks through the streets or public highways of such city or town, whereupon cars can be propelled by the force of electric power. The second rests upon the ground that if defendant had the right to construct railroad tracks through the streets of Los Angeles, whereon it could propel cars by such electric power, it had forfeited that right by its failure to complete the road within three years from the date of the ordinance granting the right of way to construct said road as prescribed by the Civil Code." The complaint was demurred to by the defendant on the ground that it did not state facts sufficient to constitute a cause of action, and each alleged cause of action was separately demurred to on the same ground. The demurrer was overruled, defendant failed to answer, and judgment by default was entered against it, by which it is adjudged guilty of usurping and unlawfully holding said franchise described in said complaint, and adjudging that the defendant be excluded from all rights, privileges, right of way, and franchise acquired under and by virtue of said municipal ordinance numbered 210, described in said complaint, and that the same has become wholly forfeited. From that judgment this appeal is taken.

Since this appeal was taken the legislature of this state has passed two acts which, in our opinion, have an important bearing upon this case. By one of said acts section 497 of the Civil Code is so amended as to invest municipal corporations with the power to grant a right to propel cars by electricity upon railroad tracks, through streets and public highways. By the other of said acts ordinances passed prior to the passage of said act, by any municipality, giving authority and permission to propel cars upon railroad tracks laid through the streets and public highways of said city, city and county or town, by electricity, are confirmed, ratified, and made valid. If constitutional, the efficacy of this act of the legislature cannot, in our opinion, be doubted. Respondent claims that it is repugnant to section 7, art. 12, of the constitution, which section reads as follows: "The legislature shall not extend any franchise or charter, nor remit the forfeiture of any franchise of any corporation now existing, or which shall hereafter exist, under the laws of this state." We are unable to so construe the act of the legislature as to make it repugnant to that provision of the constitution. There is no attempt to extend any franchise or charter; and there was no forfeiture of any franchise to remit. Acts sufficient to cause a forfeiture do not *per se* produce a forfeiture. The corporation continues to exist until the sovereignty which created it shall by proper proceedings in a proper court procure an adjudication of forfeiture, and enforce it. Ormsby v. Manufacturing Co., 65 Barb. 360; People v. Manhattan Co., 9 Wend. 351; River Co. v. Woodman, 2 Me. 404; Mickles v. Bank, 11 Paige, 118; Com. v. Bank, 28 Pa. St. 383; Murphy v. Bank, 20 Pa. St. 415; Field, Corp. § 154. In this case there has not been any final adjudication of forfeiture. Therefore the act ratifying and confirming the ordinance granting the franchise to defendant is not an act remitting a forfeiture. But it is, in our opinion, an act waiving a forfeiture. It certainly is an act showing an intention on the part of the state that the franchise shall continue in existence, and such an act will be considered an absolute waiver of any existing right to enforce a forfeiture of the defendant's franchise. In re New York El. R. Co., 70 N. Y. 327; Mor. Priv. Corp. 655, and cases cited. We think the constitution does not prohibit such a waiver, and that the state has waived its right to enforce a forfeiture of the defendant's franchise on the ground stated in the plaintiff's first alleged cause of action.

The second alleged cause of action presents another and different question. It is alleged that some portions of the road have not been constructed, although the time allowed the defendant to construct the entire road has elapsed. Conceding that the board of supervisors could not grant a franchise and right of way to the defendant on any other or different conditions than those prescribed by section 502 of the Civil Code, viz., "Work to construct the railroad must be commenced within one year from the date of the ordinance granting the right of way and the filing of articles of incorporation, and the same must be completed within three years thereafter;" and that "a failure to comply with these provisions, works a forfeiture of the right of way, as well as of the franchise, unless the uncompleted portion is abandoned by the corporation, with the consent of the authorities granting the right of way,—such abandonment and consent being in writing,"—it does not appear that at the date of the commencement of this action the time fixed for the completion of the railroad had expired. The complaint does not state when the work to construct said railroad was commenced, and, as we construe the language of the Code, the grantee of the franchise and right of way had three years after the commencement of the work within which to complete it. And at any time before the expiration of that time such grantee might, with the consent of the authorities granting the right of way, abandon the uncompleted portion. It follows that the judgment must be reversed. Judgment reversed, with directions to the court below to sustain the demurrer to the complaint.

We concur: BEATTY, C. J.; MCFARLAND, J.; HARRISON, J.; PATERSON, J.; GAROUTTE, J.; DE HAVEN, J.

(95 Cal. 581)

BAINES v. BABCOCK *et al.* (No. 14,224.)[1]

(*Supreme Court of California.* Sept. 23, 1891.)

CORPORATIONS—ACTION AGAINST STOCKHOLDERS—RETURN OF EXECUTION—RES JUDICATA.

1. A judgment creditor who has had an execution returned unsatisfied against a street-railway corporation may maintain an action against its stockholders to recover, for the benefit of all creditors who may desire to be made parties, the amount due upon unpaid subscriptions for stock.

2. The liability of the stockholders is several, and it is not necessary to make them all defendants. Hatch v. Dana, 101 U. S. 205, followed.

3. Proof that a creditor has exhausted his legal remedy against the corporation is shown by the judgment and an execution thereon returned unsatisfied.

4. Evidence that the company owns a large amount of personal property besides its road and franchise is inadmissible.

5. The judgment is conclusive against the company and its stockholders, and they cannot show that the indebtedness for which the judgment was recovered arose upon a contract which was *ultra vires*.

6. One to whom stock is issued, and in whose name it appears on the books of the corporation, is liable to the creditors of the corporation for the unpaid subscriptions, although he is not the owner of such stock.

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[1] Rehearing granted.

Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Action by Baines against Babcock and others for unpaid subscriptions for stock in a street-car company. Judgment for plaintiff, and from this and an order denying a motion for a new trial the defendants appeal. Affirmed.

Hunsaker, Britt & Goodrich, Brunson, Wilson & Lamme, Works, Gibson & Titus, and *Sprigg & Barber*, for appellants. *F. W. Burnett* and *M. S. Babcock*, (*McNealty, Trippet & Neale*, of counsel,) for respondent.

DE HAVEN, J. This is an action to subject the amount due from defendants for unpaid subscriptions for stock in the San Diego Street-Car Company to the payment of a judgment in favor of plaintiff, and against said corporation. The findings of the court, following the allegations of the complaint, show that execution was issued upon this judgment, and by the sheriff returned unsatisfied, because he could find no property of the corporation to apply to the satisfaction thereof. It is also alleged and found that the officers of the corporation have neglected and refused to make any assessment upon its stock, or to collect the balance remaining unpaid upon subscriptions for its stock. The plaintiff recovered judgment, and from this and an order denying their motion for a new trial the defendants appeal.

1. It is well settled that a judgment creditor who has exhausted his legal remedies against a corporation may maintain an action against its stockholders to recover, for the benefit of all creditors who may desire to come in and be made parties, the amount due upon unpaid subscriptions for stock, when the corporation neglects or refuses to collect the same. The action is sustained upon the principle that such unpaid subscriptions are a part of the capital stock of the corporation, and, like other debts due to it, constitute a fund to which creditors may look for the payment of their claims, and when the corporation neglects to call them in a court of equity will enforce their payment. Sanger v. Upton, 91 U. S. 56. The contention of appellants that this equitable remedy is superseded in this state by section 322 of the Civil Code, and that the only personal liability of the stockholder is that fixed by that section, is not tenable, and was so held by this court in Harmon v. Page, 62 Cal. 448. The remedy given by that section of the Code is purely statutory, and furnishes to creditors of corporations additional security by making the stockholder directly liable for his proportion of the corporate debts, and was not intended to diminish the assets of the corporation by releasing the stockholder from his indebtedness to the corporation on account of his unpaid subscription for stock, or to take away from the creditor the right to resort to a court of equity to compel its payment.

2. All the stockholders were not made parties defendant, and the objection to their non-joinder was taken both by demurrer and answer. The objection is not well taken, although the rule contended for by appellants finds support in some of the decided cases. The precise question arose in the case of Hatch v. Dana, 101 U. S. 205, and it was there held, in an opinion, the reasoning of which seems to us to be conclusive, that it is not necessary that all the stockholders should be made defendants in this kind of an action. The court there say: "The liability of a stockholder for the capital stock of a company is several, and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several. * * * It may be that, if the object of the bill is to wind up the affairs of this corporation, all the shareholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent multiplicity of suits. But this is no such case. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property, that is, out of its unpaid stock, there is not the same reason for requiring all the stockholders to be made defendants. In such a case no stockholder can be compelled to pay more than he owes." And this rule is followed by other courts. Thompson v. Bank, 19 Nev. 103, 7 Pac. Rep. 68; Bartlett v. Drew, 57 N. Y. 587; Brundage v. Mining Co., 12 Or. 322, 7 Pac. Rep. 314.

3. It was not necessary for plaintiff to show that he had pursued his statutory remedy against the stockholders. The rule is that a creditor has a right to resort to the equitable remedy invoked by the plaintiff in this action after he had exhausted his legal remedies against the corporation, and this was shown in this case by plaintiff's judgment, and the return of the execution issued thereon unsatisfied.

4. The court did not err in refusing to allow defendants to show that the corporation was the owner and in possession of a large number of street-cars and other personal property, and a line of street railway and of valuable franchises within the city of San Diego. The purpose of this offered evidence was to show that plaintiff had not exhausted his legal remedy upon his judgment, but was not competent for that purpose. The rule upon this point is thus stated by Mr. Justice FIELD in Jones v. Green, 1 Wall. 332: "The court, when its aid is invoked, looks only to the execution, and the return of the officer to whom the execution was directed. The execution shows the remedy afforded at law has been pursued, and, of course, is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not, and from the embarrassments which would attend any other rule the return is held conclusive. The court will not entertain inquiries as

to the diligence of the officer in endeavoring to find property upon which to levy."

5. The appellants offered to show that the indebtedness for which plaintiff's judgment against the corporation was recovered arose upon a contract which was *ultra vires*. The evidence was excluded, and this ruling is assigned as error. The question is thus presented whether such judgment is conclusive upon the stockholders of the corporation in this action, and that it is we entertain no doubt. The object of this suit is to compel the corporation against whom the judgment was recovered to satisfy the same out of its assets, and it is not competent for the defendants, who are simply called upon to pay what they owe to the corporation in order that its obligations may be discharged, to reopen the question whether, upon the facts, the plaintiff ought to have had judgment against the corporation. The judgment was a conclusive determination of that fact as against the corporation and all persons in privity with it, and carries with it, without relitigating the facts upon which it is based, the undoubted right of enforcement against the property of the corporation, and that is all that is sought in this case. A corporation represents and binds its stockholders in all matters within the limits of its corporate power, so long as it acts in good faith and without fraud upon their rights; and, in the bringing and defending of suits affecting the rights and obligations of the corporation, it binds the stockholders as fully as in the making of contracts. The right to sue and be sued, to maintain and defend actions concerning corporate rights and corporate liabilities, is a power incident to every corporation. In this state it is not only conferred by statute, but is preserved by constitutional provision. Const. Cal. art. 12, § 4. And with this right of the corporation to maintain and defend actions concerning its corporate rights or liabilities the stockholder cannot interfere, except when the directors refuse to act, or are guilty of fraud in the maintenance or defense of the action. Newby v. Railroad Co., 1 Sawy. 63; Memphis City v. Dean, 8 Wall. 73; Ware v. Bazemore, 58 Ga. 316; Greaves v. Gouge, 69 N. Y. 154; Brewer v. Boston Theatre, 104 Mass. 378. It must necessarily follow, from the nature of this corporate power, that a judgment against a corporation for an alleged corporate indebtedness is conclusive upon it, and of the right of the creditor to subject its property to the satisfaction thereof; and, in the absence of fraud, equally conclusive upon the stockholder when it is sought to satisfy the judgment out of the assets of the corporation in his hands. This was so held in Marsh v. Burroughs, 1 Woods, 471, Mr. Justice Bradley, in delivering the opinion of the court, saying: "The stockholders of the bank cannot ask to go behind the judgments rendered against the bank, and question the original cause of action, unless they can show collusion between the plaintiff and the bank, entered into for the purpose of defrauding the stockholders." And this view is also sustained by the following cases: Glenn v. Williams, 60 Md. 93; Henry v. Elder, 63 Ga. 347; Lehman v. Glenn, (Ala.) 6 South. Rep. 44; Stephens v. Fox, 83 N. Y. 317; Bank v. Chandler, 19 Wis. 435. See, also, Mor. Priv. Corp. § 865.

6. The appellant Babcock offered to show upon the trial that he was the real owner of only 425 of the shares issued to him by the corporation, and that the others standing in his name on its books were owned by other parties, and that they were issued to him as a matter of convenience to enable him to negotiate a loan for such owners. The evidence was excluded, and, in our opinion, the ruling was correct. It seems to be well settled that one to whom stock is issued by the corporation, and who has the same placed in his name on the corporation books as the owner, is liable to the creditors of the corporation, as though he were the absolute owner; and this whether he was in fact a pledgee, agent, or trustee for the real owner. Bank v. Case, 99 U. S. 631; Cook, Stocks, §§ 249-253; Thomp. Stocks, § 223; Thompson v. Bank, 19 Nev. 103, 7 Pac. Rep. 68. The foregoing views dispose of all the questions presented by this appeal requiring special discussion. Judgment and order affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.

BAINES v. STORY *et al.* (No. 14,223.)[1]

(*Supreme Court of California.* Sept. 23, 1891.)

Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Hunsaker, Britt & Goodrich, Brunson, Wilson & Lamme, Works, Gibson & Titus, and *Sprigg & Barber,* for appellants. *F. W. Burnett* and *M. S. Babcock,* (*McNealty, Trippet & Neale,* of counsel,) for respondent.

PER CURIAM. The questions presented by this appeal are substantially the same as those involved in Baines v. Babcock, 27 Pac. Rep. 674, the opinion in which was filed this day. On the authority of that case the judgment and order herein are affirmed.

POTTER v. DEAR. (No. 14,272.)[1]

(*Supreme Court of California.* Sept. 24, 1891.)

Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

J. E. Deakin, for appellant. *A. E. Cochran,* for respondent.

PER CURIAM. The points made by appellant have been determined adversely to his contention in the case of Baines v. Babcock, 27 Pac. Rep. 674, (this day decided;) and upon the authority of that case, and the cases cited in the opinion therein rendered, the judgment herein must be sustained. The judgment is affirmed.

(91 Cal. 304)

JUDSON *et al.* v. GAGE. (No. 14,037.)

(*Supreme Court of California.* Sept. 21, 1891.)

FINDINGS—SUFFICIENCY TO SUPPORT JUDGMENT.

In an action on notes given by defendant in payment of his subscription to a fund to purchase a right of way for a railroad the court found on conflicting evidence that there was a substantial compliance with the terms of defendant's subscription that the railroad should be built on a certain line through defendant's land. *Held,* that such finding sustained a judgment for plaintiffs.

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[1] Rehearing granted.

Department 2. Appeal from superior court, San Bernardino county; J. C. CAMPBELL, Judge.

Action by T. G. Judson against Matthew Gage on two promissory notes. Judgment for plaintiff. Defendant appeals. Affirmed.

Curtis & Otis and *Geo. E. Ottis*, for appellant. *E. E. Rowell* and *Waters & Gird*, for respondents.

PER CURIAM. This is an action upon two promissory notes, alleged to have been made by defendant in payment of his subscription to a fund raised by citizens for the purpose of procuring a right of way and depot grounds for a certain railroad. Plaintiffs had judgment as prayed for, and defendant appeals from the judgment upon the judgment roll, which contains a bill of exceptions. We think that the complaint is good as against a general demurrer, and that the demurrer was properly overruled, although neither the complaint nor the answer is as certain and full as it should have been. Appellant further contends that the evidence was not sufficient to support the finding that the notes were given in payment of the subscription; and also contends that the subscription and the notes, which were given several months afterwards, should be considered as one transaction, and that the evidence is not sufficient to support the finding that the conditions of the subscription were complied with. But the evidence is overwhelming to the point that the notes were given in payment of the subscription. As to the other contention, the point made is that the railroad, by the terms of the appellant's subscription, was to be constructed through his land "on a line running parallel to Dr. Pierson's north line, and distant about 800 feet therefrom," and that the evidence fails to show that it was constructed on that line. There was some conflict of evidence on this point, but it warranted the court in finding that there was a substantial compliance with this condition. There was testimony to the point that the road was built substantially as described in the subscription, and that, if there was any slight variance from the rigid parallel line therein mentioned, such variance was with the knowledge and consent of the appellant, and that the road "did conform to Mr. Gage's ideas." We think that the findings support the judgment, and there are no other points necessary to be mentioned. The judgment is affirmed.

91 Cal. 428

Bohnert v. Bohnert. (No. 14,406.)

(*Supreme Court of California.* Sept. 28, 1891.)

Divorce—Alimony and Costs.

1. Under Code Civil Proc. Cal. § 1049, an action is pending from its commencement until final determination on appeal, or until the time for appeal has passed; and under Civil Code Cal. § 137, providing that "when an action for divorce is pending the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action,"—the court, in an action by the husband for divorce, may, after judgment for him, on the wife's showing that she wishes in good faith to appeal, and has no means, order the husband to pay for transcribing the testimony, and other costs, and to pay into court for the wife's attorney a certain sum for prosecuting the appeal, such order being an allowance for the wife, and not a direct judgment in favor of persons not parties to the suit.

2. The allowance of alimony to the wife, in such case, for her support, being discretionary with the trial court, will not be disturbed, if no abuse is shown.

Department 1. Appeal from superior court, Siskiyou county; Edwin Shearer, Judge.

Action by Charles Bohnert against Josephine Bohnert for divorce. After judgment for plaintiff the court ordered him to pay into court certain amounts, to enable defendant to prosecute an appeal, and certain other money. From these orders plaintiff appeals. Affirmed.

John V. Brown and *James F. Farraher*, for appellant. *H. B. Warren* and *Gillis & Tapscott*, for respondent.

GAROUTTE, J. This is an appeal from two certain orders made after judgment for plaintiff in an action of divorce based upon the adultery of the defendant. Upon a showing by the affidavit of defendant that she desired in good faith to appeal to the supreme court from the judgment rendered against her in the aforesaid action; that she was advised by the attorneys who appeared for her at the trial in the lower court that she has good grounds for appeal; that she has no attorneys to prosecute such appeal, and no means to retain such attorneys; that she has no funds from which to pay the costs and expenses of such appeal, and has no means for her personal support during the pendency of such appeal, etc.,—the court made an order that the plaintiff pay into court the following sums, to-wit: "The sum of eighty-seven and 80-100 dollars, to be paid out forthwith as expenses for transcribing the testimony on the part of the defendant already incurred; the sum of seventy-five dollars as incidental expenses in perfecting said appeal, including clerk's fees and expense of printing transcript herein and filing the same with the clerk of the supreme court; and the sum of three hundred dollars, attorneys' fees for preparing said cause for appeal, and arguing the same in the supreme court, to be paid said attorneys when the transcript in the said cause is ready for filing with the clerk of the supreme court; and that plaintiff pay as alimony to the said defendant the sum of twenty dollars per month from the date of the judgment herein during the pendency of the appeal." The court also made an order that "the plaintiff pay to the clerk of said court the amount of $269.90, to be by said clerk retained, and to await further action herein." The foregoing was the amount of defendant's costs incurred in the trial of the cause, as settled by the court. Plaintiff appeals from the foregoing orders.

Section 137 of the Civil Code provides that "when an action for divorce is pending the court may, in its discretion, require the husband to pay, as alimony, any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." Section 1049 of the Code of Civil Procedure provides: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal is passed, unless the judgment is sooner satisfied." As to the granting of alimony *pendente lite*, that is a matter resting in the sound discretion of the court, and this record discloses nothing to justify us in disturbing that discretion as exercised by the trial court in this cause. Under section 137 of the Civil Code, the power to make an allowance to the wife for her support as alimony, or an allowance to her for the purpose of defending or prosecuting the action, is not exhausted upon the rendition of the judgment in the trial court. Reilly v. Reilly, 60 Cal. 624; Ex parte Winter, 70 Cal. 291, 11 Pac. Rep. 630; Larkin v. Larkin, 71 Cal. 330, 12 Pac. Rep. 227. The case of Everett v. Everett, 52 Cal. 384, is not in conflict with the foregoing authorities. In that case the order was made under another section of the Civil Code, and was made after final judgment, and was in no sense an order for alimony made *pendente lite*. The order to pay the amount of the attorneys' fees into court is not void, under the authority of Sharon v. Sharon, 75 Cal. 37, 16 Pac. Rep. 345; for it is not "a direct judgment for money in favor of persons not parties to the suit." See Robinson v. Robinson, 79 Cal. 511, 21 Pac. Rep. 1095. The fact that the court ordered the clerk to retain in his possession until further order the amount ordered to be paid by plaintiff for witness fees affords no grounds of complaint by plaintiff, for he is not injured by that portion of the order. Let the orders be affirmed.

We concur: HARRISON, J.; PATERSON, J.

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91 Cal. 367

Ex parte WIDBER. (No. 20,829.)

(*Supreme Court of California.* Sept. 24, 1891.)

SUPERIOR COURTS—FURNISHING ROOMS FOR HOLDING COURT—PAYMENT OF EXPENSE.

1. Code Civil Proc. Cal. § 144, provides that if suitable rooms, etc., for holding the superior courts be not provided by the county supervisors, the courts, or the judge or judges thereof, may direct the sheriff to provide the same, "and the expenses incurred, certified by the judge or judges to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof." *Held*, that the courts or judges, after certifying the expenses incurred, have not, either inherently or under the statute, the power to order the treasurer to pay the same, and the latter is not guilty of contempt in refusing to obey such an order.

2. Since the statute provides that the expenses incurred shall be audited by the judge, it is not necessary that they be audited by the county supervisors.

In bank. Petition for writ of *habeas corpus*. Writ granted, and petitioner discharged.

John D. Durst, for petitioner. *A. P. Black*, for respondent.

GAROUTTE, J. This is an application for a writ of *habeas corpus*. The petitioner alleges that he is unlawfully restrained of his liberty by the sheriff of the city and county of San Francisco. Section 144 of the Code of Civil Procedure is as follows: "If suitable rooms for holding the superior courts and the chambers of the judges of said courts be not provided in any city and county, or county, by the supervisors thereof, together with the attendants, furniture, fuel, lights, and stationery sufficient for the transaction of business, the courts, or the judge or judges thereof, may direct the sheriff of the city and county, or county, to provide such rooms, attendants, furniture, fuel, lights, and stationery; and the expenses incurred, certified by the judge or judges to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof." The board of supervisors of the city and county of San Francisco having failed to provide suitable apartments, furniture, stationery, etc., sufficient for the transaction of the business of department 11 of the superior court of said city and county, said department 11, Hon. James M. Troutt presiding, made an order that the sheriff of the city and county of San Francisco provide such apartments, furniture, stationery, etc., sufficient for the transaction of the business of said department of the court. The sheriff complied with the aforesaid order, and incurred certain expenses in the sum of $1,867.42 therefor, and said expenses were certified to be correct by said James M. Troutt, judge of department 11 of the superior court of said city and county. Thereafter an order of court was made declaring that said expenses were a charge against the treasury of the city and county of San Francisco, and it was further ordered and adjudged that the treasurer of said city and county forthwith pay out of the "general fund" the aforesaid bills and expenses. A copy of this order was served upon the petitioner, treasurer of the city and county of San Francisco, and he refused to comply with its terms; whereupon such proceedings were had that he was adjudged guilty of contempt, and ordered committed to the custody of the sheriff.

In the solution of the question as to the legality or illegality of petitioner's imprisonment, it is only necessary to determine whether or not the court had any authority in law to make the order requiring the treasurer to pay these expenses. If the order was made without authority in law, the treasurer was not bound to obey it, and his refusal constituted no contempt. That portion of the order of the court declaring the expenses to be a charge against the treasury of the city and county of San Francisco is purely surplusage, for the statute expressly provides that the act of the judge in certifying to the correctness of these expenses constitutes them a charge against the city and county treasury, to be paid out of the general fund. It will be conceded upon all sides that it is the duty of the board of supervisors to prepare suitable rooms, furniture, stationery, etc., for the use of the judges of the superior courts of this state, and public officers are presumed to know their official duties. It is also conceded that the board of supervisors of the city and county of San Francisco in the line of their official duties failed to provide suitable rooms, furniture, lights, etc., for department 11 of the superior court of said city and county. It is immaterial whether such failure was willful and intentional, or arose through negligence and neglect, the evil results to ensue from the failure would be the same. The articles enumerated are necessities required in order that courts may exist, and the law be administered; and the legislature undoubtedly recognized these facts when it provided that, if these articles were not furnished, the court should have the power to provide them forthwith, and thus the progress of its business would not be retarded, and the administration of justice would flow on without interruption. This power vested in the judge or court is not an unlimited power, and therefore not a dangerous power. This section of the Code does not open wide the doors of the city treasury, and place the keys of the treasure vaults in the hands of the judiciary, with an invitation to enter and partake *ad libitum*, as petitioner would insist, but the power is measured by the section, and expenditures made in excess of the limitation of the statute would be made without authority of the law. It is not necessary that these demands should be audited by the board of supervisors, for the legislature in the section of the Code itself provided that the judge should be the auditing officer. The act of the board of supervisors in auditing such demands would be an idle thing, purely *pro forma*, for it would have no authority to reduce or increase the amount of the demand, as certified by the judge. Indeed, the legislature never intended that the board of supervisors should audit these demands, which are created in direct opposition in most cases to their wishes and desires, and to which the board may be hostilely inclined. Ex parte Reis, 64 Cal. 233, and especially the concurring opinion of Justice Thornton, 242 et seq., would seem to conclusively establish the correctness of the foregoing views.

This demand being a charge against the city and county treasury, to be paid out of the general fund, can the payment thereof be enforced against the county treasurer by proceedings in contempt? In other words, had the court the power to order the petitioner to pay this money from the general fund of the treasury? If it had the power to make the order, it had the power to enforce that order by contempt proceedings, but we find nothing in the provisions of the section giving the court any such power, and it certainly had not the inherent power to make the order, for such power was not a necessary incident to the court in order that its previous acts might fully and truly accomplish the results intended and desired. The demand had ripened into a legal liability against the city and county, and remedies were not lacking to enforce its payment. Again, the treasurer was not an officer of the court, and in no way was he a party to the proceedings. Under the above circumstances, the court certainly had no inherent power to make an order placing the petitioner in the unpleasant and perilous position of either paying out the people's money or be punished for contempt of court. Under the provision of the Code, the court does not even audit the demand; that act is performed by the judge, and when performed the power given under the section is exhausted, and whatever duty devolves upon the treasurer thereafter, in relation to such demand, is a duty imposed by law, and a neglect or refusal to perform that duty renders him liable to proceedings by writ of *mandamus* or other appropriate remedy. The cases of Ex parte Reis, 64 Cal. 233, and Aid Soc. v. Reis, 71 Cal. 627, 12 Pac. Rep. 796, add no weight to respondent's position. The latter case is a proceeding in *mandamus*, and in the matter of Ex parte Reis the language of the statute was, "and paid out of the treasury of the county on the order of the court." These words are italicized in the opinion of Justice McKinstry, and it is patent from a casual reading of the decision that, if the statute had not contained the words "on the order of the court," the petitioner would never have been remanded. We conclude, therefore, that the court neither had inherent power, nor power granted by statute, to make the order requiring petitioner to pay out the city and county's money upon these certified demands, and that a refusal to obey such order did not render the petitioner amenable to proceedings in contempt. Let the petitioner be discharged.

We concur: HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.; DE HAVEN, J.

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91 Cal. 112

KREMER v. EARL *et al.* (No. 14,054.)

(*Supreme Court of California.* Sept. 10, 1891.)

CONTRACTS AGAINST PUBLIC POLICY—AGREEMENT TO CONVEY—PUBLIC LANDS—SPECIFIC PERFORMANCE.

1. Under Pol. Code Cal. § 3500, relative to acquiring title to school lands from the state, and requiring the applicant to swear that he is a citizen of the county and a resident of the state, and that he has not entered any of said land, which, together with that then sought to be purchased, exceeded 320 acres, a contract by which one of two persons, each of whom claims adversely to the other the right to acquire title to nearly 500 acres of public land, agrees to convey to the other all the title which he had or might have in about 400 acres of it, he having already taken steps to have other persons enter it in their names, under the school-land laws, but for his benefit, is void as in violation of the spirit of the law, and will not be enforced.

2. Though the defendant in an action to enforce such contract has never questioned its legality, a decree for its specific performance will on appeal be reversed.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action to compel the conveyance of land and the cancellation of a mortgage. Judgment for plaintiff, and defendants appeal. Reversed.

Del Valle & Munday, for appellants. *S. Haley* and *Lee & Scott*, for respondent.

PATERSON, J. This is an action to compel the defendant Earl to convey to plaintiff, who is special administrator of the estate of Henry Charles, deceased, the legal title to the N. E. ¼ of the N. W. ¼ of section 22, township 8 S., range 8 W., S. B. M., and to cancel a mortgage thereon given by Earl to his co-defendant Egan. The facts found by the court show that in September, 1875, Henry Charles and F. P. Forster, brother of defendant M. A. Forster, claimed the right adversely to each other to acquire the title to several tracts of public land, including the land in controversy, and on that day entered into a written agreement, by the terms of which Forster agreed to convey to Charles all the right, title, and interest which he then held or might thereafter acquire in the lands described in the agreement, upon the payment to him by Charles within 60 days of the amount paid by Forster to Mullen & Hyde, of San Francisco, for said lands, together with interest thereon at 1 per cent. per month. On November 8, 1875, Charles paid to Forster the sum of $1,056, which was more than enough to pay for the lands described in the agreement, and thereupon Forster executed and delivered to Charles a deed of conveyance, including the lands in controversy. Forster had previously, for the purpose of acquiring the title to the lands described in the agreement, together with other public lands, employed Mullen & Hyde to discover portions of school sections which had been lost to the state, and to procure lands in lieu thereof, under the provisions of title 8, pt. 3, of the Political Code. In pursuance of their employment they procured one Sheldon to make an application in due form under the provisions of the Code referred to for certain lands, including the lands in controversy, on March 5, 1875. On April 16, 1875, the surveyor general applied to the register of the United States land-office, asking that all of the lands described in Sheldon's application be accepted in part satisfaction of the grant to the state in lieu of certain portions of school sections which had been lost to the state, and at the same time located and selected the lands described in the application for the use and benefit of the applicant. On November 15, 1875, the surveyor general's selection was duly approved by the commissioner of the general land-office and by the secretary of the interior, and thereupon the state became the owner of the lands. About the same time Mullen & Hyde procured other persons to make applications for other portions of the land which Forster had agreed to secure and convey to Charles. Believing the applications to be void because they had been made before the approval of the township plat, Mullen & Hyde procured other persons to file applications for the same lands in March, 1876. Sheldon's application was abandoned, and one Weber filed on the lands described therein. His application was approved by the surveyor general in December, 1880, and on February 19, 1881, the register of the land-office issued to him a certificate of purchase for the lands described in his application, including the lands in controversy. F. P. Forster died intestate March 15, 1881, and the defendant M. A. Forster was appointed administrator in the following month. In February, 1881, Mullen & Hyde procured Weber to execute a deed to the defendant Egan for all the lands in the Weber application. This conveyance, the court finds, was for the sole use and benefit of F. P. Forster, who paid the consideration and cost thereof. Egan, who was an employe of F. P. Forster, did not know of the execution of the deed until several days thereafter. On November 24, 1882, Egan conveyed the lands in controversy, with others, to M. A. Forster, it being understood that Forster would reconvey to him the 40 acres in controversy. November 25, 1882, Forster reconveyed the lands in controversy to Egan. A patent was issued to M. A. Forster December 27, 1882. March 10, 1888, Egan conveyed the 40-acre tract to Earl in consideration of the sum of $4,000, one-third of which was paid in cash, and the balance was secured by the note and mortgage which plaintiff seeks to have canceled. Egan was the trustee, friend, and confidential adviser of both F. P. and M. A. Forster. He acted as the agent of F. P. in procuring the payment of the $1,056 by Charles, and never disclosed the fact that he claimed any interest in the land in controversy until within two years before the commencement of this action. All of the defendants knew of the agreement between Charles and Forster from the time it was executed, and had notice of all the facts concerning the dealings between Mullen & Hyde, the different applicants who filed on the lands, and Charles and Forster. Charles always erroneously believed, until within two years prior to the commencement of this action, that he had acquired title to the lands in controversy through the application of Clarke and Cavanaugh, the certificate of purchase issued to them and assigned to him, and the patent issued by the state to him for the lands described in their application. Hyde procured the deed from Weber to Egan to be made to Egan as the agent of Forster, and Egan received it in trust for and for the sole use and benefit of Forster, who paid the consideration, fees, and expenses on account thereof through Mullen & Hyde. The purchase price of the land was paid to the state by Egan from his own funds. Charles occupied the lands in controversy exclusively, and used the same for pasture, from the time of the agreement with Forster to April 1, 1883. From April 1, 1883, to March 30, 1888,—the date of the commencement of this action,—he used the land in the same manner in connection with other lands, except that in 1885 and 1886 Egan's tenants, who it appears were also tenants of the plaintiff, used the land for pasturage. Egan purposely concealed from Charles the fact that he had procured a deed from Weber for the 40-acre tract.

It is apparent from the facts stated above, and taken from the findings of the court, that the purpose of the agreement between Charles and Forster was to secure from the state large tracts of land in a manner unauthorized by law. The lands described in the agreement itself amounted to 398.46 acres, and the quantity claimed by each adversely to the other was 463.27 acres. The statute under which they propose to acquire title to the lands requires the applicant to make an affidavit that he is a citizen of the United States, or has filed his intention to become such, and a resident of the state of lawful age; that he desires to purchase the lands, and there is no valid claim to the same other than that of the applicant; that he has not entered any land in part satisfaction of the grant in lieu of sixteenth and thirty-sixth sections, which, together with that now sought to be purchased, exceeds 320 acres. There is no doubt that the contract contravenes the spirit and policy of the land laws of this state. The application and purchase authorized by section 3500, Pol. Code, are intended for the benefit of the applicant himself. "This was distinctly the policy of the act,—a policy adopted to prevent the acquisition of large tracts of land by one person through the use of other persons. * * * If such evasion of the statute as is attempted in this case should be allowed, it would be a very easy matter for one who had acquired under the laws above mentioned 640 [here 320] acres, and therefore could not take the oath prescribed, by the employment of others, who could take the oath, to acquire for himself, in manifest disregard of the intent and policy of the act, many times 640 [here 320] acres." McGregor v. Donelly, 67 Cal. 150, 7 Pac. Rep. 422. It is not necessary that the act itself or any other act should declare in express words such a contract to be void. If, upon a review of all the state legislation upon the subject, such a contract appears to contravene the design and policy of the laws, a court of equity will not enforce it. Civil Code, § 1667; Dial v. Hair, 18 Ala. 800; Smith v. Johnson, 37 Ala. 636. "No court will lend its aid to give effect to a contract which is illegal, whether it violate the common or statute law, either expressly or by implication." Damrell v. Meyer, 40 Cal. 170. The parties being *in pari delicto*, the court will leave them where it finds them. Wat. Spec. Perf. § 207. Our land laws are intended to benefit actual settlers; to encourage the immigration of industrious people, and enable them to build homes; to place the lands of the state beyond the reach of speculators. If we hold this contract not to be in violation of the spirit of the law, we shall sanction a contrivance by which one, though not an actual settler, or even a resident of the state, can acquire any quantity of land under the act. There is nothing in the record to show that Charles was a citizen of the United States, or possessed of any of the qualifications necessary to entitle him to purchase land from the state. If he is entitled to the relief he seeks in this action, it must be by virtue of the terms of the written contract, and not by virtue of any oral agreement, or of any trust relation existing between him and Egan, or between Egan and Forster. There is enough in the record to indicate that the land in controversy is agricultural land, and fit for cultivation. If it is, no one was entitled to purchase it who was not an actual settler thereon. There seems to be no pretense that the plaintiff was ever an actual settler on the land. Our constitution provides that "lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding 320 acres to each settler;" and this provision governs applications made prior to the time when the constitution took effect. Manley v. Cunningham, 72 Cal. 240, 13 Pac. Rep. 622; Wat. Spec. Perf. § 207, supra; Brake v. Ballou, 19 Kan. 402. But, whether the lands were fit for cultivation or not, the agreement upon which plaintiff relies for a specific performance contravenes the provisions of the statutes which were in force at the time it was executed, and no recovery can be had upon it.

It may be suggested that the appellant has never questioned the legality of the contract, and that we ought not to make the point for him. As a general rule, cases should not be reversed upon points which the respondent has not had an opportunity to discuss; but in cases of this kind the court is bound to satisfy its own conscience, and cannot shut its eyes to the fact, although it is not put in issue. A court of equity will not allow itself to become a handmaid of iniquity of any kind. It intervenes, not for the sake of the party who is benefited by the intervention, but for the sake of the law itself. It matters not that no objection is made by either party; when the court discovers a fact which indicates that the contract is illegal, and ought not to be enforced, it will of its own motion instigate an inquiry in relation thereto. Valentine v. Stewart, 15 Cal. 405; Pom. Cont. § 286. Judgment and order reversed, with directions to the court below to dismiss the action.

We concur: HARRISON, J.; GAROUTTE, J.

(91 Cal. 309)

WARNER v. DARROW. (No. 14,179.)

(*Supreme Court of California.* Sept. 21, 1891.)

APPEAL—JUDGMENT OF NONSUIT—RIGHTS OF VENDEE—TRIAL ON CROSS-COMPLAINT.

1. The time within which an appeal can be taken from a judgment of nonsuit is not prescribed by Code Civil Proc. Cal. § 939, subd. 1, providing that an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within 60 days after the rendition of the judgment. Miller v. Wade, 25 Pac. Rep. 487, explained.

2. Under an agreement of the vendor of land to make the conveyance "on or before" a date named, provided the vendee shall, "on or before that day," have paid to the vendor the price stated therein, payment or tender of the price by the vendee within the time stated, entitles him to a conveyance.

3. Where plaintiff is nonsuited after filing a answer to a cross-complaint, he can have no relief on account of matters alleged in his complaint, but defendant is entitled to have the issues made by his cross-complaint, and the answer thereto, tried and disposed of.

Department 2. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by Warner against Darrow, in which the plaintiff is nonsuited, and the defendant files a cross complaint for affirmative relief that the plaintiff be required to convey certain land. Trial under the cross-complaint, and judgment of nonsuit against defendant. Defendant appeals. Reversed.

W. T. Kendrick, for appellant. *M. Whaling*, for respondent.

DE HAVEN, J. The defendant filed a cross-complaint in the action, in which he asked as affirmative relief that the plaintiff be required to convey to him certain described land. The plaintiff answered. Upon trial of the action the plaintiff was, upon motion of defendant, nonsuited. The court thereupon proceeded to a trial of the issues made by the cross-complaint and answer thereto, and, when the defendant had concluded his evidence in support of his cross-complaint, the court, on motion of plaintiff, granted a nonsuit as to the matters alleged in said cross-complaint. From this judgment the defendant appeals.

1. The appeal in this case was taken more than 60 days after the rendition of the judgment of nonsuit, and the respondent insists that, as the determination of the question whether the nonsuit was proper actually depends upon the sufficiency of the evidence to sustain the allegations of the cross-complaint, the appeal was not taken in time.[1] This view finds support in the opinion of Mr. Justice WORKS, in Miller v. Wade, 87 Cal. 410, 25 Pac. Rep. 487, but was not concurred in by a majority of the court in that case, and it cannot be sustained without overruling previous decisions in which it was uniformly held that the ruling of a court upon a motion for a nonsuit presents a pure question of law, and is properly assigned as such on appeal from the judgment. Cravens v. Dewey, 13 Cal. 42; Donahue v. Gallavan, 43 Cal. 576; Schroeder v. Schmidt, 74 Cal. 460, 16 Pac. Rep. 243. In the latter case this court said: "An error in granting a nonsuit is an error in law, and should be excepted to and specified as such. Donahue v. Gallavan, 43 Cal. 576; Cravens v. Dewey, 13 Cal. 42. It cannot be reviewed on the ground that the evidence is insufficient to sustain the decision. This is a ground for the review of questions of fact, not of law." We have no doubt of the correctness of these views. A motion for a nonsuit admits the truth of plaintiff's evidence, and every inference of fact which can be properly drawn therefrom, and the question thus presented is as purely one of law as that which would arise if, to a complaint alleging the same facts, a demurrer should be interposed upon the ground that such facts were insufficient to constitute a cause of action.

2. The evidence was sufficient to show that appellant tendered to respondent the balance of the price, which, by the terms of the agreement alleged in the cross-complaint, he was to pay for the land. This, in the absence of any proof of the matters set up as a defense, entitled him to a conveyance. The agreement binds the respondent to make the conveyance "on or before" July 1, 1892, provided that the appellant shall, "on or before that day, have paid to the obligor" the price named therein. This provision does not render the present action by appellant for a specific performance premature, or justify the respondent in withholding the conveyance after she had been paid or tendered the agreed price for the land. The true meaning of the agreement is that appellant was to have until the dates fixed therein with-

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[1] Code Civil Proc. Cal. § 939, subd. 1, provides that "an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment."

in which to make the different payments provided for, the last falling due on July 1, 1892, but might at his option make payment sooner, and if he did that respondent would at once convey. Upon payment or tender of the purchase price, the appellant became in equity the owner of the whole estate in the land purchased, and entitled to a conveyance of the legal title.

3. The nonsuit of plaintiff, upon motion of defendant, did not operate as a dismissal of the action, so as to prevent the trial of the issues arising upon the cross-complaint and the answer thereto. The effect of this order was that plaintiff was entitled to no relief against the defendant on account of matters alleged in the complaint, but the issues made by the cross-complaint and the answer thereto still remained, and the appellant was entitled to have them tried and disposed of. This was, in effect, so held in Mott v. Mott, 82 Cal. 419, 22 Pac. Rep. 1140. The case of Wood v. Ramond, 42 Cal. 644, upon which respondent relies, is not in conflict with this view. In that case there was no cross-complaint, and what was there said about an order of nonsuit being, in effect, a dismissal of the action does not apply here. The other grounds relied upon to sustain the judgment do not require special mention. The reversal of the judgment and order denying appellant's motion for a new trial necessarily compels a reversal of the order denying the motion for taxation of costs. Judgment and orders reversed.

We concur: Beatty, C. J.; McFarland, J.

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91 Cal. 323

Smith *et al.* v. Phenix Ins. Co. (No. 13,514.)

(*Supreme Court of California.* Sept. 21, 1891.)

Insurance—Conditions of Policy—Change of Possession and Title.

Putting a lessee in possession of insured property under a contract that he shall buy the property on the expiration of his lease, or, at his option, at any time during its continuance, does not violate a condition of the policy that it shall become void if any change takes place in the title or possession, when, on application for the insurance, the building was in process of erection, untenanted, and the company had notice of the contemplated lease and change of possession, though not of the agreement to convey contained in the lease. 23 Pac. Rep. 383, reversed.

In bank. On rehearing. For former report, see 23 Pac. Rep. 383.

Action by Smith and others against the Phenix Insurance Company for loss under a fire policy. Judgment for plaintiffs. Defendant appeals. Affirmed on rehearing.

Beatty, C. J. In March, 1890, we made a decision in this case reversing the judgment of the superior court, with directions to enter judgment on the findings in favor of the appellant. 23 Pac. Rep. 383. After a rehearing of the case, and upon fuller consideration of the questions involved, we are satisfied that our former decision was erroneous, and that the judgment of the superior court should be affirmed. The action is upon a fire insurance policy. Plaintiffs had judgment in the lower court, and defendant appealed from the judgment alone, claiming that upon the facts found the judgment should have been in its favor. The policy in suit was issued in August, 1887, and the property insured consisted of a frame building designed for an hotel or boarding-house. The defendant was advised by the papers accompanying the application for insurance—which, by the terms of the policy, are made a part of the contract—that the building was occupied or to be occupied by a tenant (no particular tenant being named) for hotel purposes; and it is found by the court, as alleged in the complaint, "that before said insurance was effected defendant had full knowledge that said building was built by plaintiffs for the purpose of renting the same for a boarding and lodging house, and was to be occupied by the tenant of the plaintiffs, the said building not being at that time fully completed and furnished." After the insurance was effected and the building completed, the plaintiffs, on December 24, 1887, by a written lease, demised the insured premises to one J. D. Stewart for a term of five years, at a fixed rent, payable monthly. The lease also contained stipulations binding the plaintiffs to put in certain furniture, consisting of carpets, cooking range, gas-fixtures, etc., and binding Stewart to put in other necessary furniture. It was agreed that the building and furniture should be properly insured for the benefit of the parties as their interest might appear, and that Stewart, the lessee, should pay one-half of the expense of insuring the building and the entire expense of insuring the furniture. It was further agreed as follows: "Said party of the second part [Stewart] may at any time during said term of five years purchase said hotel, lots, and premises for the sum of twenty-five thousand dollars cash, and likewise purchase said carpets, gas-fixtures, and range at cost price. It is further agreed that said party of the second part will purchase said hotel, lots, and premises on or before five years from this date for the sum of $25,000, together with said carpets, gas-fixtures, and range at their cost price." The defendant had no notice of these stipulations for purchase and sale of the property. Under this lease and agreement Stewart entered into possession of the insured premises, and so continued until the destruction of the hotel by fire in April, 1888. The plaintiffs thereafter, upon due notice and proofs of loss, demanded payment of the policy, which was refused by the defendant. Hence this action, which is defended on the ground of an alleged violation by plaintiffs of the following conditions of the policy: "*If the property be sold or transferred,* (in whole or in part,) or upon the commencement of foreclosure proceedings against, or a sale under a deed of trust, or the existence of a judgment lien, or the issue or levy of an execution against any kind of property herein described; or if the property be assigned under any bankrupt or insolvent law, *or any change takes place in the title or possession,* (except in case of succession by reason of the death of the assured,) whether by legal process or judicial decree, or voluntary transfer, assignment, or conveyance; *or if the title or possession shall be changed from any cause whatsoever;* or if this policy shall be assigned before a loss, without the consent of the company indorsed hereon,—this policy shall, in each and every instance, be void." The passages which we have italicized are those to which attention is particularly directed; the claim of appellant being that the lease and agreement of sale, and Stewart's possession thereunder, wrought a change both in the title and possession of the property insured, involving a forfeiture by plaintiffs of all rights under the policy.

In their argument at the rehearing counsel for appellant took the position, for the first time, that possession by Stewart, under the lease and as a tenant merely, without regard to the contract of sale, was a violation of the provision of the policy against a change of possession. But clearly this position cannot be maintained, in view of the statement made in the application upon which the policy was issued, to the effect that the building was to be occupied by a tenant for hotel purposes; and the fact found by the court that defendant had full knowledge, before issuing the policy, of the purpose for which the building was being constructed, and that it was to be occupied by a tenant. Occupancy of the identical character contemplated by the policy was not a change of possession. The issuance of the policy was an express consent to possession by a tenant, and, since no particular tenant was named, it was a consent to occupancy by any tenant selected by the assured, subject, of course, to revocation by canceling the policy and returning the premium if an objectionable tenant was selected.

The real and only question in the case is whether the contract of sale embraced in the lease, or superadded to it, wrought a change in the title to the insured premises within the meaning of the policy, or imparted to the possession of Stewart a character materially different from the possession of a tenant. Upon this question we held in our former decision, in accordance with the contention of appellant, that Stewart, by taking possession of the insured premises under the lease and agreement of December 24, 1887, not only acquired the right but became absolutely bound to complete the purchase; that henceforth the buildings were at his risk; that if they were destroyed the loss would be his alone, because he was obliged at the expiration of his term as tenant, upon tender of a deed for the land without the buildings, to pay the full contract price of $25,000. From this it necessarily followed that Stewart, from the time of taking possession, acquired an insurable interest equivalent to the value of the buildings, and that, if plaintiffs could collect the insurance and keep it, they would be paid twice over for the buildings, so that they would have a direct interest in their destruction. Of course, upon these premises, it was impossible to avoid the conclusion that the effect of the transaction with Stewart was to work a change in the title not merely nominal and technical, but substantial and material to the risk, and necessarily violative of the conditions of the policy. But on a fuller consideration of the case we are satisfied that the authorities cited in our opinion and in the briefs of counsel did not warrant us in holding that under the circumstances of this case Stewart, by taking possession under the lease and contract of December 24, 1887, became absolutely bound to complete the purchase of the premises at the expiration of his term, notwithstanding the previous destruction of the buildings. There can be no question that under such a contract the equitable title to the land, as between the vendor and vendee, is in the latter. This is a familiar doctrine of equity, based upon the principle that, for the prevention of fraud and the enforcement of the just rights of the parties, equity will deem that to be done which ought to be done. The maxim is applied most frequently in actions by the vendee for specific performance of the contract, or in aid of his defense when the vendor is seeking to recover possession of the land upon his legal title. Laffan v. Naglee, 9 Cal. 663; De Rutte v. Muldrow, 16 Cal. 505; Hall v. Center, 40 Cal. 63; Dowd v. Clarke, 54 Cal. 48; King v. Ruckman, 21 N. J. Eq. 599.

Decisions almost innumerable to the same effect might be cited from the reports of this and other states, but they do not decide the question involved in this case. There is a wide distinction between the proposition that the vendee in possession under an executory contract of sale may maintain the possession against the vendor as long as he performs his part of the agreement, and upon full compliance may enforce specific performance of the vendor's contract to convey the legal title, and the proposition here contended for, viz., that the vendor in such a contract, notwithstanding the destruction of the subject of the contract, in whole or in part, before the date stipulated for payment and conveyance, and his consequent inability to make a conveyance of that for which the vendee has bargained, may nevertheless compel the vendee to pay the whole contract price in exchange for a fraction of the property sold. When we come to make a critical examination of the cases cited to this point, and especially the cases in which the precise questions we are considering are directly involved, we find that they lend a very slight support to the appellant's contention. In the case of McKechnie v. Sterling, 48 Barb. 330, the doctrine is, it is true, carried to an extreme degree; but the authorities cited in support of that decision are not in point, and the reasoning by which they are made to support the decision is very unsatisfactory. In Richter v. Selin, 8 Serg. & R. 439, the supreme court of Pennsylvania use this language: "Where a contract is made for the sale of land, equity considers the vendee as the owner of the estate sold, and the purchaser as a trustee for the vendor for the purchase money. So much is the vendee considered in contemplation of equity as actually seised of the estate that he must bear any loss that may happen to the estate between the agreement and the conveyance, and he will be entitled to any benefit which may accrue to it in the interval, because by the contract he is the owner of the premises to every intent and purpose in equity." But this was said *arguendo* in deciding a case where the point was not directly involved, and the proposition, true enough in general, and in its application to the circumstances of that case, was stated in its most unqualified form, and without regard to the special circumstances which in many cases render it inapplicable. Similar statements of the same doctrine are to be found in some of the insurance cases hereinafter referred to, with reference to most of which it was correctly applied, as we shall see. But we shall also see that the doctrine has its reasonable limitations, and that this is one of the cases to which it cannot be applied without doing the wrong and injustice which it was designed to prevent. In the case of Wells v. Calnan, 107 Mass. 514, the facts were that the plaintiff agreed to sell the defendant a farm, and the defendant agreed to buy. On the day previous to that fixed for the payment and conveyance, the buildings on the farm were destroyed by fire. The plaintiff tendered a conveyance in pursuance of the contract, and demanded payment of the purchase price, which being refused, he sued for damages. It was held that he could not recover, because by reason of the destruction of the buildings he was unable to comply with the contract on his part. It is true the vendee had not taken possession, and the court found it necessary to distinguish the cases in which lessees in possession had been held liable on their covenant to pay rent or make repairs notwithstanding the destruction of tenements by fire during the term. In those cases it was said the liability of the defendant resulted from the fact that the lessors had fully complied with their contracts, while in the case under consideration the plaintiff was unable to do so. There can be no doubt of the soundness of this distinction, and no difficulty, we think, in showing that it applies to the present case. In the earlier Massachusetts case, (Thompson v. Gould, 20 Pick. 134,) it was applied where the defendant was in possession and had paid the purchase price for the purpose of sustaining his right to recover back the money paid. In that case the agreement of purchase and sale was by parol, but the plaintiff paid at different dates the whole purchase price, and got receipts in writing specifying the purpose of the payments, and he had entered into possession of the house. Clearly, under the circumstances, he had put himself in a position to enforce specific performance of the contract to convey, and was the owner of the equitable title. But, before any conveyance was tendered, the house was destroyed by fire, and the plaintiff sued in *assumpsit* for the money paid. In a well-considered opinion the court held that he was entitled to recover back the money on account of failure of consideration. It was conceded that the contract of the vendor, though by parol, could, under the circumstances, have been specifically enforced, but it was denied that it could have been enforced against the vendee after destruction of the house. It may be said that in this decision the mere legal rights of the parties were regarded, and that the court could not act upon the equitable doctrine for want of jurisdiction; but it will be seen that the equitable doctrine was discussed in the opinion, and its reasonable limitations pointed out. What those limitations are it is not necessary that we should consider exhaustively. For the purpose of this decision, it is sufficient to say that no case has been cited, and we have discovered none, in which the vendee has been held bound to pay the purchase price where a valuable part of the property has been destroyed before the day fixed for payment and conveyance, unless he has taken possession under the contract of sale, or has the right to such possession under the contract before the occurrence of the loss. Now, in this case, it is to be remembered that the agreement between plaintiffs and Stewart consisted of a lease, for a term of five years, reserving a rent payable monthly in money, a stipulation giving Stewart the privilege of purchasing at $25,000 at any time during the term, and the contract binding him to purchase at $25,000 at the end of the term.

In considering the question before us we may lay out of view the stipulation giving Stewart the privilege of purchasing, for clearly he was not thereby bound to take the property and pay for it, even if it remained whole and intact. To determine the character of his possession with reference to the extent of his liability upon his agreement to purchase, the contract is to be viewed as if it consisted merely of the lease and the agreement to purchase. Would Stewart, entering under such a contract, at the beginning of the term demised, be deemed, for the purpose of enforcing a most inequitable liability, to have entered and to be holding under his contract of purchase? Clearly he would not, if his possession could be referred to either the lease or the contract as distinct from the other; for there can be no doubt that during the term of the lease he would hold under that. His right to remain in possession would depend on his payment of rent and performance of other covenants of the lease, and would be determined by failure so to pay and perform. And we think that, for the purpose of determining his liability under his agreement to purchase, in case of destruction of a material part of the property sold prior to the time for payment and conveyance, this distinction between the lease and agreement ought to be made. It is reasonable and equitable, and not opposed to any authority cited, unless the case in 48 Barb., above referred to, should be deemed an authority against it. If so, we can only say that we think that case goes to an unreasonable length, and that it ought not to be followed. On the contrary, we think the best-considered cases warrant us in holding that the liability of Stewart upon his agreement to purchase ended with the destruction of the hotel; that it was never at his risk, but was always at the sole risk of the plaintiffs. But appellant contends that even on this view there was a change of title and possession within the meaning of the policy, and he cites a number of cases to sustain the proposition that the equitable ownership of a vendee under a contract of purchase constitutes a sole, absolute, and unconditional ownership, and consequently that the vendor cannot also be the sole, absolute, and unconditional owner. A review of these cases, however, will show that they differ essentially from the case in hand. In the case of Hough v. Insurance Co., 29 Conn. 10, the legal title to the property insured was in a trustee, who held it as security for about $1,600, subject to which incumbrance the plaintiff and two others owned the equitable title in equal shares. The plaintiff bought out his co-owners, agreeing to pay each the sum of $1,000 for his interest, and he had paid on his purchase $500 to one, and $700 to the other. He had also taken possession of the land, and erected a dwelling thereon, at a cost of $2,700, and was to receive a conveyance from the trustee upon the payment of the sum secured to him on the property. Under these circumstances, the court held that it was not a misrepresentation on the part of plaintiff in applying for insurance to state that the property was his. And it was also held that his interest in the property was, within the meaning of the policy, an absolute interest, because he could by no contingency be deprived of it except by his own consent. No doubt this case was correctly decided. The plaintiff, by reason of his original interest in the property, his payment to his co-owners upon the purchase of their interests, and the money he had expended in improvements on the property, independent of his agreement to purchase, had bound himself to do so, and he was the only person who could suffer loss by destruction of the property. It was his, therefore, absolutely, in every sense of the word material to the risk. And the decision was in line with hundreds of others in which the courts everywhere have refused to defeat recovery upon insurance policies by giving effect to the literal terms of clauses of forfeiture. Such clauses are always, and justly, construed with the utmost strictness against the insurer, and always with reference to their only legitimate object, *i. e.*, the protection of the insurer against risks that are materially different from those which he has undertaken. The cases of Insurance Co. v. Wilgus, 88 Pa. St. 107; Chandler v. Insurance Co., Id. 223; Insurance Co. v. Dyches, 56 Tex. 565; Swift v. Insurance Co., 18 Vt. 313; and Gaylord v. Insurance Co., 40 Mo. 16,—are all substantially like the Connecticut case, and the decisions rest upon the same ground. In every instance the vendee had made large or complete payments upon his purchase, or valuable improvements, or both. In other words, he had given bonds to complete it, so that the loss must necessarily fall upon him in case of destruction of buildings.

The case of Davidson v. Insurance Co., 71 Iowa, 532, 32 N. W. Rep. 514, upon the authority of which, principally, our former decision herein was based, was another of the same sort. There the vendee had entered into possession of a small farm under a contract to purchase it for $400, upon which $50 was to be paid in cash. Prior to the sale the vendor had, as in this case, procured insurance on a building on the farm. After the sale the building was destroyed by fire, and the vendor sued on the policy. The defense was breach of a condition of the policy against any sale or conveyance of the property by the insured. The defense was sustained on the ground that there was a sale of the property. This ruling was clearly opposed to the decision of the supreme court of Maryland in Insurance Co. v. Kelly, 32 Md 421, and to other decisions cited in the dissenting opinion. It was rested also upon the false assumption that if the plaintiff could collect the insurance he could also collect the full purchase price of the building from his vendee, which would be holding, in effect, that the defendant remained bound by the policy after it became the interest of the assured to destroy the property. But upon the doctrine of equity that the vendee in possession is the equitable owner of the property, and the vendor merely his trustee of the legal title, the money collected by the plaintiff on the policy would have been held in trust for the vendee, and applied on the purchase price, (Reed v. Lukens, 44 Pa. St. 202;) so that in fact the plaintiff, even if he had been held entitled to recover on the policy, could have no interest in the destruction of the property. And so in this case, even if Stewart could be held bound by his contract of purchase after the fire, the plaintiff could gain nothing by collecting the amount of the policy. This, however, would be no answer to the objection of defendant that the title was changed in a sense material to the risk; for to hold that the plaintiff could collect the insurance for the benefit of his vendee would convert the transaction into a virtual assignment of the policy, which can never be done without the consent of the insurer. We do not, therefore, rest our decision in any degree upon the ground that the plaintiffs could not possibly have derived an advantage from the destruction of the hotel, and have only alluded to the matter for the purpose of calling attention to the false quantity in the reasoning of the Iowa supreme court in the case cited in support of our former decision. The cases of Insurance Co. v. Dunham, 117 Pa. St. 460, 12 Atl. Rep. 668, and Elliott v. Insurance Co., 117 Pa. St. 548, 12 Atl. Rep. 676, cited on the rehearing, are essentially like the other cases cited to the same point, which we have already considered. We conclude that there was in this case no change of title or possession material to the risk, and that the judgment of the superior court on the facts found was correct. In reaching this conclusion we have not overlooked the argument based upon the fact that Stewart agreed to pay one-half of the premium on the insurance of the hotel. That agreement is evidently one of the terms of the lease, as contradistinguished from the agreement to purchase. The judgment is affirmed.

We concur: PATERSON, J.; HARRISON, J.; DE HAVEN, J.; GAROUTTE, J.

MCFARLAND, J. I concur in the order of affirmance.

SMITH *et al.* v. PENNSYLVANIA FIRE INS. CO. (No. 13,515.)

SAME v. AMERICAN FIRE INS. CO. (No. 13,516.)

(*Supreme Court of California.* Sept. 21, 1891.)

In bank. On rehearing. For former report, see 23 Pac. Rep. 385.

Actions against the Pennsylvania Fire Insurance Company and the American Fire Insurance Company, respectively, for loss under fire policies. Judgment for plaintiff. Defendants appeal. Affirmed on rehearing.

PER CURIAM. These cases being in all material respects the same as Smith v. Insurance Co., 27 Pac. Rep. 738, (this day decided,) and for the reasons given in the opinion in that case the judgments are affirmed.

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91 Cal. 358

FREDERICK *et al.* v. DICKEY. (No. 14,015.)

(*Supreme Court of California.* Sept. 23, 1891.)

ADVERSE POSSESSION—PAYMENT OF TAXES—LOCATION OF WATER-RIGHT—EVIDENCE.

1. Where a mill-owner claimed adverse possession of a water-ditch appurtenant to his mill, and of a right of way therefor over adjoining property, for a period exceeding five years, and his land was, during one year of that period, mortgaged for more than its value, his failure to show, in an action to enjoin his neighbor from interfering with the ditch, that he paid the taxes on the mill property or on the ditch for that year, is immaterial under Code Civil Proc. Cal. § 325, which provides that one claiming adverse possession of "land" must show that he has paid all the taxes thereon; since, strictly speaking, no tax was levied on the "land" for that year, even if "land" be held to include such easement, which is doubtful.

2. A notice of the location of the water-right, made by the mill-owner's grantor 15 years before the commencement of the action, was admissible as evidence of an adverse claim, though the location was not made in accordance with the provisions of the Code.

In bank. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Action for an injunction by A. Frederick and another against one Dickey. Judgment for plaintiffs. Defendant appeals. Affirmed.

Waters & Gird, for appellant. *Goodcell & Leonard* and *Ezra Crossman*, for respondents.

MCFARLAND, J. This action was brought to enjoin defendant from destroying or interfering with a certain water-ditch, a portion of which runs through defendant's land. Judgment went for plaintiffs, and defendant appeals.

The court found that plaintiffs and their grantors, for 10 years next before the commencement of the action, were the owners of a certain mill; that said water-ditch and right of way for the same were appurtenant to said mill, and used solely for the purpose of operating the same; and that plaintiffs and their grantors for 10 years had been in the open and adverse possession of said ditch and right of way, except that such use and possession of the same where it crosses defendant's land was adverse only after October 19, 1881, which was about seven years before the commencement of the action.

We see nothing in the objections to the introduction of the deeds marked Exhibits "A" and "B." Neither was the objection to the introduction of a notice of location of the water-right made by plaintiffs' grantor, Matthews, made in 1873, a good one. Whether or not the location was made in accordance with the provisions of the Code, it was admissible as evidence tending to show an adverse claim, for which purpose alone it was offered. See Coonradt v. Hill, 79 Cal. 593, 21 Pac. Rep. 1099.

The real question in the case is whether or not plaintiffs and their grantors held the ditch, water-right, and right of way over defendant's land adversely to defendant and his grantors; and a discussion of this question here would simply be a review of the evidence. The evidence clearly shows that plaintiffs and their grantors were in the possession and use of the ditch for a much longer period than the one found by the court, some of the witnesses putting it at 16 years. Appellant contends that during this long period it was held and used merely under a parol license, revocable at any time by appellant or his grantors; while respondents contend that it was held under a grant, which, although at first invalid, because not in writing, ripened into title by adverse user, having always been held under claim of title. And while on this issue the evidence was, no doubt, somewhat conflicting, it was amply sufficient to justify the finding of the court.

Upon the question of adverse possession appellant invokes section 325, Code Civil Proc., which provides that one claiming adverse possession of land must show that he has paid all taxes assessed upon said land. It is doubtful if the word "land," as used in that section, was intended to have any other than its common meaning. In some legal connections it is, no doubt, used as co-extensive with "real property," but primarily it means "the soil or a portion of the earth's crust." The sections of the Code upon the subject of adverse possession which precede section 325—except sections 324 and 327, which are immediately connected with it—all use the more general words, "real property," "real estate," or "property;" but section 325 and the two preceding sections use the word "land," and speak of methods of adverse holding which apply only to land in its common meaning, as "cultivated," and "protected by a substantial inclosure," and used "for purposes of husbandry, or for pasturage." In the very section 325 it is first provided that, in order to constitute adverse possession, land is deemed to have been possessed—"*First*, when it has been protected by a substantial inclosure; *second*, when it has been usually cultivated or improved;" and then it provides that the possession shall not be considered adverse unless "'the land' has been occupied," etc., "and the claimant shall have paid the taxes levied upon such land." It is, therefore, not at all clear that the section was intended to apply to mere easements or appurtenant rights. But, waiving that question, the water ditch and right here involved were appurtenant to the mill property, and, in our opinion, as intimated in Coonradt v. Hill, supra, should be considered as included in the assessment of the latter. It was, however, during some years assessed separately; but, whether assessed separately or not, all the taxes assessed were paid by plaintiffs and their grantors each year from 1878 to 1888, (when this action was commenced,) inclusive, unless the year 1884 is to be deemed an exception. The facts as to 1884 are that in that year the property was mortgaged to an amount exceeding its value, and there was no tax to be paid by the owner. We do not think, as contended by appellant, that respondent has lost his right as an adverse claimant because he does not show affirmatively that the mortgagee had paid the tax that year on the mortgage. Strictly speaking, there was no tax levied on "the land" within the letter of said section 325, (whatever meaning we attach to "land" as there used;) and, if that section be broadly construed as requiring the payment of taxes by an asserted adverse claimant as evidence of the *bona fides* of his claim, then certainly respondent and his grantors were within the spirit and intent of the provision. The judgment and order denying a new trial are affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; HARRISON, J.; GAROUTTE, J.; PATERSON, J.

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91 Cal. 362

SCHALLERT-GANAHL LUMBER CO. *et al.* v. NEAL *et al.* (No. 13,999.)

(*Supreme Court of California.* Sept. 24, 1891.)

MECHANICS' LIENS—ENFORCEMENT—FORFEITURE OF LIEN.

1. In an action to enforce a lien for materials furnished to a contractor who was building a house for defendants, the court found that the contractor delivered a check to plaintiffs' agent, taking a receipt therefor, and requested the agent to apply the proceeds to materials furnished by plaintiffs on a building then being erected for a third person; that the agent refused to so apply the proceeds of the check, but stated that part would be so applied, and that the residue would be applied to certain other contracts, not including that with defendants; that afterwards the contractor went to plaintiffs' office, showed plaintiffs' book-keeper the receipt for the check given by the agent, and the book-keeper, in ignorance of the facts, and relying on the contractor's statements, gave him a receipt for the amount of the check on the materials furnished for defendants' house; that plaintiffs, on discovery of the facts, promptly repudiated the application of the check so made by the contractor, and the contractor afterwards approved plaintiffs' bill for the whole amount of materials furnished on defendants' house, without claiming any credit on account of the check; that the contractor, by producing the receipt, afterwards induced defendants to advance "further money" on his contract; and that plaintiffs did not know of the use to which the contractor put the receipt. *Held*, that such findings did not support a conclusion of law that defendants were entitled to have the amount of the check deducted from plaintiffs' claim for materials furnished.

2. Code Civil Proc. Cal. § 1202, provides that "any person who shall willfully give a false notice of his claim to the owner, under the provision of section 1184," or "shall willfully include in his claim, filed under section 1187, work or materials not performed upon or furnished for the property described in the claim, shall forfeit his lien." *Held*, that a lien for materials furnished to a contractor is not subject to forfeiture on the ground that the claimant "knowingly and willfully filed a notice of lien for more than he was entitled to, and sought in the action to recover an amount in excess of the amount actually due;" the notice to the owner, referred to in section 1202, not being the notice of lien required to be filed.

In bank. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by the Schallert-Ganahl Lumber Company and the Los Angeles Planing-Mill Company against Juana A. Neal and others to foreclose mechanics' liens. Judgment for defendants. Plaintiffs appeal. Reversed.

Barclay, Wilson & Carpenter, for appellants. *J. W. Mitchell & Graff* and *Gibbon & Creighton*, for respondents.

GAROUTTE, J. This is an action to enforce two certain mechanics' liens; the Schallert-Ganahl Lumber Company claiming $672.21 for materials furnished the contractor, defendant Goetzman, the building being owned by the defendant Neal. The said plaintiff recovered judgment against defendant Neal for the amount claimed, less $525, and also recovered a judgment for an attorney's fee of $50. The plaintiff the Los Angeles Planing-Mill Company brought its action for $982, and at the trial, upon the conclusion of its evidence, defendants moved for judgment of nonsuit against it upon the ground that it appeared from the evidence that it had willfully and knowingly filed a notice of lien for more than it was entitled to, and sought in this action to recover, by foreclosure proceedings against said defendants, an amount in excess of the amount actually due. The motion was granted, and both plaintiffs appeal from the respective judgments and order denying them a new trial. The ninth finding of the court is "that on or about the 30th day of November, 1887, the said H. J. Goetzman delivered to John L. Hickman a check drawn by R. T. Royal in favor of H. J. Goetzman, who was then constructing a house for said Royal, and received from said Hickman a receipt for said check; that, at the time of receiving said check, said Goetzman requested from said Hickman, as the agent of plaintiff, that the same be applied on the Royal contract; that said Hickman at said time declined to apply the same to the Royal contract, except for the sum of $385 and some odd cents, the amount then due plaintiff for the materials furnished on said Royal contract, and stated to said Goetzman that the balance would be applied to the account of plaintiff with said Goetzman on other accounts then due, not including the Neal contract; that afterwards, on the same day, and before said Hickman had returned to plaintiff's office, said Goetzman went to the book-keeper of plaintiff, and stated to him that he paid said Hickman $525, and requested a receipt therefor, on account of the Neal job. at the same time producing the receipt given by Hickman for said check; that said book-keeper, in ignorance of the facts, and relying upon the statements of said Goetzman, gave said Goetzman a receipt for $525 on the Neal job; that upon discovery of the facts plaintiff promptly repudiated said application by Goetzman, and said Goetzman thereafter approved said bill for the amount then due, to-wit, $627.51, without claiming a credit of said $525 thereon. Said sum of $525 was applied by plaintiff as follows, to-wit, $385 on the Royal account, being the amounts then due, and the balance to the other accounts of plaintiff against Goetzman, not including the Neal job. That said Goetzman thereafter produced said receipt to Telfair Creighton, the agent of said defendant Juana A. Neal, representing to him that he had paid that amount on the Neal contract for the purpose of inducing said Creighton, as the agent of said Neal, to advance further money on said Neal contract; that plaintiff had no knowledge of the use to which Goetzman had applied said receipt." A portion of the tenth finding reads: "That, by reason of the production by said Goetzman of said receipt for five hundred and twenty-five ($525) dollars, said Creighton, as the agent of Juana A. Neal, advanced further money to said Goetzman." As a conclusion of law the court found: "That the defendant Juana A. Neal is entitled to have the sum of $525, being the amount of the receipt aforesaid, deducted from plaintiff's said claim of $672.51." This conclusion of law is clearly erroneous. How the defendant can be entitled to a credit of $525 upon this demand by reason of the facts found we entirely fail to comprehend, and respondents' counsel have given us no additional light upon this legal proposition in their printed argument. If, by reason of the presentation of this unauthorized and repudiated receipt to defendant, she had been misled, and thereby paid the contractor, or other creditors, more money than the amount of her indebtedness to the contractor, such fact might create a sufficient prop to support an argument favorable to her claims in this action; but the court found that, by reason of the production of said receipt by Goetzman, said defendant advanced "further money" to said Goetzman. The words "further money," as to amount, are vague and indefinite; *non constat* but she still had large amounts in her hands, applicable to the payment of plaintiff's claim, when this action was commenced.

The section of the Code of Civil Procedure under which the plaintiff the Los Angeles Planing-Mill Company, was nonsuited, provides: "Sec. 1202. Any person who shall willfully give a false notice of his claim to the owner under the provisions of section 1184 shall forfeit his lien;" and again: "Any person who shall willfully include in his claim, filed under section 1187, work or materials not performed upon or furnished for the property described in the claim, shall forfeit his lien." The foregoing section contains other matters not involved in this question. This section of the statute provides that the claimant shall forfeit his lien *in toto* for a violation of its provisions; it is penal in its character, and not only must be strictly construed, but the evidence under which it is invoked should be clear and convincing that the violation was willful and intentional. Upon a comparison of the provisions quoted above with the grounds upon which the motion for a nonsuit was made, we find no similarity. The grounds upon which the motion was made for a nonsuit, which was practically to ask that the lien be declared forfeited, are not grounds specified in section 1202 of the Code, and we have been referred to no provision authorizing the forfeiture of a claimant's lien upon the grounds relied upon, to-wit, that "he knowingly and willfully filed a notice of lien for more than he was entitled to, and sought in the action to recover an amount in excess of the amount actually due." The notice referred to in this section is not the notice of lien required to be filed, and the allegation and proof that the plaintiff is seeking in this action to recover an amount in excess of the amount actually due is not satisfied by the provision of the Code "that any person who shall willfully include in his claim materials not furnished for the property described in the claim shall forfeit his lien." For the foregoing reasons we find it unnecessary to enter into an examination of the evidence as to the good or bad faith of the plaintiff in making these charges upon which a lien is sought. The judgment and order denying a new trial as to both plaintiffs is reversed, and as to the plaintiff the Schallert-Ganahl Lumber Company it is ordered that the trial court enter judgment for the amount prayed for in its complaint, an attorney's fee of $50 as heretofore allowed, and costs of suit; as to the plaintiff the Los Angeles Planing-Mill Company the cause is remanded for a new trial.

We concur: Harrison, J.; Paterson, J.; Sharpstein, J.; De Haven, J.; McFarland, J.

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91 Cal. 442

Meux v. Hogue. (No. 14,383.)

(*Supreme Court of California.* Sept. 30, 1891.)

Sale of Real Estate—Sufficiency of Contract—Specific Performance.

Under Civil Code Cal. § 1741, providing that no agreement for the sale of real estate is valid "unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent, thereunto authorized in writing," a contract signed by an agent, who had only verbal authority to sell, reciting that the sale was "subject to the approval of the owner," and giving the terms as $3,925, of which $1,595 should be cash, is invalid, and cannot be enforced by the owner of the land, the only ratification on his part being an approval of the terms of the sale as set out in a letter from the agent to him, stating that the sale was for $4,000, of which $1,600 was to be cash.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by J. P. Meux against S. L. Hogue for specific performance of a sale of real estate. Judgment for defendant, and plaintiff appeals. Affirmed.

Meux & Edwards and *Thompson & King*, for appellant. *Edward Lynch*, for respondent.

In bank. BEATTY, C. J. Justice GAROUTTE is, for the purpose of a decision herein, assigned to department 2.

BELCHER, C. The plaintiff brought this action to enforce the specific performance of a contract to purchase from him certain lots of land in the city of Fresno. The court below gave judgment for the defendant, from which the plaintiff has appealed, and has brought the case here on a bill of exceptions. The principal question in the case is whether an enforceable contract was made between the parties for the sale and purchase of the lots. The material facts of the case, as shown by the record, are as follows: The plaintiff was residing in San Francisco, and was the owner of the lots; and prior to April 10, 1888, he had verbally authorized Rader & Bear, who were real-estate agents at Fresno, to sell them. On the day of its date the defendant executed and delivered to Rader & Bear a paper, reading as follows:

"Fresno, Cal., April 10, 1888. Received from S. L. Hogue and J. D. Power the sum of one hundred dollars in gold coin, being a deposit and part payment on account of bargain and sale made to them this day of a certain lot, tract, or parcel of land, lying and being situate in the city of Fresno, county of Fresno, state of California, and bounded and described as follows, namely, lots 13, 14, 15, and 16 in Blk. 77, said lots having been sold to them this day for the sum of three thousand and nine hundred and twenty-five dollars in gold coin, subject to the approval of the owner; the balance to be paid, fourteen hundred and twenty-five dollars on delivery of deed and abstract; one thousand dollars, six months; and sixteen hundred dollars on one year from Feby. 1, '88, at 10 per cent. interest from date, or this deposit to be forfeited without recourse; title to prove good, or no sale; and this deposit to be returned, subject to approval of owner.

"We hereby agree to buy the property above described, upon the terms and conditions hereinbefore expressed.

"S. L. HOGUE.
"J. D. POWER.
"By S. L. H.
"RADER & BEAR, Agents."

On the same day the agents wrote to plaintiff, but did not send him a copy of the contract, nor does it appear that he ever saw the contract, or a copy of it. The letter is as follows: "Fresno, Cal., April 10, 1888. J. P. Meux, Esq., 240 Montgomery St., San Francisco, Cal.—Dear Sir: We have sold lots 13 to 16, inclusive, in block 77, of Parkhurst's addition, for $4,000. Terms, sixteen hundred dollars cash, one thousand dollars in six months, and sixteen hundred dollars in one year, interest 10 per cent. This sale is made upon the terms left us by your brother, Dr. Meux. He preferred $1,600 cash. Please send deed and abstract at once, as the purchaser is ready to take up the deed at once. Yours, truly, RADER & BEAR." To this letter plaintiff replied, but the reply was not produced and put in evidence. Rader could only testify, as to its contents, that it "amounted to just a confirmation of the sale as it was made on the terms," etc. And the plaintiff only said: "I wrote to Mr. Rader that I confirmed the sale that had been made; that I was satisfied with the sale of the property, and would give a deed to the parties." Several other letters in reference to the matter subsequently passed between the plaintiff and his agents, but none of them were produced, nor were their contents shown. Shortly after the receipt of the letter above set out, plaintiff sent to the agents a deed of the property. When this deed was shown to Hogue he requested that it be sent back to plaintiff, and that he should make another deed to one Murray. The deed was sent back and plaintiff made and forwarded another deed, in which Murray was named as grantee. This second deed, Rader testified, was tendered to Mr. Hogue, and he also said: "I don't know what has become of that deed. I don't think Mr. Hogue ever took the deed up. I suppose it afterwards fell back into the hands of Mr. Meux." Neither of the deeds above mentioned was produced or offered in evidence. Subsequently a third deed was made, and on this the plaintiff testified: "I executed another deed, and again tendered him (Hogue) a deed. That was on the 9th of February, 1889. He declined to receive it, and he said that he would not take the property, and I waited some little while, and filed this complaint against him." The deed was produced, and in it S. L. Hogue and J. D. Power were named as grantees, and the consideration expressed was $4,000. When the first deed was offered to Hogue the agent stated that they would deliver it upon the payment of a certain amount of money, and the execution of notes and a mortgage for the balance. The action was commenced against Hogue and Power; but upon Hogue's statements that he signed Power's name to the contract without any authority, the action was dismissed as to the latter. The Civil Code (section 1741) provides: "No agreement for the sale of real property, or of an interest therein, is valid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent, thereunto authorized, in writing." The agreement produced here was not subscribed by the seller, or by any agent authorized in writing to subscribe it, nor can it be ascertained therefrom who the seller was. It was probably not necessary that the seller sign the paper, (Vassault v. Edwards, 43 Cal. 459; Pom. Spec. Perf. § 75;) but it was made "subject to the approval of the owner," and it was necessary that he should know its contents, and approve and ratify it, before it could become binding upon either party. It is claimed for appellant that he fully approved and ratified the sale, upon the terms named in the paper, by his letters to his agents and by the deeds which he executed and offered to the purchaser. But, as before stated, it is not shown by the record that he ever saw the written agreement, or ever learned its terms, except from the letter above quoted. Now, what were the terms of sale which the appellant approved and ratified? The agreement states that the property was sold for $3,925, and that the balance to be paid was $1,425 on delivery of deed, $1,000 in six months, and $1,600 on February 1, 1889, thus making the deferred payments aggregate $4,025. The letter states that the property was sold for $4,000, to be paid as follows: $1,600 cash, $1,000 in six months, and $1,600 in one year, thus making the payments aggregate $4,200; and the complaint states that the property was sold for $4,000, payable $1,600 cash, $1,000 in six months, and $1,400 on the 1st day of February, 1889. (At the conclusion of the trial, by consent of counsel, and by leave of the court, the complaint was "considered amended on its face so as to conform to the contract of purchase and to the evidence.") These terms are not the same, but materially different, and the ratification, if any, must have been of the terms stated in the letter, and not of those stated in the contract. But, in order to constitute a valid contract, the minds of the contracting parties must meet and agree to the same thing. "A court of equity will not specifically enforce any contract, unless it be complete and certain. This rule applies as well to parties as to price, subject-matter," etc. "It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense. They must have contracted *ad idem*." "Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or equity. Where a contract is a unit, and left uncertain in one particular, the whole will be regarded as only inchoate, because the parties have not been *ad idem*, and therefore neither is bound. A proposal to accept, or acceptance, upon terms varying from those offered, is a rejection of the offer." See Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. Rep. 179, and cases cited. We see nothing in the evidence to take the case out of the rule above stated, and we conclude, therefore, that the court below properly found that the plaintiff never authorized or ratified the contract of sale on which he relies. We advise that the judgment be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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91 Cal. 383

McGOVERN *et ux.* v. MOWRY. (No. 13,112.)

(*Supreme Court of California.* Sept. 26, 1891.)

QUIETING TITLE—POSSESSION.

Under Civil Code Cal. § 1006, providing that "occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession," evidence that plaintiff was in the actual possession and occupation of premises, at and for a long time before the commencement of an action to quiet title, is sufficient to enable him to maintain it as against one who claimed, but never had, title.

Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Action to quiet title. Judgment for plaintiffs, and defendant appeals. Affirmed.

R. Percy Wright, for appellant. *Page & Eells*, for respondents.

BEATTY, C. J. Justice HARRISON is, for the purpose of a decision herein, assigned to department 2.

SHARPSTEIN, J. This is an action to quiet title to certain lands in the Laguna survey, in San Francisco. Several defendants were sued, but only one defendant, George B. Mowry, appears. His answer denied the plaintiffs' title, and set up title in himself. The findings of the court are in favor of plaintiffs on all the issues, and the appellant attacks them upon two very material grounds: *First*, that there was no evidence that plaintiffs were the owners of the land; and, *second*, that the evidence established the defendant Mowry to be the owner. The evidence for plaintiffs establishes that they are husband and wife; that they inclosed the land in question with a substantial fence about March 1, 1882, and used it as a pasture until 1886, when they built a dwelling-house upon it, and have ever since resided there; that they filed a declaration of homestead upon the property in 1886; that a deed from the city under the Van Ness ordinance was made to them in 1883, and that their possession has been exclusive and undisturbed under claim of title since March, 1882. The suit at bar was begun on August 17, 1887. The Alcalde grant covering the lot in question was executed on September 25, 1848, to one Stephen A. Harris, and no deraignment of title from Harris was shown by either party, except so far as it is to be presumed from plaintiffs' occupation of the land. Counsel for appellant claims that the proof of plaintiffs' title is insufficient, because the Van Ness ordinance deed is inoperative, owing to the previous Alcalde grant, and because plaintiffs have not established a title by prescription, owing to the fact that they had not paid taxes upon the property for the full term of five years before the commencement of the action. His contention is that it is incumbent upon the plaintiff, in a suit of this character, to establish a perfect title of record, or by prescription, whether the defendant has any title or not, and that, on the failure of such proof by the plaintiff, the action should be dismissed. Counsel for respondents claim, on the contrary, that actual possession under claim of ownership is sufficient evidence of title in the plaintiff as against a trespasser, or one who establishes no title in himself. Section 1006 of the Civil Code provides that "occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession." "The possession of real estate is *prima facie* evidence of the highest estate in the property, to-wit, a seisin in fee." Hill v. Draper, 10 Barb. 458. The plaintiff was in the actual possession and occupation of the premises at and for a long time before the commencement of this action. This was sufficient to enable him to maintain an action to quiet title against any one who, like defendant, never had any title, but who claimed to have title to the premises. Judgment and order affirmed.

We concur: DE HAVEN, J.; HARRISON, J.

(91 Cal. 342)

HOWELL v. BUDD, Judge. (No. 14,539.)

(*Supreme Court of California.* Sept. 22, 1891.)

RES JUDICATA — DISTRIBUTION OF ESTATES — DISQUALIFICATION OF JUDGE.

1. Code Civil Proc. Cal. 1886, § 1908, which provides that, "in case of a judgment or order against a specific thing, or in respect to the probate of a will or the administration of the estate of a decedent, * * * the judgment or order is conclusive upon the title to the thing, the will, or administration," does not modify Garwood v. Garwood, 29 Cal. 514, which holds that, where the grant of administration turns on the question as to which of the parties is next of kin, the judgment is conclusive on that question in a suit between the same parties for distribution.

2. Section 170 provides that no justice or judge shall act as such in any action or proceeding "when he is related to either party by consanguinity or affinity within the third degree, computed according to law." *Held*, in an action by an alleged daughter of a decedent to revoke letters of administration granted to decedent's grand-nephew, that the sons of a judge, who have contracted to try the case for the nephew on condition of receiving one-fourth of the estate if they succeed, are "parties," within the spirit of the Code, and their father cannot act as judge.

3. Where the answer to a petition to enjoin the judge from trying the application to revoke the letters of administration alleges that he has no information sufficient to enable him to answer the allegation as to the agreement between his sons and the nephew of decedent, but his brief states that since the oral argument he has received information which will enable him to deny the allegation, he will be allowed time to amend his answer in that regard.

In bank. Application for writ of prohibition by Mary Eliza Johnson Howell against Joseph H. Budd, judge of the superior court of San Joaquin county. Demurrer overruled, and leave to amend granted.

Pillsbury, Blanding & Hayne, for petitioner. *Jos. H. Budd, in pro. per.*

GAROUTTE, J. This is an application for a writ of prohibition to restrain the respondent, who is one of the judges of the superior court of San Joaquin county, from acting as judge in the matter of the application of the petitioner herein for the revocation of letters of administration issued to one Eugene Kay upon the estate of William B. Johnson, deceased, and for her own appointment as administratrix in the place and stead of said Kay. For the relief desired, petitioner relies upon the following allegations of her petition: "(1) That the sons of the respondent (in conjunction with two other attorneys) have a contract with and from said Kay and other alleged heirs for the conveyance of one-fourth of the said estate to them, when petitioner is declared to have no title therein, and said title shall be adjudged to be vested in said heirs. (2) That the administrator, Kay, is a grand-nephew of the deceased, and claims that as such he and the other collateral kindred are entitled to the estate. (3) That petitioner is the only child of the deceased, and as such is entitled to the whole estate, and also entitled to letters of administration (though a married woman) by virtue of an act of the legislature of 1891. (4) That, upon the hearing of petitioner's application for letters of administration, the question at issue will be whether she is the child of the deceased or not. The administrator and other alleged heirs say she is not, and, if it be decided that she is the child of the deceased, she is entitled to letters of administration, and to the whole of the estate; but if she is not such child she is entitled to nothing, and said Kay and other heirs are entitled to the estate."

As shown by the verified answer of respondent, which must be taken as true, as far as the consideration of questions of law are involved, the objection to respondent hearing the matter and the application for transfer of the cause was made as follows: "That thereafter, and on the 7th day of June, 1891, F. T. Baldwin, Esq., and E. S. Pillsbury, Esq., who had long been on terms of intimate friendship with respondent, made a friendly call on respondent, and during said call, and a conversation with respondent thereat, Mr. Pillsbury stated to respondent, in substance, that he deemed he ought to inform respondent that their client, Mrs. Howell, the petitioner herein, objected to said matter being heard before respondent as judge of the court, because of the relationship between respondent and James H. Budd and John E. Budd, two of the attorneys for Mr. Kay; and suggested that respondent request one of the judges of the superior court in and for the city and county of San Francisco to hear and determine the matter. In reply to this, respondent stated, in substance, that his associate on the bench, Judge Smith, and respondent, would not request any other judge to hear and determine any matter which they could hear and determine, and that the rules of the court respecting the apportioning of the business of the court among the judges thereof would not be departed from to suit the wishes of any litigant, and that, the matter being in department 1 of the court, it would be heard and determined by respondent as judge; and respondent denies that said petitioner and affiant ever, in any way or manner, called the attention of this respondent to the alleged fact that said sons of affiant had a contingent interest in said estate of Wm. B. Johnson, deceased, or in the result of said litigation, or to any disqualification of this respondent from acting as judge in said matter; and he denies that she ever in any manner, other than by said statement and suggestion of Mr. Pillsbury, at said friendly call on respondent, requested respondent not to act as judge in said matter, or to call in some qualified judge to act therein; and respondent denies that she ever, in any way or manner, either directly or indirectly, requested respondent to transfer said matter to said department 2 of said court; on the contrary, he alleges that neither the petitioner, nor either or any of her attorneys, ever suggested to or requested of respondent that Judge Smith, one of the judges of said court, hear and determine said matter. Further answering, respondent admits that he refused, as above stated, said request of Mr. Pillsbury to have a judge of the superior court of San Francisco hear and determine said matter, and he admits that he stated to her attorneys, as above stated, in reply to the statement and suggestion of her attorney, Mr. Pillsbury, that, said matter being in department 1 of the court, it would be heard and determined by the respondent as judge; but he denies that he otherwise informed her or her attorneys, or either or any of them, that he intended to act or would act as judge in said matter." Under the authority of Havemeyer v. Superior Court, 84 Cal. 402, 24 Pac. Rep. 121, the application to respondent for a transfer of the cause was clearly insufficient; yet we understand respondent, being desirous of an adjudication of the cause upon its merits, to have waived his objection to the course adopted by the petitioner in making her application for an order of transfer, and therefore we proceed to examine the cause upon the main questions involved.

It is insisted by petitioner that the respondent is disqualified from hearing her application to have the letters of administration heretofore issued to one Kay revoked, and herself appointed as administratrix in the estate of said Johnson, deceased; and this matter is to be decided in the light of subdivision 2 of the following sections of the Code of Civil Procedure: "Sec. 170. No justice or judge or justice of the peace shall sit or act as such in any action or proceeding (1) to which he is a party, or in which he is interested; (2) when he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law."

At the very threshold of this examination, in order that we may intelligently consider the question as to who are parties to this proceeding in the lower court, we must ascertain what will be the force and effect of the judgment of that court denying or granting petitioner's application, as considered with reference to subsequent proceedings in the estate, and especially as considered with reference to the decree of distribution. In this estate, as alleged in the petition, the right of petitioner to administer depends solely upon the fact as to whether or not she is the child of deceased; that is the issue in the case. No exercise of discretion is allowed. The inquiry becomes a matter of legal right, and is, by the express provision of the statute, to be determined by the right of succession; and, if the determination of that issue upon this hearing is to be conclusive upon her at final distribution, then this application for letters assumes a far more serious aspect; for it practically determines, at the very inception of the probate proceedings, who is to receive the residue of the estate upon final distribution, and places the respondent in the exact position as though he were proceeding to hear the petition for distribution rather than an application for letters of administration. In section 550 of Greenleaf on Evidence, we find the following: "And if the grant of administration turned upon the question as to which of the parties were next of kin, the sentence or decree upon that question is conclusive everywhere in a suit between the same parties for distribution." In the case of Caujolle v. Ferrie, 13 Wall. 474, a case in all respects involving the principles under discussion here, the supreme court of the United States, after an exhaustive review of the English authorities upon the question, said: "It may, therefore, as the result of these authorities, be safely assumed to be the established law in England that if the sentence of an ecclesiastical court in a suit for administration turns upon the question of which of the parties is next of kin to the intestate, it is conclusive upon that question in a subsequent suit in the court of chancery between the same parties for distribution." And again: "On principle and authority, therefore, the judgment in the suit for administration in New York was pleadable in bar to this suit, and on that ground alone the bill should have been dismissed." If the judgment upon the issuance of letters of administration upon the question of heirship can be pleaded as a bar to matters arising upon petition for distribution in a court of concurrent jurisdiction, can there be a doubt as to that judgment being a complete and perfect bar in a proceeding in the very court that created such judgment?

Passing to the law of this state, we find practically this identical question carefully considered by this court in the case of Garwood v. Garwood, 29 Cal. 514, where the doctrine heretofore announced is fully approved and declared to be the law of the land. Respondent insists that the effect of the law found in Garwood v. Garwood has been nullified by the following provision of section 1908 of the Code of Civil Procedure: "In case of a judgment or order against a specific thing, or in respect to the probate of a will or the administration of the estate of a decedent, * * * the judgment or order is conclusive upon the title to the thing, the will, or administration." The fair and legitimate interpretation of this provision is that a judgment or order respecting the administration of the estate is conclusive upon the administration as to all matters directly involved in such judgment or order. There seems to be nothing in the provision detracting in any degree from the force and effect of the principles laid down in the case of Garwood v. Garwood, supra, but rather the provision seems to be in complete consonance and full accord with it. We conclude, therefore, that the judgment to be rendered by the court upon the hearing of petitioner's application for letters of administration (subject to appeal) will determine for all time and in all courts, as far as the parties to the proceeding are concerned, whether the petitioner is the child of said

Johnson, deceased, and therefore entitled to all of his estate to the exclusion of kindred of the collateral line, or whether Kay, the administrator, and other collateral kindred, are next in the direct line of succession, and entitled to the whole of the estate of said deceased.

What is the interest of the sons of respondent in this estate? The allegation of the petitioner is that "said Kay and the other said next of kin after this petitioner have made a valid agreement with James H. Budd, Esq., John E. Budd, Esq., and Messrs. Nutter and De Vries, all of whom are attorneys at law, that they shall have one-fourth of said estate in case and upon condition that the said question of the heirship of this petitioner and affiant be determined adversely to her and in favor of said Kay and said other next of kin." It seems these parties have a contract for a share of the estate, which consists of real and personal property, and which share is contingent upon the nature of the judgment to be rendered upon the hearing of the application for letters of administration; which matter respondent threatens to hear and determine, and whose threatened acts in that regard this very proceeding is inaugurated to restrain and forbid. These parties will be the owners of a perfect equitable title to one-fourth of the estate upon the happening of a condition, and that condition is dependent upon the act of respondent. To the extent of the investigation of the questions pending before us, the conditional equitable interest of the sons of respondent in this estate is clothed with all the dignity, importance, and value of a vested and absolute interest; for it is in the power of the respondent to create the condition, and thus create a perfect equitable estate. It is assumed in the argument of respondent, although not found in the petition, that the consideration for this agreement was legal services to be performed by these attorneys *in futuro*, and he insists that until these services are performed the sons of respondent have no interest in the estate. No principle of equity can be found to support such argument. In equity, from the time of the execution of the contract for the sale of land, the vendor as to the land becomes a trustee for the vendee, and the vendee as to the purchase money becomes a trustee for the vendor. Such contracts for most purposes are deemed executed, upon the principle that courts of equity will regard substance rather than form, and thus assist the parties by extending to the agreement the effect desired and intended. Pomeroy, in his Equity Jurisprudence, (volume 1, § 105,) speaking of such agreements, says: "The view which equity takes of the juridical relations resulting from the transaction is widely different. Applying one of its fruitful principles, that what ought to be done is regarded as done, equity says that from the contract, even while yet executory, the vendee acquires a real right, a right of property in the land, which, though lacking a legal title, and therefor equitable only, is none the less the real beneficial ownership, subject, however, to a lien of the vendor as security for the purchase price as long as that remains unpaid." This principle is fully recognized by the decisions of this court. See Willis v. Wozencraft, 22 Cal. 616; Love v. Watkins, 40 Cal. 565; Hoffman v. Vallejo, 45 Cal. 565; Watson v. Sutro, 86 Cal. 527, 24 Pac. Rep. 172, and 25 Pac. Rep. 64. In the case of Hoffman v. Vallejo, supra, the court said, referring to a contract similar to the one respondent alleges this to be: "The agreement of September, 1865, constituted Hoffman and the Wilsons together the equitable owners, as against the defendant, J. J. Vallejo, of the undivided half of whatever should thereafter result from the prosecution or compromise of the suit instituted against Clark."

Counsel for petitioner has argued with great learning that proceedings upon the application for letters of administration are in the nature of proceedings *in rem*, and therefore all persons interested are parties; but, owing to the views we entertain upon the other branch of the case, it will not be necessary to consider that question. To hold that the word "party," as used in section 170 of the Code of Civil Procedure, is confined to parties of record by name, would be a construction so narrow as to find support neither in principle nor authority. To say that a judge would be qualified under this provision to try and determine an action in ejectment, brought by the administrator of an estate, of which the children of the judge are the heirs, or that he could render judgment in a foreclosure suit, where an administrator is defendant, and the heir is a son of the judge, would be to sacrifice substance to form, and contrary to all principles of modern legal jurisprudence. In the case of Fredericks v. Judah, 73 Cal. 608, 15 Pac. Rep. 305, the court said: "Although in that action Mrs. Judah, as executrix, was plaintiff, it was an action between the same parties, within the meaning of this provision, for the executrix represented the heirs therein." In the case of Briggs v. Briggs, 80 Cal. 255, 22 Pac. Rep. 334, it was held that a successor in interest was a "party," within the meaning of the provision that a deposition properly taken could be read in evidence in a subsequent action "between the same parties." In the case of Schultze v. McLeary, 73 Tex. 92, 11 S. W. Rep. 924, the court said that, notwithstanding that the judge was not related to the party by name, yet that "if he was but the representative of his wife, who was so related, or if he was the representative of a right claimed by himself and wife in community, or if any judgment rendered in his favor or against him would affect the right of the wife through her community rights even to the extent of costs, then the wife of Orynski, within the spirit and purpose of the constitutional provision to which we have referred, was a party to the suit, and the district judge disqualified." See Hodde v. Susan, 58 Tex. 389; Gains v. Barr, 60 Tex. 676; North Bloomfield, etc., Co. v. Keyser, 58 Cal. 322. In Stockwell v. Township Board, etc., 22 Mich. 350, Justice GRAVES said: "The court might not be astute to discover refined and subtle distinctions to save a case from the operation of the maxim, when the principle it embodies bespeaks the propriety of its application." The Code provides that its provisions "are to be liberally construed, with a view to effect its objects and to promote justice." Section 4, Code Civil Proc. And again: "When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted." Section 1866, Code Civil Proc. These provisions of the Code, taken in connection with the authorities cited, indicate that section 170 is to have no technical or narrow construction, but is to be broadly applied to all litigation, where a judge is called upon to adjudicate property rights. We conclude, therefore, that the word "party," as used in section 170, is not confined to the parties to the record by name, but includes all persons represented by parties to the record. Are the sons of the respondent represented by a party to the record? It seems unnecessary to examine into the question as to the relations existing between the administrator and the heirs, for the administrator himself is one of the heirs, and is a grantor under the agreement to convey to the sons of respondent. While he is not the sole grantor, that fact is immaterial, for the disqualification results from the kind of interest held by the sons, and not from the amount of interest. Their ownership of a portion of the estate is as disqualifying as if they owned it in entirety. As petitioner's right to the estate will be conclusively determined upon the hearing of her application for letters, as far as the parties to that proceeding are concerned, and as Kay, the administrator, is a party to that proceeding, and has contracted to convey to the sons of respondent an interest in the estate, and as therefore he is the trustee of said sons for such interest, and as they are the equitable owners thereof, they are as fully and completely represented by the administrator, Kay, in that proceeding, as any beneficiary can be represented by his trustee.

Respondent alleges in his answer that he has no information or belief upon the subject sufficient to enable him to answer the allegation in said petition and affidavit "that said Kay and the other of said next of kin after this petitioner and affiant have made a valid agreement with Jas. H. Budd, Esq., and John E. Budd, Esq., and Messrs. Nutter and De Vries, that they shall have one-fourth of said estate, in case and upon condition," etc., "and therefore he denies said allegation." Petitioner objects to the sufficiency of the foregoing denial to create an issue, but inasmuch as respondent in his brief sets out that since the oral argument he has received information that will enable him to make a specific denial of the allegation, and asks to amend his answer in that regard, which application we are disposed to grant, it becomes unnecessary to pass upon the merits of petitioner's contention in this respect. The demurrer to the petition will be overruled, and the respondent will be allowed five days after service of a copy of the order thereof to file an amended answer in accordance with his request.

We concur: Beatty, C. J.; De Haven, J.; Harrison, J.; Paterson, J.

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91 Cal. 377

Miller v. Waddingham *et al.* (No. 13,899.)

(*Supreme Court of California.* Sept. 25, 1891.)

Sale of Land—Removal of Buildings—Injunction.

Plaintiff sold certain land, receiving $9,000 of the purchase price, and placing his vendee in possession, but retaining the legal title as security for the fulfillment of the contract of purchase. The vendee, without any agreement with plaintiff relative thereto, constructed houses on the land, and then sold them to defendant to be removed. *Held* that, in the absence of any showing on plaintiff's part that security would be impaired by such removal, it would not be enjoined.

In bank. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action to enjoin the removal of certain houses. Injunction denied, and plaintiff appeals. Affirmed.

Walters & Gird, for appellant. *Harris & Gregg*, for respondents.

Harrison, J. In March, 1887, the plaintiff entered into an agreement in writing with one Clubine, for the sale and conveyance to him of two blocks of land in Ontario, in this state, receiving from him the sum of $9,000 on account of the purchase price of the property, and placed his vendee in possession of the land. Clubine subdivided the land into lots suitable for residence and business purposes, and employed the defendant Newman to construct certain dwelling-houses upon the land, and to furnish the materials therefor, for the sum of $4,100, payable in weekly installments as the work progressed. Shortly after Newman began the construction of the houses, Clubine, failing to make such payments, agreed with him that the houses should belong to said Newman until paid for, and thereupon Newman proceeded with his work, and finished the houses, having received from Clubine only the sum of $725 upon account thereof. Prior to the commencement of this action, Newman sold the houses to the defendants Waddingham and Gargan, and they very soon thereafter commenced to remove them from the land, and had partly completed such removal when the plaintiff commenced this action. The houses were built on redwood mud-sills of two-inch by six-inch timber, resting upon the soil, and the soil was not disturbed in building or removing the houses. The plaintiff brought this action for the purpose of perpetually restraining the defendants from removing the houses from the land, and also to recover from them the sum of $3,000 damages alleged to have been done to his property by the attempted removal. At the commencement of the action a restraining order was issued by the court, and upon the trial of the cause the court rendered judgment in favor of the defendants, and dissolved the restraining order. From this judgment the plaintiff has appealed upon the judgment roll alone.

Although the principal ground urged by the appellant for the reversal of the judgment is that upon the construction of the houses they became fixtures attached to the land, and that by their removal the defendants were committing waste, we think that the respective rights of the parties are to be determined upon principles other than those applicable to the subjects of waste and fixtures. The court below did not find that the buildings in question were fixtures, and, in the absence of a finding by it upon that subject, we cannot say upon the facts that were found that they did become fixtures. Whether, in any case, buildings that are placed upon land become fixtures, is a question of fact to be determined upon the evidence of that particular case. The mere erection of a building upon land does not necessarily make it a fixture, (Pennybecker v. McDougal, 48 Cal. 160;) and in order to determine whether it be a fixture depends upon various circumstances and relations connected with its being placed upon the land, (Lavenson v. Soap Co., 80 Cal. 250, 22 Pac. Rep. 184.) The rules applicable to fixtures have been created by a series of judicial decisions, and these decisions are not always capable of being reconciled. The attempt in the Civil Code to give a definition of a "fixture" only in part removes the difficulty. Section 660 declares that "a thing is deemed to be affixed to land when it is * * * permanently resting upon it, as in the case of buildings;" but it still requires evidence to determine what is "permanently resting" upon the land. The finding in the present case that "said houses were built on redwood mud-sills of two-inch by six-inch timber, said mud-sills resting upon the soil," and that "the soil was not disturbed in building or removing said houses," is consistent with a determination of the court below that the buildings in question were not fixtures, and, for the purpose of upholding its decision, it may be assumed that such determination was made by it. But, without determining whether or not the buildings were fixtures, we are of the opinion that upon other principles applicable to the case the plaintiff is not entitled to the relief sought by him.

The plaintiff has invoked the aid of a court of equity to protect him against threatened injury, and, in order that he may have such protection, it is incumbent upon him to show that he has rights which need and can receive it, and also that the acts charged upon the defendants are an invasion of such rights, and demand such assistance. In his complaint he alleged that he was the owner of certain land upon which certain buildings exist, and that the defendants had committed certain acts of trespass upon the same, causing a damage thereto of $3,000. Upon the trial the court, instead of finding that he was the "owner" of the land upon which the alleged trespass was committed, found that he had made a contract of sale thereof with the grantor of the defendants, and placed his vendee in possession of the land, and that the buildings had been thereafter placed upon the land at the instance of the vendee, and were being removed under authority derived from him. Upon the execution of this contract of sale, the vendee of the plaintiff became vested with the equitable title to said land, and the plaintiff retained in himself the legal title as a security for the performance of the contract by the vendee. By placing his vendee in possession of the land, he thereby conferred upon him the right to its use and enjoyment, so long as he should continue to comply with the obligations of his contract. It may be conceded that, if the buildings had been upon the land at the date of the purchase, and had formed a part of the subject-matter of the sale, the plaintiff might have had the right to have them remain upon the land as a part of his security until the whole purchase price was paid. In this case, however, the buildings formed no part of the consideration for the purchase of the land, nor were they placed upon the land in pursuance of any terms of the contract of sale. The fact that the plaintiff was under no obligation to give to his vendee possession before a conveyance of the land is immaterial. He did give him possession, and, while such possession did not authorize the vendee to do any act which would diminish the value of the property of which he had received the possession, he had the right under his equitable ownership to any use and enjoyment thereof consistent with such obligation. For such use and enjoyment he could not be chargeable with waste. After the execution of a contract of sale the relation of the vendor and vendee to the land is likened to that of mortgagor and mortgagee. The vendor retains the legal title as security for the performance by the vendee of the contract on his part, and by placing the vendee in possession of the land gives to him the right to use and enjoy it as his own, so long as he does not impair its condition, or diminish its value as it existed when received by him. So long as the vendee complies with the terms of his contract, he is entitled to retain possession of the land, (Willis v. Wozencraft, 22 Cal. 607;) and the vendor can at no time enforce payment of more than the agreed price therefor, however much the land may have appreciated in value, or been improved by the vendee. The fact that the vendor holds the legal title as security for such payment does not give him any greater rights than he would possess if he had conveyed the land and taken back a mortgage for the unpaid portion of the purchase money, or than are held in land by a mortgagee, who takes for his security a conveyance absolute in form, instead of a formal mortgage. It is a well-recognized principle in equity that a mortgagee cannot maintain an action to restrain waste without showing that thereby his security will be impaired, (Robinson v. Russell, 24 Cal. 467; Buckout v. Swift, 27 Cal. 433. See, also, Perrine v. Marsden, 34 Cal. 14;) and, by parity of reasoning, the vendor who holds the legal title as security for the fulfillment of the contract of purchase by the vendee in possession should show that he will sustain some injury before he can maintain an action like the present. So long as the sufficiency of the security is unimpaired, he has no right to disturb the vendee in any use or enjoyment which he may make of the land. Such use and enjoyment by the vendee is a use of his own property, and unless he thereby impairs the security, or diminishes the estate which he received from the vendor, or the value of the land as he received it, he should not be restrained. In view of these principles, the plaintiff has failed to show any right to the equitable interposition of the court, and the action of the court in dismissing his complaint was correct. It is not alleged in his complaint, nor is it found by the court, that the vendee has in any respect failed to comply with the terms of his contract, or that he is unwilling or unable to do so. The record does not disclose the terms of the contract of sale,—either the amount of the purchase price remaining unpaid, or the time when it will become payable. Nor is it alleged or found that the land is less valuable than it was at the date of the contract of sale, or how great is the obligation for which the plaintiff holds it as security. In the absence of any allegation or finding to the contrary, it must be assumed that the land is fully as valuable as at the date of the contract, and that the vendee is not only able to comply with his obligations, but that he will fully and promptly meet them as they mature. Inasmuch, then, as the plaintiff has received $9,000 towards the payment of the purchase price of the land, he does not show any impairment of his security or injury to himself by the fact that the defendants are threatening to remove from the land buildings placed thereon by themselves, and which are shown to be of the value of only $4,100. The judgment of the court below is affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; GAROUTTE, J.; SHARPSTEIN, J.

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91 Cal. 313

THOMPSON v. LAUGHLIN. (No. 13,972.)

(*Supreme Court of California.* Sept. 21, 1891.)

JUDGMENT—EQUITABLE RELIEF—INJUNCTION.

1. A court of equity will enjoin the enforcement of the alternative part of a judgment for the return of property or its value where the property was voluntarily returned before the judgment was rendered.

2. After judgment, and within the time allowed by law to move for a new trial, the attorney for defendant agreed with plaintiff to satisfy the judgment on payment of a certain sum of money. Plaintiff, relying on this agreement, did not move for a new trial, and tendered the amount agreed on to defendant's attorney, who, after the time to move for a new trial had expired, refused to accept it, and to satisfy the judgment. *Held*, that the enforcement of the judgment would be enjoined.

3. Injunction will lie to restrain the enforcement of a judgment already satisfied.

SHARPSTEIN, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

A suit in equity by Thompson against Laughlin to enjoin the enforcement of a judgment. Judgment for plaintiff. Defendant appeals. Affirmed.

Dooner & Burdett, for appellant. *Wells, Guthrie & Lee*, for respondent.

DE HAVEN, J. On November 8, 1889, in the superior court of Los Angeles county, the defendant herein obtained a judgment against the plaintiff in this action for the recovery of the possession of a certain lot of lumber, or, in case a delivery thereof could not be had, then for its value, found to be $1,000; and also for $250 damages, and costs of the action. This action is brought to enjoin the enforcement of said judgment for damages, and also the alternative part for the value of the lumber. The court below rendered judgment enjoining the defendant from collecting the said sum of $1,000, and requiring him to satisfy the judgment to that extent. The defendant appeals.

The court below found, and, indeed, the fact is not denied in the answer, that during the pendency of the action brought by the defendant against the plaintiff, but after issue joined therein, the plaintiff returned to the defendant all of the lumber sued for. It also appears that during the trial, which resulted in the judgment referred to, the plaintiff herein offered to show this fact, but the court held the evidence inadmissible under the pleadings. The findings further show that, after the rendition of said judgment, and within the time allowed by law to move for a new trial, the attorney for the defendant in that action agreed with the plaintiff's attorney therein that upon payment of $150 and costs the said judgment should be satisfied; and that, relying upon this agreement, the plaintiff herein did not move for a new trial; and that, after the time to move for a new trial had elapsed, the attorney for the defendant refused to accept the said sum agreed upon, and to satisfy said judgment. Upon the facts above stated there can be no doubt that it would be an act of gross injustice upon the part of appellant to enforce the collection of the alternative judgment for $1,000; and there can be as little doubt that it is within the power of a court of equity to prevent it. As already stated, the court below finds, and the defendant does not deny, that before the rendition of the judgment the plaintiff had in fact returned to him the lumber sued for, and that he has used and sold the same. This being so, the judgment, in so far as it awarded to the defendant here the right to recover said lumber, or its value if no delivery could be had, has already been satisfied. That judgment, in the form in which it was entered, was in accordance with former decisions of this court. Berson v. Nunan, 63 Cal. 550; Arzaga v. Villalba, 85 Cal. 195, 24 Pac. Rep. 656; Brichman v. Ross, 67 Cal. 606, 8 Pac. Rep. 316. But, although the judgment was in that form, it did not entitle appellant to both property and value. It affirmed his right to the possession of the property, and was in legal effect an adjudication that the plaintiff here wrongfully detained it from him at the date of the commencement of that action, and that since then he had acquired no right to retain its possession from the appellant. In Arzaga v. Villalba, supra, this court said: "But the judgment must always be in the alternative. Even when the possession not only can be, but has been, delivered, (under provisional process,) the judgment must nevertheless be for the recovery of the property, or its value in a specified sum in case possession cannot be had. Berson v. Nunan, 63 Cal. 552; Brichman v. Ross, 67 Cal. 606, 8 Pac. Rep. 316. And it by no means follows that the plaintiff is to have both the property and its value. So far as this part of the judgment is concerned, it is for one thing or the other, not both; and, if possession has already been delivered to the plaintiff, the court would not allow him to proceed with his execution for that part of the judgment." It makes no difference in the application of this rule that in the former action between plaintiff and defendant the property sued for was voluntarily delivered to the defendant here, and not under provisional process in that action. The only effect of this difference in the way the lumber was returned is in the nature of the evidence by which the fact is shown to the court. But the fact, when once made to appear, has the same force in both cases. All that the defendant was entitled to by his judgment was either the property or the value, and not both; and, having the lumber in his possession, equity, treating that as done which ought according to justice to be done, will consider that the defendant received the same in satisfaction of his judgment, and will enjoin its further execution.

2. But, on the other hand, if it should be assumed that the judgment has the effect claimed for it by appellant, and that the previous return of the lumber does not operate as a satisfaction of any part of it, then, upon the facts alleged, the plaintiff here was entitled to the injunction obtained, on account of the agreement of appellant's attorney to accept $150, and cause the judgment to be satisfied. The court finds that this agreement was made, and that in consequence the plaintiff neglected to move for a new trial of the action, and that appellant's attorney repudiated the agreement after the time to move for a new trial had expired. It must be presumed that by reason of this conduct of appellant's attorney the plaintiff was deprived of the substantial right to have the judgment set aside, and a new trial of the action; for it cannot be supposed that this motion would have been denied if the granting thereof was necessary in order to work that justice which is sought in this action. It may be true that this agreement was not put in such form that it could be enforced, and that the attorney had no authority as such to release the judgment for the sum agreed upon But this is not an action to enforce the agreement, but it is to prevent the appellant from retaining the benefit of an unfair advantage, obtained by the representations and assurances of his attorney, and which would be an act of fraud upon the part of the appellant to retain, with knowledge of the facts. "Fraudulent conduct and deceitful representations upon the part of plaintiff in an action at law, by means of which defendant, having a meritorious defense, is prevented from interposing it, afford frequent ground for application for the aid of an injunction to restrain the enforcement of judgments thus fraudulently obtained." High, Inj. § 199. And the same rule must necessarily obtain where, by reason of such conduct of his adversary, a party has lost the right to move for a new trial. "It is also to be noticed, in connection with the jurisdiction of equity in restraint of judgments upon the ground of fraud, that the cases in which the relief is granted are not limited to those where the fraudulent representations are those of plaintiff in person, but that the fraudulent conduct of plaintiff's attorney in the case may afford sufficient ground for enjoining a judgment which is obtained by means of such fraud. * * * So, where defendant in the judgment shows a good equitable defense thereto, which he was prevented from making by relying upon the representations of the solicitors for plaintiff in the action, proceedings under the judgment may properly be enjoined." High, Inj. § 202. For cases illustrative of this rule, see Holland v. Trotter, 22 Grat. 136; Kent v. Richards, 3 Md. Ch. 392. And we do not think that in failing to move for a new trial, under the circumstances here disclosed, plaintiff was guilty of such negligence as to deprive him of the right to appeal to a court of equity to restrain the defendant from reaping the full fruits of the broken agreement of his attorney, and to permit which would be a fraud on plaintiff, and a reproach to the law and to the courts administering it. Upon both of the grounds here discussed the judgment appealed from is right.

3. The remedy by injunction was proper, in this case, even conceding that the court in which the judgment was rendered might have the power to grant the same relief upon motion to stay the execution. Crawford v. Thurmond, 3 Leigh, 85. Besides, the defendant waived any objection to the remedy by answering without first moving to dismiss the action on the ground that plaintiff should have proceeded by motion. Wood v. Currey, 49 Cal. 359. Judgment affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; PATERSON, J.; HARRISON, J.

GAROUTTE, J. I concur in Justice DE HAVEN's opinion upon the first ground discussed. The judgment in Laughlin v. Thompson was a valid, binding judgment, but in all respects save as to costs is fully satisfied, for the property has been returned to Laughlin. Why should he object because Thompson returned him the property sooner than was required? If Thompson had retained the property and returned it after judgment, that would have strictly comported with the requirements of the judgment. Is he to suffer a grievous wrong because he was too alert in giving Laughlin his rights? If Laughlin *vi et armis* had taken the property from Thompson, and thus have prevented Thompson from returning it, could it be pretended that he would be entitled to execution to recover its value? The law contemplates the recovery of the property or its value; never both property and value. The execution should be quashed on motion. It should be restrained because it would be unconscionable to satisfy it by sale of Thompson's property. I think an attorney unprofessional that would attempt to enforce it.

Sharpstein, J. I dissent. This appeal is by the defendant from a judgment that he be perpetually enjoined from levying any execution or other process upon any of the property of the plaintiff for the collection of $1,000, the value of lumber for which he, defendant, obtained judgment in the superior court of Los Angeles county in the suit therein, wherein defendant herein was plaintiff and plaintiff herein defendant; and that defendant herein further be enjoined from attempting to or incumbering the property of plaintiff herein by any lien by reason or virtue of said judgment to the extent of said $1,000, or from demanding any sum of money by reason or by virtue of said judgment to the extent of $1,000, value of said property; and defendant herein was required to satisfy said judgment in said superior court to the extent of said $1,000. Prof. Pomeroy says: "It was a settled doctrine of the equitable jurisdiction, and is still the subsisting doctrine, except where it has been modified or abrogated by statute, or has become obsolete through the enlarged powers of the law courts to grant new trials, that where the legal judgment was obtained or entered through fraud, mistake, or accident, or where the defendant in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his part or on the part of his agents, then a court of equity will interfere at his suit, and restrain proceedings on the judgment which cannot be consistently enforced." The material allegations of the complaint are "that the plaintiff, a constable, by virtue of a writ of claim and delivery issued out of a justice's court in an action wherein one Wilson and others were plaintiffs and Laughlin and Berkle were defendants, levied upon and took possession of 29,274 feet of lumber. That thereafter an action was commenced by the defendant herein against the plaintiff herein to recover the possession of said lumber, and for damages for the detention thereof. That action was tried, and a judgment was rendered in favor of the plaintiff herein. On appeal to this court by the defendant herein said judgment was reversed, and the cause remanded for a new trial, which was afterwards had, and a judgment rendered in favor of the defendant herein and against the plaintiff herein that he return the lumber so seized by him, or, upon failure to do so, he pay in lieu thereof one thousand dollars, and two hundred and fifty dollars damages for detention," etc. "That, after the rendition of said judgment and the release of said property by order of said superior court, an action was commenced in said justice's court against said Laughlin and Berkle, and a writ of attachment issued therein and placed in the hands of the plaintiff herein as such constable as aforesaid, and said plaintiff, in pursuance of said writ, attached the said lumber, and held the same in his possession until judgment in said action was rendered in said justice's court in favor of said Laughlin and Berkle, when plaintiff herein, by order of said justice's court, released said lumber from said attachment, and turned the same over to the defendant herein; but plaintiff herein failed to take a receipt from said defendant herein for said lumber, and said defendant herein continued to prosecute his said action of claim and delivery in said superior court against plaintiff herein. That on the trial of said action in said superior court plaintiff herein was not permitted to give evidence of the return of said lumber to defendant herein, because said return had not been pleaded in said action." After judgment was rendered plaintiff's and defendant's attorneys agreed the plaintiff would pay defendant $150, and that defendant would accept that sum in full satisfaction of said judgment. That after the lapse of more than 10 days after plaintiff was informed of said agreement he tendered said $150 to defendant's attorney, who refused to accept the same, and repudiated said agreement. Plaintiff made no motion for a new trial. The attorney who conducted his defense in the action is insolvent. The complaint was demurred to by the defendant herein on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled.

Did the court err in overruling said demurrer? In other words, does the complaint state facts sufficient to constitute a cause of action? The only ground stated in the complaint for equitable relief of the kind prayed in this action is that the plaintiff had a perfect defense, which he did not plead, to the action in which the execution of judgment rendered against him in said action is sought to be enforced. Why said defense was not pleaded is not stated. It is not alleged that the defendant herein is in any way responsible for the omission. The attempt to introduce evidence to prove that defense was defeated by the objection that such evidence was not admissible under the pleadings. The ruling of the court in sustaining said objection is not complained of, but plaintiff alleges that he then ascertained "for the first time" that his attorney had not pleaded said defense. It does not appear that any application was made to the court to amend the answer, so as to obviate the objection to the introduction of evidence to prove the only defense, so far as disclosed by the complaint in this action, the plaintiff had to the action which defendant was prosecuting against him. That such an amendment might have been allowed under section 473 of the Code of Civil Procedure, is made clear by various decisions of this court. No motion for a new trial, although a new trial may be granted on the ground of accident or surprise, which ordinary prudence could have guarded against, was made. Code Civil Proc. § 657. It is alleged that defendant's attorney agreed with plaintiff's attorney to accept $150 in full satisfaction of the judgment, and that plaintiff tendered that sum more than 10 days after the agreement was made, and after the time within which notice of motion for a new trial might be given, but it is not alleged that plaintiff was prevented from giving the notice by reason of the pendency of said agreement; and within six months after the judgment was rendered the court in which it was rendered might have relieved the plaintiff therefrom, provided said judgment was taken against him through his mistake, inadvertence, surprise, or excusable neglect. Section 473, Code Civil Proc. Chancellor KENT says: "The rule is that chancery will not relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or unless he was prevented from availing himself of the defense by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part." Foster v. Wood, 6 Johns. Ch. 87. "A court of equity does not interfere with judgments at law unless the complainant has an equitable defense, of which he could not avail himself at law because it did not amount to a legal defense, or had a good defense at law which he was prevented of availing himself of by fraud or accident, unmixed with negligence of himself or his agents." Hendrickson v. Hinckley, 17 How. 443. Here the plaintiff had a good defense at law, but he was not prevented from availing himself of it by fraud or accident, unmixed with negligence of himself or agent. No element of fraud or accident is apparent, but the negligence of the plaintiff or his agent is conspicuous. The application of the rule laid down by the eminent authorities to which I have above referred leaves the plaintiff no equities whatever. I think the party who employs an attorney, who appears and conducts his defense, cannot make the negligence of such attorney a ground for equitable relief from a judgment which might have been prevented by reasonable diligence. I know of no case in which the incompetency or neglect of an attorney has been held to be a sufficient ground for the relief prayed and granted in this case. The complaint, in my judgment, does not state facts sufficient to constitute a cause of action, and the demurrer to it on that ground should have been sustained.

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91 Cal. 518

PRESCOTT *et al.* v. GRADY. (No. 14,016.)

(*Supreme Court of California.* Oct. 5, 1891.)

ACTION ON DEMAND NOTE—PLEADING—ANSWER—RECORD.

1. On a demand note providing for a reasonable attorney's fee in case of suit thereon, the maker is entitled to demand of payment before suit can be brought, and it is error, in an action on such a note, to render judgment for plaintiff on the pleadings, if the answer alleges that payment was not demanded.

2. In such an action, under an allegation in the answer that the amount demanded in the complaint as a reasonable attorney's fee is not reasonable, defendant has a right to show that plaintiff is not entitled to any fee, or that the fee demanded is not reasonable; and judgment against him on the pleadings is error.

3. Where a judgment on motion on the pleadings recites that the motion was heard on June 20th, it will not be disturbed for want of notice to defendant of the hearing, in the absence of a bill of exceptions, on what purports to be a notice of a hearing on May 30th, a legal holiday, inserted in the transcript, since such notice constitutes no part of the judgment roll, and does not warrant a conclusion that it was the notice on which the final hearing was had.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; WILLIAM O. MINOR, Judge.

Action by F. K. Prescott and others against W. D. Grady, on a note executed by defendant. Judgment for plaintiffs. Defendant appeals. Reversed.

Grady & Austin, for appellant. *Church & Cory*, for respondents.

TEMPLE, C. This action is brought upon a promissory note executed by defendant. Judgment was entered against him on the pleadings, and it recites that the defendant was duly and regularly served with notice of the time and place of hearing the motion. There is inserted in the transcript, however, what purports to be a notice of the hearing of the motion May 30, 1890, a legal holiday. The judgment recites that the motion was heard June 20, 1890. There is no bill of exceptions, and we cannot conclude that the notice, inserted without authority in the transcript, is the notice in pursuance of which the motion was finally heard. The notice constitutes no part of the judgment roll. The judgment shows that it was entered upon the pleadings, on the theory that the answer raises no issue, and the question is whether this ruling was correct. The suit is upon a promissory note, which is set out at length in the complaint. It is in the usual form, except that it contains this stipulation: "And if this note is collected by suit, I agree and promise that the court having jurisdiction allow a reasonable attorney's fee, together with all legal expenses, to be made part of the judgment." It is also averred that payment has been demanded and no part paid, and that $75 is a reasonable attorney's fee. The answer denies that payment of the note was ever demanded, that $75, or any other sum, is a reasonable attorney's fee, and alleges that that stipulation for an attorney's fee was without consideration. All the other facts constituting plaintiff's cause of action are expressly admitted.

Appellant does not wish to open the well-settled question whether suit may be brought upon a note payable on demand without other demand than the bringing of the suit, but he claims that the contract sued on is more than a promissory note; that it contains a stipulation for special damage in case suit be brought, and that he ought not to be held to have incurred this liability until he is in default according to the terms of his contract; that is, until he has failed to pay on demand. On principle it is difficult to resist this argument. It is well settled that suit may be brought at once on a demand note, but the rule does not seem to be in accord with the general principles of pleading. The cause of action would consist of the right to the money on demand, the demand, and the breach of the agreement, to-wit, failure to pay. If the bringing of the suit is the demand, still before suit brought there was no breach. It is an exception to general rules established by precedent, and, when confined to a recovery of the debt, there is no great harm in the exception; but, where special damage results from a merely imaginary breach of the contract, the case is different. Upon giving a note payable on demand, one naturally expects that some time would be allowed. Under our Code, for the purpose of fixing the liability of indorsers, the apparent maturity of such a note bearing interest is one year. It is not to be supposed that a debtor would add to his debt the liability for an attorney's fees if he expected to be sued at once. But, on giving such a note, he adds an inducement to sue at once, and without—on the view adopted by the court—a chance to escape the damage. In this light, such a stipulation is simply calculated to encourage litigation, and has in some states been declared against public policy, and void. Bullock v. Taylor, 39 Mich. 137; Witherspoon v. Musselman, 14 Bush, 214. It becomes solely an inducement to sue, and not an indemnity for a dereliction on the part of the debtor. In Adams v. Seaman, 82 Cal. 636, 23 Pac. Rep. 53, it was held that such a stipulation constitutes a material part of the contract, and destroys its negotiability. It would seem that it should also take it out of the limited exception to the general rules of pleading, and that such damage cannot be recovered until there has been a breach of the contract.

The answer also denies that $75, or any other sum, is a reasonable attorney's fee. Respondent claims, and the court must have held, this to be an immaterial denial, on the ground that it was not necessary to aver what a reasonable fee would be. In Carriere v. Minturn, 5 Cal. 435, in an action to foreclose a mortgage which stipulated for a fee of 5 per cent., it was said that it was not necessary to aver that 5 per cent. was a reasonable fee, because the fee did not constitute the cause of action, but was an incident to it, like costs. Costs are not an incident to the cause of action, but to the judgment; and neither in the practice act as it then was, nor under the Code, could this fee be entered as costs, or be reached by a motion to retax costs. Such a ruling apparently denies the right of the mortgagor to be heard at all upon the question of fixing the attorney's fee, although it may amount to thousands of dollars, and the effect of the decisions are that the fee is in the nature of damages to indemnify the creditor against the necessity of paying an attorney's fee. Carriere v. Minturn, supra; Patterson v. Donner, 48 Cal. 369; Bank v. Treadwell, 55 Cal. 379. Carriere v. Minturn is not authority, however, for the proposition that such stipulation must not be pleaded, although it was apparently so construed in Monroe v. Fohl, 72 Cal. 568, 14 Pac. Rep. 514, and in Bank v. Holt, 87 Cal. 158, 25 Pac. Rep. 272, and White v. Allatt, 87 Cal. 245, 25 Pac. Rep. 420. But whether these cases were rightly decided or not will not determine this question. They were all for the foreclosure of liens, and the charges were expressly authorized by statute. It might, with some plausibility, be argued in such cases that the charge is in the nature of costs, or like the allowance of a fee by a chancellor, when the rules of law justify it. Here the case is at law, and the charge not authorized by any statute. It is by virtue of the contract only. The Code determines the damages for the breach of a contract for the payment of money. This is a special damage, expressly authorized by the contract to be recovered in addition to general damages. The rules of pleading require such damages to be specially averred. A defendant may always admit the breach of the contract, and defend as to the amount of damage. Unless he can raise an issue as to such damage, he cannot have his day in court. We think under this answer defendant could have shown either that plaintiff was not entitled to any fee, as in Bank v. Treadwell, 55 Cal. 379, or could have been heard as to what would have been a reasonable fee; and perhaps might have made some other defense.

Appellant has not raised the question whether such a stipulation is valid, or whether judgment could be entered on the pleadings, where evidence would be required, even on default. We think the judgment should be reversed.

We concur: Belcher, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed.

(91 Cal. 432)

SAN LUIS OBISPO COUNTY v. WHITE.
(No. 13,556.)

(*Supreme Court of California*. Sept. 28, 1891.)

HIGHWAY TAXES — BRIDGES — COUNTIES — CORRECTION OF ASSESSMENTS — ELECTION PROCLAMATIONS.

1. Pol. Code Cal. § 3671, provides that taxes upon road-districts shall be collected in the same manner as county taxes. St. 1880, p. 136, provides that a county may maintain an action, in its own name, for the recovery of delinquent taxes. *Held*, that a county can maintain an action in its own name to collect delinquent taxes which were levied upon a road-district.

2. St. Cal. 1883, p. 299, provides that the board of supervisors of a county shall have power to levy taxes upon the taxable property in any district in their county for the construction and repair of roads, provided the proposition be submitted to and received by a majority of the qualified voters. Pol. Code, § 2618, defines a bridge to be a highway. *Held*, that it is within the power of the board, provided the proposition is approved by a majority of the voters, to levy a tax on a road-district to build a bridge.

3. An election proclamation, ordered published by the board of supervisors, pursuant to Pol. Code Cal. § 1056, is not invalid because the clerk affixed a scroll thereto, instead of his offi-

cial seal, though the county government act (St. Cal. 1883, p. 299, § 20, subd. 8) makes it the duty of the clerk to place his seal upon all proceedings of the board, whenever the same are ordered published.

4. If the clerk of the board of supervisors neglects to enter an order for the publication of a special election proclamation upon the minutes, as he is required to do by law, parol evidence is admissible to prove that such an order was made.

5. Code Civil Proc. Cal. § 2010, provides that evidence of the publication of a notice required by law may be given by the printer's affidavit annexed to a copy of the notice. *Held*, that an objection that the contents of an election proclamation could not be proven by a printed copy with the affidavit of publication annexed, on the ground that the original had not been sufficiently accounted for, was properly overruled, where the court was not requested to limit such evidence to the purpose for which it was admissible.

6. Pol. Code Cal. § 1055, provides that the board of supervisors, upon the receipt of the governor's proclamation of a general or special election, shall cause a copy of the same to be published in some newspaper printed in the county, and posted in each place of election, and, in the case of a special election to fill vacancies in certain state offices, they shall post or publish a copy of such proclamation upon the receipt thereof. Section 1056 provides that whenever a special election is ordered by the board of supervisors they must publish and post a proclamation in the same manner as a proclamation issued by the governor. *Held* that, if a proclamation by the board of supervisors of a special election, on a proposition to levy a tax to build a bridge, was published in a county newspaper, it was not necessary that it be posted also.

7. Upon an assessment roll, the decimal parts of the dollar were separated from the units and tens by the subdivisional account-book lines instead of the decimal point, and the word "cents" was omitted from the top of the column. *Held*, that an objection that the tax was not entered upon the assessment roll, on the ground that the decimal point and word "cents" were omitted, is untenable, and that it was competent for the district attorney to permit the assessor to add the abbreviation "cts." at the top of the column, over the space intended for the decimal parts.

8. Pol. Code Cal. § 3881, provides that omissions, errors, or defects in an assessment book may, with the consent of the district attorney, be supplied or corrected by the assessor at any time before the sale for delinquent taxes. *Held*, that it is competent for the assessor, under the written instructions of the district attorney, to supply the omission on the original roll of the "total tax" in the column provided for it, where the total tax appeared in the column headed "Road-Tax."

San Luis Obispo Co. v. White, 24 Pac. Rep. 864, affirmed.

In bank. On rehearing.

PER CURIAM. We are satisfied with the opinion filed in this case on October 2, 1890, (24 Pac. Rep. 864,) and for the reasons therein stated the judgment and the order denying defendant's motion for a new trial are affirmed.

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91 Cal. 440

Ex parte SOLOMON. (No. 20,881.)

(*Supreme Court of California.* Sept. 29, 1891.)

CITY ORDINANCES—VALIDITY—EXCESSIVE PENALTY—POSSESSION OF LOTTERY TICKETS.

Pen. Code Cal. §§ 320-326, make it a misdemeanor to conduct the drawing of a lottery, or to sell tickets, or to open any office or any other place for the sale of tickets, or to permit any building to be used either for the drawing or sale; and, as a punishment, impose a fine of not exceeding $500, or imprisonment in the county jail not exceeding 6 months, or both. *Held*, that order No. 1,587, § 70, of the city of San Francisco, providing as a punishment for having lottery tickets in one's possession a fine of not less than $250 nor more than $1,000, or imprisonment for not less than 3 months nor more than 6 months, or both, is unreasonable and void, as out of harmony with the general laws of the state; and a person who is imprisoned under its provisions should be discharged. In re Ah You, 88 Cal. 99, 25 Pac. Rep. 974, followed.

In bank. Application for writ of *habeas corpus.*

Alex. Campbell and *Humphreys & Flournoy*, for petitioner.

DE HAVEN, J. The petitioner was convicted in the police court of the city and county of San Francisco of "having lottery tickets in his possession," which is made an offense by section 70 of order No. 1,587 of that city, and is now suffering imprisonment therefor The ordinance provides that the offense of which petitioner was convicted is punishable "by a fine of not less than two hundred and fifty dollars, nor more than one thousand dollars, or by imprisonment for not less than three months nor more than six months, or by both such fine and imprisonment." Under the general law of the state found in sections 320 to 326 of the Penal Code, it is made a misdemeanor either to conduct the drawing of a lottery or to sell lottery tickets, or to aid in the drawing of a lottery or the selling of tickets therein, or to open any office or other place for the sale of such tickets, or to let or permit to be used any building for the drawing of any lottery, or for the purpose of selling such tickets therein, but the extent to which any of these offenses may be punished is a fine not exceeding $500, or by imprisonment in the county jail not exceeding 6 months, or by both such fine and imprisonment; and it is therefore possible that upon conviction of either of said offenses under the state law there may, in a wise discretion, be imposed upon the offender only a nominal fine, while, for the comparatively trifling offense of having a lottery ticket in possession, the discretion to impose a fine of less than $250 is taken away from the court by this ordinance, and the fine may be double that which can be imposed for the more serious offenses named in the general law. Such an ordinance is not in harmony with the general laws of the state, and is unreasonable and void, within the rule announced in Ex parte Ah You, 88 Cal. 99, 25 Pac. Rep. 974; and upon the authority of that case the petitioner is discharged.

We concur: BEATTY, C. J.; HARRISON, J.; SHARPSTEIN, J.; GAROUTTE, J.

PATERSON, J. I concur. There is nothing in the nature of the offense which calls for any severer penalty for its commission in a thickly settled community than for its commission in the country. The acts constituting the offense in no way tend to create a breach of the peace, nor do they tend to injure the person or property of another. The minimum penalty was fixed, doubtless, at $250, to cut off any leniency on the part of the court in which the conviction might be had. But the reasonableness or unreasonableness of an ordinance does not depend upon the difficulty of enforcing its penal provisions. The object of the ordinance is plain, but, as it in effect provides a greater penalty than that provided by the statute for kindred offenses, it is unreasonable in law, and therefore void.

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91 Cal. 488

SIMPSON *et al.* v. BUDD. (No. 14,470.)

(*Supreme Court of California.* Oct. 2, 1891.)

MOTION FOR NEW TRIAL — STIPULATION FOR EXTENSION OF TIME.

Code Civil Proc. Cal. § 283, provides that an attorney can bind his client in any of the steps of an action by written agreement filed with the clerk, or entered upon the minutes of the court. Section 1054 provides that when an act to be done relates to the preparation of bills of exception, or to the service of notices other than of appeal, the time may be extended by the court; but that such extension shall not exceed 30 days, without the consent of the adverse party. *Held*, that the statutory time for giving notice of intention to move for a new trial and the preparation of a bill of exceptions may be extended without an order of court, by stipulation of the attorneys, even though the stipulation itself be not filed within the time limited for doing the acts themselves.

In bank. Application by Simpson and Gray for a writ of mandate against Budd for refusal to settle a bill of exceptions. Writ ordered.

Nicol & Orr and *Carter & Smith*, for petitioners. *Joseph H. Budd*, (*F. T. Baldwin*, of counsel,) for respondent.

DE HAVEN, J. In an action by Simpson and Gray, the petitioners herein, against Peyton et al., tried in the superior court of San Joaquin county, the findings of the court were filed, and judgment thereupon rendered and entered, December 22, 1890, against said petitioners. It does not appear that any notice of the decision was ever served upon petitioners, but on January 2, 1891, a stipulation was filed in said court, which shows they had actual knowledge at that date of the rendition of the judgment, and for the purposes of this decision it will be assumed that they had notice thereof at that time. Five days thereafter the attorneys for the defendants in that action signed and delivered to the attorneys of the petitioners a written stipulation, by which it was stipulated and agreed that the petitioners here should have 30 days from date thereof "within which to prepare, serve, and file a bill of exceptions, notice of motion for a new trial, and statement on motion for a new trial." This stipulation was not filed with the clerk of the court until April 15, 1891, nor was there any order of the court, or of the judge thereof, extending the time within which the acts named in the stipulation might be done. The notice of motion for a new trial was filed and served within the time given by the stipulation, and within 10 days thereafter, to-wit, on February 14, 1891, the petitioners prepared and served a proposed bill of exceptions, and the defendants in that action prepared amendments thereto, and the same afterwards came before the respondent for settlement. No objection was made to the settlement of the bill of exceptions for the reason that the notice of motion was not given in time, but objection was made to such action upon the ground that the copy of said notice, served upon the attorneys for defendant therein, was not signed by the attorneys for petitioners. The respondent refused to settle the bill of exceptions, upon the ground that the notice of intention to move for a new trial was not served and filed in time, and that the proposed bill of exceptions was not prepared and presented in time.

Upon these facts the only question for decision is whether the statutory time for giving notice of intention to move for a new trial and the preparation of bills of exception can be extended by a stipulation of counsel not filed within the statutory time, and of this we entertain no doubt. An attorney has authority to bind his client in any of the steps of an action or proceeding by his agreement in writing, filed with the clerk, or entered upon the minutes of the court. Section 283, Code Civil Proc. The service and filing of notices of motion for a new trial and proposed bills of exception are steps in an action within the meaning of this section, and the stipulation is filed in time if it is on file, with the consent of the adverse attorney, when the court is called upon to act upon the matter affected by the stipulation. Section 1054 of the Code of Civil Procedure[1] does not limit the authority of attorneys, as given by section 283 of the same Code, nor prescribe the exclusive mode by which the time for giving notices or the service of proposed statements or bills of exception may be extended, but it only imposes a limitation upon the power of the court to extend such time without the consent of the adverse party. It is undoubtedly true, as has often been decided by this court, that the right to move for a new trial is statutory, and, unless the prescribed steps are taken within the time allowed, the right does not exist as against a party who stands upon the statute and insists upon strict compliance with every provision of the law relating thereto, and intended for his benefit; but it has never been held that such provisions may not be waived by the party otherwise entitled to claim their benefit. On the contrary, it has been assumed in many cases, if not directly decided, that the time for giving notice of motion for a new trial, as well as every other step to be taken in relation thereto, may be waived or extended by consent. Hobbs v. Duff, 43 Cal. 485; Brichman v. Ross, 67 Cal. 602, 8 Pac. Rep. 316; Patrick v. Morse, 64 Cal. 462, 2 Pac. Rep.

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[1] Sec. 1054. When an act to be done, as provided in this Code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparations of statements or of bills of exceptions or of amendments thereto, or to the service of notices other than of appeal, the time allowed by this Code may be extended, upon good cause shown, by the court in which the action is pending, or a judge thereof; but such extension shall not exceed thirty days without the consent of the adverse party.

49; Gray v. Nunan, 63 Cal. 220; Schieffery v. Tapia, 68 Cal. 184, 8 Pac. Rep. 878; Curtis v. Superior Court, 70 Cal. 390, 11 Pac. Rep. 652. We are of the opinion that the parties may, within the time allowed by law to give notice of intention to move for a new trial, stipulate that the time for giving such notice may be extended, and that such stipulation has effect without any order of the court ratifying the same. The question in such cases is one which most immediately concerns the parties to the action, and attorneys may be safely intrusted to look after the rights of their respective clients in such matters. Peremptory writ of mandate ordered.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; HARRISON, J.; PATERSON, J.; GAROUTTE, J.

CLARK v. BUDD. (No. 14,469.)

(*Supreme Court of California.* Oct. 2, 1891.)

In bank. Application for writ of mandate prayed against a superior judge of San Joaquin county.

Nicol & Orr and *Carter & Smith*, for petitioner. *Joseph H. Budd*, (*F. T. Baldwin*, of counsel,) for respondent.

DE HAVEN, J. The question for decision here is substantially the same as that decided in Simpson v. Budd, 27 Pac. Rep. 758, (No. 14,470,) the opinion in which has been this day filed, and upon the authority of that case a peremptory writ of mandate is ordered herein.

We concur: BEATTY, C. J.; HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.

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91 Cal. 463

JACKSON v. HYDE. (No. 14,065.)

(*Supreme Court of California.* Oct. 1, 1891.)

PUBLIC LANDS — ASSIGNMENT OF CERTIFICATE OF PURCHASE—TRUSTS.

1. The assignee of a certificate of purchase of land from the state holds the same, or a patent issued to him thereon, in trust for those to whom, with his knowledge, his assignor has previously sold and conveyed the land. Henderson v. Grammar, 66 Cal. 332, 5 Pac. Rep. 488, followed.

2. Where such assignee has been decreed to hold the patent in trust for the grantees of his assignor, and ordered to convey to them, he is properly allowed reimbursement of his expense in procuring the patent.

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action by Andrew Jackson against H. R. Hyde to compel defendant to convey land alleged to be held by him in trust for plaintiff. Judgment for plaintiff. Defendant appeals. Affirmed.

Meux & Edwards, for appellant. *Geo. A. Nourse*, for respondent.

MCFARLAND, J. The purpose of this action is to have it decreed that plaintiff is the equitable owner of a certain described 80-acre tract of land; that defendant holds the legal title thereto in trust for plaintiff; and that defendant convey the same to plaintiff. Judgment was rendered for plaintiff, and defendant appeals.

The material facts in the case are these: On September 2, 1867, one Gabriel Moore purchased said tract of land from the state, paying 20 per cent. of the purchase money and one year's interest, and received a certificate of purchase therefor. He occupied and held possession of the land under said certificate from its date until his death, which occurred in May, 1880; having paid most of the accruing interest. He died intestate, and his only heirs were his widow, Mary Moore, and his son, Ephraim Moore, who were appointed administratrix and administrator, and occupied said land until they conveyed it as hereinafter stated. By a final distribution of the estate of said Gabriel Moore, made May 21, 1881, said land was distributed to said Mary and Ephraim. On September 12, 1885, said Mary conveyed said land to said Ephraim by a deed duly executed, and recorded on the same day. On July 20, 1887, said Ephraim, by deed recorded that day, conveyed said land to John H. Byrd; and on July 26, 1887, said Byrd, by deed recorded that day, conveyed said land to plaintiff herein. These conveyances were made for valuable considerations, and plaintiff and his grantors have been continuously in undisturbed possession of said land. The said certificate of purchase seems to have remained in the possession of said Mary and Ephraim; and afterwards,—the said Mary on May 2, 1889, and the said Ephraim on May 7, 1889,—by written instruments attached to said certificate, they assigned the same, for the expressed consideration of one dollar, to the defendant, Hyde, and delivered to him the certificate. Thereupon the said defendant presented said certificate to the register of the state land-office, together with said assignments, and proof of the said distribution to said Mary and Ephraim; and, upon payment of the balance due the state thereon, procured a patent for said land to be issued to himself. The register was ignorant of said conveyances of said land as aforesaid, but the defendant had full knowledge thereof.

We think that the judgment of the court below was clearly right. The case cannot be distinguished, on the point involved, from Henderson v. Grammar, 66 Cal. 332, 5 Pac. Rep. 488. The only difference is that in the Henderson Case the purchaser of the lands from the state had mortgaged them, and plaintiff there claimed under a sheriff's deed obtained upon foreclosure and sale, the defendants there having obtained the certificates and procured a patent; while, in the case at bar, the plaintiff holds through a direct conveyance from the original purchaser from the state. The court there held, which is the law, that, in such a case, a conveyance of the land carries the title, of which the certificate is merely evidence. MCKINSTRY, J., delivering the opinion of the court, says: "Plaintiff became the owner of the title of which such certificates were evidence, and from the time he so became the owner it was the manifest duty of defendants to assign the certificates to him. And so, when they acquired the state title, by and through the certificates, it was their duty to convey it to plaintiff." We do not deem it necessary to notice at length the quite able arguments of counsel for appellant, or the many authorities cited. The cases to which they call our attention are not applicable to the case at bar. The law which governs this case is as above stated. The judgment provides for the payment by respondent to appellant of the amount expended by the latter in procuring the patent, which is proper. The judgment is affirmed.

We concur: Beatty, C. J.; De Haven, J.

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91 Cal. 465

People v. Neil. (No. 20,834.)

(*Supreme Court of California.* Oct. 1, 1891.)

Elections — Fraudulent Voting — Indictment and Information.

1. An information charging that defendant "fraudulently voted at an election when he was not entitled to vote," though in the language of the statute, (Pen. Code Cal. § 45,) is not sufficient to state an offense, but must set forth the facts relied on to show fraudulent voting. People v. McKenna, 81 Cal. 159, 22 Pac. Rep. 488, followed.

2. Such information is also fatally defective unless it states the particular fact or facts showing that defendant was not entitled to vote.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Information against James Neil for fraudulently voting at an election. Judgment of conviction. Defendant appeals. Reversed.

Hugh J. & Wm. Crawford, for appellant. *Atty. Gen. Hart*, for the People.

Fitzgerald, C. The defendant was tried and convicted in the court below upon an information charging him with illegal voting, and sentenced to imprisonment in the state-prison for the term of one year. The information, which charges, in the language of the Code, that the defendant fraudulently voted at an election when he was not entitled to vote, was demurred to on the following grounds: *First*, that the facts stated in the information do not constitute a public offense; *second*, "that the information does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code, in this: that it is alleged that defendant was not entitled to vote at the election therein mentioned, but it is not alleged what qualification of a voter he does not possess." The demurrer was overruled. After verdict, and before the defendant was called for judgment, he moved the court in arrest of judgment on the first ground stated in the demurrer, which motion was denied by the court. The case is brought here by appeal, upon the judgment roll, from the judgment rendered upon the conviction, and from the order denying the defendant's motion in arrest of judgment.

The only question presented for decision involves the validity of the information, on the ground that it is not direct and certain, for the reason that it omits to set forth the particular circumstances of the offense charged, and which are necessary to be alleged in order to constitute a complete offense under the law. Section 45 of the Penal Code, or rather that part of it upon which the information herein is founded, reads as follows: "Every person not entitled to vote, who fraudulently votes at any election, * * * is guilty of a felony." Section 1 of article 2 of our state constitution prescribes the qualifications and disabilities of electors, and sections 1083 and 1084 of the Political Code are in the exact language of this section of the constitution. The information, as we have before stated, charges the offense in the language of the Code, and it is well settled, under our system of pleading in criminal cases, that this will generally be held to be sufficient; but where the particular circumstances of the offense are necessary to constitute a complete offense they should be stated and averred, and a failure to do so will vitiate the information or indictment. It is objected by appellant "that the allegation contained in the information that the defendant 'fraudulently voted' is insufficient, and this, notwithstanding those are the words of the statute." In Hirschfield's Case, 13 Blatchf. 331, it was said by Benedict, J., that "the averment that the accused fraudulently registered is insufficient, although those are the words of the statute. Something more must be stated in order to give the accused any proper notice of the charge which he is to meet. It is impossible for the accused to determine, from this indictment, whether he is required to show in his defense that he was twenty-one years of age, or to show that he resided in a certain place, or to show that he bore a certain name, or to show that he was a native, or that he was a naturalized citizen, of the United States. An indictment under this statute should point out the fraud which it is supposed the accused committed, so that he can know what it is that he is called on to explain, and be enabled to prepare his defense." And in People v. McKenna, 81 Cal. 159, 22 Pac. Rep. 488, it was said by Mr. Justice Paterson that "the question whether a thing has been done fraudulently is a matter of law, and an allegation of fraud, in general terms, presents no issuable fact." "It is a sound principle that an indictment charging fraud of any kind should aver with particularity the facts relied upon to show fraud. Many of the niceties and technicalities which existed under former methods of pleading are not allowed to prevail under the provisions of our Code, but the rule still exists that an indictment must be certain and clear as to 'the particular circumstances of the offense charged, when they are necessary to constitute a complete offense.'" Id. On the authority of that case it follows that the objection to the information on this ground was well taken.

It is further objected "that the information is fatally defective for omitting to state facts showing that the accused was not entitled to vote." The facts which constitute a qualified elector are those which are prescribed by the sections of the constitution and the Political Code above referred to, and there are many causes of disqualification therein enumerated, but as to which one of them the defendant labored under the information does not disclose. The averment that the defendant was not entitled to vote is not the averment of a fact, but of a conclusion of law. The material facts necessary to be charged, and upon which this legal result, that he is not entitled to vote, is founded, are those facts prescribed by the constitution and the Code as constituting the qualifications and creating the disabilities of electors. Mr. Bishop, in the first volume of his work on Criminal Procedure, (3d Ed. § 627,) says: "Whether one is a qualified voter or not is a result deduced by the law from the facts, and, though a statute may mention a legal result in defining an offense, this is not the province of an indictment. It must state the facts out of which such result comes; thus giving the defendant notice of what is charged against him, and putting upon the record a proper case for the adjudication of the court." In People v. Standish, 6 Parker, Crim. R. 111, it is said: "*Prima facie* every white man of the age of twenty-one years is entitled to vote, and when he offers a vote it must be received, unless some fact is shown or appears which disqualifies him; and, when charged with voting without being legally qualified, the indictment should show the fact or facts which disqualify him." To the same effect are State v. Moore, 27 N. J. Law, 105; State v. Tweed, Id. 111; Gallagher v. State, 10 Tex. App. 469; Pearce v. State, 1 Sneed, 63; Gordan v. State, 52 Ala. 308; U. S. v. Hirschfield, 13 Blatchf. 331; Quinn v. State, 35 Ind. 487. When these cases were decided, the statutes of most of those states were substantially the same as our own. The principal cases to the contrary are State v. Douglass, 7 Iowa, 414; Com. v. Shaw, 7 Metc. (Mass.) 52; State v. Marshall, 45 N. H. 281; U. S. v. Quinn, 12 Int. Rev. Rec. 153. Upon a careful examination of these cases on this point, we are satisfied with the reasoning and the conclusion reached in the former. It therefore follows that the information is fatally defective in omitting to state the particular fact or facts showing that the defendant was not entitled to vote. The judgment and order should be reversed, and the information dismissed, and we so advise.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the court below is directed to dismiss the information.

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91 Cal. 400

DE GUYER *et al.* v. BANNING. (No. 13,240.)

(*Supreme Court of California.* Sept. 26, 1891.)

PUBLIC LANDS—MEXICAN GRANTS—BOUNDARIES AND EXTENT.

1. Where there is a conflict between the boundaries of a Mexican grant as given by the decree of confirmation and those fixed by the survey upon which the patent is based, the patent, while it remains in force, must control; and, although the survey itself be incorrect in not including all the land contained in the decree, it cannot, after approval by the land department, be impeached or disregarded in an action of ejectment by one who claims under the proceedings of which it is an essential part.

2. An island within the exterior boundaries of the inner bay of San Pedro was claimed as part of a Mexican grant. The survey recited that it was made in conformity to the boundaries specified in the decree of confirmation; and, after giving certain boundaries which it was contended were the same as those fixed in the decree, excepted from the tract surveyed "that portion thereof covered by the navigable waters of the inner bay * * * which are included within the following described lines, to-wit;" the lines referred to being those which marked the exterior boundaries. It also designated the tract, exclusive of that covered by the navigable waters, as certain numbered lots on the plats of the public survey. *Held*, that inasmuch as the bay was marked "Excepted" upon the map accompanying the patent, and none of the lots referred to included any portion of the land within the exterior boundaries of the bay, the exception must be construed to include, not simply the lands covered by the navigable waters, but all those within the exterior boundaries.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Action of ejectment by De Guyer and others against Banning. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

Houghton, Silent & Campbell and *J. S. Chapman*, for appellants. *Bicknell & White*, (*Smith, Winder & Smith*, of counsel,) *J. E. Foulds*, and *Lee & Scott, amici curiæ.*

DE HAVEN, J. This is an action to recover possession of a tract of land know as "Mormon Island," lying within the exterior boundaries of the inner bay of San Pedro. The plaintiffs claim the land in controversy as a part of the Rancho San Pedro, the title to which is a Spanish grant, confirmed by the United States district court on appeal thereto from the board of land commissioners appointed under the act of congress of March 3, 1851, to ascertain and settle private land claims in this state, and a United States patent therefor dated December 18, 1858. This patent conveys the land embraced in the said Rancho San Pedro, as the same was surveyed by the United States surveyor general after the confirmation of said grant, the patent referring to the survey and plat thereof for purposes of description. The survey recites that it was made in conformity to the boundaries specified in the decree of confirmation, and after giving certain named exterior boundaries, which it is contended by plaintiffs are the same as those fixed in the decree of confirmation, it proceeds as follows: "Excepting, reserving, and excluding from the tract as thus surveyed that portion thereof covered by the navigable waters of the inner bay of San Pedro, and which are included within the following described lines, to-wit;" the lines thus referred to as following this general description being those which mark the exterior boundaries of the inner bay of San Pedro. The judgment of the superior court was in favor of defendant, and the plaintiffs appeal.

The whole controversy in this case grows out of the alleged difference between the boundaries of the said grant, as given in the decree confirming it, and those fixed in the patent; this difference being made by the exception contained in the survey above referred to. The appellants contend: (1) That they have title to all the land within the specific boundaries of the Rancho San Pedro, as fixed in the decree of confirmation, and that the exception contained in the patent and survey must be disregarded as unauthorized and void. (2) That, if the exception is not held to be void, it should be construed only as embracing the navigable waters of the inner bay of San Pedro, and not all the land within the exterior boundaries of such inner bay, in which case the land sued for would not be within the exception.

1. In support of their first proposition, the appellants insist that in surveying the Rancho San Pedro no discretionary power was vested in the United States surveyor general, and that his only authority was to make a survey which would conform to the boundaries given in the decree of confirmation, and that, as by this exception land is excluded from the survey which was included within the boundaries of the rancho as confirmed, it is void. It is true the duty of that officer was to locate the confirmed grant in conformity with the decree. The Fossat Case, 2 Wall. 714. But it does not follow that, when the survey has been made, approved, and acted upon by the land department, its correctness may be impeached or disregarded in an action of ejectment, and that, too, by one who claims under the very proceedings of which the survey was one essential part. To avoid the force of this position, the appellants insist upon the broad proposition that the location of the grant was not fixed and established by the survey and patent, but by the decree of confirmation; and that, in case of a conflict between the boundaries given by the decree and those fixed by the survey upon which the patent is based, the descriptive calls given in the decree are controlling. This position cannot be upheld, and the contrary is, we think, the established doctrine. Moore v. Wilkinson, 13 Cal. 478; Teschemacher v. Thompson, 18 Cal. 11; Leese v. Clark, Id. 535; Chipley v. Farris, 45 Cal. 527; Cassidy v. Carr, 48 Cal. 339; People v. San Francisco, 75 Cal. 388, 17 Pac. Rep. 522; Wright v. Seymour, 69 Cal. 122, 10 Pac. Rep. 323; Beard v. Federy, 3 Wall. 478. The reasoning in Chipley v. Farris, supra, appears to be particularly applicable to this case. In that case it was contended that the confirmation of the grant gave the claimant a perfect title, and that he could not be divested of his title to any such lands by a patent which did not embrace them all. In answer to this the court said: "A patent, issued under the act of 1851, is, as has often been held by this court, the final act in proceedings instituted for the confirmation of the claim of the patentee to land which had been granted by the former government, and for the segregation of such land from the public lands of the United States; and it is a record which binds both the government and the claimant, and cannot be attacked by either party, except by direct proceedings instituted for that purpose. Leese v. Clark, 18 Cal. 535. While it stands, the claimant, or those deriving title through him, will not be permitted to aver that the claim comprised other or different lands from those mentioned in the patent. * * * It is contended by the plaintiffs that the survey, which is incorporated into the patent, does not accord with the decree of confirmation, and that they are entitled to rely upon the decree—which is also incorporated into the patent—for title to lands within the decree, but not within the survey. This position cannot be maintained consistently with the views already expressed as to the nature and effect of the patent. The patent purports to convey the lands described in the survey, and its scope cannot be extended, nor on the other hand can it be limited, by showing that the decree comprised a greater or less area than the survey. Nor can the claimant, after admitting, as he must, the conclusive effect of the patent, make out title to lands not conveyed by the patent, by the production of the proceedings which culminated in the patent. The patent, while it remains in force, conclusively determines what lands the claimant was entitled to under his claim and the decree of confirmation. The claimant can neither reform the patent nor show that it is in any respect incorrect, in an action of ejectment." It is unnecessary to quote further from the decisions on this point. Those above cited establish the proposition that upon the confirmation of a Mexican grant the patent issued by the United States to the claimant is the only evidence of the extent of the grant. The obligation assumed by the United States to protect the rights of claimants under Mexican grants was political in its character, and the manner in which this should be met, and the effect to be given the prescribed proceedings in relation to the establishment of such rights, were matters of legislative policy, and the evident purpose of the act of March 3, 1851, was not only to confirm and protect the rights of claimants under Mexican grants, but also to segregate from the public domain the lands thus confirmed to such grantees, so that it might be known what lands in the state were subject to settlement by citizens of the United States. To accomplish this end the act provided for a survey of all confirmed grants to be made under authority of the government, and for the issuance of a patent thereon, which should be conclusive evidence of the location of the grant. It follows from this that, in ascertaining the boundaries of the Rancho San Pedro, we must look to the patent, and, if there is a conflict as to its location and extent between it and the decree of confirmation, the patent must control.

2. The remaining question is whether the land in controversy is included within the exception; and, as to this, we entertain no doubt that the exception, properly construed, embraces all the lands within the exterior boundaries of the inner bay of San Pedro, as shown on the map accompanying the patent, and is not confined simply to such land as is covered by the navigable waters of that bay. That this is the true meaning of the exception is made to appear, not only from the fact that the inner bay of San Pedro

is marked "Excepted" upon the map referred to, but is also conclusively shown by the concluding portion of the survey itself, as returned and certified, in which, after giving the boundaries of the land surveyed by courses and distances, it designates the land surveyed, "exclusive of the lands above described, as covered by the navigable waters of the inner bay of San Pedro," as being certain numbered lots on the plats of the public survey, neither of which lots includes any portion of the land within the exterior boundaries of the inner bay of San Pedro, as marked on said map. We hold, therefore, that the land in controversy is not a part of the Rancho San Pedro, as patented by the United States, and the judgment of the superior court is right. Judgment and order affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; SHARPSTEIN, J.

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91 Cal. 486

BARRY v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (No. 14,436.)

(*Supreme Court of California.* Oct. 2, 1891.)

CONTEMPT—JUDGMENT—RIGHT TO ENTER SECOND JUDGMENT.

A judgment that a person be imprisoned for contempt five days and pay a fine, and, if the fine be not paid, that he be further imprisoned at the rate of one day for each two dollars, until it is paid, is final; and the court has no authority, at the end of the five days, to enter another judgment for the fine, and issue execution, but only to enforce the original judgment according to its terms.

In bank. Proceeding by *certiorari* to review the action of the superior court, city and county of San Francisco, in rendering two different judgments for contempt against James H. Barry.

Reddy, Campbell & Metson, for petitioner. *Atty. Gen. Hart* and *W. S. Barnes*, Dist. Atty., (*J. A. Hosmer* and *Wm. Fitzmaurice*, of counsel,) for respondent.

DE HAVEN, J. On September 30, 1889, in the superior court of the city and county of San Francisco, it was adjudged that the petitioner here was guilty of a contempt of court, and that he be punished therefor by imprisonment in the county jail of said city and county for five days, and pay a fine of $500, and, if such fine was not paid at the end of said five days' imprisonment, that he be further imprisoned until said fine should be satisfied, at the rate of one day for each two dollars of the fine unpaid. On October 4, 1890, in department No. 8 of said superior court, on motion of the district attorney, another judgment was entered in the same proceeding for contempt, which, after reciting that the five-days term of imprisonment had expired, and that no part of the $500 had been paid, proceeded as follows: "It is therefore ordered that judgment be entered herein against said James H. Barry for $500 and costs, and that execution issue against said James H. Barry for $500 and costs, to the sheriff of the city and county of San Francisco. Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that judgment be, and the same is hereby, entered herein against said James H. Barry for the sum of five hundred ($500.00) dollars, with interest thereon at the rate of seven per cent. per annum from the date hereof till paid." This judgment was entered without any notice to the petitioner. This is a proceeding upon *certiorari* to review the action of the court in rendering the last judgment, and our inquiry is confined to the single question, whether in that the court exceeded its jurisdiction. We are of the opinion that when the court rendered its judgment in the contempt proceeding on September 30, 1889, it did not retain jurisdiction to enter another and different judgment in the same matter on October 4, 1890. The first judgment was final, and the only authority of the court thereafter, in the matter concluded thereby, was the power to enforce the judgment according to its terms, so far as it was capable of enforcement. The order and judgment of October 4, 1890, are annulled.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.; SHARPSTEIN, J.; PATERSON, J.

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91 Cal. 458

BRANDT v. THOMPSON *et al.* (No. 14,021.)

(*Supreme Court of California.* Oct. 1, 1891.)

QUIETING TITLE—RIGHTS OF MORTGAGEE.

In an action to quiet title, the court found that plaintiff, to secure a loan, had conveyed the land to B. by absolute deed, which was intended only as a mortgage, and that T. purchased from B. with knowledge of the nature of B.'s title. *Held*, that it was error to quiet title to the land in plaintiff against T., "except as a mortgagee thereof having a mortgagee's interest therein, to be determined by a proper suit of foreclosure;" since, it having been determined that T. stood in the position of a mortgagee, the only way for plaintiff to quiet title was to pay the mortgage.

Department 2. Appeal from superior court, Fresno county; J. C. CAMPBELL, Judge.

Action to quiet title by Otto Brandt against C. M. Thompson and Herman Brandt. Judgment for plaintiff. Defendant Thompson appeals. Reversed.

N. O. Bradley and *E. D. Edwards*, for appellant. *Geo. A. Norse* and *Justin Jacobs*, for respondent.

MCFARLAND, J. This action was tried upon the second amended complaint. What the preceding complaints were does not appear. The second amended complaint presents simply an action to quiet title. It is averred that plaintiff is, and for a long time has been, the owner in fee and in the actual possession of certain described land; that defendants claim and assert an interest of some kind in said land; and that defendants, or either of them, have no right, title, or interest whatever in said land. The prayer is that defendants be required to set forth the nature of their asserted claims, and that it be decreed that they have no right, title, or interest in said land, and that plaintiff has an absolute title thereto. The defendant Herman Brandt, who is plaintiff's brother, made no defense.

Defendant Thompson filed an answer in which it is denied that since March 4, 1885, plaintiff has been the owner, or in possession, or entitled to possession, of the said land; and in which it is averred that from said March 4, 1885, to April 23, 1888, the defendant Herman was the owner in fee and in possession of said land; that on April 23d Thompson held a mortgage on said land, amounting at that time, principal and interest, to $13,679.50, and that said Herman proposed to him that if he would satisfy said mortgage, and pay said Herman the sum of $6,200, the latter would sell and convey said land to him, (Thompson;) that he accepted the proposition, released said mortgage, paid said $6,200 to said Herman, and that the latter on said 23d day of April, 1888, conveyed said land to Thompson, since which time he has been the owner in fee and entitled to the possession of said land. The court below found that on March 3, 1885, plaintiff was owner in fee and in the possession of said land, and has ever since been in possession, holding the same adversely to defendant and all the world, and that neither of the defendants have been in possession of the same, or any part thereof; that on said March 3, 1885, plaintiff borrowed of Thompson $8,500, and to secure the same executed to him a mortgage on said land; that on the next day (March 8th) plaintiff executed and delivered to his said brother Herman (defendant herein) a deed of conveyance of said land, absolute in form, but intended only as security for $6,000, borrowed by plaintiff from said Herman; that afterwards, on March 19, 1888, Thompson "paid to the said Herman Brandt the said sum of six thousand dollars, ($6,000,) which he, the said Herman Brandt, had loaned to plaintiff, together with two hundred dollars ($200) interest, and satisfied on the records the said mortgage of $8,500 from plaintiff to Thompson;" and that on said March 19, 1888, said Herman made a deed of conveyance of said land to said Thompson. It is found, also, that at the time of said last conveyance Thompson knew that the said deed from plaintiff to said Herman of March 4, 1885, was intended as security for the said loan of $6,000. And upon these facts the court found that the said deed of March 4, 1885, from plaintiff to Herman, was a mortgage to secure $6,000, and did not pass the title, and that the deed from Herman to Thompson carried to the latter only Herman's interest, viz., that of a mortgagee; that plaintiff is the owner in fee of the land as against Thompson, and that Thompson has no right, title, or interest therein, except as a mortgagee thereof, having a mortgagee's interest therein to be foreclosed by a proper suit of foreclosure against plaintiff herein; and that plaintiff is entitled to a decree as prayed for to "quiet title" to said land against Thompson, and those claiming under him, "except as a mortgagee thereof having a mortgagee's interest therein, to be determined by a proper suit of foreclosure." A judgment was rendered in accordance with these conclusions; that is, it was decreed that plaintiff is the owner in fee-simple of the land, and that Thompson has no interest therein except that of a mortgagee, "to be determined by proper suit of foreclosure against plaintiff herein." Thompson appeals from the judgment and from an order denying a new trial. We think the evidence sufficient to warrant the findings of the court that the deed from plaintiff to his brother Herman was given to secure $6,000 borrowed money; that it was therefore only a mortgage; and that Thompson knew the nature of said deed when he took his conveyance. And the court was correct in holding that it did not pass the title. The doctrine of Hughes v. Davis, 40 Cal. 117, has been abrogated, and the rule stated in Jackson v. Lodge, 36 Cal. 28, and Cunningham v. Hawkins, 27 Cal. 603, restored, by sections 2924 and 2925 of the Civil Code. See Taylor v. McLain, 64 Cal. 514, 2 Pac. Rep. 399; Healy v. O'Brien, 66 Cal. 519, 6 Pac. Rep. 386; Hall v. Arnott, 80 Cal. 348, 22 Pac. Rep. 200.

Neither do we think that the decree (assuming that it was based upon a proper theory) excludes Thompson from enforcing his rights as a mortgagee under the said mortgage from plaintiff to Herman Brandt, with respect to which Thompson would be subrogated to the rights of Herman. It merely undertakes to reserve to Thompson the right, "by proper suit of foreclosure," to have determined his interest "as a mortgagee," without declaring what that interest is.

But the judgment must be reversed for other reasons. It is somewhat difficult to say from the pleadings in this case what issues were really before the court; but the court found certain facts upon which the validity of the judgment in favor of respondent must be determined. Now, upon those facts, respondent stands simply in the position of a mortgagor seeking to quiet his title against a mortgagee, without paying, or tendering or offering to pay, the debt for which the mortgage was given. But such a result cannot be achieved. It would be against general equitable principles and adjudicated cases. De Cazara v. Orena, 80 Cal. 132, 22 Pac. Rep. 74; Booth v Hoskins, 75 Cal. 271, 17 Pac. Rep. 225; Spect v. Spect, (Cal.) 26 Pac. Rep. 205. In the case of Booth v. Hoskins the rule was applied when the mortgage debt was barred by the statute of limitations. The only way for a party in respondent's position to quiet a mortgage is to pay it. The decree in the case at bar first undertakes to quiet respondent's title, and then disturbs it again by declaring appellant's right to foreclose. If appellant's debt should become barred by the statute of limitations, then, by this decree, respondent would have his title quieted without paying the mortgage debt; the very thing which equity says cannot be done. Respondent can have no remedy in the premises without paying or tendering the amount due appellant on his mortgages, and the court erred in holding otherwise. No doubt both parties, with a better understanding of their rights, can reconstruct their pleadings so as to better present those rights to the court. The judgment and order appealed from are reversed, with leave to both parties to amend their pleadings as they may be advised.

We concur: BEATTY, C. J.; DE HAVEN, J

91 Cal. 506

OLSEN v. LOVELL. (No. 14,191.)

(*Supreme Court of California.* Oct. 3, 1891.)

SPECIFIC PERFORMANCE—DAMAGES.

1. Where one owning land in common with another contracts to sell and convey the same to another, signing his own name, and, without authority, his co-tenant's name also, he cannot be compelled to convey to the vendee his undivided half of the land, on his co-tenant's repudiating the contract, since it would be to enforce specific performance of a contract which he did not make or contemplate. Jackson v. Torrence, 83 Cal. 521, 23 Pac. Rep. 695, followed.

2. Nor can he be made to respond in damages for breach of the contract, since the contract sued on is one which he did not make.

Department 2. Appeal from superior court, Sacramento county; W. S. VAN FLEET, Judge.

Action by Alfred Olsen against C. A. Lovell for specific performance. Judgment for defendant. Plaintiff appeals. Affirmed.

Robt. T. Devlin, for appellant. *McKune & George*, for respondent.

MCFARLAND, J. Plaintiff brought this action to compel defendant to specifically perform a certain contract for the conveyance of land. Defendant demurred on the general ground of want of facts, and also on certain special grounds. The demurrer was sustained, and judgment was rendered for defendant. Plaintiff appeals.

It appears from the complaint that on January 21, 1890, a certain written contract was entered into, which purports upon its face to have been made by plaintiff, as a party of the first part, and the defendant C. A. Lovell and one F. E. Judson, as parties of the second part. By this contract plaintiff was to convey to defendant and Judson a certain tract of land in Placer county, and pay them $1,750; and defendant and Judson were to convey to plaintiff a certain lot of land in Sacramento city. The contract was signed by plaintiff and by defendant, but was not signed by Judson. Judson's name was signed to the contract by defendant in this manner: "F. E. Judson, by C. A. L." There is nothing else on the face of the contract, or in any way attached to it, to intimate that defendant was the attorney in fact or agent of Judson, and he does not assume to sign Judson's name as his attorney; and, indeed, it appears from other averments in the complaint that plaintiff did not rely upon any legal authority of defendant to bind Judson, but upon the probability that the latter would agree to whatever defendant might promise for him in the premises. No fraud is alleged against defendant. It is averred that Judson resided at the time in the eastern states, and that defendant in fact had no authority to bind Judson, who, it is to be inferred from the complaint, although not directly averred, has repudiated the contract. It is further averred that plaintiff tendered to defendant the sum of $875, being one-half of said $1,750 mentioned in the contract, and offered to grant him the undivided one-half of said land in Placer county, or, if defendant preferred, the one-half of said land in severalty; and thereupon plaintiff demanded of defendant that he convey to plaintiff the undivided one-half of said lot of land in Sacramento, and tendered him a conveyance thereof, and demanded that he execute the same, but that the defendant refused to execute the deed to plaintiff of said undivided one-half, or of any interest in said lot in Sacramento. The prayer is that defendant be adjudged to convey to plaintiff said undivided one-half of said lot in Sacramento, upon the payment to plaintiff of said $875, and his execution of a deed to the one-half of said land in Placer county.

The case at bar cannot be distinguished in principle from Jackson v. Torrence, 83 Cal. 521, 23 Pac. Rep. 695. In that case Torrence and wife signed a written contract to convey certain land in which the wife had a separate interest. The wife afterwards repudiated the contract, and, as she had not acknowledged it, she could not be compelled, under the statute, to perform it. It was then sought to compel the husband to convey his interest in the property, on receipt of his proportion of the agreed price; but it was held that this could not be done. It is true that in Jackson v. Torrence the parties were husband and wife, and this court in its opinion in that case very naturally notices some of the peculiar results which would follow a specific performance by the husband, as, for instance, that the wife would be left a tenant in common with strangers. But the ground upon which the decision rested was that to force such a specific performance upon W. H. Torrence would be to compel him "to perform a contract which he never made or intended to make." This court there says: "The only contract he executed, or intended to execute, was a contract in which his wife was to join, for the conveyance of the whole property for a round sum. Until the contract was completed by the accession of his wife, there was no contract of which there could be any breach or failure to perform." And so in the case at bar. To compel defendant to convey an undivided half of the Sacramento lot would be to force him "to perform a contract which he never made, or intended to make." He did not contract to convey his half of the lot, thus making plaintiff and Judson co-tenants thereof, or to take in exchange an undivided half of the Placer county land, and half of the $1,750, thus becoming a tenant in common with plaintiff. The reasons why he might not want so to do may not be so striking as in the case of Torrence and wife; but the principle to be applied is the same. The contract upon its face clearly means that defendant and Judson were to convey the whole of their land in exchange for the whole of plaintiff's land, together with the whole of a certain named sum of money; and, if such contract cannot be specifically enforced as written, then it cannot be so enforced at all. We think, therefore, that the demurrer was properly sustained.

There is also a claim in the complaint, not separately stated, in which it is averred that, by reason of "the breach of covenant to convey on the part of the defendant hereinbefore set out, and of his failure to specifically perform the same," plaintiff has sustained damages in the sum of $3,000, for which he also prays judgment. But, waiving respondent's point that such a cause of action could not be joined with the other, and that it should have been specifically stated, we do not see how, upon the averments in this complaint, appellant could recover damages because respondent did not do what he was not legally liable to do. The question whether, with proper averments, defendant could be held in damages in an action based upon some such ground as deceit or fraud, does not here arise.

Judgment affirmed.

I concur: De Haven, J.

Beatty, C. J., (*concurring.*) The decision in Jackson v. Torrence does not, in my opinion, apply to the facts of this case, but I concur in the judgment on the ground that Lovell's contract to convey his interest in the Sacramento lot cannot be enforced, except upon condition of giving him what he bargained for, viz., a half interest, undivided, in the Placer land, with Judson for co-tenant. He did not agree to take such interest with plaintiff as co-tenant, nor did he agree to take a divided half of the land in severalty. He has never been offered, and he cannot get, what he agreed to take. Therefore he cannot be compelled to convey; and, for the same reason, he is not liable in damages unless, as suggested by Justice McFarland, for fraud or deceit.

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91 Cal. 510

Ex parte Sam Wah. (No. 20,882.)

(*Supreme Court of California.* Oct. 3, 1891.)

Taxation—Obstructing Collection.

Pen. Code Cal. § 428, which provides that every person who obstructs or hinders any public officer from collecting taxes "in which the people of this state are interested" is guilty of a misdemeanor, does not apply to the act of obstructing a town officer in the collection of a town tax.

In bank. Original proceedings in *habeas corpus* by Sam Wah against C. W. Rogers, sheriff of Contra Costa county. On *ex parte* hearing, petition was dismissed.

Smith & Murasky, for petitioner.

De Haven, J. The petitioner was convicted in a justice's court of Contra Costa county of the alleged offense of hindering and obstructing the town marshal of the town of Martinez, in that county, in the collection of certain street poll-taxes of and in that town. The alleged obstruction consisted in petitioner's refusal to give his true name to the officer when requested to do so. It is claimed that this act was a violation of section 428 of the Penal Code, which reads as follows "Every person who willfully obstructs or hinders any public officer from collecting any revenue, taxes, or other sums of money in which the people of this state are interested, and which such officer is by law empowered to collect, is guilty of a misdemeanor." It appears that Martinez is a town of the sixth class, and by section 862 of the municipal corporation bill, approved March 13, 1883, towns of that class are given power "to impose on and collect from any male inhabitant, between the ages of twenty-one and sixty years, an annual street poll-tax, not exceeding two dollars," and are also authorized to levy and collect a property tax for street work and other municipal purposes. It is very clear to us that the money levied and collected under this grant of power belongs to the municipality, and not to the state, and that, therefore, section 428 of the Penal Code has no application to the charge made against the petitioner. It is true that such taxes are held in trust by the municipal corporation, and are to be expended only for public purposes; but the trust is for the immediate benefit of the inhabitants within the corporate limits, although incidentally the people of the state who may have occasion to come within such limits may also share in such benefits. It is, under existing laws, left entirely to the option of towns of the class to which Martinez belongs whether any street poll-tax shall be imposed upon their inhabitants, and such taxes, when collected, belong in the municipal treasury, and are to be expended only by the town, and the people of the state do not have any interest therein, within the meaning of section 428 of the Penal Code. That this section does not apply to the collection of a municipal tax is also apparent from other sections of the chapter in which it is found. Section 424, relating to embezzlement or other misuse of public moneys, or falsification of accounts by public officers, is made expressly to apply to city, town, and district officers. Under section 425, every officer charged with the receipt or disbursement of "public moneys," who fails to keep and pay the same in the manner provided by law, is guilty of a felony; and the succeeding section defines the phrase "public moneys," as used in the two preceding sections, to include, among other things, "all moneys belonging to the state, or any city, county, town, or district therein." In view of the care taken to specifically define general words in the preceding sections so as to include public moneys of towns and cities, it becomes plain that the language of section 428 of the Penal Code, which makes it an offense to obstruct an officer in the collection of "any revenue, taxes, or other sums of money in which the people of the state are interested," was not intended by the legislature to apply to the act of obstructing a town officer in the collection of a town tax. It follows that the petitioner is entitled to be discharged. So ordered.

We concur: Beatty, C. J.; Harrison, J.; Sharpstein, J.; Paterson, J.

(91 Cal. 535)

PEOPLE *ex rel.* ATTORNEY GENERAL v. WALLACE. (No. 14,766.)

(*Supreme Court of California.* Oct. 6, 1891.)

COURTS—JURISDICTION—SHAM CONTROVERSY.

Where an application to the supreme court of California for a writ of review is made merely to test the validity of the grand jury, and presents no real controversy between the parties to the record, the court will not take cognizance of it.

In bank. Application by attorney general against Wallace for a writ of review. Application dismissed.

Atty. Gen. Hart, for petitioner. *Creed Haymond* and *W. H. L. Barnes*, for respondent.

PER CURIAM. The court is unanimously of the opinion that this is not a case which the court can entertain in the shape in which it is presented. When the question of the legality of this grand jury arises in a real controversy between parties opposed in interest, the court will decide it as promptly as it can. This case does not present a real controversy. It is a made-up case, in which the parties to the record are not opposed in interest. It is simply a submission of a series of questions which numbers of people undoubtedly have a curiosity or a desire to have decided by this court, but is not a case of which the court can take cognizance. The court cannot sit here to answer questions proposed by anybody. We decide real controversies. If the grand jury is an illegal body, there are various regular ways of presenting the question, but it cannot be presented in this way. The application is dismissed.

(91 Cal. 512)

WORLEY v. NETHERCOTT. (No. 14,236.)

(*Supreme Court of California.* Oct. 5, 1891.)

VENDOR AND VENDEE—FAILURE OF TITLE—REMEDY OF VENDEE.

A vendee, who goes into possession of land under a contract of sale, is not entitled, on the vendor's failure or inability to convey a perfect title as agreed, to retain both the land and the purchase money until such a title be offered him, but his remedy is to rescind and restore the possession; and in that case he can recover the money already paid, together with the value of his improvements, less a reasonable rental during the time of his occupancy.

Commissioners' decision. Department 1. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Ejectment by W. H. Worley against Robert Nethercott. There was a judgment for defendant, and plaintiff appeals. Reversed.

John F. Ellison, for appellant. *Wm. Nagle*, for respondent.

BELCHER, C. In January, 1889, the plaintiff was residing upon and claiming to own certain real property in the town of Red Bluff, Tehama county. On the 26th of that month plaintiff verbally agreed to sell the real property and some personal property to the defendant for the sum of $1,880, and to let him take immediate possession thereof. Plaintiff was to give a warranty deed of the real property, conveying a good and perfect title thereto, and defendant was to pay $1,000 cash, and give his note for $880, bearing interest at the rate of 10 per cent. per annum, but it was not stated how long the note might run. Defendant paid $10 to bind the bargain, and asked plaintiff if he had a good title to the property, and the latter replied that he thought he had; that he had a warranty deed of it. Defendant asked for an abstract of the title, and plaintiff agreed to furnish one. On the 29th of the month defendant took possession, and about that time the abstract was made out and put in the hands of Mr. Ellison, an attorney at law. On the 4th of February the parties met, and went to Mr. Ellison's office, and defendant testified: "When I entered Mr. Ellison's office, knowing that he had the abstract, I said to him, 'As an attorney, can you say that the title is perfect?' He said, 'No, I can't.' He said, 'I have looked over it, and I can't say that it is perfect.'" A few days later the parties again met, and plaintiff testified: "I went to him and told him I was going away, and I wanted to settle it up one way or another. He wanted to know what I wanted to do, and I asked him if he was satisfied with the title, and he said he wasn't. Then I told him we would say quits. He said he had been out considerable in moving down there, and would be in moving away. I asked him how much, and he said about $20. I told him I would pay it, and he would give up possession. He said he didn't care to do it." Defendant then proposed to retain possession of the property, and to make some improvements upon it, and plaintiff agreed that he might make improvements costing from $100 to $150. Before the end of February plaintiff went to the mountains, and he did not return till some time in August. During his absence defendant made improvements on the property, costing, as he testified, $388.21, besides his own work, which he estimated to be worth $125. The matter remaining unsettled, plaintiff in October executed a warranty deed of the property, and on the 2d of November tendered it to the defendant, and demanded of him payment of the balance of the purchase money, namely, $1,870. The defendant refused to accept the deed or to pay the money, but he on the same day tendered and asked plaintiff to execute a warranty deed for an undivided one-half of the property, and in connection therewith offered to pay him $1,075, for the real and personal property. The plaintiff refused to execute this deed or to accept the payment as offered. The plaintiff then served on defendant a notice reading as follows: "Mr. Robert Nethercott—Dear Sir: Having refused to pay me the contract price for the land hereinafter described, I hereby notify you that the contract of sale for said lots is hereby rescinded. I hereby offer to pay you for any improvements you have made upon said property the amount they have cost you, upon being satisfied of the true amount, and also the $10 you paid thereon, with legal interest, deducting therefrom the rent of said premises during the time you have occupied them; and I hereby demand that you leave said premises, and surrender up to me the possession thereof. [Then follows a description of the property.] [Signed] W. H. WORLEY." Possession was not surrendered, and the plaintiff brought this action of ejectment to recover the same. The defendant answered denying all the averments of the complaint, and, for a second defense, setting up the contract of sale and plaintiff's failure and inability to convey a good and perfect title, and his own readiness and ability to perform his part of the contract on receiving a conveyance of such title. The court below gave judgment for the defendant, from which, and from an order denying him a new trial, the plaintiff appeals.

It appears from the evidence that the plaintiff did not have a perfect title to the whole of the property which he agreed to sell; and it is claimed for respondent that under such circumstances he was not obliged to accept plaintiff's deed or to pay the purchase money, but that he could retain both the land and money until a perfect title should be offered him. We do not think this position can be maintained. In Gates v. McLean, 70 Cal. 42, 11 Pac. Rep. 489, the action was brought to recover the possession of certain land which the plaintiff had contracted to sell to the defendant, and the court, on page 50, 70 Cal., and page 492, 11 Pac. Rep., said: "Even where the contract provides for the vendee taking possession, the remedy of the purchaser, where the title of the vendor fails, or he is unable to make conveyance as stipulated in the contract, is to rescind the contract, or offer to, and to restore the possession, in which case he may recover the purchase money advanced and the interest, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably have been worth. If, on the other hand, the purchaser chooses not to rescind, but to retain possession under the contract, he can do so only on the condition that he pays the purchase money and interest according to the contract. In the latter case, it is considered that he is willing to receive such title as the vendor is able to give, and is content with the personal responsibility of the vendor upon his covenants." In Rhorer v. Bila, 83 Cal. 54, 23 Pac. Rep. 274, the court said: "A purchaser cannot remain in possession of lands under a contract, and at the same time refuse to pay the purchase price. If the title fails, or the vendor refuses to convey, an action on the covenants of his deed or contract will give him all the relief to which he is entitled." It is urged for respondent that what is said in the above quotation from Gates v. McLean was not necessary to the decision of that case, and was merely *obiter dictum;* and that it was not a correct statement of the law, and ought not to be followed. We cannot assent to the conclusion reached by counsel. In our opinion, the law was correctly declared, whether what was said was necessary to the decision of that case or not. To hold otherwise would in many cases work very great injustice. It follows, in our opinion, that the findings and judgment were erroneous, and that they ought not to be permitted to stand. We advise, therefore, that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: FITZGERALD, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

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91 Cal. 449

PACIFIC RY. CO. *et al.* v. WADE, Judge.
(No. 14,593.)

(*Supreme Court of California.* Sept. 30, 1891.)

STREET RAILWAYS—RIGHT TO USE EACH OTHER'S TRACKS—COMPENSATION—PROCEDURE.

Since Civil Code Cal. § 499, provides that two lines of street railway under different managements may use the same street for the distance of five blocks, each paying an equal portion for the construction of the road used by them jointly, a street-railway company, on receiving a franchise, has an absolute right to use so much of the tracks of another company, and does not thereby take the property of the other company, so that the laws relating to ascertaining the compensation to be paid on taking property under the right of eminent domain do not apply; and where the property of the first company is in the hands of the court through its receiver, the court may, on application of the second company, without the intervention of a jury, determine the amount of one-half the cost of constructing so much of the road as is sought to be used jointly, and allow such use on payment of the same.

In bank. Application for an alternative writ of prohibition by the Pacific Railway Company, whose road is in the hands of a receiver, to prevent the court which appointed the receiver from allowing the Los Angeles Consolidated Electric Railway Company to use part of petitioner's road, and from determining the amount to be paid petitioner for such use. Application denied, and alternative writ discharged.

S. C. Hubbell, (*Houghton, Silent & Campbell,* of counsel,) for petitioner. *John D. Pope* and *Chapman & Hendrick,* (*Dom & Dom, S. C. Denson,* and *W. S. Goodfellow,* of counsel,) for respondent.

PATERSON, J. The Pacific Railway Company is the owner of a street railroad, operated by means of a wire cable, for the carriage of persons in the city of Los Angeles. On January 20, 1891, Edward W. Russell commenced an action against said company, its stockholders, and a large number of creditors, alleging, among other matters, that he was a judgment creditor, that the company was indebted in large sums to divers persons, without means or revenue to pay the same, except by the operation of its railroad system, and the proceeds thereof were wholly insufficient; that suits had been brought and many attachment suits would follow, unless steps be taken to prevent the same, and the operation of the road would be suspended; that to protect all parties a receiver was necessary; wherefore plaintiff prayed for the appointment of a receiver, to take charge of and control the property of said company, and, if necessary, to sell the same for the payment of the debts. On the day the complaint was filed J. F.

Crank was appointed receiver, with directions to take charge of the street railways owned by and under the control of the Pacific Railway Company, together with all its real and personal property, and to manage and conduct the business thereof, and from time to time render his accounts. Crank qualified and took possession, and has ever since continued to operate the road under the order of the court. On January 26, 1891, the Los Angeles Consolidated Electric Railway Company presented to the superior court a petition in said cause, setting forth that the petitioner had entered upon the construction of its line of road, as authorized by certain ordinances, and in the further prosecution of its work it was necessary that it should intersect the tracks of the Pacific Railway Company, and run along the same for a distance of three blocks; and praying an order authorizing it to operate over and on said tracks for said distance, and directing the receiver to grant all necessary facilities therefor, and for a further order fixing the amount of compensation which petitioner should pay for the right to use the tracks as aforesaid. At the time fixed for hearing, the petitioners herein appeared, and objected to any proceedings being taken, on the ground that the court had no authority to grant the relief asked. The court overruled the objection, and decided that it had jurisdiction to determine the amount of damages which would be occasioned by making the connections referred to in the petition, and continued the matter for hearing to July 16, 1891. Thereupon petitioners applied to this court for an alternative writ of prohibition, which was granted. In response to the order to show cause why he should not be restrained from any further proceedings in said matter the judge filed an answer, admitting the facts stated, and alleging that the order appointing the receiver was made on motion of the plaintiff in the action, and with the consent of the defendants therein; that on February 13, 1891, the plaintiff Russell filed a petition setting forth that there was some doubt whether the order appointing the receiver was sufficient of itself to vest in him the title to the property, especially the real property, so as to enable him to exercise all the powers and perform all the duties which the exigencies of the case might require, and asking for an order directing the Pacific Railway Company to assign its property to the receiver; that the order was made as prayed for, with the consent of the Pacific Railway Company.

Section 499 of the Civil Code provides that "two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the track and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively." The petitioner contends that, as the ordinances granting the franchises do not provide how compensation shall be ascertained, the electric company must proceed under the provisions of subdivision 6 of section 465, Civil Code. That section is a part of the chapter on the enumeration of the powers of every railroad corporation, and provides that "every corporation whose railroad is, or shall be hereafter, intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersection and connections, and grant facilities therefor and, if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or the manner of such crossings, intersections, and connections, the same shall be ascertained and determined as is provided in title 7, part 3, Code of Civil Procedure." But title 7, pt. 3, prescribes rules for the assessment of compensation and damages (section 1248, Code Civil Proc.) inconsistent with the measure of compensation established by section 499, Civil Code, and the latter must control, as it relates particularly to street railroads. What counsel for the petitioner means to claim, doubtless, is that the procedure prescribed by title 7 must be followed; that there must be an effort to agree with the cable company as to the amount to be paid; and, upon disagreement, an action against the receiver in the manner and form required by the title on eminent domain, including a trial by jury, if the defendant insist upon it.

The question to be determined is simply whether the court, which, through its receiver, has the custody and control of the insolvent corporation's property, has the power to determine the compensation, viz., one-half of the cost of the construction of the tracks and appurtenances used by the companies jointly, or whether the electric company must treat with the cable company, and, upon failure to agree as to the amount to be paid, bring an action therefor against the receiver, with the permission of the court. There are none of the elements of an ordinary condemnation proceeding involved in the litigation. There is no private property to be taken for public use,—no occasion to exercise the right of eminent domain. The cable company did not acquire by the grant of its franchise any proprietary interest in the street. There can be no private property in a street, except the fee of the owner, which is held subject to the easement as long as the public continue to use the street as a highway. "The maintenance of horse railroads and running of cars upon the public streets of the city of San Francisco, designed for the carriage of passengers, is a mere special mode of using the highway, nothing more. The right to maintain such a railroad does not exclude the public from the use of the street." Market St. R. Co. v. Central R. Co., 51 Cal. 586. The franchise of the cable company gave it no exclusive use of that portion of the street upon which its road was constructed. It gave to the company the right to construct its road in such a place and manner as not to interfere with the use of the street by the public. The material placed in the street, it is true, is still the property of the cable company; but it was placed where it is with full knowledge on the part of the company that the latter would have no exclusive right to its use, so long as it should remain in the street. The right of the public to drive vehicles over and upon its road, and the right of the mayor and council to grant to another street-car company a franchise to connect with its track, and to use the same for a distance not exceeding five blocks, entered into its contract with the city as fully, under the provisions of section 499, Civil Code, then in force, as if the condition had been expressly stated in the grant; and, as the cable company took its franchise with the understanding—in effect an express stipulation—that any other company authorized by the mayor and council might use the track jointly with itself, it cannot now be heard to say that such a taking is without its consent, and is a taking of private property for public use, which can be done only by proceedings under the statute relating to eminent domain. The grant to the cable company was made to facilitate, not to abridge, the public use of the street; and, the subsequent franchise having been granted to the electric company in accordance with the provisions of the statute, it cannot be said to be a taking of the property of the cable company for any higher or different purpose than that to which it had already been devoted. Civil Code, §§ 497–499; Railway Co. v. Baldwin, 57 Cal. 178; Jersey City & H. H. Ry. Co. v. Jersey City & B. Ry. Co., 21 N. J. Eq. 556; Kinsman St. Ry. Co. v. Broadway, etc., Ry. Co., 36 Ohio St. 239; Railway Co. v. Kerr, 45 Barb. 138; People v. Kerr, 37 Barb. 357; Chicago, etc., R. Co. v. Dunbar, 100 Ill. 138; St. Louis Ry. Co. v. Southern R. Co., 15 S. W. Rep. 1013, 16 S. W. Rep. 960.

If it be true that the grant of the franchise to the electric company gave to it an absolute right, under the statute, (section 499, Civil Code,) to use the tracks of the cable company upon payment of one-half of the cost of construction of the tracks and appurtenances used jointly by the companies, and that there is no question as to the right of eminent domain involved in the matter before us, the question whether the respondent has the right to fix the amount of damages or compensation to be paid by the electric company is a simple one. The property of the cable company is *in custodia legis*. The receiver is indifferent between the parties. His possession is the possession of the court for the benefit of all persons interested, whether named as parties in the action or not, and it cannot be disturbed without the consent of the court. No one claiming a right paramount to that of the receiver can assert it in any action without the permission of the court. No sale can take place, no debt can be paid, no contract can be made, which does not receive the sanction of the court. The receiver, with permission of the court, can do anything the corporation might have done to make the most out of the assets in his hands. It has been held that in a proper case he may settle disputed claims and compromise with debtors of the corporation; he may lease other lines of railways, and operate them; he may complete the construction of unfinished lines of railroad, and negotiate loans for the payment of the cost thereof; he may enter into contracts by the terms of which the owners of other roads may use the road under his control at given rates; and he may charge the rates agreed upon prior to his appointment between the company he represents and another railroad corporation. Code Civil Proc. § 568; Beach, Rec. §§ 268, 335, 360, 406; Gluck & B. Rec. pp. 106, 107, 131, 140, 241; In re New Jersey, etc., Ry. Co., 29 N. J. Eq. 67; Wiswall v. Sampson, 14 How. 65; Gibert v. Railway Co., 33 Grat. 586. In the case before us the electric company has the right, under the statute and its franchise, to use the tracks of the cable company upon payment of one-half of the cost of the construction thereof. The only question to be determined is, what is the amount due the cable company? It is like any other claim for damages or compensation in favor of a corporation whose property is in the hands of a receiver, and is to be determined in the same way. As to the manner of determining such question there has been some discordance of opinion among judges, but, so far as we have investigated the subject, there has been no conflict of decision. The cases all hold that, while it is, under certain circumstances, proper to direct the prosecution of an action at law against the receiver to determine the amount of compensation or damages to be paid, the better and more commonly recognized practice is to apply for relief by petition to the court in which the receiver is acting. The rule applies to all cases of damages to person or property, whether occasioned prior or subsequent to the appointment of the receiver. In re Merrill, 54 Vt. 200; Redf. Ry. (6th Ed.) 378, 380; High, Rec. §§ 139, 255, 256; Mills, Em. Dom. § 75; Olyphant v. Steel Co., 28 Fed. Rep. 729; Central Trust Co. v. Wabash, etc., Ry. Co., Id. 871. Any party deeming himself aggrieved by the judgment of the court has the right of appeal. First Nat. Bank v. Barnum Wire, etc., Works, 58 Mich. 315, 25 N. W. Rep. 202; Porter v. Kingman, 126 Mass. 141. It is claimed by petitioner that this view of the case deprives it of the right to have the question of compensation determined by a jury,—a right which is guarantied to it by the constitution, art. 1, § 14; but, as it is not a case involving the exercise of the right of eminent domain,—is not a taking of private property for public use,—the contention is without merit. In Barton v. Barbour, 104 U. S. 126, the court, speaking to a similar objection, said: "The argument is much pressed that, by leaving all questions relating to the liability of receivers in the hands of the court appointing them, persons having claims against the insolvent corporation or the receiver will be deprived of a trial by jury. This, it is said, is depriving the party of a constitutional right. * * * But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity. * * * The new and changed condition of things which is presented by the insolvency of such a corporation as a railroad company has rendered necessary the exercise of large and modified forms of control over its property by the courts charged with the settlement of its affairs and the disposition of its assets." See, also, Joy v. City of St. Louis, 138 U. S. 1, 11 Sup. Ct. Rep. 243.

It is unnecessary, in view of what has been said, to consider the questions raised by respondent, whether prohibition is the proper remedy, and whether the petitioner is competent to invoke it. The question as to whether the East & West Los Angeles Railroad Company sold or leased its tracks on Washington street to the petitioner is a matter to be considered by the superior court on the hearing of the petition, and is not the subject of inquiry in this proceeding. Bishop v. Superior Court, 87 Cal. 233, 25 Pac. Rep. 435. The respondent declares in his answer filed herein that "neither the said court nor the judge thereof ruled or intimated that he had any power to fix the compensation or authorize the connection with any railway tracks not belonging to the Pacific Railway Company, or any property not in the custody and control of the court." The application is denied, and the alternative writ is discharged.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; HARRISON, J.; GAROUTTE, J.

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91 Cal. 523

MADDUX v. BROWN. (No. 14,260.)

(*Supreme Court of California.* Oct. 8, 1891.)

SWAMP LANDS—PURCHASE—CERTIFICATE OF SURVEY—ACTUAL SETTLERS.

1. Pol. Code Cal. § 3445, provides that persons desiring to purchase swamp lands which have been segregated by authority of the United States, but which have not been sectionized by the same authority, must apply to the county surveyor to have the desired lands surveyed, and that a certificate of such survey must be attached to the affidavit of purchase. *Held,* that an application for purchase, not accompanied by such certificate, is invalid.

2. Where a survey was made on plaintiff's application, defendant cannot defeat plaintiff's claim by making application for the land based on a certificate of such survey, issued prior to a certificate furnished to plaintiff.

3. Where defendant's application was based on a survey made by one not the county surveyor, and whose only authority for making the survey was given him by the county surveyor in his private capacity, the application is void.

4. Where plaintiff removed his family from the land temporarily only, and because of the ill health of a member thereof, such removal is no evidence that he was not an actual settler.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action by R. A. Maddux against R. A. Brown. Judgment for defendant. Plaintiff appeals. Reversed.

Lambertson & Taylor, for appellant. *W. B. Wallace,* for respondent.

TEMPLE, C. Contest for the right to purchase swamp land which is suitable for cultivation. The land was segregated by the authority of the United States in 1855, but has not been sectionized. The court found in favor of defendant, and that plaintiff was not an actual settler. The appeal is from the judgment and from an order refusing a new trial. Objection was made to certain rulings admitting evidence, and that the evidence was insufficient to sustain the findings.

The defendant made two applications to purchase. One was based upon an alleged survey by one Newman, who assumed to act as deputy of the county surveyor of Tulare county. His appointment as such deputy was by a certificate signed by one A. T. Fowler, as a private individual, and not in his official capacity. It did not purport to appoint Newman as deputy surveyor of Tulare county, but that "I, A. T. Fowler, by these presents do make, constitute, and appoint H. Newman my true and lawful deputy to survey lot 7," etc. The certificate of appointment, with the official oath of Newman, was not filed until after the survey. Evidently Newman was not a deputy surveyor. Conceding that a deputy might be *de facto* such, though not *de jure*, there is still no evidence tending to establish such fact. The appointment being void, the application founded upon the survey was void, and the finding relating to that issue is unsupported by competent evidence.

Plaintiff and defendant each claimed to be living on the land, and had both previously applied to purchase, and had had a similar contest over the right. The court in that contest had found that neither was entitled to purchase. There seems to have been something of a scramble to make the new application. Defendant states that he applied to the county surveyor for a survey; that, being busy, at the request of defendant, he deputized Newman, with the result appearing above. Plaintiff also applied to the county surveyor for a survey, and this the surveyor made in person, July 30, 1889. Apparently defendant received from the county surveyor a certified copy of the record of this survey before it was furnished to plaintiff, for whom it was made, and on August 1, 1889, made out another application to purchase, which was filed in the office of the surveyor general, August 2, 1889. Plaintiff made out his new application to purchase, August 3, 1889, which was filed with the surveyor general, August 6, 1889. It would not do to hold, as a general proposition, that a person desiring to purchase swamp lands which have been segregated as such, but not sectionized by the officers of the United States, finding on record in the office of the county surveyor a survey of the same, can get a certified copy of such record, to be used in lieu of a certificate of a survey made at his request, as required by section 3445[1] of the Political Code.

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[1] Section 3445 provides that persons desiring to purchase swamp lands which have been segregated by authority of the United States, but which have not been sectionized by the same authority, must apply to the county surveyor to have the desired land surveyed, and that a certificate of such survey must be attached to the affidavit of purchase of the land.

Such survey may not have been made with a view to a compliance with this statute, and unless made for one desiring to purchase, and for that purpose, the county surveyor cannot be said to have been acting as an officer of the state land-office. People v. Cowell, 60 Cal. 400.

The second application of Brown is not accompanied by a certificate of a survey of the land he desired to purchase, made upon his application by the county surveyor, as required by section 3445 of the Political Code.

The court held that plaintiff was not an actual settler upon the land. We fail to discover any evidence in the record which would justify that finding, unless the court found that plaintiff's evidence was unworthy of credence. If he did remove his family from the place temporarily only, and because it became necessary for the health of a member of the family, such fact did not even tend to show that he was not an actual settler. We think the judgment and order should be reversed.

We concur: Belcher, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed.

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91 Cal. 391

Hayes *et al.* v. Fine *et al.* (No. 13,865.)

(*Supreme Court of California.* Sept. 26, 1891.)

Application for New Trial — Grounds of Motion—Statute of Frauds—Interest in Water-Right.

1. Where a complaint for diverting water alleges that plaintiffs extended and enlarged a certain ditch upon the express agreement that they should have an interest therein in common with the owners, and there is no exception to a finding that there was no such agreement, an order granting a new trial upon the ground that such a finding is not justified by the evidence should be reversed, where all the other findings are justified by the evidence and sustain the judgment of themselves.

2. A contention that the labor of plaintiffs had destroyed the ditch described in the complaint, and created a new one, in which they were entitled to share as tenants in common by virtue of their labor, is irreconcilably inconsistent with the allegation that they became tenants in common by express agreement.

3. An agreement for an undivided interest in a ditch and water-right is within Code Civil Proc. Cal. §§ 1971, 1973, declaring that no estate or interest in real estate, other than leaseholds for a year, can be created except by conveyance in writing, and that no agreements other than those which are to be performed within a year can be proved except by some note or memorandum in writing.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; William W. Cross, Judge.

Brown & Daggett, for appellants. *N. O. Bradley* and *Oregon Sanders*, for respondents.

Vanclief, C. Action to enjoin defendants from diverting water from plaintiff's lands. Judgment for defendants. A new trial was granted, and this appeal is from the order granting a new trial.

The material allegations of the complaint are substantially as follows: That in 1869 the defendants constructed a water-ditch, known as the "Rhodes and Fine Ditch," conveying water from Tule river a distance of about five miles, and being of a average width of eight feet on the bottom, and one foot deep; and acquired rights to water therefor, to be sued in irrigating their lands. That, in 1876, the plaintiffs and others, "with the knowledge and consent of the then owners of said ditch, and water-rights, [defendants and their grantors,] and with the assistance of said owners, enlarged said ditch to a width of about sixteen feet on the bottom for a distance of about one mile from the head thereof, and deepened said ditch about one foot for a distance of about four miles from the lower end thereof; and about the same time, and with the knowledge and consent of the then owners of said ditch and water-rights, and with their co-operation and assistance, extended said ditch about three miles further in a westerly direction from the mouth thereof; said extension being about three feet deep and eight feet wide on the bottom. That at the time said ditch was so extended and enlarged it was expressly understood and agreed by and between the then said owners thereof" and the plaintiffs or their grantors that the latter named parties, "in consideration of such work of extending and enlarging such ditch as aforesaid, should become tenants in common with said owners in said ditch and extension, and of all water-rights and privileges thereto pertaining." That the plaintiffs and defendants are now, and for more than 10 years last past have been, the owners and in the possession and use of said ditch and the extension thereof and the water flowing therein, as tenants in common; the plaintiffs being the owners of the undivided twenty-nine sixty-sixths thereof. That during said period of 10 years the plaintiffs, with their said co-tenants, have kept said ditch in repair, "and have used the waters thereof for the purpose of irrigating their lands situated along the line of said extension, * * * and have used their said share of the waters * * * openly, peaceably, continuously, notoriously, uninterruptedly, and under a claim of right, and adversely to the defendants and to the whole world, and with the knowledge and acquiescence of said defendants, except when prevented by the wrongful and unlawful acts of said defendants, as hereinafter stated." That in March, 1888, the defendants wrongfully diverted the water from the ditch at a point about one and a half miles above the head of said extension to such a degree that plaintiffs were, and ever since have been, thereby deprived of the use of their portion of the water; and that defendants threaten and intend to continue such diversion, etc. In their answer the defendants deny all the material allegations of the complaint, except that they constructed the original ditch, and continued to own and use it from 1869 until 1876; and they aver that they still own the whole of it, and are entitled to the use thereof. They deny that they co-operated or assisted in the construction of any extension of the original ditch, and disclaim any interest in such extension, which, they say, is improperly called an extension of their ditch, and which they allege was constructed by plaintiffs and others for the purpose of taking up and utilizing surplus water which defendants permitted to flow from the lower end of their ditch, and there abandoned. They admit that, as a neighborly accommodation, they have permitted the water to flow through their ditch to that of the plaintiffs (the alleged extension) whenever they (defendants) had no use for it. They do not deny the diversion of the water from their own ditch, as alleged in the complaint, but claim they were entitled so to divert it. The court filed written findings upon all the issues in favor of the defendants, and rendered judgment accordingly

The plaintiffs moved for a new trial, upon the grounds that certain findings of fact are not justified by the evidence, and that errors in law were committed at the trial. In granting the motion for a new trial, the court rendered an opinion stating the ground upon which the motion was granted. The following is a copy of the opinion as brought here with the record, and certified to be correct by counsel for both parties: "Plaintiffs' motion for a new trial of the above-entitled action came on regularly to be heard this day upon the judgment roll and the bill of exceptions settled and filed in said cause, upon the ground stated in their notice of intention to move for a new trial, and it satisfactorily appearing to the court that the evidence introduced and received upon the trial of said cause is insufficient to sustain the second finding of facts heretofore found and filed by this court in this particular only, to-wit: Said evidence shows that the Rhodes and Fine ditch, mentioned in the pleadings in said cause and in said findings of fact, was during the winter of 1876, by work then done thereon by the persons named in the complaint, other than the defendants, from the head thereof down to the upper end of Kellogg cut, being a distance of about one mile and a half, was enlarged from an average width of eight feet on the bottom to an average width of twelve feet on the bottom, and below the head of said Kellogg cut said ditch was not and has not been materially enlarged by artificial means; that such enlargement was not done by or under any contract or agreement, and defendants did not assist therein, but they assisted in building and putting in the head-gate at that time; that, with the exception above stated, said findings of fact are correct, and this court is satisfied with its conclusions of law heretofore filed,—and this court being of the opinion that said erroneous finding will prevent the plaintiffs being able to present to an appellate court the points of law on which they rely with the same force and effect as if said findings of fact had been originally correct in the above particulars; and this court being of the opinion that, after judgment entered, and on motion for a new trial, it has no jurisdiction or authority to amend its findings: Now, therefore, because of the insufficiency of the evidence to support said finding as above specified, and for that reason only, it is ordered that said plaintiffs' motion for a new trial of said cause be, and the same is hereby, granted."

In view of certain undenied averments in the complaint, and findings of fact which are not excepted to, the ground upon which the new trial was granted is immaterial. The averments in the complaint that defendants constructed the ditch and acquired the water-rights in 1869, and owned both the ditch and water-rights until 1876, not being denied, but emphatically affirmed, by the defendants, must have been taken as conclusively true for all purposes of the trial. From these averments it necessarily follows that defendants by some means must have parted with whatever interest or estate the plaintiffs acquired in the ditch and water-rights in 1876 or thereafter; and, consistently with this, it is averred in the complaint that the plaintiffs acquired their alleged interest as tenants in common with the plaintiffs by express agreement with defendants, the consideration for which, moving from plaintiffs to defendants, is alleged to have been work done by plaintiffs on the ditch in extending and enlarging it. The denial of this agreement by defendants raises the principal issue of fact in the case. If this issue has been properly decided in favor of the defendants, the plaintiffs are not entitled to any relief whatever in this action; for, without the alleged agreement, the mere fact that plaintiffs did more or less work on the ditch in extending and enlarging it, gave them no estate or interest, as tenants in common or otherwise, in the original ditch or water-rights owned by defendants in 1876. The only agreement that could be implied from the mere fact that plaintiffs did the work alleged, even at the request of defendants, would be that defendants were to pay for the work so much as it was reasonably worth. Upon this issue the finding of the court is: "That there never was, either in 1876 or at any time, any contract, agreement, or understanding by or between the then owners of said Rhodes and Fine ditch and said S. E. Dale, A E. Scruggs, and J. Cattaneo, or either of them, that said ditch should be enlarged or extended, or that, in consideration of such enlargement and extension, or for any consideration, said Dale, Scruggs, and Cattaneo, or either of them, should become tenants in common with said owners, either in said ditch or extension, or in any water-rights or privileges belonging to said ditch." This finding is not excepted to on any ground. It follows that, unless the order granting a new trial can be justified on some other ground than that upon which it is based by the opinion of the learned judge of the court below, it should be reversed.

It is conceded by counsel for respondents that there was no express agreement by which plaintiffs were to have or to acquire any interest in the ditch or water-rights; and that whether or not their alleged labor on the ditch, with the knowledge and consent of defendants, implied an agreement that they should become tenants in common, etc., is the vital question in the case. On page 3 of this brief counsel for respondents says: "The first point made for appellants is that 'the plaintiffs failed to prove that they had acquired any title to the ditch in controversy.' This is the vital question in this case. If the work of enlargement made by plaintiff S. E. Dale and others did not give them an interest in the ditch as now found, then plaintiffs have no interest in it." All the findings of fact, except the second, as to which the new trial was granted, are fully justified by the evidence, and sustain the judgment without aid from the second finding.

The issues of fact seem to have been thoroughly tried. The testimony of 17 witnesses on the part of the plaintiffs and 12 for the defendants occupy 250 pages of the transcript; and it seems extremely improbable that a materially different state of facts could be elicited by a new trial. Certainly the facts alleged in the complaint could not be disputed by plaintiffs, and there is no exception to the finding that there was no agreement that plaintiffs should have an interest in the ditch or water-rights, and no pretense that there was any such express agreement.

None of the errors in law specified in the bill of exceptions are well taken. The only one of them that can be said to be involved in any point urged here by appellant's counsel is that the court erred in deciding that the agreement alleged in the complaint, by which the plaintiffs were to acquire interests as tenants in common with defendants in the ditch and water-rights, is within the statute of frauds, and cannot be proved, except by some note or memorandum thereof in writing. In this there was no error, since the estate in the ditch and water-rights, the acquisition of which plaintiffs sought to prove, is other and greater than a leasehold for one year. It is absolute ownership of an undivided part of the ditch and water-right for the protection of which plaintiffs ask a perpetual injunction. That such an estate in the ditch and water-rights is real property, and that an agreement for a conveyance thereof is within the statute of frauds, there is no question in this state. Code Civil Proc. §§ 1971, 1973.[1] Smith v. O'Hara, 43 Cal. 371; Bradley v. Harkness, 26 Cal. 77; Lower Kings R. W. D. Co. v. Kings River & F. C. Co., 60 Cal. 408; Ang. Water-Courses, §§ 168–171; Washb. Easem. pp. 23, 24; Gould, Waters, §§ 300, 321. After the court had ruled that the agreement could not be proved by parol evidence, plaintiff's counsel asked and the court granted them leave to introduce evidence of the labor done by plaintiffs on the ditch, on the condition that they should afterwards connect it with written evidence of the agreement. On this condition, and without any apparent restriction, plaintiff not only gave evidence of the labor done on the ditch, but of all that was orally said by both parties in connection with that labor, yet failed to introduce or to offer any evidence, parol or written, tending to prove the express agreement alleged in their complaint. The evidence fails to show the amount or the proportion of the work done by the plaintiffs, or by either of them, but does show that a considerable portion of the work in repairing the ditch was done by persons who are not parties to the action, and who never claimed any interest in the ditch, but who were occasionally permitted by defendants to use portions of the surplus water. Counsel for respondents contends that the labor done by them and the defendants in enlarging the ditch destroyed the identity of the original ditch as described in the complaint, and created a new ditch, in which, by virtue of their labor, plaintiffs are entitled to share as tenants in common with defendants in the proportion that their labor bears to the whole labor of construction. To say nothing of the impracticability of ascertaining on this theory what proportion of the alleged new ditch they are entitled to, the theory itself is inconsistent with the complaint. The allegation in the complaint that plaintiffs should become tenants in common with the defendants in the ditch and water-rights by express agreement with the defendants—"the then owners"—in consideration of plaintiffs' labor, is irreconcilably inconsistent with the theory that they became such tenants in common by merely assisting in the labor of enlarging the ditch. Their allegation is, in effect, that they acquired such title as they claim by purchase from the defendants, for which purchase their labor was the consideration. They now ignore the purchase theory, and claim title to an undivided portion of the ditch, by virtue of having created it by the same labor that is alleged to have been the consideration for their purchase. Other apparently valid objections might be made to this unpleaded theory; but, for the purposes of this appeal, it is enough that the theory is inconsistent with plaintiffs' complaint.

It is further contended for respondents "that defendants are estopped from denying that plaintiffs have an interest in said ditch and water;" and also that plaintiffs acquired title by adverse user of the water for a period of more than five years. Conceding that the facts necessary to sustain these points are averred in the complaint, (which is doubtful,) such facts are negatived by findings of the court which are fully justified by the evidence.

As the record discloses no ground upon which a new trial should have been granted, nor any reason for believing that a new trial can justly result in a judgment more favorable to the plaintiffs, I think the order granting a new trial should be reversed.

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[1] Code Civil Proc. Cal. § 1971, provides that no estate or interest in real property other than leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared otherwise than by operation of law, or a conveyance or other instrument in writing. Section 1973 provides that an agreement which by its terms is not to be performed within a year is invalid unless the same or some memorandum thereof be in writing, and that proof of such an agreement cannot be received without the writing or secondary evidence of its contents.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order granting a new trial is reversed.

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91 Cal. 492

WATKINS v. BRYANT *et al.* (No. 14,288.)

(*Supreme Court of California.* Oct. 3, 1891.)

SETTING ASIDE DECREE—LIMITATION OF ACTIONS—PARTIES.

1. An action to set aside, on the ground of fraud, a decree annulling a deed of trust as fraudulent against the grantor's creditors, if not brought within three years (the statutory period) after rendition of the decree, is barred, and the complaint is demurrable, where plaintiff merely avers that he had no notice of the fraud until after rendition of the decree, without alleging that he discovered the fraud within three years before commencing the suit.

2. A decree annulling, on the ground of fraud, a deed of trust given to secure creditors not named therein, rendered on default of the trustee in an action in which he was a party, is not absolutely void as to creditors who were not made parties to the action, since they were represented therein by the trustee.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Action by C. G. Watkins against M. E. Bryant and others, on behalf of plaintiff and other creditors of said Bryant, to set aside a decree annulling a deed of trust, and to enforce the trust. Judgment for defendants. Plaintiff appeals. Affirmed.

John B. Hall, for appellant. *Baldwin & Campbell* and *Wilkes & Rutherford*, for respondent.

VANCLIEF, C. A demurrer to the complaint in this action was sustained. The plaintiff declined to amend his complaint, and thereupon judgment was rendered in favor of defendants. This appeal by the plaintiff from the judgment presents the general question whether or not the demurrer should have been sustained. The complaint purports to be on behalf of the plaintiff and of such other creditors of Bryant as will come in and contribute to the expenses of the suit, and occupies 27 pages of the transcript; but the following is deemed a sufficient statement of its substance for all purposes of the appeal: On January 17, 1885, the defendant Bryant made two promissory notes to the defendant Tully, each for the sum of $500, payable six months after date, with interest at the rate of 1½ per cent. per month. On the same day Tully indorsed the notes to plaintiff in these words: "Without recourse on me, John Tully." The consideration for the notes was a loan from plaintiff to Bryant of $1,000, which loan had been negotiated by Tully, and the notes were intended to secure payment of that loan. At the time of making these notes, "Bryant was indebted, and still is indebted in divers sums, to many persons besides this plaintiff," amounting to not less than $35,000, upon promissory notes made by him to Tully, and indorsed by Tully to them. On October 1, 1885, for the purpose of securing the payment of the above-mentioned promissory notes, and like notes to be thereafter made, the whole not to exceed $60,000, Bryant executed to John S. Davis a deed of trust of some 11 tracts of land, described by legal subdivisions, and 3 town lots, aggregating about 1,400 acres. John Tully was named as party of the third part to this deed of trust, and authorized to pay the taxes on the land, and to prosecute or defend suits considered necessary to protect the trust and the title to the land. In case of Bryant's default in making payment of any of the debts secured, the trustee, Davis, is authorized to sell so much of the trust property as necessary, and to apply the proceeds to the payment of such debts. None of the creditors intended to be secured, except Davis and Tully, are named in the trust-deed. Davis expressly accepted the trust. The execution of this instrument was acknowledged by Bryant on the day of its date, and on the 9th day of October, 1885, was duly recorded. On February 16, 1886, Bryant, in accordance with the provisions of the Civil Code, made an assignment of all his property, subject to the trust created by the above instrument, to the defendants Wilboit, Langford, and Bemert, for the benefit of his creditors; and on the same day filed in the office of the county recorder an inventory of his estate, including all the land described in the above deed of trust, and wherein the defendants Davis and Tully are listed as creditors for large sums of money, and wherein it is stated that said lands were incumbered by certain mortgages other than the deed of trust, and also that one quarter section of the land was exempt from execution, it being his homestead. On April 6, 1886, the assignees, Wilhoit, Langford, and Bemert, commenced an action against Davis, Tully, and Bryant to set aside and annul the deed of trust above set out, on the ground of fraud, and that it was never delivered to Davis by authority of Bryant, the acts constituting the fraud being stated in the complaint, and being sufficient to warrant the relief asked, as against Davis, Bryant, and Tully, the only defendants in that action; but neither the plaintiff in this action, nor any other creditor of Bryant, except Davis and Tully, were made parties to that action. The defendants were duly served with summons, but made default, and on May 27, 1886, judgment was rendered against them to the effect that the trust-deed of October 1, 1885, was fraudulent, and a cloud upon the title of the plaintiffs in that action, as assignees for the creditors of Bryant; that it be annulled and canceled; that Davis convey the lands to the assignees by good and sufficient deed, etc., within five days; and that Davis and Tully be perpetually enjoined from asserting any title to or claim upon the lands under or by virtue of the deed of trust.

After stating the above facts, the complaint herein proceeds to allege that the material averments of the complaint of the assignees against Davis, Tully, and Bryant, as to fraud and non-delivery of the deed of trust, were false and known to be so by Davis, Tully, and Bryant at the time they made default, and at the times their default was entered, and judgment taken against them; that the plaintiff herein, Watkins, "had no notice or knowledge either of said suit or the decree therein, until after the rendition of said decree;" and that divers other creditors of Bryant, designated in said deed of trust, had no notice or knowledge of said suit and decree before the rendition and entry of said decree. The complaint herein further states that Davis has not done any act or thing in or towards the execution of his trust, or the performance of his duty under the deed of trust, and "at all times since the date of said decree has refused to perform the said trust, and the duties connected therewith." That in the years 1886 and 1887 several portions of the land described in the deed of trust were sold under several decrees of court, to satisfy mortgages thereon prior to the deed of trust, and that such mortgages were satisfied from the proceeds of such sales. From the description of the land thus sold by legal subdivisions, it must amount to over 600 acres. That an additional one-quarter section of said land (the homestead quarter) was sold under a foreclosure decree on April 27, 1889, to satisfy a mortgage executed by Bryant to defendant Wilkes on February 17, 1886, to secure a note of that date for $9,033, but that the consideration for this note consisted solely of the sum of several smaller notes, made before the date of the deed of trust, and which were secured by the deed of trust. This quarter section was purchased by Wilkes at the foreclosure sale for the sum required to satisfy the foreclosure decree, viz., $12,125.58. Wilkes had notice of the deed of trust at and before the time he took the mortgage thus foreclosed. That, on one of the foreclosure sales above mentioned, the sheriff reported a surplus of $1,533.40, which was ordered by the court to be paid to the assignees without notice to Davis or to plaintiff. That the assignees sold the right of redemption to another tract which had been sold at a foreclosure sale for $9,000, which they now hold in their hands. That the assignees redeemed from the foreclosure sale the three town lots, and resold them at a profit of $1,000; and, further, that they have received and hold in their hands, of the income, rents, and profits derived from said lands since February 16, 1886, (date of assignment,) about $10,000. That Bryant has no property subject to the payment of his debts except the real estate described in the deed of trust, and plaintiff has no security except his lien upon that property or its proceeds by virtue of the deed of trust. That no part of his debt has been paid, and that the trust remains unexecuted, and will so continue unless enforced by decree of this court. It is also alleged in the complaint that on July 13, 1889, th plaintiff commenced an action agains Bryant on the two promissory notes indorsed to him by Tully, as above stated, and obtained a personal judgment against Bryant for the sum of $2,342.60, including interest and costs. The prayer of the complaint is that it may be adjudged that the decree canceling and annulling the deed of trust "is in fraud of the rights of, and of no effect as against, this plaintiff; that the several tracts, pieces, or parcels of land in said deed described, * * * not heretofore sold for the satisfaction of the mortgages to which said deed of trust refers, together with the said surplus," viz., the sums alleged to be in the hands of the assignees, Wilhoit, Langford, and Bemert, amounting to about $21,000, be adjudged subject to said deed of trust: that the last above described lands be sold under the direction of the court, and the proceeds thereof, together with the money in the hands of the assignees, Wilhoit, Langford, and Bemert, "be applied to the payment in full, or the payment ratably, of this plaintiff's said demands, with those of all other creditors meant, mentioned, or intended to be secured by the said deed of trust, and who may come in and contribute to the expenses of this suit; and that the mortgage of February 17, 1886, to the defendant Wilkes, was subsequent and subordinate to the equitable lien of this plaintiff," and for such other relief, etc. To this complaint the defendants Wilhoit, Langford, and Bemert, the assignees, and Wilkes demurred, on the general ground that it does not state facts sufficient to constitute a cause of action, and on the special grounds of nonjoinder of parties plaintiff and defendant, misjoinder of causes of action, and that the causes of action appear to be barred by sections 318, 337, 338, and 343 of the Code of Civil Procedure. The other defendants, Bryant, Davis, and Tully, made default.

1. Conceding, without deciding, that there is not a misjoinder of causes of action, still the complaint shows that the judgment of May 27, 1886, canceling the deed of trust, ordering Davis, the trustee, to convey the trust property to the assignees, Wilhoit, Langford, and Bemert, and perpetually enjoining Davis and Tully from asserting any title or claim to the trust property, is an insuperable obstacle to any relief sought in this action so long as that judgment remains in force; and this is the theory of the complaint, which charges that that judgment was obtained by and through the fraudulent default of Davis and Tully, and, on the ground of this alleged fraud, seeks to annul it in this action. The prayer of the complaint is that it be adjudged that that judgment "is in fraud of, and of no effect against, this plaintiff." If this relief cannot be granted, it is plain that the deed of trust, canceled by that judgment, cannot be enforced in this action, either through the instrumentality of Davis, or any trustee appointed by the court. Therefore, if it appears that the cause of action to annul and set aside that judgment on the ground of fraud is barred by the statute of limitations, the plaintiff can have no cause of action upon the canceled deed of trust, and the demurrer to the complaint was properly sustained on that ground. This action was not commenced within three years after the rendition of the judgment annulling the deed of trust, and, conse-

quently, not within three years after the acts constituting the fraud by which that judgment is alleged to have been obtained; yet there is no averment in the complaint that the fraud was first discovered within three years next before the commencement of this action, (People v. Blankenship, 52 Cal. 619,) the only averment in this respect being that the plaintiff "had no notice or knowledge either of said suit or the decree therein until after the rendition of said decree."

It is contended, however, for the appellant, that the decree canceling the deed of trust, etc., was absolutely void as to this plaintiff, as he was not a party to the suit in which that decree was rendered. The answer to this is that, although not named as a party to that action, he was represented therein by the trustee, Davis. Says Mr. Pomeroy, in his work on Remedies and Remedial Rights, (section 357:) "There is a broad distinction between the case of an action brought in opposition to the trust, to set aside the deed or other instrument by which it was created, and to procure it to be declared a nullity, and that of an action brought in furtherance of the trust, to enforce its provisions, to establish it as valid, or to procure it to be wound up and settled. In the first case the suit may be maintained without the presence of the beneficiaries, since the trustees represent them all, and defend them." This, as an exception to the general rule, applies to the case at bar, and seems to be well supported by the following and other authorities: Kerrison v. Stewart, 93 U. S. 155; Corcoran v. Canal Co., 94 U. S. 744; Rand v. Walker, 117 U. S. 344, 6 Sup. Ct. Rep. 769; Richter v. Jerome, 123 U. S. 246, 8 Sup. Ct. Rep. 106; Railroad Co. v. Dull, 124 U. S. 171, 8 Sup. Ct. Rep. 433; Rogers v. Rogers, 3 Paige, 378; Winslow v. Railroad Co., 4 Minn. 313, (Gil. 230;) Paul v. Fulton, 25 Mo. 156; Bank v. Suydam, 6 How. Pr. 379; Mitchell v. Bank, 7 Minn. 252, (Gil. 192;) Jones, Mortg. 1399; Code Civil Proc. § 369; Chew v. Brumagen, 13 Wall. 497. Admitting that, in a case of this kind, the beneficiaries would have been proper parties, and also that, in case they were not made parties, it was the duty of the trustee to notify them of the pendency of the suit, yet it does not appear in this case that either the trustee, Davis, or the plaintiffs in the action to annul the trust-deed, knew, or had the means of ascertaining, who were the beneficiaries. The deed of trust did not name nor describe any one of them. Nor did it classify them by reference to any common attribute, except that the class consisted of all such persons as held negotiable notes made by Bryant to Tully, and indorsed by the latter, amounting to not more than $60,000, and which may have been made either before or after the execution of the deed of trust. There may have been 30, 60, or 120 holders of these notes, and many of the notes may have been negotiated after their indorsement by Tully. Suppose a holder of any one of these notes, made after the execution of the deed of trust, had been found, how could it have been ascertained whether his note was within or in excess of the $60,000 limit? Under these circumstances, the application of the exceptional rule permitting the trustee to represent the holders of these notes is peculiarly appropriate. Besides, it seems at least doubtful whether or not the deed of trust was void for uncertainty as to the beneficiaries.

2. It is claimed by appellant that the court erred in refusing to give judgment against the defaulting defendants, Bryant, Davis, and Tully; but, inasmuch as the complaint shows that the deed of trust upon which the action was brought had been canceled, the plaintiff was not entitled to any relief against Davis or Tully. No personal judgment against Bryant on his promissory notes is asked; besides, such a judgment would have been superfluous, as plaintiff had obtained a personal judgment against Bryant on those notes in July, 1889.

As the foregoing considerations dispose of the case finally, it is not necessary to consider the point as to laches and equitable estoppel. I think the judgment should be affirmed.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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91 Cal. 477

WIXON v. DEVINE. (No. 14,365.)

(*Supreme Court of California.* Oct. 2, 1891.)

PLEADING—AMENDMENT OF ANSWER—EVIDENCE.

1. In an action to determine plaintiff's rights in a water-course, he claimed title by actual appropriation in 1883. Defendant in his answer asked no affirmative relief, but, to defeat plaintiff's claim, set up a prior appropriation by himself in 1877, and also an adverse user for more than six years before commencement of the action. No other denial of plaintiff's claim was made. *Held*, that evidence on defendant's behalf that, in 1865, one under whom he claimed his land by mesne conveyances appropriated the waters, was properly excluded, as not within the issues raised by the pleadings.

2. Where evidence gotten into the case without objection is entirely without the issues raised by the pleadings, and it appears that the court expressly denied the right to amend so as to bring it within the issues, no issue will, on the principle of estoppel, be taken to have been raised by the introduction of evidence.

3. In an action to determine plaintiff's rights in a water-course, he claimed by actual appropriation. Defendant, to defeat his claim, merely set up prior appropriation by himself in 1877. After the taking of evidence at the trial had almost concluded, an amendment of the answer was offered alleging an appropriation in 1865 by one from whom defendant claimed title to his land by mesne conveyances. Facts similar to those in the proposed amendment had been pleaded by the same attorneys as a defense eight years before, in another suit between some of the same parties, litigating some of the same rights. Defendant could not have been misled by believing the evidence admissible under his original answer, and the amendment was contradictory to an admission in his answer. *Held*, that the court did not abuse its discretion in refusing to allow the amendment.

Department 1. Appeal from superior court, Sierra county; J. M. WALLING, Judge.

Action by J. S. Wixon against Thomas Devine to establish his rights in a certain water-course. Judgment for plaintiff. Defendant appeals. Affirmed.

H. L. Gear and *F. R. Wehl*, for appellant. *T. L. Ford* and *S. B. Davidson*, for respondent.

GAROUTTE, J. This is an action to determine the rights of the parties to the waters of Kentucky ravine and its east and west branches, located in Sierra county, Cal. The court adjudged the plaintiff to be entitled to 25 inches of the waters of said ravine under a 4-inch pressure. Defendant appeals from the judgment and order denying his motion for a new trial, and for grounds of reversal insists (1) that certain evidence offered was improperly rejected; (2) the court erred in refusing to allow the defendant to amend his answer during the progress of the trial. Plaintiff claimed title to these waters by actual appropriation in 1883. Defendant claimed no affirmative relief in his answer, but, for the purpose of defeating plaintiff's right, set up a prior appropriation of these waters by himself in 1877; and he also relied upon an adverse user for a period of more than six years before the commencement of this action. During the progress of the trial, while the defendant was presenting his evidence to the court, he offered to prove "a prior actual appropriation and diversion of all the waters of Kentucky ravine in the year 1865 by James Galloway; that he was the original claimant and possessor of the land described in the answer as the 'Doyle Ranch,' and that it was then known as the 'Galloway Ranch;' that said appropriation and diversion was made at a point above plaintiff's dam and ditch; that said waters, by actual use and enjoyment, were made an appurtenance to said ranch, and passed with the ranch by mesne conveyances to defendant," etc. An objection was sustained to the admission of the foregoing testimony, upon the ground that it was not within the issues made by the answer. Appellant insists that he was entitled to make such proof under the general issue. If his answer had contained a specific denial of plaintiff's right to the waters of the ravine, we are not prepared to say but that, under the following authorities, he would have been entitled to make the proof sought by virtue of such denial. Marshall v. Shafter, 32 Cal. 192; Bruck v. Tucker, 42 Cal. 346; Daniels v Henderson, 49 Cal. 247; Roberts v. Columbet, 63 Cal. 25; Hyde v. Mangan, 88 Cal. 325, 26 Pac. Rep. 180, and cases there cited. But the record upon this appeal does not present the question to us for consideration. There is no specific denial of any material allegation of the complaint. The answer raises no "general issue" within the meaning of the statute and authorities. In his answer, defendant denies plaintiff's right to these waters, "except as hereinafter expressly stated." Again, he admits plaintiff's right, "subject to the prior right of defendant," specially referring to his right under acts of appropriation in 1877. In short, the answer confesses plaintiff's right, but seeks to avoid it by asserting a particular prior right in defendant. Under this condition of the pleadings the evidence was properly rejected as not being within the issues made.

It appears that the witness Galloway, without objection, did testify generally to many of the facts encompassed in the proposed amendment to the answer, and appellant insists that such evidence was sufficient to defeat plaintiff's right of recovery, and that the court should have so found. It is unnecessary to enter into a detailed examination as to the sufficiency of this evidence in point of fact to defeat plaintiff's right of recovery. As we have already seen, such evidence was not only entirely without the issues as made by the pleadings, but the court expressly denied the right to amend so that this particular evidence might become germane by being brought within the issues as made by the amended pleading. Referring to this question in Ortega v. Cordero, 88 Cal. 227, 26 Pac. Rep. 80, the court said: "To justify this application of the principle of estoppel it should appear, from the record on appeal, among the other elements of an estoppel, that the issue was actually and intentionally tried by the introduction of pertinent evidence, and that the party against whom the estoppel is invoked consciously participated or acquiesced in such trial as if the issue had been made by the pleadings, and in such manner as may have induced the other party to believe that the issue had been properly made, or diverted his attention from the fact that it was not made by the pleadings." Applying the foregoing rule to the case at bar, it can hardly be contended that the evidence of Galloway and the acts and conduct of the parties created an issue as to the appropriation by Galloway of the waters of this ravine in 1865, and that the court was in error in not finding upon such issue.

It is insisted that the court erred in refusing to allow the proposed amendment to the answer. The amendment, in effect, was "that an actual appropriation and diversion of all the waters of Kentucky ravine was made by James Galloway, the original claimant and possessor of the tract of land owned by defendant, by means of a ditch constructed by said Galloway in 1865, at a point above where plaintiff's dam and ditch are now located, and the right to the waters of said ravine, by actual use and enjoyment, became appurtenant to said ranch for the irrigation thereof, and passed by conveyance to defendant herein." While the power of the court in granting amendments to pleadings should be freely and liberally exercised, in order that all the substantial merits of a cause may be reached and determined without unnecessary delay and in one suit, yet, when the court has exercised that power by granting or refusing an amendment to a pleading, such ruling is only subject to review by this court, when it is apparent that an abuse of discretion has occurred. From an examination of the record, it appears there are sufficient grounds to support the ruling of the court in the exercise of its discretion in denying this proposed amendment to the answer. We will not review all these grounds *in extenso*. It appears that the taking of evidence at the trial had almost concluded at the time the proposed amendment was offered; that the same attorneys, in another suit between some of the same parties, in litigating some of the same rights here involved, eight years prior, pleaded as a defense in that suit facts very similar to those set out in the proposed amendment. Again, defendant could not have been misled by believing the evidence admissible under the allegations of his answer as it was framed; and also the proposed amendment was directly contradictory to an admission in the answer, to-wit: "That plaintiff had a right to twenty-five inches of the waters of Kentucky ravine, subject to defendant's right, by prior appropriation and diversion in 1877." As an additional ground to sustain the action of the lower court, we would say that while the amendment proposed shows that the location and diversion of the waters of the ravine occurred at a point above plaintiff's dam and ditch, yet the evidence offered to the court to support the amendment shows that, for the purposes for which the water could be claimed as appurtenant to defendant's ranch, it was taken from the ravine at a point below plaintiff's ditch and dam; and it must be conceded that the prior decisions of this case found in 67 Cal. 341, 7 Pac. Rep. 776, and 80 Cal. 385, 22 Pac. Rep. 224, when taken together, at least settle one principle of law as between these parties beyond doubt, and this is, that plaintiff has the first right to 25 inches of water at a point upon the ravine where his dam and ditch are located. If the defendant's evidence is too weak to support the pleading, it would be idle to allow the amendment. Several years ago, in writing an opinion in this case, (67 Cal. 345, 7 Pac. Rep. 776,) SEARLS, C., said: "There should be a limit to litigation." This cause has been dragging its slow length along the judicial highway for nearly a decade, and is now with us for the third time, and we think it in order to repeat the words of the learned commissioner, "There should be a limit to litigation;" and we believe, for the foregoing reasons given, the limit in this case has been reached. Let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

(91 Cal. 526)

RUTLEDGE v. CRAWFORD. (No. 14,584.)

(*Supreme Court of California.* Oct. 8, 1891.)

ELECTIONS AND VOTERS—LEGALITY OF BALLOTS—ELECTION CONTEST—PLEADING.

1. The fact that on the back of a ballot, otherwise regular, is a faint type impression of the face of a similar ticket, caused by there having been too much ink on the type, or that there is a small piece of red sealing wax, or a stain, as from a drop of oil, does not, in the absence of evidence of unlawful intent in causing the impression, make the ballot illegal, within the meaning of Pol. Code Cal. §§ 1206, 1207, which provide that a ballot must be rejected if it bears on the outside any impression, device, color, or thing "designed" to distinguish it from other legal ballots, or "intended" to designate or impart knowledge of the person who voted it.

2. A ballot read: "18. Judge of the Superior Court, R. 19. Judge of the Superior Court, O. 20. State Senator, 10th District, H." The name H. was erased, and opposite, or in line with it, was written the name of respondent, who was a candidate for judge of the superior court. *Held*, that it was error to count the ballot for respondent, as candidate for judge.

3. Where the printed name of one candidate on a ballot is erased with an indelible pencil or with red ink, and the name of another written opposite with the same kind of pencil or ink, the ballot should be counted for the latter, under Pol. Code Cal. § 1204, providing that when one name has been erased on a ballot, and another substituted therefor, in any other manner than by the use of "a lead-pencil or common writing ink," the name erased must be counted; it being the intention of the legislature merely to prohibt erasures and substitutions in any other style or form, or with any different effect, than would be produced by the use of a lead-pencil or common writing ink.

4. If no name is substituted for a name erased on a ballot, the erased name must be counted, under the provisions of Pol. Code Cal. § 1204; such requirement of the statute not being unconstitutional as requiring an educational qualification for the voter, nor as requiring him to disclose the secrecy of his ballot, nor for any other reason.

5. In an action by a candidate to establish his right to an office to which the opposing candidate has been illegally declared elected, the complaint is not fatally defective in not alleging that plaintiff possesses the qualifications for the office; but, if it alleges that he is an elector, it shows his right to contest defendant's right to the office, and may be amended so as to allege that plaintiff is qualified to hold it.

In bank. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge.

Action by one Rutledge against one Crawford to contest defendant's right to an office. Judgment for defendant. Plaintiff appeals. Reversed.

A. P. Ware, (*T. J. Geary*, of counsel,) for appellant. *C. S. Farvuar* and *J. A. Barham*, for respondent.

DE HAVEN, J. The parties to this action were opposing candidates for the office of judge of the superior court of Sonoma county at the general election of 1890. The respondent, Crawford, received a certificate of election, and this is an action contesting his right thereto. As a result of the trial and recount in the superior court, it appearing that the defendant received one vote more than the plaintiff, the court, on motion of defendant, granted a nonsuit and dismissed the proceedings. The plaintiff appeals from this judgment, and claims that the court erred in counting certain ballots for the respondent, and in refusing to count others for the appellant.

1. Two ballots, regular on their face, and with the appellant's name printed thereon for judge of the superior court, were not counted by the court for the reason that there was on the back of each a faint type impression of a portion of the face of a similar ticket. The impression is known among printers as an "off-set," and, if there is too much ink upon the type used, is produced when one ticket is placed face downward upon the back of another, which has preceded it from the press. In our opinion the court erred in its refusal to count these ballots for appellant. Section 1206 of the Political Code provides: "When a ballot found in any ballot-box bears upon the outside thereof

any impression, device, color, or thing, or is folded in a manner, designed to distinguish such ballot from other legal ballots deposited therein, it must, with all its contents, be rejected." Prior to the adoption of the Code it was the usual practice to have the tickets of the different political parties of a different color or weight or size, so that an observer at the polls could see at a glance and detect which party ticket was deposited by the voter. It was to prevent this, and secure to the citizen absolute secrecy for his ballot, that the section above quoted, and others of the same Code, were enacted, prescribing for ballots uniformity of paper, color, and size; and, in order to justify the rejection of a ballot under this section, it must appear that such "impression, device, color, or thing," on the outside thereof, was intended to distinguish it from other legal ballots, (Wyman v. Lemon, 51 Cal. 273;) and the court is not authorized to find such design when it is just as reasonable to attribute the appearance of the ticket to accident as design. It is not doubted, as was argued here, that tickets may be marked as these were for the purpose of distinguishing them from other ballots, and to be furnished only to a certain class of voters. But in the absence of any proof tending to show this the presumption must be that such an impression was the result of accident, and not intended, and therefore within neither the letter nor spirit of this section, or section 1207 of the same Code, which provides that when a ballot bears upon it any impression, device, color, or thing intended to designate or impart knowledge of the person who voted it, it must be rejected.

2. What is said in the preceding paragraph will apply with equal force to the two ballots not counted for appellant, one of which had upon its back a very small piece of red sealing wax, and the other a small stain as if made by a drop of oil, or something of that nature. It is far more reasonable to suppose that the wax was accidentally placed upon the ticket by the officers of election in sealing the package in which it was returned than to believe that it was designedly placed there as a distinguishing mark before its deposit in the ballot-box; and, as to the other, the mark or discoloration is of that character that the most natural conclusion in relation to it is that it was due to some accidental cause, and was not intended to distinguish the ballot, or impart knowledge of the person who voted it.

3. The court erred in counting ballot marked "Exhibit 37" as a vote for the respondent. The ticket, so far as necessary to be set out, is as follows: "18. Judge of the Superior Court, Thomas Rutledge. 19. Judge of the Superior Court, J. W. Oates. 20. State Senator, Tenth District, Robert Howe,"—with the name Robert Howe erased, and that of the respondent written opposite, or in line with it. We do not see how this ticket can be read as a vote for respondent for the office of judge of the superior court. A ballot is to be construed as any other writing; and, while a resort to parol evidence of extrinsic circumstances may be had for the purpose of interpreting what would otherwise be doubtful, it cannot be shown, by such or any evidence, that the intention of the voter was anything different from what plainly appears upon the face of the ballot. People v. Seaman, 5 Denio, 409. And, when the ballot intelligently shows that a particular person is voted for to fill a particular office, it cannot be counted differently because the court may believe that the voter made a mistake in preparing his ticket. Voting for a person to fill an office for which he is not a candidate may be the result of mistake, or it may be merely the frivolous exercise of the right of suffrage; but, no matter whether such action be attributed to folly or mistake, the ballot is the only expression of the voter's will, and it must be counted according to its legal effect. The intention of the voter as it appears upon the face of this ballot was to vote for respondent for state senator, and not for judge of the superior court, and it should be so counted.

4. Upon certain ballots the printed name of the respondent was erased with an indelible pencil, and the name of the appellant written opposite thereto with the same kind of pencil. The court refused to count the same for appellant, but did count such ballots as votes for respondent. The respondent insists that the rulings of the court in relation to the counting of these ballots are justified by section 1204 of the Political Code. That section declares: "When upon a ballot found in any ballot-box a name has been erased, and another substituted therefor, in any other manner than by the use of a lead-pencil or common writing ink, the substituted name must be rejected, and the name erased, if it can be ascertained from an inspection of the ballot, must be counted." There was evidence introduced tending to show that indelible pencils are not in fact lead-pencils, nor commonly known as such by merchants selling them. The question is thus presented, whether a voter must follow the very letter of this section of the Code in preparing his ticket, or have his vote for a particular candidate rejected. We think it very clear that such is not the purpose or the meaning of that section. The Code commissioners, in their note to this section, say: "This section is intended to prevent the use of nitrate of silver, or any other chemical substance which may be written over a name and not be distinguishable until time brings out the impression; also, to prevent the use of pasters, the use of which is subject to two objections: *First*, their liability to come off; *second*, their liability to be fraudulently taken off." This object of the law—and it is apparent that the legislature could have had no other in view—is attained if the erasure and substitution are made in such a manner as to present at the time and retain the same general appearance as if made by a lead-pencil or common writing ink. This section, in declaring that erasures and change of names shall not be made "in any other manner than by the use of a lead-pencil or common writing ink," really means that the

erasure and substitution shall not be made in any other style or form, or with any different effect than would be produced by the use of a lead-pencil or common writing ink. The law looks only to matters of substance, and does not waste its energy in pursuit of shadows; and, if the appearance of having been made with a lead-pencil is produced by the use of an indelible pencil, there is a substantial compliance with the statute, although such a pencil may not, strictly speaking, be known as a lead-pencil. Any other construction would sacrifice the spirit and reason of the law to the mere letter; and yet it is one of the great maxims of interpretation to keep always in view the general scope, object, and purpose of the law, rather than its mere letter. "He who considers merely the letter of an instrument goes but skin deep into its meaning." Broom, Leg. Max. 611. "A rigid and literal meaning would, in many cases, defeat the very object of the statute, and would exemplify the maxim that 'the letter killeth, while the spirit keepeth alive.' Every statute ought to be expounded, not according to the letter, but according to the meaning. * * * And the intention is to govern, although such construction may not in all respects agree with the letter of the statute." Tracy v. Railroad Co., 38 N. Y. 437.

5. The court erred in counting ballot No. 8 as a vote for the respondent. Upon this ticket the printed name of respondent was erased with red ink, and that of J. W. Oates written in place of it, also in red ink. The respondent contends that red ink is not common ink, within the meaning of the statute. We cannot say that it is not such ink, and it is clear its use is not within the mischief which it is the object of the law to prevent.

6. Upon several ballots the name of appellant was erased, and no name substituted therefor, and the words "No vote" were not written after the name erased. These were counted as votes for appellant. The court was correct in this ruling. The statute, in order to guard against fraudulent erasures, has provided this as the only way in which the voter can manifest his intention to erase a name, when he does not substitute another, and under such circumstances the erasure is not complete unless followed by these words. There is no valid constitutional objection to this requirement. It does not prescribe any educational qualification for the voter, nor require him to disclose the secrecy of his ballot, as contended.

7. The statement or complaint filed herein by appellant does not allege that he possesses the qualifications required by the constitution of this state to make him eligible to the office of judge of the superior court, and it is claimed by respondent that the statement is therefore fatally defective, and for that reason the judgment dismissing the proceeding should be affirmed. It is true that in order to entitle appellant to the full relief asked for, to-wit, a judgment that he was elected instead of respondent, the statement should have alleged facts showing that he was eligible. But the statement is not fatally defective, if it states a case for any relief. Perri v. Beaumont, (Cal.) 27 Pac. Rep. 534, pt. 10. And we think that it does. It is alleged that the appellant is an elector of the county of Sonoma; and, such being the case, he was authorized to commence this proceeding, and upon proof of facts alleged in his statement was entitled to a judgment annulling the election of defendant. As the case must be remanded for a new trial, the court below should, upon application, permit the appellant to amend his statement so as to allege the necessary facts showing his eligibility to be chosen to the office, the election to which is in controversy here. Perri v. Beaumont, supra. Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.; SHARPSTEIN, J.; PATERSON, J.

(91 Cal. 470)

PEOPLE v. BIBBY. (No. 20,798.)

(*Supreme Court of California.* Oct. 1, 1891.)

FORGERY—ORDER OF SCHOOL TRUSTEES — INDICTMENT—EVIDENCE — COMPARISON OF HANDWRITING.

1. Pen. Code Cal. § 470, declaring guilty of forgery "every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any * * * writing obligatory, * * * bond, * * * check, draft, bill of exchange, contract, promissory note, due-bill for the payment of money, * * * county order or warrant, or request for the payment of money," is sufficiently broad in its terms to include the offense of forging an order of the trustees of a school-district upon the county superintendent of schools for a requisition upon the auditor for a county warrant.

2. Pol. Code Cal. § 1543, subd. 3, relating to the duties of the county superintendent of schools, provides that "no requisition shall be drawn up on the order of the board of trustees against the county fund of any district, except for teachers' salaries, unless such order is accompanied by an itemized bill." *Held* that, in a prosecution for the forgery of such an order, it was unnecessary to allege or prove the accompaniment of an itemized bill. People v. Todd, 77 Cal. 464, 19 Pac. Rep. 883, followed. People v. Tomlinson, 35 Cal. 503, distinguished.

3. The order being valid upon its face, and subscribed with the names of B. and C., "school trustees of Pleasant Valley district," it was unnecessary to allege the existence of the district, or the fact that the persons named were trustees of that district.

4. In a prosecution for forging a money order other instruments of the same general character, proven in defendant's handwriting, are admissible before the jury for the purpose of comparison, and also, it would seem, for the purpose of showing his guilty knowledge in passing the said order.

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Hinds & Merriam, for appellant. *Atty. Gen. Hart* and *Geo. E. Church*, for the People.

GAROUTTE, J. This is an appeal from a judgment of conviction for the crime of forgery, and also from the order denying defendant's motion for a new trial. The defendant was the deputy county superintendent of schools of Fresno county, and the information charged him with forging, uttering, and passing with intent to defraud the First National Bank of Fresno a certain writing of the following tenor, to-wit: "Order upon the county superintendent of public schools No. 3, Oct. 23, 1889. The county superintendent of public schools of Fresno county will draw a requisition on the county auditor against the county school fund in favor of B. N. Colwell, or order, to the amount of one hundred and twenty dollars, for material and work from —— to ——, during the present school year, in the Pleasant Valley school-district; monthly salary of teacher, $——. T. T. Barnes, J. W. Cox, School Trustees of Pleasant Valley District. $120." The defendant filed a demurrer to the information upon various grounds, which demurrer was overruled. He also moved an arrest of judgment for the same reasons, which motion was denied.

Section 470 of the Penal Code[1] is very broad in its terms, and, we think, sufficiently broad to include the offense of forging an order of the trustees of a school-district upon the county superintendent of schools for a requisition upon the auditor for a county warrant.

Appellant contends that the order is illegal upon its face, for the reason that it does not appear by the information that it was accompanied by a bill of items; that such an order is worthless paper, save for the purpose of forming a foundation upon which to issue a requisition to the auditor for a county warrant; and that no requisition could issue in this case, because the order was not accompanied by a bill of items. Section 1543, subd. 3, of the Political Code, in stating the duties of the county superintendent of schools, provides, among other things: "No requisition shall be drawn unless the money is in the fund to pay it; and no requisition shall be drawn upon the order of the board of trustees against the county fund of any district, except for teachers' salaries, unless such order is accompanied by an itemized bill showing the separate items, and the price of each, in payment for which the order is drawn," etc. Appellant's contention cannot be supported. The case at bar, in this regard, bears a striking likeness to the Hawkeswood Case, East, P. C. 955. Hawkeswood was indicted for forgery of a bill of exchange, and objection was taken that, not being stamped, it was no bill of exchange, and that this was an objection apparent upon the face of it, and no person could be deceived or defrauded thereby, unless he took it without looking at it, which would be gross negligence. The court held that, as the stamp act was merely a revenue law, and did not purport in any way to alter the crime of forgery, and as the false instrument had the semblance of a bill of exchange, and was negotiated by the person as such, the conviction was proper. The judgment being respited, all the judges were of opinion that "the prisoner was properly convicted; for the stamp act, in saying that a bill without a stamp shall not be pleaded or given in evidence, or available in law or equity, means only that it shall not be made use of to recover the debt; and, besides, the holder might get it stamped after it was made." In Com. v. Costello, 120 Mass. 367, where the defendant was charged with forging a bond to be used for the purpose of dissolving an attachment, the court held that an instrument falsely made with intent to defraud is a forgery, although, if it had been genuine, other steps must have been taken before the instrument would have been perfected, and those steps were not taken. It was contended that the bond was worthless upon its face, as it was not approved, and until approved could not serve to dissolve the attachment. The court said: "It is true that the false making of an instrument merely frivolous, or one which upon its face is clearly void, is not forgery, because from its character it could not have operated to defraud, or been intended for that purpose; but if the instrument is one made with intent to defraud, although before it can have effect other steps must be taken or other proceedings had upon the basis of it, then the false making is a forgery, notwithstanding such steps may never have been taken or proceedings had." In Ex parte Finley, 66 Cal. 264, 5 Pac. Rep. 222, the defendant was convicted of forging a decree of divorce; and it was held that the information was sufficient without averring a marriage of the parties to the forged decree, as "on its face the writing shows that it may have been used to consummate a fraud." In People v. Todd, 77 Cal. 464, 19 Pac. Rep. 883, where the defendant was charged with forging a will, upon demurrer it was held not necessary to state in the indictment that the testator had property that might have been affected by the will. Appellant's views are not supported by the case of People v. Tomlinson, 35 Cal. 503. The instrument alleged in that case to have been forged was a *nudum pactum*, and so appeared by its face; and, after citing many authorities, the court said: "These cases establish the doctrine that, to constitute forgery, the forged instrument must be one which, if genuine, may injure another." We think the present cause comes clearly within the foregoing rule. The order is a valid order upon its face. It fulfills every requirement of the law; and, if genuine, would have a distinct, well-defined value. A bill of items is no part of the order, and is only required to accompany the order when a requisition is demanded from the county superintendent. At that time, and only at that time, has the bill of items any value. The county superintendent of schools is prohibited from drawing the requisition until there is money in the fund of the school district. The inhibition in this regard is equally as strict as in drawing a requisition without the bill of items; yet, could it be contended that the order of the board of trustees could not be forged because there was no money in the fund? This order is certainly as valid, for the purposes of a forgery, as a bill of exchange without a stamp, or a bond without the approval of the court. If genuine, it has a value; for, if issued by the board of trustees to the proper party without an accompanying bill of items, no reason is apparent why legal proceedings could not be taken by the holder of the order to compel the furnishing of a proper bill by such board in case of a refusal. We conclude that the information was sufficient, the instrument being a valid instrument upon its face, and that it was neither necessary to allege nor prove that a bill of items accompanied the order.

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[1] Pen. Code Cal. § 470, provides that "every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any * * * writing obligatory, * * * bond, * * * check, draft, bill of exchange, contract, promissory note, due-bill for the payment of money, * * * county order or warrant, or request for the payment of money, * * * is guilty of forgery."

The instrument being valid upon its face, it was not necessary to allege the existence of "Pleasant Valley school-district," or the fact that T. T. Barnes and J. W. Cox were trustees of such district. In Ex parte Finley, supra, the court declared that "the rule does not require that the indictment or information shall contain an express allegation of the existence of every fact, the existence of which is assumed in the forged instrument. It is enough if the writing is one which, if genuine, might apparently be of legal efficacy."

Appellant complains of the conduct of the prosecution in introducing before the jury other orders of the same general character as the one set out in the information herein. Having proven these orders to be in the handwriting of defendant, there was no valid objection to their admissibility as evidence to be considered by the jury for the purpose of determining by comparison whether the defendant was the forger of the order recited in the information. While those orders may have, unfortunately to the defendant, demonstrated his ample capabilities in the line of the creation of spurious paper, still that fact afforded no legal objection to their admissibility as evidence of his handwriting; and it was upon this ground alone, as stated by the district attorney at the time, that they were offered and received in evidence. Aside from the foregoing reasons, it would seem the evidence of the forgery of other orders of the same character, and at about the same time, by appellant, in the line of a systematic course of conduct, would be admissible for the purpose of showing the guilty knowledge of appellant when he passed the forged order relied upon in this case. People v. Frank, 28 Cal. 515; People v. Gray, 66 Cal. 276, 5 Pac. Rep. 240; 2 Russ. Crimes, p. 404. Let the judgment and order be affirmed.

We concur: DE HAVEN, J.; HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.

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3 Cal. Unrep. 432

FIRST NAT. BANK OF SANTA MONICA v. KOWALSKY. (No. 14,765.)

(*Supreme Court of California.* Oct. 12, 1891.)

APPEAL—FAILURE TO FILE TRANSCRIPT.

An appeal will be dismissed after the time allowed for filing a transcript has elapsed, if no transcript has been filed, nor attempt made to prepare one, and no sufficient excuse is offered for failure to do so.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by the First National Bank of Santa Monica against H. I. Kowalsky Judgment for plaintiff. Defendant appeals. Appeal dismissed.

A. Courey & Miller, for appellant. *H. I. Kowalsky* for respondent.

PER CURIAM. Motion to dismiss appeal. The transcript has not been filed, nor have any steps been taken to prepare a transcript, although the time allowed for that purpose has fully elapsed, and no sufficient excuse is offered for failure to comply with the rule. Appeal dismissed.

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91 Cal. 538

PALMDALE IRRIGATION DIST. *et al.* v RATHKE *et al.* (No. 14,700.)

(*Supreme Court of California.* Oct. 14, 1891.)

APPEAL—NOT TAKEN IN TIME—ESTOPPEL.

1. The running of the 10 days within which an appeal must be taken under Act Cal. March 16, 1889, (St. 1889, p. 213, § 6,) in a proceeding to determine the validity of the organization of an irrigation district, and orders for the issuance of bonds, is not affected by the fact that appellants had no notice of the entry of the judgment, since the statute does not require such notice.

2. A stipulation by respondents on appeal that the transcript is correct, and that the appeal has been duly perfected, means nothing more than that the papers in the transcript are correct copies of the record, and that a sufficient undertaking was properly filed by appellants, and does not estop them to ask dismissal of the appeal if it was not taken in time.

In bank. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

Proceeding by the Palmdale Irrigation District and others against one Rathke and others. Judgment for defendants. Plaintiffs appeal. Appeal dismissed.

R. H. F. Variel and *Spencer G. Millard*, for appellants. *Louis Luckel*, for respondents.

PER CURIAM. Motion to dismiss appeal. This is a proceeding under the act of March 16, 1889, (St. 1889, p. 212,) to determine the validity of the organization of an irrigation district, and certain orders for the issuance of bonds, etc. Judgment in favor of the defendants was entered August 8, 1891, and notice of appeal therefrom was filed and served August 21, following. But the statute (section 6, p. 213) requires that the appeal in this class of cases shall be taken within 10 days after entry of judgment, and therefore this appeal was not taken in time. Appellants admit that it appears from the record that the appeal was not taken within 10 days after the entry of judgment, but they show by affidavit that they had no notice of such entry until a day or two before the appeal was taken. The statute, however, does not require notice of the entry of judgment in order to set the time for appeal running.

Appellants also claim that respondents are estopped by their stipulation to the correctness of the transcript, and that the appeal has been duly perfected. But we understand this stipulation to mean nothing more than that the papers in the transcript are correct copies of the record, and that a sufficient undertaking was properly filed within five days after notice of appeal. In that sense it does not conflict with the proof afforded by the record that the appeal was not taken in time to confer jurisdiction upon this court to review the judgment of the superior court. Appeal dismissed.

(91 Cal. 540)

MCTARNAHAN *et al.* v. PIKE. (No. 14,269.)

(*Supreme Court of California.* Oct. 15, 1891.)

EJECTMENT—PLEADING—TITLE—ENTRY OF MINERAL LAND.

1. In ejectment, a portion of defendant's answer, alleging that plaintiffs' claim of title arises from a pretended entry of the land in the United States land-office as a placer mining claim, and a certificate of purchase based thereon, which they induced the local land-office to issue to them by means of false affidavits and testimony, and that defendant had filed a protest against the allowance of the entry in the general land-office, is properly stricken out, since it does not show that any question as to the validity of plaintiffs' entry and purchase was then pending and undecided in the land-office.

2. The fact that the secretary of the interior directed a hearing and determination of defendant's protest against plaintiffs' entry nine months after the trial of the ejectment action does not render the striking out of the above portion of the answer erroneous, since the action of the secretary of the interior could not have been anticipated by the court.

3. Where plaintiffs in ejectment claim title under an entry and purchase of the land from the federal government, defendant cannot set up title in himself by adverse possession before plaintiffs' entry, since the statute of limitations does not run against the federal government.

4. Where defendant in ejectment for mineral land alleges, and introduces evidence to prove, adverse possession by himself at the time of its location by plaintiffs, who claimed under a certificate of purchase from the federal government pursuant to such location, a failure by the court to find as to such adverse possession is reversible error, since Code Civil Proc. Cal. § 1925, which renders a certificate of purchase or location of land, issued by the federal government, *prima facie* evidence of title in the holder, also provides that such evidence may be overcome by proof that at the time of the location the land was in the adverse possession of the adverse party.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

Ejectment by Carroll McTarnahan and others against Ward C. Pike. From a judgment in plaintiffs' favor defendant appeals. Reversed.

F. P. Otis, for appellant. *F. W. Street*, for respondents.

In bank.

BEATTY, C. J. Justice GAROUTTE is, for the purpose of a decision herein, assigned to department 2.

VANCLIEF, C. The action is ejectment to recover possession of 50 acres of placer mineral land, described by legal subdivisions of section 22, township 2, range 14 N., M. D. M., and called "Crystal Spring Gravel Placer Mine," situate in the county of Tuolumne. The complaint is in the most general form, alleging, in substance, that plaintiffs own the demanded premises, and are entitled to the possession thereof, and that defendant is wrongfully in possession, and wrongfully withholds the possession from the plaintiffs. The answer of the defendant specially denies each allegation of the complaint, except that he withholds the possession, and affirmatively alleges that defendant is entitled to the possession by right and title derived from his grantors, who, in April, 1873, had entered and paid for the land in the United States land-office, and received a certificate of purchase therefor. Further answering, defendant alleged that for more than 7 years last past he had been in the open, continuous, notorious, exclusive, peaceable, and adverse possession of the demanded premises as against all persons except one Wiggins, who was a tenant in common with him, and especially as against the plaintiffs; and further alleges that he and his grantors and tenants in common have been in like adverse possession for more than 15 years last past. In the seventh division of his answer the defendant alleges as a further defense, among other things, substantially that the only right or title under which plaintiffs claim arises from "a pretended entry of said land at the United States land-office" as a placer mining claim, which entry was founded upon fraudulent proceedings, and false testimony and affidavits as to having posted on the claims the plat and notice for the period of 60 days, and as to having done $500 worth of work, as required by law. "*That, when said attempted locations were made, all of said land was, and long prior thereto had been, and now is, in the adverse, open, notorious, continuous, exclusive, and peaceable possession of said defendant; and that said plaintiffs and applicants well knew such to be the case.*" That the register and receiver of the land-office were deceived and imposed upon by the aforesaid false affidavits and testimony, and were thereby induced to issue to plaintiffs the certificate of purchase under which they claim the land. That defendant, by his attorney, has filed in the general land-office at Washington a protest against the allowance of said entry by plaintiffs, in which is set forth all the facts showing the invalidity of the application and entry by plaintiffs, and he verily believes a hearing will be granted in the matter, and that said entry will be canceled. On motion of plaintiffs, the seventh division of the answer, except the above italicized quotation therefrom, was stricken out by the court. The court found the facts as follows: "(1) That on January 1, 1889, the plaintiffs were, and have ever since continued to be, the owners of and entitled to the possession of all that certain placer mining claim, described as follows, to-wit, [here follows the description;] (2) that on January 1, 1889, the defendant was, and has ever since continued to be, in possession of a portion of said mining claim, against the will and without the consent of plaintiffs, and has refused, and continues to refuse, to yield possession thereof to plaintiffs; (3) that defendant has no title to said mining claim or any portion thereof, either by adverse possession or otherwise, and has no right to the possession thereof, nor to the possession of any portion thereof." Upon these findings judgment was rendered in favor of the plaintiffs for possession of the land, and costs; from which, and from an order denying his motion for a new trial, the defendant appeals.

1. It is contended for appellant that the court erred in striking out part of the seventh division of defendant's answer. Perhaps this point would be good if the seventh division of the answer had stated facts showing that the question as to the validity of the entry in the land-office, under which the plaintiffs claim, was then pending and undecided; as in such case a very serious question at least would have been raised as to whether the certificate of purchase issued to plaintiffs should have been considered *prima facie* evidence of title under section 1925 of the Code of Civil Procedure.[1] Campbell v. Buckman, 49 Cal. 362. But as the answer does not state the pendency of any question in the land-office as to the validity of plaintiffs' certificate of purchase, admitted to have been issued to them, nor facts from which the pendency of such question must necessarily be inferred, I think the court did not err in striking out that portion of it which was stricken out.

Counsel refer to a decision of the secretary of the interior, rendered nine months after the trial of this cause, directing a hearing and determination of the matter of defendant's protest against the entry under which plaintiffs claim, and suspending that entry pending the investigation, and also directing, in a certain contingency, a readjudication of the matter of the cancellation of the entry under which defendant claims, and a reinstatement of it. 12 Dec. Dep. Int. 125. But nothing of this could have been anticipated by the court below.

2. It is claimed that the third finding is not justified by the evidence; but as the statute of limitation did not run against the government, and less than two years intervened between the date of plaintiffs' entry and the commencement of this action, the finding that defendant acquired "no title by adverse possession," whether a fact or a conclusion of law, is correct. For the mere purpose of proving title by prescription, defendant's alleged adverse possession before plaintiffs entered and paid for the land counted for nothing.

3. It is further claimed that the decision is against law, for the reason that the court did not find upon all the material issues of fact; and I think this point is well taken. There was no other evidence of plaintiffs' title or right of possession than their certificate of purchase, dated May 23, 1888, the effect of which, as evidence in this action, might have been overcome "by proof that, at the time of the location" of the mining claim upon which the certificate issued, the land was in the adverse possession of the defendant. Code Civil Proc. § 1925; Witcher v. Conklin, 84 Cal. 500, 24 Pac. Rep. 302, and cases there cited. This, however, goes on the assumption that section 1925 of the Code of Civil Procedure applies to certificates of purchase of mineral land, as I think it does, and there is no controversy here on this point. But if that section does not apply to mineral lands, then there is no evidence to sustain the first finding, since it is by virtue of that section alone that certificates of sale are made "primary evidence" of ownership, (Haven v. Haws, 63 Cal. 452;) and the result would be that appellant's point that the first finding is not justified by the evidence should be sustained. The answer, as above shown, raises the issue as to defendant's adverse possession at the time of the location of the mining claim upon which plaintiffs' certificate of purchase was issued, and thence until the commencement of this action, and there was evidence upon that issue strongly tending to prove such adverse possession; yet there is no finding upon that issue. The third finding, that defendant "has no title by adverse possession," being perfectly consistent with the adverse possession alleged, does not touch the issue as to the existence of such adverse possession. The adverse possession may have been such as contemplated by section 1925 of the Code of Civil Procedure, and quite sufficient to overcome the evidence afforded by plaintiffs' certificate of purchase, and yet insufficient to prove title by prescription, for reasons above indicated. For the failure to find upon this issue as to adverse possession, I think the judgment and order should be reversed, and a new trial granted.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial granted.

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64 Cal. 32

COX *et al.* v. HAYES.[2]

(*Supreme Court of California.* July 25, 1883.)

DEED—DESCRIPTION—WHAT PROPERTY PASSES.

A land-owner, having sold 22.29 acres of the south-easterly portion of a certain quarter section, conveyed to another person "the east one hundred acres [of the quarter section,] commencing on the west bank of the F. river, and running back to the westward far enough so as to contain one hundred acres, and so as to comprise the east one hundred acres [of the quarter section,] excepting therefrom a small piece of land" previously sold. *Held*, that the deed conveyed 77.71 acres. MCKEE, J., dissenting.

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[1] This section provides: "A certificate of purchase or of location of any lands in this state, issued or made in pursuance of any law of the United States or of this state, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes."

[2] This case, filed July 25, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

In bank. Appeal from superior court, Butte county.

Action of ejectment by Thomas Cox and others against John Hayes. Judgment for plaintiffs. Defendant appeals. Reversed.

I. S. Belcher, for appellant. *Reardan & Freer*, for respondents.

ROSS, J. F. R. and A. O. Larkin, being the owners of a certain quarter section of land, conveyed to one Campbell a small portion of it taken from the south-easterly part of the quarter section, and containing 22.29 acres. Afterwards the Larkins conveyed to one Hudson, and Hudson to the plaintiffs, "the east one hundred acres [of the quarter section,] commencing on the west bank of the Feather river, and running back to the westward far enough so as to contain one hundred acres, and so as to comprise the east one hundred acres [of the quarter section,] excepting therefrom a small piece of land sold by F. R. and A. O. Larkin to A. W. Campbell." If by this deed 100 acres of the quarter section were conveyed, the judgment should be affirmed. If, on the other hand, from the 100 acres mentioned in it is to be deducted the tract previously conveyed to Campbell, the judgment must be reversed. The language of the deed is awkward, but we think its true construction is that it conveys the east 100 acres, etc., excepting therefrom the 22.29 acres previously conveyed to Campbell. In other words, that the deed in question conveyed 77.71 acres only. Judgment reversed, and cause remanded for a new trial.

MCKINSTRY, THORNTON, MYRICK, and SHARPSTEIN, JJ., concurred. MCKEE, J., dissented.

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64 Cal. 34

LYON *et al.* v. CROSBY *et al.*[1]

(*Supreme Court of California.* July 26, 1883.)

INSOLVENCY—JURISDICTION—MEETING OF CREDITORS.

Where, on petition of creditors, the court orders a person to show cause why he should not be adjudged insolvent, and the person appears with attorney, the court has jurisdiction to adjudge him insolvent, without waiting for a meeting of creditors.

Department 2. Appeal from district court, Sacramento county.

Action by E. Lyon and another against C. C. Crosby, sheriff, and another, upon the sheriff's official bond. Judgment for defendants. Plaintiffs appeal. Affirmed.

Grove L. Johnson and *D. E. Alexander*, for appellants. *Hale & Craig* and *J. M. Fulweiler*, for respondents.

MYRICK, J. Upon receiving the petition of three creditors of Bryant, the debtor, the court made an order that Bryant show cause why he should not be adjudged an insolvent debtor, and a surrender of his estate be made for the benefit of his creditors. On the return-day of the order Bryant appeared in person and with counsel, and, after hearing statements and admissions made by him and his counsel, the court adjudged him an insolvent debtor, and ordered that all proceedings against him and his property be stayed. The court also appointed a receiver of his property, and ordered notice to be given to creditors by publication. At this point in the history of the case, the sheriff, Crosby, who had previously attached goods of Bryant for a debt due the plaintiffs, and had advertised a sale under execution, turned the property over to the receiver. This action is brought to recover of the sheriff and his bondsmen the value of the property so turned over. We are of opinion that the court had jurisdiction to adjudge Bryant an insolvent in an involuntary proceeding, without waiting for the meeting of creditors. We think the evidence sustains the findings of the court as to the fraudulent procurement of the attachment and obtaining the judgment, as against the insolvent law. We see no error in the record. Judgment and order affirmed.

SHARPSTEIN and THORNTON, JJ., concurred.

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64 Cal. 1

BOSWORTH v. WEBSTER, Tax Collector.[2]

(*Supreme Court of California.* July 2, 1883.)

TAXATION—ASSESSMENT ROLL—MANDAMUS—PLEADING.

1. The words, "To all owners and claimants, known and unknown, in A. township," in the heading of an assessment roll, are an idle recital, and do not vitiate the assessment.

2. Where, in the tabular part of the assessment roll, under the heading "Tax-Payer's Name," appear the words, "Place, Wilson, Newman, and others," the assessment is invalid.

3. A writ of mandate will not issue to compel a tax collector to issue a certificate and deed to a purchaser at a tax-sale, where the petition fails to aver that the property was assessed, that any taxes were levied, or that the taxes were unpaid.

Department 1.

Application for writ of *mandamus* by William Bosworth against James A. Webster, tax collecter. Denied.

E. A. & G. E. Lawrence, for petitioner.

MYRICK, J. This is an application for a writ of mandate that the respondent issue to petitioner a certificate and deed of certain premises alleged to have been purchased by him at a sale for unpaid taxes.

1. As to the taxes for 1870-71. The heading of the assessment roll reads: "Assessment of property for the fiscal year ending April 1, 1871. To all owners and claimants, known and unknown, in Alameda township." In San Francisco v. Phelan, 61 Cal. 619, we held that this recital in the heading was an idle recital, which did not vitiate the assessment. In the tabular part of the assessment roll, under the heading "Tax-Payer's Name," are the words, "Place, Wilson, Newman, and others." This places the assessment within Hearst v. Eggle-

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[1] This case, filed July 26, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[2] This case, filed July 2, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

stone, 55 Cal. 365, and Brady v. Dowden, 59 Cal. 51. A certificate and deed, based on such an assessment, (or, rather, alleged assessment,) would convey no title, and the issuance thereof would be vain; therefore the application of the petitioner is denied as to the certificate and deed based on the alleged assessment for 1870–71.

2. As to the petition, so far as it relates to taxes for the year 1877–78, there is no averment that the property referred to was assessed for taxes, nor that any taxes were levied, or that taxes were unpaid. Application denied.

SHARPSTEIN, J., and THORNTON, J., concurred.

64 Cal. 2

LOW *et al.* v. McCALLAN *et al.*[1]

(*Supreme Court of California.* July 2, 1883.)

NEW TRIAL—AMENDMENT OF STATEMENT ON MOTION—EVIDENCE—SUFFICIENCY.

1. The fact the trial court allowed a party to amend his statement on motion for a new trial is not error where it does not appear that the other party was injured thereby.

2. An order granting a new trial on the ground of the insufficiency of the evidence to support the finding will not be reversed where no error appears from the record, and the evidence is conflicting.

Department 2. Appeal from superior court, Butte county.

Action by F. F. Low and another against Ellen McCallan and another. Verdict for plaintiffs. New trial granted. Plaintiffs appeal. Affirmed.

Reardan & Freer, for appellants. *Gray & Sexton* and *Chas. F. Lott*, for respondents.

MYRICK, J. 1. When the defendants' motion for a new trial came on for hearing in the court below, the court permitted the defendants (respondents here) to amend their statement by adding and inserting the words "or predecessors" after the word "grantors," in specification 1. We do not see that any injury resulted to the plaintiffs.

2. It was material whether the land between the ditch of plaintiffs and the building of the defendant McCallan had ever been located as a portion of a mining claim, and, if so located, whether an abandonment had occurred. The court granted the new trial on the sole ground that the evidence did not establish the fact that the premises had, prior to the year 1868, been located and appropriated as a mining claim; or, if so located and appropriated, that plaintiffs had succeeded to the rights of the locators. We do not find, from an examination of the evidence, that the court committed an error in so holding. As to abandonment in fact, whether properly located or not, the evidence, in the most favorable aspect for plaintiffs, is conflicting. The order is affirmed.

SHARPSTEIN and THORNTON, JJ., concurred.

64 Cal. 3

BUTLER v. AUSTIN.[2]

(*Supreme Court of California.* July 3, 1883.)

TRUSTS—ACCOUNTING BY TRUSTEES—INTEREST.

1. Where a trustee held certain moneys on condition that he would pay interest thereon at the rate of 1½ per cent. per month after demand, and, in an action for an accounting, no demand was found, it was error to compute interest at that rate.

2. In an action for an accounting, the trustee should not be charged with the principal or interest of sums received by him after the filing of the complaint, where no amended or supplemental complaint was filed.

3. It was error to charge the trustee with sums paid to discharge a debt which, unless connected with the trust, was barred by limitations, where no such connection appears.

Department 2. Appeal from district court, twelfth judicial district.

Action for an accounting by C. C. Butler against F. B. Austin. Judgment for defendant. Plaintiff appeals. Reversed.

L. Quint and *Wilson & Wilson*, for appellant. *E. Kirkpatrick* and *John P. Hoge*, for respondent.

MYRICK, J. The plaintiff alleged in his complaint that defendant was indebted to him as a balance for moneys paid out and expended in the sum of $2,434.32, and asked that an accounting be had. This complaint was filed October 7, 1875. On the 19th of October, 1877, the defendant filed his answer, which set up several matters by way of counter-claim, and alleged that plaintiff was indebted to defendant in large sums of money, for principal and interest. This pleading seems to have been regarded by the parties as a cross-complaint, and was demurred to by the plaintiff. The demurrer was overruled. By stipulation, the case was referred to a referee, with instructions to take the testimony and report the same, together with the findings of fact. On the 27th of October, 1879, the referee made his report, in which he stated the aggregate amount held in trust by plaintiff for defendant to be $22,960.57, and the aggregate amount paid by plaintiff for account of defendant $252.71. Judgment was thereupon rendered for defendant and against plaintiff for $22,707.76.

1. The instrument in writing executed by plaintiff to defendant, by the terms of which he was to account for and pay to defendant the moneys therein specified, provided for the payment of interest at the rate of 1½ per cent. per month after demand. No demand was found; therefore it was error to compute interest at that rate.

2. The cross-complaint was filed October 19, 1877. The report of the referee was filed October 27, 1879. The referee heard evidence of and charged the plaintiff with amounts received between those dates. This was error, there being no amended or supplemental cross-complaint. The plaintiff was called upon to meet only the transactions occurring prior to October 19, 1877.

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[1] This case, filed July 2, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

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3. The referee allowed to the defendant computations of interest on amounts received by plaintiff after the filing of the cross-complaint. This also was error.

4. It does not appear from the findings that either of the sums paid to Lloyd Baldwin and in satisfaction of the judgment in Vassault v. Austin was in any connected with the relations of trust existing between the parties or the accounts thereof. If not so related, they would be barred by the statute of limitations.

5. The referee charged the plaintiff with $598 (and interest thereon) received by him in 1879 from the San Francisco & Point Lobos Road Company. There was no pleading to justify this.

6. The referee allowed the defendant and charged the plaintiff with rents received after the trial.

For these reasons the judgment and order are reversed, and the cause is remanded for a new trial.

Thornton and Sharpstein, JJ., concurred.

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64 Cal. 5

Canavan v. Gray *et al.*[1]

(*Supreme Court of California.* July 20, 1883.)

Forcible Entry—When Lies—Trespass.

Code Civil Proc. Cal. § 1159, provides that "every person is guilty of a forcible entry who either, (1) by breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, enters upon or into any real property; or (2) who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct the party in possession." *Held*, that a person in the wrongful possession of real property cannot maintain trespass against the owner, who has the right to possession, but makes a forcible entry, since the remedy provided by the statute is exclusive.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Jane Canavan against Hamilton W. Gray and others in trespass. Judgment for plaintiff. Defendants appeal. Reversed.

William Reade and *B. S. Brooks*, for appellants. *M. C. Hassett*, for respondent.

Sharpstein, J. On the 19th day of August, 1875, James Canavan, who was then the husband of the plaintiff, was the lessee and in the possession of the 50-vara lot on the south-east corner of Third and Brannan streets, in San Francisco, and was the owner of all the frame buildings thereon; and on that day he assigned said lease and sold said buildings to the defendant H. W. Gray. On the same day he signed and delivered to said Gray an instrument in writing, of which the following is a copy: "This is to certify that I have rented four rooms, upper story, south-east corner Third and Brannan streets, at ($20) twenty dollars per month; and I hereby agree to deliver up possession of the said rooms upon receipt of ten days' notice, said notice to take effect from 13th day of August, 1875." On the 20th of September, 1875, said Gray commenced an action against said James Canavan for the possession of said premises, and on the 27th of the same month Canavan went away, leaving his family, including his wife, the plaintiff herein, in said rooms. He has never occupied said rooms since. But the plaintiff has continued to occupy them without paying any rent for the use and occupation thereof. On the 5th day of April, 1879, some persons, who had been employed by said Gray for that purpose, unroofed the house containing said rooms, and, by so doing, damaged the personal property of the plaintiff herein, and this action was brought to recover the damages which the plaintiff thereby sustained. Upon these and other facts which do not change the legal aspect of the case, a verdict was rendered in favor of the plaintiff for $1,000. A motion for a new trial was made by the defendants, and denied by the court, on condition that the plaintiff should remit $250 of the damages, which she did. The appeal is from that order and the judgment. The vital question is, can the plaintiff, upon these facts, maintain an action of trespass against the defendant? Upon that question the cases are conflicting, and we shall not attempt to enumerate them on the one side or the other, but will briefly examine the grounds upon which the opinions *pro* and *con* are based. All agree that at common law the plaintiff could not, upon the facts disclosed by this record, maintain any action whatever against the defendants. It is also conceded that the only change which has been made in the law relating to this subject is that made by the statute, which in this state, as in many others, provides a summary remedy for forcible entry upon or into any real property. It is only as to the extent of the change wrought by this statute that there is any difference of opinion. The insistence on one side is that "the statute of forcible entry and detainer, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is therefore unlawful. If unlawful, it is a trespass, and an action for the trespass must necessarily lie." Reeder v. Purdy, 41 Ill. 279.

On the other side it is urged that the remedy given by the statute is exclusive. In this state the plaintiff, in an action of forcible entry, may recover the damages occasioned thereby, together with a judgment for the restitution of the premises.

The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the Code of Civil Procedure, but it establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice. Code Civil Proc. § 4. An action of forcible entry would be a proceeding under the Code, and its provisions relating to that subject, in such a proceeding, would have to be liberally construed. The Code has established the law of the state respecting that subject. It has provided a remedy and prescribed a course of procedure in cases of forcible entry. And all statutes, laws, or rules on that subject heretofore enforced in this state, whether consistent or not with the provisions of the Code on the same subject, are repealed and abrogated. Id. § 18. It is doubtless the duty of courts, in actions of forcible entry, to construe the provisions of the Code relating to that subject so as to suppress the mischief and advance the remedy; that is, the remedy given by the statute. The legislature has provided a remedy for forcible entry, no matter by whom made. But it has provided only one remedy. Before there was any legislation on the subject, a person in the actual rightful or wrongful possession of real estate could maintain trespass against any one, not having a right to enter, for a forcible entry upon it. A person in the wrongful possession could not maintain an action against the owner, having a right to enter, for a forcible entry But the statute gives a person, even in the wrongful possession, a right of action, and prescribes its form, against the owner having a right to enter, if he make a forcible entry. Neither expressly nor by necessary implication does the statute give to a person in the wrongful possession the right to maintain any other than the action of forcible entry when such entry is made by the owner, having the right to enter.[1] The legislature has provided a particular remedy for a forcible entry made under such circumstances, but we are unable to see upon what principle it can be held that another and different remedy, and one which did not exist at common law, and is not given by statute, is equally available in such a case. That the legislature, by giving a person in the wrongful possession of the real estate of another the right to bring an action of forcible entry against him for entering forcibly upon that which he had a right to enter upon, impliedly gives a right to maintain trespass in such a case, is, at best, a very doubtful implication, and the rules of the common law are not to be changed by doubtful implication. Wilbur v. Crane, 13 Pick. 284.

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[1] This case, filed July 20, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

As the evidence shows that the premises upon which the alleged trespasses were committed were owned by the defendant H. W. Gray, and that he was entitled to the immediate possession of the same, and that the plaintiff was in the wrongful possession thereof, the defendants' motion for a new trial should have been granted on the ground that the evidence was insufficient to justify the verdict. The case was tried upon what we deem to be an erroneous theory, and the errors committed by the court, in the course of the trial, are attributable to that fact. If the theory upon which the case was tried had been the correct one, none of the exceptions could be sustained. It is therefore unnecessary to dwell further upon them. Judgment and order reversed.

THORNTON and MYRICK, JJ., concurred.

Hearing in bank denied.

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64 Cal. 9

SHARP v. DYE.[2]

(*Supreme Court of California.* July 20, 1883.)

LETTERS OF ADMINISTRATION—PRESCRIBED FORM—SEAL OF THE COURT.

Code Civil Proc. Cal. § 1362, provides that letters of administration must be signed by the clerk under the seal of the court, and "substantially" in the following form: "State of California, county or city and county of ——. C. D. is hereby appointed administrator of the estate of A. B., deceased. [Seal.] Witness: G. H., clerk of the superior court of the county or city and county of ——, with the seal thereof affixed, the —— day of ——, A. D. 18—. By order of the court. G. H., Clerk." Civil Code, § 1628, provides that a corporate or official seal may be affixed to an instrument by a mere impression on the paper or other material on which such instrument is written. *Held*, that letters of administration commencing, "State of California, county of Sacramento—ss.: S. D. is hereby appointed administrator of the estate of J. W. S., deceased;" followed by the attestation clause; then the oath of office, with jurat; after which the seal of the court was affixed to the left of the signature of the clerk,—are not subject to an objection that the seal of the court is not affixed in the place indicated in the prescribed form, since it is not material that the seal should be affixed at the place indicated in the form.

Department 2. Appeal from superior court, Sacramento county.

Action by J. S. Sharp against Sperry Dye, administrator, for the revocation of letters of administration, and for the issuance of special letters. Judgment for plaintiff. Defendant appeals. Reversed.

L. S. Taylor, for appellant. *Elwood Bruner*, for respondent.

PER CURIAM. Letters of administration must be signed by the clerk under the seal of the court, and substantially in the following form: "State of California, county or city and county of ——. C. D. is hereby appointed administrator of the estate of A. B., deceased. [Seal.] Witness: G. H., clerk of the superior court of the county or city and county of ——, with the seal thereof affixed the —— day of ——, A. D., 18—. By order of the court. G. H., Clerk." Code Civil Proc. § 1362. The document to which our attention is directed is in the form above prescribed, except that the seal is not affixed between the principal and attestation clauses, but is affixed at the bottom of the page which contains said clauses, and to the left of the signature of the clerk to the jurat of the administrator's oath of office. On the argument a paper was exhibited to the court, by consent of counsel on both sides, as a *fac-simile* of the paper under which appellant claims to have been appointed administrator. It commences: "State of California, county of Sacramento—ss.: Sperry Dye is hereby appointed administrator of the estate of John W. Sharp, deceased." Next follows the attestation clause; then the oath of office, with the jurat, and then the seal of the court affixed to the left of the signature of the clerk. It is contended by respondent's counsel that these are not "letters of administration," because the seal of the court is not affixed at the place indicated in the form prescribed by the Code above cited. But the Code only requires that they shall be substantially in that form; that is, essentially, by including the material or essential part. And it is not material or essential that the seal should be affixed at the place indicated in the form, unless the fact of a place being so indicated makes the affixing of it at that particular place material or essential. But that would be to so construe the law as to require a literal, where it expressly requires only a substantial, compliance with the form prescribed. The Civil Code provides that "a corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such instrument is written." Civil Code, § 1628. It was not necessary to affix a seal of the court to any other matter contained on the sheet or page upon which the letters of administration were written, but it was necessary to affix one to said letters, and we think, under the circumstances, that the affixing of a seal upon the paper on which said letters were written was a substantial compliance with the law. Order reversed.

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[1] Code Civil Proc. Cal. § 1159, provides that "every person is guilty of a forcible entry who either, (1) by breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, enters upon or into any real property; or (2) who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct the party in possession."

[2] This case, filed July 20, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

91 Cal. 545

Ex parte HAYMOND. (No. 20,885.)

(*Supreme Court of California.* Oct. 15, 1891.)

GRAND JURY—IMPANELING.

Where the superior court of San Francisco, having legal authority to impanel a grand jury, impaneled and swore a competent number of persons as such jury, and charged it with the duties of a grand jury, it was a grand jury *de facto*, and one summoned to testify before it cannot refuse to testify on the ground that the jury was not impaneled according to law.

In bank.

Habeas corpus by Edgar D. Haymond. Writ discharged, and prisoner remanded.

Creed Haymond, for petitioner. *Edgar B. Haymond, in pro. per. Atty. Gen. Hart, Wm. S. Barnes*, and *A. L. Rhodes*, for respondent.

PER CURIAM. The petitioner was subpœnaed as a witness before the grand jury of San Francisco. He refused to appear, and testify, upon the ground that, in his opinion, the grand jury was not a lawful body. For this refusal he was convicted of a contempt of the superior court, and sentenced to fine and imprisonment. Thereupon he sued out this writ, under which he prays to be discharged from custody. It is not controverted that he must be remanded, and the writ discharged, unless he can show that the superior court exceeded its jurisdiction in the contempt proceeding. In order to do this, petitioner offered in evidence the record of the proceedings of the superior court in ordering, selecting, summoning, and impaneling the alleged grand jury, from which he contends that it appears the superior court was guilty of such grave irregularities and violations of plain statutory provisions that the body of men by it sworn and impaneled is not even a *de facto* grand jury. Without passing upon the question whether the grand jury, before whom the petitioner was summoned to appear, was impaneled in accordance with the provisions of the law relating to that subject, it is sufficient for us to say that such body has certainly a *de facto* existence, and, this being so, the witness was clearly guilty of contempt in refusing to testify. When a court, having legal authority to impanel a grand jury, has sworn and impaneled a competent number of persons as such, and, itself recognizing the body so formed as a lawful grand jury, charges it with the duties of a grand jury, and it is engaged in the performance of such duties, a person summoned to testify before it cannot raise the question of its competency to act. His duty is to testify as required, leaving the question of the legality of the grand jury to be tested in the modes provided by law by those who may have an interest in the question. The petitioner, on his own showing, has been regularly and properly convicted, and must be remanded. Writ discharged, and prisoner remanded.

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91 Cal. 560

COVELL *v.* WASHBURN. (No. 14,311.)

(*Supreme Court of California.* Oct. 28, 1891.)

SET-OFF—COSTS AND ATTORNEY'S FEES.

In an action to recover the value of materials furnished and labor performed on defendant's house it appeared that liens against the house for materials furnished plaintiff to be used therein had been paid by defendant after judgment in a suit against both plaintiff and defendant. *Held*, that defendant was entitled to set off all that he had been compelled to pay to relieve his property from the liens, including the attorney's fees and costs in the suits to enforce the liens.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Action by Covell against Washburn to recover the value of materials furnished and labor performed by plaintiff in building defendant's house. From a judgment for part of his claim, plaintiff appeals, claiming an additional sum. Affirmed.

Chancey H. Dunn and *Taylor & Holl*, for appellant. *Johnson, Johnson & Johnson*, for respondent.

In bank.

BEATTY, C. J. Justice GAROUTTE is, for the purpose of a decision herein, assigned to department 2.

VANCLIEF, C. The action is to recover the reasonable value of labor done and materials furnished by plaintiff, at defendant's request, in the building of a house for defendant, alleged to be $2,500, of which $560 are admitted to have been paid; and judgment is demanded for the balance, $1,940. The plaintiff recovered judgment for the sum of $423.15, with costs, but appeals from the judgment, on the judgment roll, and claims that upon the facts found by the court he is entitled to judgment for an additional sum of $187.15. The findings show that there was a written contract between the parties for the building of the house by the plaintiff for the price of $3,250; but that the contract did not comply with sections 1183 and 1184 of the Code of Civil Procedure, and was never filed in the office of the county recorder; that plaintiff began the erection of the building and the furnishing of the materials therefor according to the terms of the void written contract, with the knowledge and consent, and at the request, of defendant, and continued the work during a period of about four and a half months, and then ceased to work before the building was completed, and thereafter did no more work and furnished no more materials; that the labor performed and materials furnished by plaintiff were reasonably worth $2,193.50, of which $560 had been paid; that two persons, from whom plaintiff had purchased lumber and materials on credit, filed liens on the building for the price of such lumber and materials, amounting to about $1,070, and thereafter commenced actions against plaintiff and defendant herein to foreclose their liens. **A decree of foreclosure was** rendered for the full sums for which the liens had been filed, and in addition thereto for $175 allowed by the court for attorney's fees in the foreclosure suits, and $12.15 costs. To discharge his house from the liens the defendant herein paid all these sums, and the court allowed them as offsets against plaintiff's demand in this action. The plaintiff herein having been a party to the suit in which the liens were foreclosed, the validity of the foreclosure decree is not questioned, nor is it questioned that the defendant herein was entitled to set off the amount of the principal and interest adjudged to be due the lienholders in the foreclosure suits, which he had paid, but it is contended that he was not entitled to set off the attorney's fees and costs allowed in the foreclosure suits, not because they were improperly allowed in those suits, but because he should have paid the debts, to secure which the liens had been filed, without suit, and thus have saved the expenses and costs of those suits. In his brief counsel for appellant state the question thus: "Had defendant the right to litigate, as between himself and the lienholders, the validity of their liens, and, if defeated, to offset against the benefit conferred on him by plaintiff the costs and expenses of such litigation?" It should not be overlooked that defendant herein was not personally liable for the debts of plaintiff to the lienholders for the materials furnished by them to plaintiff, and that he cannot be presumed to have known whether or not the plaintiff herein had any valid defense to the foreclosure suits. Had the defendant herein paid the demands on which the materialmen had filed liens, without suit, and without the request of the plaintiff, he would have done so at his peril of being adjudged to have paid them as a mere volunteer to the extent to which the demands paid may not have proved to be valid liens upon his property, and to this extent he would have had no recourse upon the plaintiff for indemnity. Besides, he would have imposed upon himself the burden of proving that the demands paid by him were valid debts of the plaintiff, secured by valid liens upon defendant's property, or that he had paid thereon at plaintiff's request. He was never under any obligation to plaintiff to pay plaintiff's debts to the material-men. His only obligation to plaintiff was to pay him so much as the labor he had performed, and the materials he had furnished and used on defendant's house, were reasonably worth. Against this obligation he was entitled to set off plaintiff's obligation to indemnify him for all that he had been compelled to pay to relieve his property from the liens thereon to secure plaintiff's debts, including the attorney's fees and costs in the suits to enforce those liens. I think the judgment should be affirmed.

We concur: Fitzgerald, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

(91 Cal. 552)

Clark *et al.* v. Taylor. (No. 14,081.)

(*Supreme Court of California.* Oct. 20, 1891.)

Mechanic's Lien—Foreclosure—Costs—Attorney's Fee—Cross-Complaint—Review on Appeal.

1. Error in sustaining a demurrer cannot be considered on appeal, where it does not appear from the record that any such demurrer was interposed or sustained.

2. In an action to foreclose a lien for material contracted for on December 7, 1888, and furnished between that day and January 1, 1889, a cross-complaint alleging that defendant, "to avoid threatened litigation," paid plaintiffs on November 30, 1888, a sum of money in excess of what was then due them for materials before that time furnished, and asking judgment for such excess, is not authorized, under Code Civil Proc. Cal. § 442, providing that, whenever the defendant seeks affirmative relief against any party "relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates," he may, in addition to his answer, file a cross-complaint.

3. Under Code Civil Proc. Cal. § 1195, providing that, in actions to enforce mechanics' liens, the court must allow as part of the costs reasonable attorney's fees in the superior and supreme courts to each claimant whose lien is established, an attorney's fee will be allowed in the supreme court on the affirmance of a judgment foreclosing a lien.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by G. A. Clark and others against W. A. Taylor to foreclose a mechanic's lien. Judgment for plaintiffs, and defendant appeals. Affirmed.

Thomas J. Curran, for appellant. *Wells, Guthrie & Lee*, for respondents.

Belcher, C. This is an action to foreclose a lien for materials, alleged to be of the value of $149.35, and to have been furnished for and used in the construction of a house for defendant. The plaintiffs had judgment as prayed for, and the defendant appeals on the judgment roll. Only two grounds are urged for a reversal of the judgment: *First*, it is contended that the court erred in sustaining a demurrer to defendant's amended answer and counterclaim; and, *second*, that the court erred in sustaining a demurrer to defendant's cross-complaint.

1. It is not shown by the record that any demurrer was interposed or sustained to the amended answer and counterclaim. This point cannot, therefore, be considered.

2. We think the demurrer to the cross-complaint was properly sustained. The action was a proceeding in equity to foreclose a lien for materials alleged and found to have been contracted for on the 7th day of December, 1888, and to have been furnished between that day and the 1st day of January, 1889. The cross-complaint alleged that defendant, "to avoid threatened litigation," paid to plaintiffs on the 30th day of November, 1888, a sum of money in excess of what was then due them for materials before that time furnished, and it asked judgment for such excess. The cause of action set up in the cross-complaint did not relate to or depend upon the contract or transaction upon which the plaintiffs'

action was brought, nor did it affect the property to which the plaintiffs' action related. The cross-complaint was therefore not authorized by section 442 of the Code of Civil Procedure. Besides, the same matters were set up in the counter-claim, and under that pleading were properly cognizable. Respondents ask, in case the judgment is affirmed, that they be allowed a reasonable attorney's fee in this court, citing section 1195 of the Code of Civil Procedure, which provides that in cases of this kind the court must allow "reasonable attorney's fees in the superior and supreme courts." The respondents were allowed an attorney's fee in the court below, and they seem, under this section, to be entitled to one here. We therefore advise that the judgment be affirmed, and that respondents be allowed a reasonable sum as an attorney's fee in this court.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed, and the court below is directed, upon the filing of the *remittitur* therein, to allow the plaintiffs, as a part of their costs on this appeal, a reasonable fee for the services of their attorney in this court.

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91 Cal. 194

FOSS v. HINKELL. (No. 14,014.)

(*Supreme Court of California.* Oct. 12, 1891.)

SUPREME COURT DECISIONS—INTERPRETATION.

Where an appeal, though taken from the judgment and order denying a new trial, was heard and determined on the findings alone, and the cause was remanded, with directions that the court below find on the testimony already introduced and such further testimony as may be introduced, whether the land in suit was within the exterior boundaries of a certain rancho granted by the Mexican government, the language of the court on such appeal, that "what the exterior limits of such granted rancho were, must be determined by the *expediente* of the grant issued by the Mexican government, including petition, *diseno*, and grant, the boundaries in which may be identified by parol evidence," must be taken as words of definition, rather than of enumeration, limiting the testimony on which the court below was to make its finding.

On rehearing. For former opinion, see 27 Pac. Rep. 644.

PER CURIAM. The former opinion is modified by striking out the words, "The former appeal was taken upon the judgment roll alone," and inserting in lieu thereof the words, "The former appeal, although taken from the judgment and order denying a new trial, was heard and determined upon the findings alone."

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91 Cal. 158

GRANT v. OLIVER. (No. 13,104.)

(*Supreme Court of California.* Oct. 12, 1891.)

EJECTMENT—REVERSAL OF JUDGMENT—ORDER FOR RESTITUTION.

On reversal of a judgment for plaintiff for possession of land, defendant's motion for a restitution of the premises, and the order therefor, should be made, not in the supreme court, but in the superior court, on filing *remittitur.*

On rehearing. For former opinion, see 27 Pac. Rep. 596.

PER CURIAM. The appellant's motion to modify the judgment is denied. Upon filing *remittitur* in the court below, the appellant will be entitled to receive from the clerk the money he deposited with him, and also to restitution of the premises, but the motion and order therefor should be made in the superior court.

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64 Cal. 92

WILSON v. WILSON.[1]

(*Supreme Court of California.* Aug. 28, 1883.)

RECORD ON APPEAL—OPINION OF COURT BELOW.

The opinion of the trial court is no part of the judgment roll, and will not be considered on appeal, unless preserved in the record by a bill of exceptions.

Department 1. Appeal from superior court, Sacramento county.

William T. Wilson sued Ellen M. Wilson. Judgment for defendant. Plaintiff appeals. Affirmed.

Grove L. Johnson, *Henry Edgerton*, and *Robert T. Devlin*, for appellant. *Freeman & Bates* and *A. L. Hart*, for respondent.

MCKEE, J. In this case the only issue presented to the court for trial and determination was whether a transaction which took place between the parties on the 26th of November, 1875, was intended as a mortgage or a conditional sale. By its finding, filed pursuant to sections 632, 633, Code Civil Proc., the court decided that the transaction was a conditional sale, and gave judgment for the defendant. The finding was made upon conflicting evidence, but the evidence was sufficient to sustain the finding, and the finding was sufficient to sustain the judgment. It is contended, however, that the facts found did not warrant the conclusion drawn from them, and that the judgment entered thereon is erroneous. This contention is not founded upon the record of the case; for while the notice of motion for a new trial designated, as ground upon which the motion would be made, that "the decision is against the law," the specification of error is that "the court erred in rendering judgment for defendant, because the opinion of the court shows conclusively that the judgment should have been in favor of plaintiff." This specification concedes the facts as found by the court; and as the court found that the deed and agreement in writing, executed by the parties on the 26th of November, 1875, (which the plaintiff alleged were intended and understood as a mortgage to secure an indebtedness due by him to the defendant,) "were not intended or understood by the parties thereto, or either of them, to be or to constitute a mortgage to secure any sum whatever, and the same did not constitute a mortgage," it necessarily followed, as a conclusion of law, that the defendant was entitled to judgment, and the plaintiff was not. Judgment was therefore properly entered for the defendant, upon a conclusion of law legitimately drawn from the facts found. Where a conclusion of law is not legitimately drawn from a finding of facts, it may be reviewed without a bill of exceptions. Thompson v. Hancock, 51 Cal. 110. Such an error, if it exists, is apparent upon the judgment roll. But, if the conclusion be legitimately drawn from the facts as found, there is not, in that regard, any error apparent on the judgment roll; and if anything has occurred, on the trial and determination of a cause, which shows that the decision by the court was erroneous, and is not made by law part of the judgment roll, it must be brought into the record of the case by a bill of exceptions. If it is not made part of the record by a bill of exceptions, or by some other mode sanctioned by law, it is not reviewable by the appellate court. Here the matter or thing to which the appellant objects is an opinion delivered by the court below, in rendering judgment, which, it is contended, shows that the court reached its conclusion by the erroneous application of a principle of law to the evidence in the case. But the appellant did not except to the opinion, nor did he move, upon any grounds of law or fact, for a decision by the court upon what he considered the principle of law applicable to the case; nor did he resort to any other mode known to the law for making the opinion part of the record. In Touchard v. Crow, 20 Cal. 163, the court said: "If counsel, when a case is tried by the court without a jury, desire to present for consideration certain points of law as applicable to the facts established, or sought to be established, upon which the court might be called to charge a jury, were there a jury in the case, the proper course is to present them in the form of propositions, preceding them with a statement that counsel makes the following points, or counsel contends as follows." And in Griswold v. Sharpe, 2 Cal. 24, it is said: "In all cases where the judge below tries the facts of a case, the proper mode of reserving the questions of law arising upon the facts is to ask the court to decide the law as counsel may desire; and, upon a refusal, to have it noted in the bill of exceptions." Neither that course, nor any other known to the law, was taken to make the opinion, or the alleged principle upon which it was based, part of the record in the case. The opinion has therefore no place in the record, and cannot be considered. McClory v. McClory, 38 Cal. 575; Hidden v. Jordan, 28 Cal. 305; Houston v. Williams, 13 Cal. 24; People v. Reynolds, 11 Pac. Coast Law J. 570. Judgment and order affirmed.

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[1] This case, filed August 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Ross and McKinstry, JJ., concurred.

Hearing in bank denied.

64 Cal. 85

People v. Mitchell.[1]

(*Supreme Court of California.* Aug. 17, 1883.)

Depositions in Criminal Cases.

Under Pen. Code Cal. §§ 882, 869, providing that in criminal cases the deposition of a witness on behalf of the people may be taken when it appears from the oath of the witness himself or some other person that he is unable to give sureties for his appearance at the trial, and that it must be read over to and signed by the witness, and certified to by the officer before whom it is taken, a deposition is inadmissible when it does not show that the witness or some other person made oath that he could not give sureties, nor that it was read over to the witness, nor that it was certified to by the officer before whom it was taken.

In bank. Appeal from superior court, city and county of San Francisco.

Criminal prosecution against Thomas Mitchell. Defendant was convicted, and appeals. Reversed.

John D. Whaley, for appellant. *Atty. Gen. Marshall*, for the People.

McKee, J. On the trial of this case the court below permitted the district attorney, over the exception of the defendant's counsel, to read in evidence against the defendant a deposition of James Morris, the complaining witness in the case; and the ruling of the court in that regard is the principal assignment of error. The deposition purported to have been taken under section 882 of the Penal Code. According to the provisions of that section, the right to take the deposition of a witness on behalf of the people, in a criminal case, arises out of the fact that the witness is unable to procure sureties for his appearance on the trial; and that fact must be satisfactorily established by the examination on oath of the witness himself, or of some other person. When the fact has been judicially ascertained, the right to take the deposition of the witness may be put in motion. But the examination of the witness must be had in the presence of the defendant, or after due notice to him, and "must be conducted in the same manner as the examination of a witness before a committing magistrate is required by the Penal Code to be conducted." That is to say, the deposition must contain the name of the witness, his place of residence, and his business, the questions put to him, and his answers, together with the objections, if any, made, and the grounds of the objections to any of the questions or answers, and the rulings thereon; and, when the examination is concluded, it must be signed by the witness, or his reasons for refusing to sign stated, and the presiding judge before whom it has been taken must sign and certify to it, if it has been reduced to writing by him or under his direction, unless the examination has been taken down by a phonographic reporter, by order of the judge, in which case the reporter's transcript, when written out in longhand and certified by him as being a correct statement of the testimony and proceedings, shall be received as *prima facie* correct. Section 869, Pen. Code. But the testimony of the witness is only taken conditionally, (sections 686, 869, Pen. Code,) and cannot be read against the defendant until it has been "satisfactorily shown to the court" that the witness is dead or insane, or cannot with due diligence be found within the state, (section 686, Pen. Code.) In taking the deposition, the officers, so far as it appears on the face of the deposition, wholly failed to observe the requirements of section 882, supra, in putting the right in motion, and of section 869, in the manner of conducting the examination. The fact that the witness was unable to procure sureties for his appearance at the trial did not appear by examination on oath of the witness, or of any other person. The deposition contained the recital that "it appears from the statement of William Fitzmaurice that the witness, James Morris, was detained in jail, and was unable to procure sureties." Nowhere does it appear that the statement was made on oath. It may have been a mere verbal statement, upon which no action could have been taken. Besides, the deposition does not show that it was read over to the witness, or that he signed it after acknowledging it to be correct, or that the presiding judge or magistrate before whom it was taken certified to it, as he was required to do under the Code, to entitle it to be read in evidence against the defendant. For the informalities and irregularities apparent on its face, the deposition was therefore inadmissible. Taking the testimony of a witness on behalf of the people in a criminal case by deposition is an exception to the rule which entitles the defendant in a criminal action to be confronted with the witnesses against him in the presence of the court, and every substantial requirement of the law which authorizes it must be observed. Any real departure from the course prescribed for the taking of the deposition renders the deposition itself objectionable. People v. Morine, 54 Cal. 575; Williams v. Chadbourne, 6 Cal. 559; People v. Chung Ah Chue, 57 Cal. 567. Judgment reversed, and cause remanded for a new trial.

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[1] This case, filed August 17, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports

SHARPSTEIN, ROSS, MCKINSTRY, MYRICK, and THORNTON, JJ., concurred.

64 Cal. 95

MEREDITH v. CHRISTY.[1]

(*Supreme Court of California.* Aug. 28, 1883.)

CONTESTED ELECTION—ILLEGAL REGISTRATION.

That the successful candidate aided and abetted the registering officer in the illegal registry of a voter is no ground for contesting the election, under Code Civil Proc. Cal. § 1111, and Pen. Code Cal. tit. 4, pt. 1, providing on what grounds an election may be contested.

Department 1. Appeal from superior court, Sacramento county.

James S. Meredith sued Edmond Christy to contest his election to the office of supervisor of Sacramento county. Plaintiff offered to show that defendant aided and abetted the deputy county clerk in making a false return of an affidavit upon which a voter was registered. The evidence was excluded. Judgment for defendant. Plaintiff appeals. Affirmed.

J. H. McKune, Matt F. Johnson, and *A. C. Hinkson*, for appellant. *A. P. Catlin* and *C. T. Jones*, for respondent.

PER CURIAM. The offense on the part of the respondent offered to be proven by the appellant does not come within any of the provisions of title 4, pt. 1, Pen. Code, and does not, therefore, constitute ground for the contest in question. Code Civil Proc. § 1111. Judgment affirmed.

64 Cal. 134

MCCORD *et al.* v. OAKLAND QUICKSILVER MIN. CO.[2]

(*Supreme Court of California.* Aug. 31, 1883.)

MINING—WASTE BY TENANT IN COMMON—INJUNCTION—ACCOUNTING.

1. The extraction of ore from a mine, and the cutting of timber on the claim to be used in the operation, by a tenant in common, is not waste, within Code Civil Proc. Cal. § 732, providing that, if a tenant in common of real property commit waste thereon, any person aggrieved by the waste may bring an action against him for treble the damages.

2. In the absence of willful injury, or of unnecessary injury or destruction, caused by negligence or unskillfulness, a tenant in common will not, at the instance of his co-tenants, be enjoined from prosecuting the business of mining on their common claim.

3. If an accounting of the profits should be allowed where one tenant in common of a mining claim, which had never been developed, and never afforded rent or profit, develops it with his own means, and without any agreement with the others, he should be allowed a rebate for expenditures necessarily incurred in protecting the common possession and in buying in an outstanding paramount title.

Appeal from ninth district court.

Action by James H. McCord and others against the Oakland Quicksilver Mining Company for injunction and damages. Judgment for defendant, and plaintiffs appeal. Affirmed.

Estee & Boalt, for appellants. *Garber, Thornton & Bishop*, for respondent.

MCKINSTRY, J. The complaint alleges that plaintiffs are and have been owners and tenants in common of the Lost Ledge mining claim, the plaintiff McCord owning two hundred three-thousandth parts thereof; the plaintiff Griffith, three hundred and sixty three-thousandth parts thereof; the plaintiff Gibbs, one hundred and thirty-three and one-third three-thousandth parts thereof; the plaintiff Pond, sixty-six and two-thirds three-thousandth parts thereof; and the defendant, twenty-two hundred and forty three-thousandth parts thereof. That the defendant, "without authority or permission of the plaintiffs, or either of them," has been and is in the exclusive possession and occupancy of the entire premises, and during such occupancy "defendant has ever refused, and still does refuse, to admit the plaintiffs, or either of them, to the possession or occupancy of said premises, as tenants in common with defendant or otherwise; and has and still does exclude the plaintiffs, and each of them, from any possession or occupancy of said premises, or any part thereof." That during the time defendant has been in possession as aforesaid it has been, and still is, without the consent or permission of either of plaintiffs, actively engaged and employed in mining in and upon said premises, and, with a large number of men and machinery employed for that purpose, has been, and still is, excavating in and upon the premises, and constructing tunnels and shafts therein, and excavating large quantities of cinnabar therefrom, and cutting down and consuming and destroying growing trees and timber upon said premises, and thereby irreparably injuring and damaging said premises. That the cinnabar so taken from said premises is of the value of $100,000 and upwards. That a large quantity of the cinnabar so taken from said ground by defendant has been by it reduced and converted into quicksilver, and the quicksilver by it sold and disposed of, and the proceeds converted by the defendant. That the defendant has hitherto refused, and still refuses, to deliver to plaintiffs, or either of them, any part of said cinnabar or quicksilver; or to pay over to them, or either of them, any portion of the proceeds of said sales. That defendant has been, and still is, engaged in cutting down and destroying the growing trees upon said premises, and converting the same into wood and timber, "which said defendant has been, and still is, using for purposes of fuel, and in the construction of shaft, tunnels, machinery, and other structures in and about, carrying on its said business of mining in and upon, said premises." That the value of said trees, wood, and timber, so converted by defendant, is about $5,000; and that defendant has refused, and still refuses, to pay to the plaintiffs, or either of them, "any part or portion of such value." That defendant has refused, and still refuses, to give plaintiffs, or either of them, any statement or information in detail "of the quantity or value of the cinnabar so taken from said ground, or of the quicksilver produced therefrom, or of the amount realized from the aforesaid sales of the same, or of the quantity or value of the trees, wood, and timber so taken and converted as aforesaid." That defendant threatens and intends to continue to prosecute, for its own use and benefit, the business of mining in and upon the premises, and its excavations and diggings of cinnabar, and its reduction of the same into quicksilver, and the sale and conversion of the same, etc., and will so continue unless enjoined. That defendant has no other property, etc. That by reason of the premises plaintiffs have sustained great damage, to-wit, in the sum of $105,000 or thereabouts. The prayer is for an injunction, restraining and forever enjoining defendant from prosecuting "the business of mining" in or upon the premises, or from digging, excavating, or constructing shafts or tunnels in or upon the same, or from extracting cinnabar or other minerals therefrom, or from cutting down, injuring, or destroying any trees or timber upon said premises, or committing waste thereon in any manner; that plaintiffs, and each of them, be admitted to the occupation and possession of said premises as tenants in common with said defendant; that they recover of said defendant "the said sum of one hundred and five thousand dollars" for their damages; and that said damages "be trebled, in pursuance of section 732 of the Code of Civil Procedure;" and for such other and further relief as the nature of the case may require, etc. The court below found that the defendant had never claimed the entire mine, and had never excluded the plaintiffs from the common possession, and that plaintiffs had never entered, nor ever intended or desired to enter, into the actual occupation. As the testimony was substantially conflicting, we would not be justified in setting aside these or the other findings. The material questions presented are: Does the excavation and removal of cinnabar from a quicksilver mine, or the cutting of timber trees used in working the mine, by one tenant, constitute waste for which his co-tenants may recover treble damages, under section 732 of the Code of Civil Procedure? Does such excavation and cutting and conversion constitute waste which should be enjoined? Are the plaintiffs entitled to an accounting?

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[1] This case, filed August 28. 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports

[2] This case, filed August 31, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

1. Section 732 reads: "If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be a judgment for treble the damages." In Elwell v. Burnside, 44 Barb. 447, it was said: "By the common law, one tenant in common could not be guilty of committing waste; that is, the same acts which if committed by a tenant for life or years would constitute waste would not be waste when committed by a tenant in common. He was not liable to his co-tenant in an action for waste for the injury done to their common estate. As he is now, however, liable by statute [referring to a statute similar to the section of the Code above recited] to respond to his co-tenant in this form of action, for those acts which constituted waste when committed by a tenant for life or years, we must resort to the common law to ascertain whether the acts complained of in this case would be waste, had they been committed by a tenant for life or years." In the case now before us the quicksilver mine had already been opened when plaintiffs and defendant became tenants in common. If, therefore, it be conceded that, under the provision of our Code, a tenant in common is subject to the action in like circumstances as is a tenant for life or years, the plaintiffs cannot recover damages as for waste. "As to all tenants for life, the rule has always been that the working of open mines is not waste." And a tenant for life may open new pits or galleries without committing waste.

Neel v. Neel, 19 Pa. St. 328. A tenant for years is not guilty of waste in taking ore from the mine, the sole subject of the demise, during his term. That is what he pays rent for.

It may be urged that, as between lessor and lessee for years, their contract contemplates the extraction of mineral, and, in case of a life-estate, the grantor or donor must intend that his grantee or donee shall receive some benefit from his estate. But is it not also true, from the very nature of mining property in this state, valuable only because of the mineral it is supposed to contain, that each of the co-tenants may use it in the only way it can be used? The co-tenants out of possession may at any time enter into an equal enjoyment of their possession; their neglect to do so may be regarded as an assent to the sole occupation of the other. This is but another application of the principle announced in Pico v. Columbet, 12 Cal. 414. True, the co-tenants will not be held to assent to the commission of waste by the sole occupant, but the question returns, what acts done by him are waste? It cannot be doubted that on the part of a mere trespasser it is a wrong in the nature of waste to remove any ore from a mine. The cases cited by appellants fully sustain this proposition. But it is not a just inference that, as between tenants in common, the rule is the same. Section 732 of the Code of Civil Procedure does not relate to trespasses committed by those who have no interest in the property; nor does it define "waste," or declare what acts committed by a guardian, tenant for life or years, or joint tenant, or tenant in common, as the case may be, shall be waste. For the appropriate meaning of the word, as applicable to acts done by these several classes of persons, we are relegated to the principles of the common law, and to various considerations of policy arising out of different conditions which the common law recognizes and approves. The word "waste" is not in arbitrary term, to be applied inflexibly without regard to the quantity or quality of the estate, the nature and species of the property, or the relation to it of the person charged to have committed the wrong. As was said by ROANE, J., in Findlay v. Smith, 6 Munf. 134: "In considering what is waste in this country, it is to be remarked that the common law by which it is regulated adapts itself in this, as in other cases, to the varied situations and circumstances of the country. * * * The law on this subject must be applied with reasonable regard to circumstances." In the mining regions of this state, where title to a lode can be acquired from a United States government only after work of certain value has been done upon it, can it be that, if one of several locators or owners shall assume the sole risk of developing the mine, he shall become liable to those who have taken no chance of possible loss, not only for an accounting as to net profits,—supposing him to be fortunate enough to secure any,—but also as a tort-feasor, for three times the value of the whole, or for a proportionate share of the ore taken out?

It will be observed, upon the facts herein, no question arises as to unnecessary damage done to the mine or its works by reason of reckless or unskillful management of the business by the tenant conducting it. There may be cases in which the courts will impose damages for an abuse of his right by a co-tenant in occupation, or interpose to prevent such abuse. But here the theory of plaintiffs is that defendant could not extract ore from the mine without committing waste, because such extraction is a destruction of the very substance of the estate,—an irreparable injury to the inheritance. In view of the character of the property, and of plaintiffs' implied assent to its sole occupation by defendant for mining purposes, we regard the right of the latter to the proceeds of its operations as partaking of the nature of a usufruct; the appropriation of the net returns as a legitimate participation of the profits; and its acts of mining as not impairing or consuming the estate to any greater extent than must be presumed to have been intended to be allowable by each of the parties in interest. Murray v. Haverty, 70 Ill. 320, supposing it to have been correctly decided, does not entirely sustain the view of counsel for appellants. That decision was based upon a statute which authorized a tenant to bring trespass or trover against his cotenant who should "take away, destroy, lessen in value, or otherwise injure" the common property. The section of our Code does not declare that a co-tenant who "shall take away," etc., shall be guilty of waste. The question waste or no waste is left to the courts. Besides, in Murray v. Haverty the court had already decided the case by holding certain evidence, as to license, inadmissible under the defendant's plea. Counsel quote from Freeman on Co-Tenancy: "In all cases where a co-tenant practically destroys the estate, or some part thereof, trespass may be sustained by the injured co-tenant." Section 302. But this is to be taken with other portions of the same work where the distinction is pointed out between an appropriation of the proceeds, rents, profits, or income, and the destruction of the estate itself. See, also, Wat. Tresp. 947. The tenant in common of a mine may occupy it for the purpose contemplated by all, even though a portion of the soil or ore be removed. Each tenant has the right to use the mine, and, as was intimated by the supreme court of Pennsylvania, so long as an estate is used according to its nature, "it is no valid objection that the use is consumption, and it is no fault of the tenant that it is not more endurable." Irwin v. Covode, 24 Pa. St. 162. The taking of ore from the mine is rather the use than the destruction of the estate, within the meaning of the general rule. The results of the tenant's labor and capital are in the nature of proceeds or profits, the partial exhaustion being but the incidental consequence of the use.

It is not necessary to examine in detail the many cases cited by appellants, as in none are the facts like those of the case at bar. We shall refer to a few of them. Delaney v. Root, 99 Mass. 546, was an action of trover for the conversion of personal property. Stetson v. Day, 51 Me. 434, simply decides that, under a statute of Maine, a tenant for life, who neglected to pay taxes assessed upon the estate during his tenancy, and thereby subjected the estate to a sale, was liable to an action by the reversioner, either of waste, or of case in the nature of waste. Maddox v. Goddard, 15 Me. 219, and Symonds v. Harris, 51 Me. 14, were actions of trespass *quare clausum* for the destruction of a mill, and for the disseverance and removal of machinery from a mill; Blanchard v. Baker, 8 Me. 253, trespass on the case for a similar injury to common property; McDonald v. Trafton, 15 Me. 225, has no bearing upon any question involved in the case before us; and Hubbard v. Hubbard, Id. 198, was a statutory action of trespass "for strip and waste" of timber. As to the destruction of trees charged in the complaint herein, it has been expressly decided in California that, in the enjoyment of his legal rights in the common property, each co-tenant may cut timber, and use or dispose of it, at least to an extent corresponding to his share of the estate. Hihn v. Peck, 18 Cal. 640. In the case before us there is neither averment nor finding that defendant has cut or consumed more than its share. Besides, the use of the trees was merely incidental to the mining operations of defendant. In Pennsylvania it is held that the cutting of timber, to be used in a mine by the tenant for life, whose mining is not waste, is not itself waste. Neel v. Neel, 19 Pa. St. 328. Nowhere is it held to be waste for a tenant in common of a farm to cut wood necessary to the use of the farm. It was indeed held in New York by the supreme court that the cutting down of timber trees by one of several co-tenants, upon land whose principal value consisted of the growing timber, was waste, for which the other co-tenants could recover damages under a clause of the Revised Statutes of that state. Elwell v. Burnside, 44 Barb. 447. But, aside from the rule to the contrary laid down in Hihn v. Peck, 18 Cal. 640, plaintiffs have no averment that the quicksilver mine is "principally valuable" because of the trees growing from its surface. And here it may be added, applying the rule of Hihn v. Peck, it would seem each tenant in common of a mine is at least entitled to take out his share of the ore. That neither of the tenants can "look into the ground" may be a reason why a court of equity should order an account to be taken, but ought not to operate a prohibition upon the working of the mine by anybody.

2. Ought the court below to have enjoined defendant from proceeding with its mining? "In case of joint tenants and tenants in common, with respect to whose acts of waste the common law has provided no remedy, courts of equity will interfere when it appears that waste has been committed or threatened by one tenant in common who has become possessed of the whole premises." Tayl. Landl. & Ten. 694. This general proposition may be conceded to be correctly stated, but the very question here is, has waste been committed? At the common law the tenant had no redress for acts of admitted waste committed by his co-tenant. But the latter might be restrained in equity from felling ornamental trees, or from doing other things amounting to wanton and destructive waste, which were called "equitable waste," because allowable at law. By our statute, however, a tenant may recover damages of his co-tenant in every case of waste. Holding, as we do, that the acts of defendant were not, under the circumstances, wanton or destructive, or any waste, it follows plaintiffs were not entitled to an injunction. Counsel rely upon the opinion of the court of chancery of Upper Canada in Dougall v. Foster, 4 Grant, (U. C.) 319, where it was held (Esten, V. C., dissenting,) that one tenant in common would be restrained at the suit of his co-tenant from digging earth for bricks on the joint property. There the bill alleged that the portion of the lot from which the clay was being excavated and carried away was very valuable for building purposes, and that (with reference to such purposes) the lot had greatly deteriorated in value by reason of the acts of defendant. In his opposing affidavit defendant did not deny the first of these alleged facts at all, and did not expressly deny the last. The chancellor said: "It is quite true that this court refuses to restrict a tenant in common from the legitimate enjoyment of the estate, because an undivided occupation is of the very essence of that sort of title, (Co. Litt. 180,) and to interfere with the legitimate exercise of that right would be to deny an essential quality of the title." The court held that the legitimate enjoyment of a building lot, "within the limits of the town of Belville," was to build upon it, or improve or occupy it as town property is usually improved and occupied; and that to dig holes in it, or degrade it below the surrounding level, was not such legitimate enjoyment. To repeat the language of Roane, J., (Findlay v. Smith, supra:) "The law on this subject must be applied with reasonable regard to circumstances." If it had appeared in Dougall v. Foster that the common property was valuable only as a brick-yard, and was acquired by the co-tenants for that purpose, the case would have approximated more closely to the one at bar. By the laws of the United States the mining lands are disposed of under laws differing from those through which agricultural lands may be acquired. As a condition to their acquisition by individuals, it is requisite that the locators shall have done mining work of a certain value. They are disposed of and acquired for the purpose of mining, and the application of them to that purpose by one tenant in common is not waste of which the others can complain. Hawley v. Clowes, 2 Johns. Ch. 122, was a bill for partition, and for cutting down and carrying away timber, not wanted for the necessary use of the farm. The injunction was granted, in view of the special character of the case, and the insolvency of defendant, and on the ground that the excessive cutting of timber was destructive,

"and not within the usual and legitimate exercise of enjoyment." Chancellor **KENT** added: "The remedy is peculiarly appropriate and proper pending a partition of the very land." In Hole v. Thomas, 7 Ves. 589, Lord **ELDON**, after saying, "I never knew of an instance of an application to stay waste by one tenant in common against another, one tenant in common having the right to enjoy as he pleases," granted an injunction against cutting "saplings or any timber trees or underwood at unseasonable times," that being destructive. As was said by **ESTEN**, V. C., in Dougall v. Foster, it was malicious waste. Twort v Twort, 16 Ves. 128, was a case where one tenant in common was an "occupying tenant" to another. In Baker v. Whiting the tenant in common was the agent of his co-tenants, and the case does not assist the present investigation. 3 Sum. 485. It is said by Eden (2 Waterman's Eden, Inj., 3d Ed., 210) the instances in which injunctions have been granted between tenants in common against committing waste are few. The application has always been refused, unless attended with peculiar circumstances. In Smallman v. Onions, 3 Brown Ch. 621, an injunction was granted against the cutting of timber, on the ground that the parties were only equitable tenants in common, the legal title being in a trustee; that, therefore, the person who was committing the waste had no title to the possession, and cutting the timber was a trespass upon the trustee; also that the trespasser was insolvent. And in Goodwyn v. Spray, 2 Dick. 667, the lord chancellor denied an injunction prayed for by one tenant against his co-tenant cutting timber, saying the only remedy the plaintiff had was to get a partition. In the absence of allegations, proofs, or findings of willful injury, or of unnecessary injury or destruction caused by the negligence or unskillfullness of defendant, the plaintiffs were not entitled to an injunction.

3. Is this an action for an accounting? It is established in this state that, in ordinary cases, an action at law cannot be maintained by a tenant in common against a co-tenant in sole possession of the premises, to recover a share of the profits derived from the state by means of the labor and money expended by the party in occupation. The occupation by one tenant, so long as he does not exclude his co-tenant, is but the exercise of a legal right. The money he invests at his own risk. If his transactions result in a loss he cannot call upon his co-tenant for contribution, and if they result in a profit his co-tenant is not entitled to share in such profit. Pico v. Columbet, 12 Cal. 414. The demand of the plaintiffs is not for a sum due by way of rent from defendant as the tenant of their interest, nor is it for a proportionable share of an amount received by defendant for the use and occupation of the premises by third persons, nor is an account sought as an incident to a claim for partition. It is not for their part of moneys received by defendant which belong to all the tenants in common, nor is it based upon an allegation of any of the exceptional facts mentioned in Pico v. Columbet, 12 Cal. 414; in Goodenow v. Ewer, 16 Cal. 461; and in Abel v. Love, 17 Cal. 233. See, also, Howard v. Throckmorton, 59 Cal. 89.

Nor is the present an action brought to recover a portion of the profits acquired by the expenditure of defendant's money, treating it as the agent of plaintiffs in developing the common property. There is no pretense of an averment of any actual contract between plaintiffs and defendant whereby the latter was authorized to act for the former. On the contrary, it is expressly alleged in the complaint that the acts of defendant were against the will of plaintiffs, and without their consent. Again, the tenant in occupation is not made the bailiff of plaintiffs, in the absence of a contract of agency, by any statute of this state. The statute of Anne (4, 5, 16) has never been adopted here, and, if it had been adopted, that statute would seem only to have applied to cases where one tenant in common had received from a third person money, or other thing of value, to which both tenants were entitled by reason of their co-tenancy, and retained more than his just share according to the proportion of his interest. Pico v. Columbet, supra; Henderson v. Eason, 9 Eng. Law & Eq. 337. If the appropriation by defendant of the net proceeds of its enterprise be considered as merely the legitimate perception of the profits, the action cannot be maintained as an action for an account. Izard v. Bodine, 11 N. J. Eq. 403, cited by counsel for appellants, does not sustain their view. There the bill was for partition and account. The supreme court of New Jersey held: (1) If one tenant in common oust his co-tenant, the latter must first establish his right at law, and thus recover the mesne profits, "for one tenant is bound to account to another only as his bailiff appointed by contract, express or implied." (2) Where one tenant in common "actually receives" the rents, issues, and profits, then he may be compelled to account for such profits actually received, (from third persons;) but this by statute, both in England and this state, and not by the common law. 4 Anne, c. 16; New Jersey Act of 1794; Sargent v. Parsons, 12 Mass. 149. (3) Where one tenant actually occupies the whole estate, without claim on the part of his co-tenants to be admitted into possession, he is under no obligations to account, "for he has a right to such occupancy." Citing Co. Litt. 200*b;* Sargent v. Parsons, 12 Mass. 149; Meredith v. Andres, 7 Ired. 5; Colburn v. Mason, 25 Me. 434.

Appellants also refer to Nelson's Heirs v. Clay's Heirs, 7 J. J. Marsh. 139. But in that case the court, after saying that a statute of Virginia which, like the English statute, authorized "actions of account in favor of one joint tenant or tenant in common against another, as his bailiff, for receiving more than his just share," was in force in Kentucky, held that the statute did not apply when the estate, at the commencement of the tenancy in common, yielded no rent or profits, and one of the tenants entered, and by improving the estate rendered it productive; the other cotenant having expended neither money nor labor. In Shiels v. Stark, 14 Ga. 436, the court adjudged that, under the statute of Anne in force in Georgia, a tenant in exclusive occupation was liable to his co-tenant for a proportionate share of the value of the use and occupation; admitting that it had been held in Massachusetts (Sargent v. Parsons, 12 Mass. 149) that, under the statute of Anne, it is necessary to charge the defendant with having received rents and profits "otherwise than by his occupancy." We do not find the language attributed to Dane by the learned court of Georgia (1 Dane, Abr. p. 170, c. 8, art. 3) in our edition of the work referred to. Shiels v. Stark was a bill in equity for a partition and an account.

If it be conceded that the peculiar nature of mining property of itself constitutes such a equity as that the tenants, who could at any time have entered into the joint possession, but who have never expended labor or money upon the common property, or become liable for any portion of the loss which might have followed upon the enterprise of their co-tenant, ought to be entitled to demand an accounting from the latter, and to recover a portion of the net profit gained exclusively by its efforts and capital, the present is not an action for such an accounting. The defendant is charged with having irreparably injured the premises by taking therefrom cinnabar of the value of $100,000, and cutting thereon growing trees of the value of $5,000. The plaintiffs aver they have been damaged in the sum of $105,000, and pray, among other things, that they may have a judgment for three times that sum. It is alleged that defendant has converted the cinnabar, and the proceeds of sales of it, and the trees, and "has refused to deliver to the plaintiffs any part of the cinnabar taken from said ground, or the quicksilver so produced therefrom, or to pay over to them any portion of the proceeds of said sales, and denies to the plaintiffs, and each of them, any share or interest in the same." But neither this nor any other averment found in the complaint makes the action one for an account, legal or equitable. The averments in the complaint, except in so far as they constitute a declaration in ejectment, (and, as we have seen, the court below found that defendant had never disseised or ousted the plaintiffs,) are of facts alleged by plaintiffs to establish waste committed by defendant upon the common property, for which treble damages are asked.

Nevertheless, since the property is described in the complaint, and the exclusive occupation and working of the mine by defendant averred therein, and inasmuch as the court below did in fact take an account, we have looked into the findings and evidence with respect thereto. We have said that the net proceeds from the working of the mine were rather in the nature of profits from the use than the result of the destruction of the inheritance. But it may be conceded, for the purposes of this decision, that the relation of the tenants in common, under the circumstances disclosed, is *sui generis*, and their rights peculiar; that while the extraction of ore from the mine by one tenant, who does not exclude his co-tenants, is not waste, and the neglect of the latter to enter should be held an assent on their part to the exclusive occupation by the former, yet, because the effect of the exclusive working by one may be to exhaust the mineral, and the uncertainty of the prospective value of the property may render it impossible to make a just partition of it, a court of equity should order an accounting; holding that, while it must have been contemplated by the parties that the tenant in occupation should not be held for waste, or prohibited from proceeding with his work by the co-tenants who do not seek to enter, yet it must also have been contemplated that the tenant in occupation should not appropriate to himself the entire profits. If this be so, however, the co-tenants, not in actual occupation, applying for such account, should at least be required to do equity,—to allow to the defendant all sums actually expended for the protection of the common property. The court below found "that defendant has taken from said mine, since the 18th day of March, 1876, a great number of tons of ore, and has taken therefrom a large sum of money, and that all thereof has been expended in the proper, economical, and necessary development and working of said mine for said ore, and in the proper, economical, and necessary reduction of the said ores, and in properly, economically, and necessarily defending at law the common title to said property, and in proper payment for an outstanding title thereto." The parties here are not mining partners, between whom an accounting is sought. If they can properly be termed partners "in the profits," (see the *dictum* in Abel v. Love, supra,) they have not, by the averments of their complaint, declared themselves partners in any broader sense. By filing their complaint they did not make themselves liable to the defendant, or to creditors of defendant, in case the account of defendant's transactions should show such transactions had resulted in a loss. They did not make the defendant their agent as to debts by it created beyond the proceeds from its mining, nor did they subject their interest in the mine to any debts of its creation. In their complaint they impliedly, if not expressly, disavow any such purpose. If the plaintiffs here are entitled to an account, their claim to it is based upon special equities; their appeal to the court of equity is on the ground that defendant ought, under the peculiar circumstances, to pay them a share of the profits. It would seem plain that an equity is in turn imposed upon them to allow a rebate for expenditures necessarily incurred in protecting the common possession and in buying in an outstanding title paramount to that of the co-tenants, or such as a prudent man would deem it proper to purchase to avoid expensive and dangerous litigation.

4. Conceding, for the sake of the argument, such an action might have been maintained, the present is not an action to recover rent of defendant as successor to the tenants previously in occupation. Judgment and order affirmed.

Ross and McKee, JJ., concurred

91 Cal. 565

LATAILLADE v. ORENA. (No. 13,975.)

(*Supreme Court of California.* Oct. 30, 1891.)

GUARDIAN AND WARD — ACCOUNTING — FRAUD OF GUARDIAN—LIMITATION OF ACTIONS.

1. After the settlement of an estate and discharge of the guardian by the probate court a court of equity may compel the guardian to account for property fraudulently concealed from his ward and the court.

2. Money received by a guardian from the sale of both real and personal property constitutes but one fund, and a single action lies for its recovery.

3. Under Code Civil Proc. Cal. § 338, subd. 4, which provides that an action for relief on the ground of fraud or mistake must be commenced within three years, but the cause of action in such case is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud **or** mistake, an action against a guardian for an accounting will lie where it appeared that defendant at all times fraudulently concealed the fact that he had received and appropriated to his own use moneys belonging to plaintiff, if brought within three years from the discovery by plaintiff of his right.

4. In an action for an accounting the complaint showed that plaintiff's father purchased two ranchos, and paid for them with his own funds, but directed conveyances to be made to his wife, plaintiff's mother, who accepted the same for the benefit of her husband; that at the time of his death, in 1849, plaintiff's father also owned a large number of cattle; that for several years prior to 1849 defendant, as decedent's agent, had

the management of the ranchos and cattle, in which he afterwards continued with the consent of plaintiff's mother; that in 1854 defendant married plaintiff's mother, and thereafter, during plaintiff's minority, and until July, 1885, plaintiff was a member of defendant's family, and was treated as his own child; that defendant was the guardian of plaintiff's person and estate; that from time to time, after the death of plaintiff's father, defendant sold all of the cattle owned by plaintiff's father, and in 1868 sold the ranchos, and induced plaintiff's mother to execute deeds thereof to the purchaser; that defendant received all the money paid for the cattle and ranchos, and mingled the same with his own funds, and wrongfully and fraudulently converted the same to his own use, with intent to deprive plaintiff of his lawful share thereof; that defendant knew that the cattle and ranchos were owned by plaintiff's father, and that plaintiff, as heir, was owner of an interest therein, but this fact defendant concealed from plaintiff, and always represented to him that his father died insolvent; that in July, 1885, disputes arose between them, and plaintiff left the household of defendant, and, in interviews with persons who had been servants of plaintiff's father, for the first time ascertained that his father was owner of the cattle and ranchos left in the custody and management of defendant, and plaintiff was then for the first time directed to one J., who then for the first time showed plaintiff, by entries in his books, regularly kept in his business, wherein his daily transactions were entered at the time they took place, that he had acted as agent for plaintiff's father in the purchase of the ranchos; that plaintiff then learned for the first time that his father was the real owner of said ranchos, and the owner of the cattle. *Held*, that the complaint sufficiently shows when the discovery of fraud was made, what it was, how it was made, and why it was not made sooner.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action by C. E. Lataillade against Gaspar Orena for an accounting. From a judgment sustaining the demurrer to his third amended complaint plaintiff appeals. Reversed.

R. B. Canfield and *John J. Boyce*, for appellant. *Messrs. Garber, Boalt, Bishop* and *W. C. Stratton*, for respondent.

BELCHER, C. The plaintiff commenced this action to obtain an accounting, and the appeal is from a judgment entered against him after demurrer sustained to his third amended complaint.

The facts stated in the complaint are in substance as follows: On the 12th day of April, 1849, Cæsario Lataillade, plaintiff's father, died intestate in the town of Santa Barbara, where he was residing, leaving a widow and three minor children, of whom plaintiff, who was born December 2, 1849, was one. After his marriage to plaintiff's mother the decedent purchased two ranchos, situated in what is now the county of Santa Barbara, and paid for them with his own funds, but at his request the conveyances were executed to his wife as grantee, and were accepted by her for the benefit of her husband, and thereafter the ranchos were owned and possessed as the community property of the two. At the time of his death the decedent was also the owner of a large number of cattle, then grazing upon the ranchos. For several years prior to 1849 defendant had the care and management of the ranchos and cattle as the agent of the decedent, and afterwards, with the consent of plaintiff's mother, he continued to have the same care and management, until the property was sold and disposed of, as hereinafter stated. In 1854 the defendant married the plaintiff's mother, who is still his wife, and thereafter, during his minority, and until July, 1885, plaintiff continuously lived in defendant's family, and was brought up and treated as his own child. In the same year defendant was duly appointed the guardian of plaintiff's person and estate, and continued to act as such until the latter became of age. From time to time after April, 1849, defendant sold all of the said cattle, but for what sum or sums of money plaintiff is not advised; and in 1868 he negotiated a sale of the ranchos for the sum of $27,000 or thereabouts, and induced the plaintiff's mother to execute deeds thereof to the purchasers, and to permit him to receive the entire purchase money. The defendant received all the money paid for the cattle and ranchos, and mingled the same with his own funds, and wrongfully and fraudulently converted the same to his own use, with the intent to deprive plaintiff of his lawful share thereof. At all the times mentioned defendant knew that the cattle and ranchos were owned by the plaintiff's father at the time of his death, and that plaintiff became the owner of an interest therein as his heir; but he always concealed this fact from the plaintiff, and wrongfully and fraudulently represented to him that his father died insolvent, and that he had no interest in the cattle or ranchos. When defendant was appointed guardian of plaintiff he filed in court an inventory purporting to show all the estate of his ward, but he did not, in that inventory, or in any inventory, or otherwise, at any time, include any of the aforesaid property; and when he applied for and obtained a final discharge from his trust he falsely stated in his petition and represented to the court that he had returned a full and true inventory of all the estate of plaintiff which had come into his hands as guardian, and paid over and delivered the same to the plaintiff. This condition of things continued until July, 1885, the plaintiff all the time during his minority and afterwards relying implicitly on the statements and representations of defendant concerning plaintiff's property rights and the condition of his father's estate, and having no means of ascertaining the falsity of such statements and representations. In the last-named month difficulties and disputes arose between the parties, and the plaintiff then left the household of defendant, and ceased to be a member of his family, or to have friendly or confidential relations with him. "Thereupon this plaintiff, in interviews with persons who had acted in the capacity of servants upon the ranchos belonging to his said father, for the first time ascertained that his father during his lifetime had the interests in said real and personal property as particularly herein above set forth, and that said property was in the custody, care, and management of the defendant at the time of the death of his said father; and this plaintiff was then for the first time directed to one Augustin Janssens, who carried on business in the said county of Santa Barbara during the married life-time of the said Cæsario Lataillade, deceased, and at the time of the purchase of the said ranchos, who then for the first time showed this plaintiff by entries in his commercial books, regularly kept in his business, wherein his daily transactions were entered at the time they took place, that he had acted as the agent of the said Cæsario Lataillade in respect to the payment of the purchase money of said ranchos; and plaintiff avers that said account-books and the statements of said Janssens then and there disclosed to this plaintiff that his father was the owner of said ranchos, and that he was the real purchaser thereof, and the owner of the said cattle thereon." Shortly after these discoveries plaintiff demanded of defendant a full accounting of all his dealings with the property of the deceased, Lataillade, since his death, and the increase thereof; but defendant refused, and still refuses, to render to plaintiff any such account, or any account whatever, in relation to the said property. The proceeds of the cattle and lands disposed of by defendant as aforesaid are still in his hands, and plaintiff is the owner of and entitled to the one-sixth part thereof, together with the increase and profits arising therefrom. The complaint was filed on the 21st day of February, 1887, and the prayer was that defendant be compelled to account for all his dealings and transactions with the said property and the proceeds and increase thereof; that he be charged interest on all sums of money received by him from the sales of the property, compounded annually; and that plaintiff have judgment for such amount as he may be found entitled to. The demurrer was upon the grounds that the court had no jurisdiction of the subject-matter of the action; that several causes of action were improperly united, and not separately stated; that the complaint did not state facts sufficient to constitute a case of action, for the reason that it appeared on the face thereof that the cause of action was barred by the statute of limitations and by the plaintiff's laches; and that the complaint was ambiguous, unintelligible, and uncertain in several particulars. It does not appear upon what ground the demurrer was sustained.

1. The respondent contends that the probate court had exclusive jurisdiction to compel defendant to account as guardian, and that its decree, settling his accounts and discharging him from his trust, was final and conclusive; and in support of this position numerous authorities are cited. This is undoubtedly the general rule applicable to the settlement of the accounts of guardians, executors, and administrators, but we do not think it applicable to a case like this. Here, if the averments of the complaint are true,—and they must be assumed to be so for the purposes of this decision,—none of the matters now in controversy were passed upon in the settlement, for the reason that the guardian intentionally and fraudulently concealed from the court and his ward the fact that the latter had then, or ever had, any interest in the property in question. The cases cited state and apply the general rule, but, so far as we have discovered, no one of them goes to the extent of holding that such a settlement can shield a guardian from afterwards being called upon in a court of equity to account for the property so concealed. The rule applicable to the case is correctly stated in Griffith v. Godey, 113 U. S. 89, 5 Sup. Ct. Rep. 383. In that case Mr. Justice Field, in delivering the opinion of the court, said: "It is well established that a settlement of an administrator's account by the decree of a probate court does not conclude as to property accidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the probate court might, in such case, open its decree, and administer upon the omitted property; and a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity." And see Estate of Hudson, 63 Cal. 454; Dean v. Superior Court, Id. 473; In re Cahalan, 70 Cal. 604, 12 Pac. Rep. 427; Tobleman v. Hildebrandt, 72 Cal. 316, 14 Pac. Rep. 20.

2. In support of the second ground of demurrer it is claimed that the transactions in regard to the land and cattle were entirely distinct, and involved different facts, and that they constituted two distinct causes of action, which should have been separately stated; but as we read the complaint it states only one cause of action, namely, for an accounting as to moneys received by defendant and in part held by him in trust for plaintiff. The money received constituted in defendant's hands a single fund, though derived from sales of real and personal property, and received at different times.

3. The third ground of demurrer seems to be the one mainly relied upon as justifying the ruling of the court, and it is very elaborately discussed by counsel. The Code provides that an action for relief on the ground of fraud or mistake must be commenced within three years, but the cause of action in such case is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Section 338, subd. 4, Code Civil Proc. Was the cause of action in this case saved from the bar of the statute by this section? Counsel for respondent earnestly contend that it was not, for several reasons: (*a*) It is urged that the action was not one for relief on the ground of fraud. It is true, the action was for an accounting, but the grievance complained of was that defendant knowingly received and held moneys in trust for plaintiff, and appropriated the same to his own use, and at all times fraudulently concealed from plaintiff the fact that he had ever received or held any such moneys or any money in which plaintiff had

any interest. It seems to us, therefore, that the averments make a case of the class provided for in the section of the Code above cited. (*b*) It is urged that the averments respecting the discovery of the fraud are wholly insufficient. It is said that a party seeking to avoid the bar of the statute on account of fraud must show that he used due diligence to detect it, and, if he made any particular discovery, should state when it was made, what it was, how it was made, and why it was not made sooner; and, further, that one will be presumed to have known whatever with reasonable diligence he might have ascertained concerning the fraud of which he complains. The foregoing propositions seem to be well supported by the authorities, (Wood v Carpenter, 101 U. S. 140; Badger v. Badger, 2 Wall. 94; Hecht v. Slaney, 72 Cal. 367, 14 Pac. Rep. 88;) and the question is whether or not, in view of them, the averments of the complaint are sufficient. It must be observed that the relations of the parties were such as would naturally inspire trust and confidence on the part of the plaintiff in the defendant. The defendant was plaintiff's step-father and guardian, and brought him up in his own family, and as his own son. Plaintiff always, up to the time of the rupture in 1885, placed implicit confidence in whatever defendant told him, and never doubted its truth. He had no knowledge, and no reason to suspect, that a fraud was being practiced upon him. There was nothing, therefore, to put him upon inquiry; and, under such circumstances, we do not see how it can be said that he failed to use due diligence to detect the fraud, or how he can be presumed to have known anything concerning it. The complaint does state, we think, when the discovery was made, and what it was, and how it was made, and why it was not made sooner. It is claimed, however, that the averments as to the discovery were of mere conclusions of law, and not of the facts. It is true that pleadings should state the ultimate facts, and not the probative facts, or conclusions of law; but what are ultimate facts and what conclusions of law are often mixed and uncertain questions. Levins v. Rovegno, 71 Cal. 273, 12 Pac. Rep. 161; Turner v. White, 73 Cal. 299, 14 Pac. Rep. 794. The same averment may be of a fact or of a conclusion of law according to the context. We think the averments here complained of should be held sufficient as statements of fact. (*c*) Conceding all that has been said to be true, it is further contended that no cause of action against the defendant respecting the two ranchos or their proceeds is shown. The argument on this point, briefly stated, is as follows: According to the averments of the complaint, plaintiff's father purchased the ranchos with his own funds; but at his request the conveyances thereof were made to his wife, who thereafter held the same as community property. Being community property, the title to the ranchos, under the Mexican law then in force, upon the death of the husband immediately descended to and became vested in the widow and children, without the necessity of any administration. De La Guerra v. Packard, 17 Cal. 183; Scott v. Ward, 13 Cal. 459. The plaintiff and his mother became tenants in common of the property, and were such at the time of the alleged sale thereof. The mother had no power to sell or convey the plaintiff's interest, and there is nothing to show that she attempted to do so; and, if she did, the deeds did not pass or affect his interest in any way. He could afterwards have asserted his right thereto just as well as if no deeds had been made, and possibly could do so now. The purchase money received was therefore the money of the mother, in which the plaintiff had no interest. This argument seems to be sound, and the conclusions reached correct. A similar claim is made in regard to the cattle and their proceeds, but we do not think it can be sustained. The defendant sold all the cattle, and received all of the purchase money, and converted the same to his own use. As to the plaintiff's interest, the sale was a conversion, but he could waive the tort, and sue in *assumpsit* for his share of the purchase money, or, under the circumstances shown here, for an accounting. Pom. Rem. § 110.

4. We see nothing in the fourth ground of demurrer calling for special consideration. As we read the complaint, it is not ambiguous, unintelligible, or uncertain in any material respect. We advise that the judgment be reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

We concur: TEMPLE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

(91 Cal. 555)

MARRINER v. DENNISON. (No. 14,154.)[1]

(*Supreme Court of California*. Oct. 20, 1891.)

BREACH OF CONTRACT—EXCESSIVE DAMAGES—EVIDENCE—GAMBLING VERDICT.

1. Defendant contracted to convey 6 lots to plaintiff, and induced him to accept a contract for other lots in lieu thereof. Plaintiff rescinded the latter contract, and sued for breach of the first contract. To show the value of the first lots, a witness for plaintiff testified that he had bargained for the lots at $6,500 before the contract with plaintiff, but that he did not think them worth over $500 each. Plaintiff's testimony showed that lots similar to those in the second contract had been sold for from $800 to $1,000 each. *Held*, that a verdict for plaintiff for $2,500 was unauthorized.

2. Plaintiff offered in evidence deeds of certain land which he was to convey to defendant in exchange for the lots named in the former contract, which deeds he claimed to have tendered to defendant. The deeds contained restrictions as to defendant's right to use the land. Plaintiff's contract with defendant to convey the property was silent as to any restrictions. *Held*, that the deeds were insufficient to show compliance with the contract.

3. Where the jurors placed different amounts upon their ballots, and added them together, and divided the sum by 12, the verdict was not reached by a resort to the determination of chance, and therefore it could not be impeached by affidavits of the jurors. Hunt v. Elliott, (Cal.) 20 Pac. Rep. 132, followed.

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[1] Opinion modified on rehearing, 27 Pac. Rep. 1091.

Department 1. Commissioners' decision. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Jacob U. Marriner against Gilbert L. Dennison to recover damages for a breach of a contract to convey land. Verdict and judgment for plaintiff. Defendant moved for a new trial, which was denied, and from the order denying the motion he appeals. Reversed.

E. C. Bowers, for appellant. *M. C. Hester* and *Judson, Hester & Woods*, for respondent.

BELCHER, C. This is the second appeal in this case. The decision on the first appeal is reported in 78 Cal. 202, 20 Pac. Rep. 386. After the case was sent back for a new trial, the pleadings were amended so as to conform to that decision. The case was then tried before a jury, and the result was a verdict and judgment in favor of the plaintiff for $2,500 damages. The defendant moved for a new trial, which was denied, and has appealed from the order denying his motion. We think a new trial should have been granted.

1. It was held on the former appeal that the plaintiff could not rescind the contract of March 14, 1887, and recover for a breach of the contract of January 13, 1887, even though he was induced to make the change by fraud, unless he was damaged by the change; and it was said: "It was necessary for the plaintiff to allege and prove that the last property contracted for was of less value than the first, or other facts sufficient to show that he was damaged by the making of the last contract." And on the new trial the court instructed the jury that they could not find for the plaintiff, unless he had proved by a preponderance of evidence that he was damaged by the agreement to take the lots last contracted for in lieu of those first contracted for. It is clear, we think, that the plaintiff did not prove by a preponderance of evidence, if at all, that he was damaged by the making of the last contract in the sum of $2,500, or in any appreciable sum, and if this be so, the damages allowed should at most have been only nominal. To prove the value of the six McGee lots which were to be conveyed to him under the first contract, plaintiff called as a witness one Scott, who testified that on the 9th of March, 1887, defendant executed a written agreement to sell him the Dennison subdivision of the McGee tract in Pasadena, containing 10 acres, and subdivided into 60 lots; that he was to pay for the 6 lots in question in the aggregate $6,500; that in making the purchase he was acting for other parties who represented the Santa Fe Railroad Company, and that the company wanted the property for railroad purposes. He then went on to testify that he did not think the lots were worth what he agreed to give, and told the parties he was buying for, at the time, that they were wild to give any such price for the property, that it was not worth half of it, that the inside lots were really worth about $400, and the corner lots about $450. Plaintiff also called another witness, one Evans, who testified that he was in the real-estate business in Pasadena in 1887, and knew the lots, and that he considered them worth in March, 1887, $400 to $500 per lot. The above was all the testimony introduced by the plaintiff as to the value of the lots. The defendant called two witnesses, Wilson and Phillips, to show the value of the McGee lots. Wilson testified that he was in the real-estate business at Pasadena, and knew the lots, and that they were worth in March, 1887, about $400 to $500 each; and Phillips testified that he owned adjoining land, and that in March, 1887, the inside lots were worth $300, and the corner lots $450. The respondent claims that the price at which Scott agreed to take the lots is controlling as to their value, but, in view of the other testimony upon the subject, we do not think this can be so. It is true that the price at which a thing is sold may be shown as tending to prove its value, but property is sometimes sold for more and sometimes for less than its market value, and it is the market value—that is, the price at which an equivalent thing might be bought—that is controlling in a case like this. Civil Code, § 3354. The plaintiff wanted the lots to build a residence on for himself, and the evidence shows that he could have purchased as good, if not better, lots for that purpose, in the immediate vicinity, for much less than Scott agreed to pay. As to the value of the lots in the Banta tract, on Fair Oaks avenue, which the plaintiff was to take under the second contract, the decided preponderance of the evidence was that they were in March, 1887, worth much more than the McGee lots. The plaintiff himself testified that he sold some lots on that avenue in July, 1887, for $800 each, and one for $1,000. Under the showing made, the verdict seems to have been clearly contrary to the instructions of the court, and should have been set aside for that reason.

2. By the first contract the plaintiff agreed to convey to the defendant, in exchange for the McGee lots, certain real property in California, "and lot No. 52 of building lots in Malden, Mass., bought of E. L. Converse, size of lot 6,440 square feet, viz., 57½ by 115 deep." Plaintiff offered in evidence two deeds of the Malden lot, one to his wife, and the other executed by himself and wife to the defendant, and he proved that he tendered the last-named deed to the defendant under the contract, and the latter refused to receive it. Both the deeds described the lot as bounded on one side on Converse avenue, and then stated that "said lot is sold subject to the following restrictions, to-wit: That no building shall ever be erected within 20 feet of said Converse avenue, and no building shall ever be erected or used as a livery stable, slaughter-house, currier-shop, soap factory, or for any offensive or nauseous purpose or use, on any part of said lot and premises." The contract required the plaintiff to convey the lot, and was silent as to any restrictions or limitations in regard to its use. The defendant had a right to a clear deed conveying an unincumbered and unrestricted title. The deed offered to defendant evidently did not convey such title, and

therefore did not meet the requirements of the contract. It does not appear what objections to the deed were made when it was tendered, the only evidence being that on the part of the plaintiff, that defendant refused to accept it. But the burden was upon the plaintiff to show that he had complied with his contract, and this could only be done by proof that he had tendered a proper deed, or of other facts from which it could be seen that defendant waived the objection now urged.

3. One of the grounds on which the defendant asked for a new trial was that more than one of the jurors trying the cause were induced to assent to the verdict by a resort to the determination of chance. At the hearing of the motion the defendant was permitted to read the affidavits of two of the jurors, one of whom was the foreman of the jury. The affidavits stated that after the jury retired to the jury-room a foreman was elected, and "a ballot was then taken to see how the jury stood, which resulted in four for the defendant and eight for the plaintiff. It was then proposed by a member of the jury that another ballot be taken, and for each juror to write on this ballot the amount he was in favor of giving the plaintiff as damages; but before that motion was put to the vote of the jury it was moved to amend that resolution (motion) as follows: That the amounts voted on the ballots be added together, and the aggregate be divided by twelve, and that the result be the verdict of the jury. This motion, as amended, was voted on, and carried by a majority of the jury. The jury took the vote as described by the motion, each voting a ballot with the amount written thereon that he was in favor of giving the plaintiff. Some voted for the defendant, one voted $1, others, various amounts, and one voted $10,000. The amounts voted were all added together, and divided by twelve, which made $2,600. One member of the jury then moved that $100 be knocked off, making the amount $2,500, which was carried by a majority of the jury, and they then returned that amount to the court as their verdict." There were no counter-affidavits, and we may assume, therefore, that the affidavits read stated the facts correctly. Under these facts, the verdict was undoubtedly vicious, and ought to be set aside. The method of finding it and the result were determined by a majority of the jurors, and it does not appear that three-fourths of them ever assented to it. Moreover, the complaint asked damages only in the sum of $3,500, and it appears that one of the jurors put down $10,000, and that sum was used to increase the average. The only question is, can the affidavits of jurors be used to impeach such a verdict? It seems to be settled law in this state that a verdict found as this one is shown to have been, is not reached "by a resort to the determination of chance," and hence that the affidavits of jurors cannot be received to show the facts. See Turner v. Tuolumne Co. W. Co., 25 Cal. 398; Boyce v. Stage Co., 25 Cal. 475; Hunt v. Elliott, 77 Cal. 588, 20 Pac. Rep. 132. These cases we consider controlling, and the contention of appellant on this point cannot, therefore, be sustained. We advise that the order appealed from be reversed, and the cause remanded for a new trial.

We concur: Temple, C.; Vanclief, C

Per Curiam. For the reasons given in the foregoing opinion the order appealed from is reversed, and the cause remanded for a new trial.

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91 Cal. 288

Etchepare v. Aguirre. (No. 14,298.)

(*Supreme Court of California.* Oct. 19, 1891.)

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

For former report, see 27 Pac. Rep. 668.

M. V. Biscailuz and *W. I. Foley*, for appellant. *W. J. Williams*, for respondent.

Per Curiam. A verbal error having, by inadvertence, been made in the judgment heretofore rendered herein, it is ordered that the said judgment be modified by striking therefrom the words, "But the judgment is reversed, and the court below is directed to enter a judgment on the verdict in favor of the plaintiff, in substantial accordance with this opinion," and inserting in lieu thereof the following viz.: "But the court below is directed to set aside its judgment entered in said cause, and to enter judgment upon the verdict therein in favor of the defendant, in substantial accordance with the foregoing opinion."

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91 Cal. 549

City of San Luis Obispo *et al.* v. Haskin, City Treasurer. (No. 14,755.)

(*Supreme Court of California.* Oct. 20, 1891.)

Municipal Bonds—Election Notice.

Act Cal. March 19, 1889, relative to the issuance of bonds for municipal improvements, provides (section 3) that the board of trustees shall give notice of proposed improvements to the electors, stating "the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of levy to be made for the payment thereof." *Held*, that where the board passed and published ordinances determining that it was necessary to make certain municipal improvements, estimating the exact cost of each, and providing that each should be voted on separately, a notice of a special election, which specified the number and amount of bonds to be issued for each purpose, and the rate of interest, and stated that one-twentieth should be payable each year till all was paid, and that the tax levy for each year would be one-twentieth of the amount that might be voted, was sufficiently definite. People v. Baker, (Cal.) 23 Pac. Rep. 364, distinguished.

In bank.

Original petition for writ of mandate by the city of San Luis Obispo and another against Haskin, city treasurer, to compel the issuance of bonds for municipal improvements. Granted.

Wm. Shipsey, for petitioners.

Paterson, J. It is admitted that the plaintiffs are entitled to the writ prayed for, if the notice required by section 3 of the act of March 19, 1889, and published by order of the board of trustees, sufficiently states the amount of tax levy which is to be made for the payment of the bonds and interest for each year during the existence of the debt. The act provides that the notice shall state "the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of tax levy to be made for the payment thereof." Amend. Codes 1889, p. 400. The board passed and published ordinances determining that it was necessary to make certain municipal improvements, and estimated therein the cost thereof as follows: Bridges, $14,628.50; grading, filling, etc., of Higuera street, $16,929.73; widening Chorro street, $2,500; Pacific street, $1,500; sewers, $9,431.77; total, $45,000; and calling a special election submitting to the qualified voters of the city the question of incurring an indebtedness, and bonding the city for said improvements. The latter ordinance provided that each proposition above stated should be voted on separately. Thereafter a notice was published calling a special election to determine whether an indebtedness should be incurred in the amounts and for the purposes above set forth. The notice specified that the number of bonds to be issued was as follows: For said bridges, 20 bonds, of $731.43 each; for improving Higuera street, 20 bonds, of $847 each; improving Chorro street, 20 bonds, of $125 each; improving Pacific street, 20 bonds, of $75 each; for sewers, 20 bonds, of $471.60. It was further stated in the notice that the bonds should be payable as follows: "One-twentieth part of the whole amount of indebtedness shall be paid each year till all is paid, payable on a day and place to be hereafter fixed by the city council, together with interest on all sums unpaid at such date. The rate of interest to be paid on said debt will be five per cent. per annum; and the amount of the tax levy for payment of such bonds and interest for each year during the existence of said debt will be one-twentieth of the amount that may be voted and created as above specified, and sufficient to pay the yearly interest as above set forth." This notice was as definite as it could be made under the circumstances. The trustees could not determine with certainty the amount of tax levy necessary to be made for the payment of the indebtedness until the result of the election on the five separate propositions submitted to the voters was known. The best it could do was to fix the proportion of the indebtedness which should be paid each year. The notice gave to each voter all the information which could be reasonably required under the circumstances. It gave him sufficient *data* upon which to calculate with certainty the amount of tax levy which would be required each year to pay the indebtedness which he proposed by his vote to incur. The case of People v. Baker, 83 Cal. 149, 23 Pac. Rep. 1112, does not support the defendant's contention. In that case it appears that the proposed improvements consisted of bridges, highways, a jail, a poor-house, and a hospital, but the notice failed to specify how much money the supervisors proposed to devote to each improvement. The bonds were held to be invalid for this reason. It is ordered that the writ issue as prayed for.

We concur: Beatty, C. J.; Harrison, J.; De Haven, J.; Garoutte, J.; Sharpstein J.

91 Cal. 563

People v. Scott. (No. 20,842.)

(*Supreme Court of California.* Oct. 29, 1891.)

Appeal in Criminal Cases—Excluding Exceptions from Record—Harmless Error.

On a trial for assault with intent to murder, the trial court excluded a question put to the person assaulted, "Did you ever threaten this man's life?" and an exception was taken, but afterwards the court allowed the question, and in preparing the bill of exceptions excluded the exception. *Held*, that defendant's application to the supreme court for leave to prove the exception would be denied, since, though the first ruling and the exception should have been inserted, no real injustice was done to defendant.

In bank. Appeal from superior court, Napa county; E. D. Ham, Judge.

This is an application to the supreme court by J. W. Scott, who was convicted of assault with intent to murder, for leave to prove certain exceptions. Dismissed.

Chas. S. Harker, for appellant. *Henry C. Gesford*, for the People.

McFarland, J. This is an application by appellant to this court for leave to prove certain exceptions alleged to have been taken by him at the trial, and which, it is alleged, the judge of the trial court refused to allow in the bill of exceptions settled by him. The alleged crime for which petitioner was tried was an assault with intent to commit murder upon the person of one Vaughn; and it is averred in the petition, first, that upon cross-examination petitioner's counsel asked Vaughn this question, "Did you ever threaten this man's life?" that counsel for the people objected to the question; that the objection was sustained, and that petitioner excepted to the ruling; and that the court refused to put said exception into the bill, but, on the contrary, settled said bill so as to show that said objection was overruled. It appears, however, by the answer of the judge and the admissions of the parties on the argument of this petition, that the facts about the matter were these: The judge did first sustain said objection, but soon afterwards, becoming satisfied that his ruling was wrong, he reversed it, and allowed the question, and others of a substantially similar character, to be asked. The presiding judge would no doubt have been more strictly accurate if he had complied with petitioner's motion, and have put into the bill, first his ruling sustaining the objection, and then his subsequent ruling denying it, (and he would have saved thereby a good deal of trouble;) but, conceding everything petitioner contends for, no real injustice was done to him, and the matter is not of sufficient importance to require further action in the premises. As to the other matters set forth in the petition, it is not averred that the court refused to allow the exceptions mentioned. It merely appears that there are slight differences between the presiding judge and petitioner as to the precise circumstances under which the exceptions were taken, which do not seem to us to be material. The prayer of the petition is denied, and the proceeding dismissed.

We concur: HARRISON, J.; GAROUTTE, J.; DE HAVEN, J., SHARPSTEIN, J.; PATERSON, J.

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91 Cal. 580

CAVANAUGH v. JACKSON. (No. 14,256.)

(*Supreme Court of California.* Oct. 31, 1891.)

BOUNDARIES — ESTABLISHMENT BY AGREEMENT—RATIFICATION.

1. The fact that a purchaser of land, holding and claiming ownership thereof, has not yet paid the consideration therefor, does not invalidate a parol agreement made by him with an adjoining land-owner fixing the boundaries between their land.

2. Where fences were erected by the parties on the dividing line thus determined, and the adjoining land-owner paid taxes on all the land occupied by him, the acquiescence of said purchaser in the boundaries for six years, and his failure to claim title to any of the land held by his neighbor, constitute a ratification of the agreement sufficient to take it out of the statute of frauds.

Department 1. Appeal from superior court, Siskiyou county; EDWIN SHEARER, Judge.

Action by Cavanaugh against Jackson. Judgment for plaintiff. Defendant appeals. Reversed.

John V. Brown and *Jas. F. Farraher*, for appellant. *H. B. Gillis* and *H. B. Warren*, for respondent.

PATERSON, J. The record shows that in December, 1880, and long prior thereto, the plaintiff was in possession of the Coats place, which he now owns, and the defendant, Jackson, was in possession of an adjoining ranch, known as the "Beaughan Place." A dispute having arisen as to the boundary line between the two ranches, a surveyor was employed by plaintiff and defendant to make a survey, and establish the true line. Such survey was made in December, 1880. The plaintiff testified as follows: "Jackson had this land fenced up for a long time prior to the 1st day of September, 1886,—may be four or five years before that date,—along with other lands of his. * * * Jackson and I established a line of fence between the Coats place, which I now own, and the Beaughan place, now owned by Jackson. We had the land surveyed from the center of section 28, west to the road. We established the line on the quarter section line, and when we established the line Jackson moved his fence out to the road, and enclosed this strip in controversy. That strip is narrower at the west end than at the east end. I bought the Coats place from Mr. Orr, but the deed did not include this strip, and Mr. Warren discovered that I had no deed, and that I must have a deed. I have exercised no acts of ownership over this strip of land. * * * I had A. M. Jones survey this tract in about 1872. That strip is one hundred yards wider at the east end than at the west end. Dan Sullivan assisted Davidson in making the last survey. * * * Jackson and I put up our fences on the line as determined by Mr. Davidson. I did not object to Mr. Jackson putting up fence on line from center of section 28 west to the road, and inclosing this tract in dispute. He fenced it right after the survey made by Mr. Davidson. That line never was inclosed, except a small portion thereof inclosed by appellant, until Mr. Jackson fenced it after the Davidson survey. We built the fences on the lines agreed on. We ran one line west from center of section 28 to the road, and on this line Mr. Jackson was to build his fence, and I was to build as much on the north and south line as he was to build on the east and west line,—we were to and did build equal portions of said fence. Jackson moved out his fence, and inclosed this strip of land. * * * I never asked Mr. Jackson for the land, nor to be let into possession of it." The defendant testified that he had occupied and used the land exclusively since 1880, and paid taxes on it ever since 1878, when he paid his proportion for the Whitmire patent for the N. W. ¼ of section 28; that he took all the wood he needed off the land in controversy since the establishment of the boundary line, and had prohibited others from cutting wood there for eight or ten years past. The assessment rolls offered in evidence showed that the land in controversy had been assessed to defendant every year from 1878 to 1887, and that defendant had regularly paid said taxes. The defendant testified that in 1872 a survey was made by one Jones on behalf of Mr. Wholey, Mr. Cavanaugh, and himself, the object being to determine how much Mr. Wholey and defendant were each to pay for the patent for the land granted by the state to Whitmire. In rebuttal, the plaintiff proved by the records of the assessor and tax collector that he had had the lands in controversy assessed to him for the years 1885 and 1887, and had paid the tax for the year 1885.

We think that on this evidence the defendant was entitled to judgment. The parties entered into an express agreement fixing the dividing line between their lands; fences were built upon the line so established; and the parties have ever since acquiesced therein. It is well settled that where the owners of contiguous lots by parol agreement mutually establish a dividing line, and thereafter use and occupy their respective tracts according to it for any period of time, such agreement is not within the statute of frauds, and it cannot afterwards be controverted by the parties or their successors in interest. White v. Spreckels, 75 Cal. 610, 17 Pac. Rep. 715; Helm v. Wilson, 76 Cal. 485, 18 Pac. Rep. 604; Blair v. Smith, 16 Mo. 273; Orr v. Hadley, 36 N. H. 575; Laverty v. Moore, 32 Barb. 347; Houston v. Sneed, 15 Tex. 307. It is the policy of the law to give stability to such an agreement, because it is the most satisfactory way of determining the true boundary, and tends to prevent litigation. Houston v. Matthews, 1 Yerg. 118; Fisher v. Bennehoff, 121 Ill. 435, 13 N. E. Rep. 150.

It is claimed by respondent that, as the payment was made several years prior to the time when he received his deed from Coats for the land in controversy, it is not binding upon him, but the evidence shows that the plaintiff was in possession of the Coats place, and claiming to be the owner up to the line established. The evident meaning of his testimony is that he had paid for the land, but had failed to secure the legal title thereto. It has been held that such an agreement, made by an occupant of public land, was binding upon him after he acquired legal title from the government. Jordan v. Deaton, 23 Ark. 704. See, also, Orr v. Hadley, supra; Silvarer v. Hansen, 77 Cal. 586, 20 Pac. Rep. 136. In many states it is held that, in the absence of any express agreement, where the boundary line has been recognized, and parties have used and occupied according to it for a considerable period, although less than the period which would be a bar under the statute of limitations, they and all claiming under them will be estopped from afterwards claiming a different boundary. Blair v. Smith, supra; Smith v. Hamilton, 20 Mich. 438.

The agreement establishing a dividing line between the plaintiff and the defendant was made in 1881. Coats conveyed to Cavanaugh, April 30, 1884. From the time the agreement was made until the commencement of this action on April 15, 1887, plaintiff never exercised any acts of ownership over the land in controversy. This long-continued acquiescence by the plaintiff in the line previously established we think is a ratification of the agreement made in 1881. Judgment and order reversed, and cause remanded for a new trial.

We concur: HARRISON, J; GAROUTTE, J.

(91 Cal. 584)

ELTZROTH v. RYAN *et al.* (No. 14,281.)

(*Supreme Court of California.* Oct. 31, 1891.)

PRACTICE—SETTING CASE FOR TRIAL—WAIVER OF FINDINGS—CONTINUANCE.

1. A rule of the trial court provides "that on any Monday either party may on motion have, without notice, any case set down for trial, * * * and for such purpose the opposite party is deemed to have received notice that such action would be taken." *Held*, where a case was on the 4th day of the month set for trial on the 13th, and defendant's attorney received notice of such action on the 7th, a new trial will not be granted on the ground that defendant's attorney did not have sufficient notice that the case had been set for trial.

2. Code Civil Proc. Cal. § 634, provides that "findings of fact may be waived by the several parties to an issue of fact (1) by failing to appear at the trial," etc. *Held*, where defendant, by attorney, appeared specially, to move for a continuance of the case, and, on the motion being denied, withdrew from the trial, defendant thereby waived the findings of fact.

3. Under Code Civil Proc. Cal. § 1029, which provides that when for any reason a postponement of a trial is asked the court may, in its discretion, make the payment of costs occasioned by such continuance a condition of granting the same, where defendant refused to pay the costs the denial of the motion for a continuance is not error.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action to quiet title by David Eltzroth against Patrick Ryan and J. H. Wythe. From a judgment in favor of plaintiff defendants appeal. Affirmed.

Welles Whitmore and *David Stoddart*, for appellants. *Lamberson & Taylor*, for respondent.

BELCHER, C. The plaintiff brought this action against Patrick Ryan and J. H. Wythe to quiet his title to a quarter section of land in Tulare county. The defendants answered separately. The case as against Wythe was tried, and judgment rendered for the plaintiff. From that judgment and an order refusing a new trial an appeal was taken to this court, where the judgment and order were affirmed. 89 Cal. 135, 26 Pac. Rep. 647. The case as against Ryan was, on the 4th day of March, 1889, set down for trial on the 13th day of that month. Ryan resided at Portland, Or., and his attorney at Oakland, in this state. The attorney received notice on the 7th of the month that the case had been set for trial on the 13th, and immediately telegraphed his client to that effect. The defendant started for Oakland, and arrived there on the 10th, which was Sunday. On the next day he saw his attorney, and then for the first time learned that he was too sick to attend the trial at the time set for it. He advised with his attorney as to the best course to pursue, and attempted to procure other counsel in Oakland to go with him to Visalia, and try the case, but was unable to do so. The attorney and his attending physician then made affidavits showing the attorney's sickness and inability to be present at the trial, and that there was not sufficient time to engage other counsel to conduct it, and also that the attorney was familiar with all the facts of the case, and believed that his client had a meritorious defense. These affidavits were given to defendant, and he then started for Visalia, where he arrived on the 12th. Immediately on his arrival he consulted E. O. Larkins, an attorney at law residing there, and engaged him to appear in court the next day and move for a continuance. When the case was called on the 13th Larkins appeared and moved for a continuance on the affidavits which defendant had brought from Oakland. The court asked the attorney if his client was prepared to pay the costs of the continuance, and he answered that he was not. The court then denied the motion, and Larkins withdrew from the case. The trial was thereupon commenced, and, after the introduction of oral and documentary evidence by the plaintiff, the cause was submitted, and judgment rendered in his favor, but no findings were filed. The defendant moved for a new trial upon a bill of exceptions and upon new affidavits, made by himself and his attorney, setting up, among other things, that after defendant arrived in Visalia he had not sufficient time to procure the attendance of his witnesses or familiarize Larkins or any attorney with the facts of the case. The court denied the motion, and the defendant appeals from the judgment and order. All the points urged for a reversal of the judgment except three were decided against appellant's contention on Wythe's appeal. The three remaining points are: *First*, that defendant's attorney had no sufficient notice that the case had been set for trial; *second*, that the court erred in not making and filing findings of fact and its conclusions of law therefrom; and, *third*, that the court erred in not granting defendant's motion for a continuance.

1. It is claimed that the attorney for defendant was notified that the case had been set out for trial by a letter written by the attorney for plaintiff, and sent by mail from Visalia to Oakland; that, the distance between the two places being 260 miles, he was entitled, under section 1013 of the Code of Civil Procedure, to 21 days' notice, commencing with the time the letter was deposited in the post-office at Visalia, before a legal trial could be had; and that, no such notice having been given, defendant was deprived of a statutory right, and thereby prevented from having a fair trial. We do not think this position can be maintained. It does not appear from the record how or by whom the attorney was notified that the case had been set. He only states in his affidavit that he received the notice on or about March 7, 1889. But, however the notice may have been given, the section of the Code cited has nothing to do with it. No notice of the setting of a case for trial is required by statute. One having a lawsuit pending must, by himself or his attorney, whether they reside in the county where the case is or elsewhere, watch its progress, and he can only be heard to complain that a proceeding is taken against him in his absence when it is taken through his mistake, inadvertence, surprise, or excusable neglect. Section 473, Code Civil Proc. Ordinarily the time when demurrers and motions may be heard and cases set down for trial is regulated by rules of court; and in the court below there seems to have been a rule reading as follows: "It is by the court ordered that on any Monday either party may on motion have, without notice, any case set down for trial, and dispose of any motion on file to settle the pleadings and dispose of a demurrer which has been on file three days previous to such Mondays; and for any of such purposes the opposite party is deemed to have received notice that such action would be taken."

2. It is contended that findings were not waived, and that, as no findings were filed, the judgment should be reversed; but we think the record conclusively shows that findings were waived. The Code (section 634, Code Civil Proc.) provides: "Findings of fact may be waived by the several parties to an issue of fact (1) by failing to appear at the trial." It appears that Larkins appeared only for the special purpose of moving for a short postponement of the trial, and that, when his motion was denied, he withdrew from the case. And the judgment recites that the cause came on regularly for trial, the plaintiff appearing by his attorney, "and the said defendant, Patrick Ryan, not appearing either in person or by attorney, and thereby waiving findings in said cause." The judgment cannot, therefore, be reversed on this ground.

3. Every attorney is supposed to examine the facts and study up the law of a case before he enters upon the trial of it. And where, as here, an attorney suddenly becomes sick, and is thereby prevented from being present at the time set for trial, a postponement should undoubtedly be granted for such time, at least, as will enable the litigant to procure another attorney, and have him become familiar with the facts and law which he is expected to present. But under our Code, whenever a postponement of a trial is asked on any ground, the court is authorized, in its discretion, to make the payment of costs occasioned by the postponement a condition of granting the same. Section 1029, Code Civil Proc. This condition was imposed by the court below, and not accepted by the defendant. Under these circumstances, we cannot say that the refusal to grant the postponement was a reversible error. It follows, in our opinion, that the judgment and order should be affirmed, and we so advise.

We concur: TEMPLE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(91 Cal. 589)

Ex parte TUTTLE. (No. 20,835.)

(*Supreme Court of California.* Oct. 31, 1891.)

VALIDITY OF ORDINANCE—POOL-SELLING.

Under Const. Cal. art. 11, §§ 7, 11, authorizing the city and county of San Francisco to make and enforce within its limits such police regulations as are not in conflict with general laws, an ordinance prohibiting the sale of pools, etc., on horse races, "except within the inclosure of a race track where such trial or contest is to take place," is valid, since, though its incidental effect may be to confer special privileges on the owners of race tracks, its purpose is to restrain gambling of the character mentioned, which is a proper subject of police regulation.

In bank. Petition for writ of *habeas corpus* on behalf of ——— Tuttle to the chief of police of San Francisco. Writ discharged, and prisoner remanded.

W. W. Foote, *George A. Knight*, and *Garret W McEnerney*, for petitioner. *Davis Louderback*, for respondent.

DE HAVEN, J. The return to the writ issued herein shows that the petitioner was at the date of its service in the custody of the chief of police of the city and county of San Francisco, under arrest upon a charge of violating an ordinance of that city, which prohibits selling pools on horse-races, or holding money or other thing as a stake upon any wager as to the result of such race, "except within the inclosure of a race track where such trial or contest is to take place." The preamble to this ordinance, which gives the reason for its enactment, is as follows: "Whereas, it has become apparent that the practice of gambling on horse-races has become alarmingly prevalent, and is the cause of debauching many of our boys and young men, rendering them unfit for the honorable occupations of life; and whereas, this discreditable occupation, with all its vicious results, is allowed in all its alluring features to occupy places in the business portion of our city, enticing our youths into habits which ultimately effect their ruin and degradation; and whereas, it is asserted that there is no legislation prohibitory of this nefarious and demoralizing pursuit being conducted and carried on, the present legislature having failed to pass any of the bills introduced for that purpose: Now, therefore, the people of the city and county of San Francisco do ordain," etc. It is claimed by the petitioner that the ordinance is void, for the reason that it in effect gives to the proprietor of the race-course the right to determine who shall enjoy the privilege of indulging in this species of betting, as he has the power to admit and exclude whom he pleases, and only those admitted to the track are permitted to wager upon the result of the race; and, further, that a monopoly is created in favor of such proprietor, as those who desire to engage in the business of pool-selling will necessarily be compelled to pay him for the privilege. We do not think these objections have sufficient force to render the ordinance invalid. Under sections 7 and 11 of article 11 of the constitution of this state the city and county of San Francisco is authorized to make and enforce within its limits such police regulations as are not in conflict with general laws, and the ordinance in question is clearly a police regulation. Any practice or business, the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits of industry, is a legitimate subject for regulation or prohibition by the state; and that gambling, in the various modes in which it is practiced, is thus demoralizing in its tendencies, and therefore an evil which the law may rightfully suppress without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure, is no longer an open question. The measures needful or appropriate to be taken in the exercise of this police power are determined by legislative policy, and for this purpose a wide discretion is committed to the law-making body. Whether it shall entirely prohibit, or only regulate by confining such practices within prescribed limits; whether the law shall apply to every kind of gambling, or only to those games or wagers in which evil effects appear with greatest prominence,—must be determined primarily by the legislative department of the state or of the municipality authorized to exercise this great power, which is conferred for the purpose of securing the public safety and welfare; and unless it clearly appears that a statute or ordinance ostensibly enacted for this purpose has no real or substantial relation to these objects, and that the fundamental rights of the citizen are assailed under the guise of a police regulation, the action of that department is conclusive. Mugler v. State, 123 U. S. 661, 8 Sup. Ct. Rep. 273; In re Jacobs, 98 N. Y. 98; Watertown v. Mayo, 109 Mass. 315; Ex parte Keating, 38 Cal. 702. It is manifest, we think, under this rule, that the ordinance in question cannot be declared invalid. Whatever may be its incidental effect, it is apparent that it is not the object or purpose of the ordinance to confer any special privilege or benefit upon those who own or control race-courses, by giving them the exclusive right to carry on the business, or of selling to others the privilege of pool-selling on horse-races, and therefore we need not stop to consider whether a law or ordinance having only such an effect, or plainly intended to accomplish such an object under the mere pretense of establishing a police regulation, could be upheld. As already stated, a large discretion is vested in the legislative branch of the municipal government, in dealing with questions of this character, in determining not only what games or wagers should be made the subject of legislation, but, if permitted at all, under what regulations they should be allowed to exist. It seems to have been the judgment of that department that the existing evils consequent upon selling pools on horse-races, as declared in the preamble to the ordinance under review, would be sufficiently restrained by confining the business to the inclosure where the race is to be run, and, as the object sought to be accomplished is lawful, and the mode of regulation not clearly inappropriate to effect it, the ordinance is valid. Writ discharged, and prisoner remanded.

We concur: Beatty, C. J.; Garoutte, J.; Sharpstein, J.; Harrison, J.; Paterson, J.

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91 Cal. 606

Banbury v. Arnold. (No. 14,163.)

(*Supreme Court of California*. Nov. 5, 1891.)

Waiver of Error—Contracts by Married Women — Specific Performance — Acknowledgment.

1. The fact that appellant's demurrer to the complaint was overruled by consent does not preclude him from attacking its sufficiency in the appellate court.

2. Under Civil Code Cal. § 1093, providing that no estate in the land of a married woman shall pass except by a grant or instrument acknowledged by her, and section 1187, providing that a conveyance by a married woman has no validity until acknowledged, an unacknowledged contract by a married woman for the sale of her land is void, and cannot be enforced by her, and is not one which she can avoid or not, at her option.

3. The vendor's failure to demand the purchase money, and tender a deed, upon the vendee's default of payment, under a contract for the sale of land, does not estop the vendor from enforcing the contract, although time is of the essence thereof. Wilcoxson v. Stitt, 65 Cal. 596, 4 Pac. Rep. 629, and Smith v. Mohn, 87 Cal. 489, 25 Pac. Rep. 696, followed.

4. The certificate of acknowledgment of a notary public to a conveyance by a married woman is not a part thereof, under Civil Code Cal. § 1188, making the indorsement on the instrument, or attaching thereto a certificate of acknowledgment, a purely ministerial duty, and sections

1093 and 1187, providing that her conveyance, when executed and acknowledged, has the same effect as the deed of an unmarried woman, and is sufficient to pass her estate; and the fact that a married woman's contract for the sale of land, as set out in her complaint, in an action for its enforcement, contains no certificate of acknowledgment, does not make it appear to have been unacknowledged, and control allegations that she "entered into a contract with the defendant," etc., whereby she "agreed to sell to the defendant," etc., and "the said defendant agreed to purchase," etc.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Catherine Banbury against Delos Arnold to enforce a contract for the sale of land. From a judgment for plaintiff, defendant appeals.

Metcalfe & McLachlan and *Delos Arnold*, for appellant. *H. C. Carr, W. S. Wright*, and *John Haynes*, for respondent.

GAROUTTE, J. This action is brought by respondent, who was the vendor in a contract for the sale of certain real estate, to enforce specific performance of the contract on the part of the appellant, who was the vendee. There is an appeal by defendant from the judgment. A copy of the contract is attached to the complaint, and made part of it. The contract shows that the plaintiff was a married woman and the wife of T. Banbury at the time she entered into it. There is no certificate of acknowledgment attached thereto, and no express allegation in the complaint that it was acknowledged. For grounds of reversal appellant insists that the complaint does not state facts sufficient to constitute a cause of action. The fact that appellant's demurrer was overruled by consent does not preclude him from attacking the judgment in this court upon the ground that it rests upon a complaint inherently defective, and it is upon the sufficiency of that complaint that the merits of this appeal must be determined. Section 1093 of the Civil Code provides: "No estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner prescribed by sections 1186 and 1191." Section 1187 of the Civil Code provides that a conveyance by a married woman has no validity until acknowledged according to the requirements of section 1186. In the case of Jackson v. Torrence, 83 Cal. 521, 23 Pac. Rep. 695, it was held under these provisions of the Code that specific performance of an unacknowledged executory contract of a married woman to convey her separate real property could not be compelled. In the case at bar, assuming that this contract was not acknowledged, we have a married woman attempting to enforce against the vendee her unacknowledged executory contract for the sale of real estate. As we have seen, the vendee could not have enforced the contract against her, and there is no principle of equity that gives, or should give, her rights under the contract not accorded to the defendant vendee. This principle is clearly declared in Cooper v. Pena, 21 Cal. 412; and in Vassault v. Edwards, 43 Cal. 466, the court said: "There is no exception to the rule, at least none now occurs to us, that the contract, though signed by both parties, will not be specifically executed at the instance of one party, unless performance on his part could also be compelled. The proposition that specific performance of the contract would not be decreed when the party asking its enforcement could not be compelled to perform it was decisive of the case, (referring to Cooper v. Pena,) and upon it the case was in fact decided; and, in our opinion, the decision is sustained by the overwhelming weight of the authorities." Appellant concedes the rule, but insists that this cause is an exception thereto, and similar in principle to those cases which hold that a minor may enforce his contract after arriving at majority, or that a beneficiary may enforce a contract against his trustee although the trustee had no enforceable rights against him. The principles there involved are not analogous. Such contracts for just and proper reasons are made voidable at the option of the infant or beneficiary; but in this state a married woman, in dealing with her separate property, stands upon no such plane, and is hampered in her transactions relating to her property in no such manner. The contract in this case is not one, and certainly should not be construed as one, voidable at plaintiff's option. The consideration actuating the vendee in entering into the contract was her agreement to convey the land to him. Her acknowledgment of the contract was an essential part of the execution of it, (Joseph v. Dougherty, 60 Cal. 360,) and, not being acknowledged, it was not executed; and, the consideration actuating the vendee having totally failed, the contract was absolutely void, and became *nudum pactum* for all purposes.

Appellant contends that time was of the essence of the contract, and that plaintiff did not tender a deed and demand the purchase price until some months subsequent to the date fixed by the contract for final payment, and that, therefore, it will not support the action. While the authorities in this state are not as explicit and uniform upon this question as they should be, yet the true rule is laid down in Wilcoxson v. Stitt, 65 Cal. 596, 4 Pac. Rep. 629, and Smith v. Mohn, 87 Cal. 489, 25 Pac. Rep. 696, and as there found is opposed to appellant's contention in this regard. Respondent insists that it does not appear from the record that the contract was not acknowledged, and, consequently, the judgment must be affirmed. The allegation of the complaint in this regard is: "On the 6th day of May, 1887, the plaintiff entered into a contract with the defendant, whereby the plaintiff agreed to sell to the defendant," etc., "and the said defendant agreed to purchase," etc. In Kays v. Phelan, 19 Cal. 128, in construing a similar allegation of a complaint, the court said: "Upon the allegation of the complaint, the deed must be presumed to have been such as passed the estate of the plaintiff in the premises." Appellant concedes this principle of law, but says that a copy of the contract is made part of the complaint, and controls the allegations thereof as to its contents, and it appears therefrom that the certificate of acknowledgment was not attached, and that, therefore, it affirmatively appears that the contract was not acknowledged. The proper solution of this question depends upon the fact as to whether or not the certificate of acknowledgment of a notary public to a conveyance of a married woman is a part of the conveyance. If the certificate of acknowledgment is no part of the conveyance, then the absence of such certificate upon the copy of the contract attached to the complaint would in no way affirmatively indicate that the contract was not executed and acknowledged according to law, and the allegation of the complaint heretofore quoted would be quite sufficient to show such to be the fact. Prior to the adoption of the Codes, under a line of authorities cited in Leonis v. Lazzarovich, 55 Cal. 52, it would appear that the certificate of acknowledgment of a married woman was an essential part of the execution of her deed, and even in that case, though not necessary to its determination, there is found language supporting such views. In Wedel v. Herman, 59 Cal. 511, this very question was under discussion; and, while the case may not be deemed authority by reason of the remaining justices of the department simply concurring in the judgment, yet the views there expressed by Justice McKee seem to indicate the true rule. He said: "But execution, acknowledgment, and certification of acknowledgment were no longer necessary to the validity of her conveyance. It was sufficient to pass her estate if she executed and acknowledged a conveyance thereof according to the requirements of the Code. Section 1093, Civil Code. When thus executed and acknowledged, her conveyance had the same legal effect as the deed of a *feme sole*. Section 1187, Id. Therefore the certificate of acknowledgment is not an essential part of her conveyance. That, under the Code, is regarded simply as record proof of the fact of acknowledgment. When acknowledgment has been made according to law, before an officer qualified by law to take it, the party making it has done all that the law requires to make the instrument her act and deed. Her deed thus executed and acknowledged may be valid, though defectively certified. The embodiment of the fact of acknowledgment in the form of the certificate prescribed by law devolves upon the officer who has taken the proof of it, and not upon the party making it." Under section 1188 of the Civil Code, the duty of the officer in indorsing upon the instrument or attaching thereto a certificate of acknowledgment in the form required by law is purely ministerial, and it is impossible to comprehend how the ministerial act of such officer can be construed to form a part of the execution of an instrument by a married woman conveying realty. In Joseph v. Dougherty, 60 Cal. 360, it was held that when an instrument was signed and acknowledged by a married woman it was executed; and in Hutchinson v. Ainsworth, 73 Cal. 458, 15 Pac. Rep. 82, the court clearly indicates that the notary's certificate is no part of the conveyance, where it is said: "The conveyance, then, having been properly executed and acknowledged, (though not properly certified,) was valid as between the parties to it and all the world, except subsequent *bona fide* purchasers," etc. We therefore conclude that the record before us does not show that the contract involved in this case was not acknowledged by the plaintiff. Let the judgment be affirmed.

We concur: Paterson, J.; Harrison, J.

(91 Cal. 600)

FITZGERALD v. NEUSTADT. (No. 14,390.)

(*Supreme Court of California.* Nov. 5, 1891.)

Fraudulent Conveyances—Review of Evidence—Continuance — Action by Assignee of Insolvent.

1. In an action by an assignee to recover goods sold by one G., an insolvent, within 30 days of his insolvency, the complaint alleged "that at the time of the attempted sale, * * * and for a long time prior thereto, the said G. was, and ever since has been, indebted to various persons in large sums of money; and during all said times was, and still is, unable to pay his debts from his own means, as said debts become due, and then was, and still is, an insolvent debtor," etc. *Held*, that the allegations sufficiently showed G.'s financial condition when the sale was made.

2. As there was a conflict in the evidence as to defendant's knowledge of G.'s financial condition when the goods were purchased, the findings of the trial court will not be disturbed.

3. A trial court may, in its discretion, allow parties to amend their pleadings, and such action will be sustained, unless there is gross abuse of discretion.

4. Insolvent Act Cal. § 18, provides that, "in suits prosecuted by an assignee, a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue." *Held* immaterial that the bond of the assignee was only signed by the sureties.

Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by J. E. Fitzgerald, assignee, etc., against Sarah Neustadt, to recover goods sold by an insolvent contrary to rights of creditors. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Justin Jacobs, for appellant. *Rothschild & Ach* and *Brown & Daggett*, for respondent.

Garoutte, J. This is an action of claim and delivery brought by respondent, as assignee in the matter of Joseph Goodman, in insolvency, against appellant, to recover a stock of merchandise of the value of $3,000. Appellant claims title to the goods by virtue of purchase from Goodman made within 30 days next preceding his adjudication in insolvency. This is an appeal from the judgment and order denying her motion for a new trial.

1. The following allegation of the complaint, which was not denied, is sufficient to establish the insolvent's financial condition at the time of the alleged sale to appellant: "That at the time of the attempted sale of his said stock of goods, wares, merchandise, and fixtures above

described, as hereinafter stated, and for a long time prior thereto, the said Joseph Goodman was, and ever since then he has been, indebted to various persons in large sums of money; and during all said times was, and still is, unable to pay his debts from his own means as said debts became due, and then was, and still is, an insolvent debtor," etc.

2. There is a substantial conflict in the testimony as to the appellant's knowledge of Goodman's insolvency at the date of the transfer to her, and the finding in that regard will not be disturbed. Neither do we think the court was not justified in concluding from all the evidence that such transfer was made in violation of the provisions of section 55 of the insolvent act of 1880.

3. There was no error in denying the motion for judgment upon the pleadings, and allowing the plaintiff to amend his complaint. Such action of the lower court will always be sustained, unless there is a gross abuse of discretion.

4. Appellant contends that it was error to admit the bond of the assignee in evidence as against her objections, such bond not being signed by the assignee, but by the sureties only. Section 18 of the insolvent act of this state is as follows: "In suits prosecuted by an assignee, a certified copy of an assignment made to him shall be conclusive evidence of his authority to sue." In this case the assignment to the plaintiff from the county clerk was introduced in evidence, and under this provision of law it seems its validity cannot be questioned by a collateral attack. There is no reason why the legislature had not the power to make such a rule of evidence, and such rule has been recognized and applied in many cases. Cone v. Purcell, 56 N. Y. 649; Herndon v. Howard, 9 Wall. 664; Rogers v. Stevenson, 16 Minn. 68, (Gil. 56;) Dambmann v. White, 48 Cal. 439; Luhrs v. Kelly, 67 Cal. 291, 7 Pac. Rep. 696. In the case of Luhrs v. Kelly the court said: "The creditors and debtor were alone interested in the amount and sufficiency of the bond." We see no error in the record. Let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

(91 Cal. 603)

DAVIS v. BROWNING (No. 14,107.)

(Supreme Court of California. Nov. 5, 1891.)

CLAIMS AGAINST DECEDENT'S ESTATE—SUFFICIENCY OF AFFIDAVIT.

Code Civil Proc. Cal. § 1494, provides that a claim against an estate must be "supported by an affidavit of the claimant, or some one in his behalf, that the amount is justly due; that no payments have been made thereon which are not credited; and that there are no offsets to the same to the knowledge of the affiant," etc. *Held*, that an affidavit to a claim made by an executrix, in her representative capacity, which states "that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of said *claimant*," etc., is sufficient.

Department 1. Appeal from superior court, Colusa county; E. A. BRIDGEFORD, Judge.

Action by Sebia Davis, executrix, etc., against Browning, administrator, etc. From a judgment for plaintiff defendant appeals. Affirmed.

John T. Harrington, for appellant. *H. M. Albery*, for respondent.

HARRISON, J. The only question involved in this appeal is the sufficiency of an affidavit to a claim against the estate of the defendant's intestate. Plaintiff's testator, prior to his death, had prepared and properly verified a claim against said estate, but, having died before its presentation, the plaintiff herein, after her appointment as executrix of his last will and testament, added to the claim that had been so prepared and verified by him her own verification, in the following words, viz.: "State of California, county of Colusa—ss.: Sebia Davis, being first duly sworn, deposes and says that she is the executrix of the estate of Howell Davis, deceased, whose foregoing claim is herewith presented to the administrator of the estate of R. S. Browning, deceased; and Sebia Davis, being duly sworn, says that the amount thereof, to-wit, the sum of fifteen hundred and four and forty-seven one-hundredths dollars, is justly due to the said Sebia Davis, as executrix of the estate of Howell Davis, deceased; that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of said claimant; that the reason said affiant makes this affidavit is that said Howell Davis is dead, and she is executrix of said estate of Howell Davis, deceased. SEBIA DAVIS. Subscribed and sworn to before me this 25th day of June, A. D., 1888. S. M. BISHOP, County Clerk. By S. S. RUSSELL, Depy." The claim, so verified, was presented by her to the defendant, and by him rejected. Suit was thereupon brought upon the demand, and at the trial the above-named claim with the foregoing verification was admitted in evidence against the objection of the defendant. This ruling of the court is now presented as error. It is contended by the appellant that the affidavit of the plaintiff "that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of said *claimant*," is not a sufficient compliance with the statute, (Code Civil Proc. § 1494,) which requires that the claim must be "supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due; that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of the *affiant;*" that, inasmuch as it appears from the affidavit that the "claimant" is the estate of Howell Davis, deceased, and as the affidavit is made by the plaintiff, a denial of the existence of any offsets or credits to the knowledge of the "claimant" is insufficient, but that such denial should be according to the knowledge of the "affiant." We think, however, that in this case the "claimant" and the "affiant" are the same person, and that the use of the word "claimant" instead of "affiant" in the clause referred to in the affidavit is immaterial. It is true that the demand is in behalf of the estate which she represents, and that the moneys that may be received by her will not be her individual property; but she is nevertheless the proper individual to make, and the one who has made, the claim, and to whom the money is to be paid. It would be giving too much attention to mere form and shadow to hold that the affidavit made by her is not a substantial as well as a sufficient compliance with the requirements of the statute. Judgment affirmed.

We concur: **Paterson, J.**; **Garoutte, J.**

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64 Cal. 95

People's Sav. Bank *et al.* v. Hodgdon.[1]

(*Supreme Court of California.* Aug. 28, 1883.)

Ejectment—Title Obtained after Answer Filed—Res Judicata.

Where defendant in ejectment acquires a good title between the time of filing the answer and the judgment, a judgment for plaintiffs does not estop defendant from setting up this after-acquired title in another suit, it not having been set up in the first suit by supplemental answer.

Department 1. Appeal from superior court, Sacramento county.

Suit by the People's Savings Bank and others against Wadsworth Hodgdon to quiet title. Judgment for defendant. Plaintiffs appeal. Reversed.

A. C. Freeman and *Geo. E. Bates*, for appellants. *M. L. G. O'Brien*, *Matt. F. Johnson*, and *T. G. Hodgdon*, for respondent.

Ross, J. Action to quiet title. It is conceded on both sides that one Gass was the owner in fee of the property in controversy on the 29th day of June, 1855. Being such owner, he, on the 17th day of December, 1858, mortgaged the property to Morse and English, trustees, etc. April 21, 1863, a complaint was filed for the foreclosure of the mortgage, and the proceedings were regularly conducted to judgment, under which the property was duly sold by the sheriff on the 6th of July, 1863, to Morse and English, who received a certificate of purchase, which, in the year 1869, they assigned to Laidley, Hickox, and Dale. After the execution of the mortgage to Morse and English, and on the 22d of November, 1860, Gass conveyed the property by deed to Jane Griffin, who thereupon entered into its possession. In the year 1868 the present defendant Hodgdon commenced an action of ejectment against Jane Griffin and other persons to recover the posssesion of a block of land, including the land here in question. In that action Jane Griffin, on the 13th of July, 1869, answered, denying that Hodgdon had any right or title to this land, and alleging herself to be the owner in fee thereof. This answer was filed prior to the execution of the sheriff's deed to Laidley, Hickox, and Dale pursuant to the sale made under the decree of foreclosure of the Gass mortgage. The sheriff's deed was, however, executed subsequently in the same year; that, is to say, in the year 1869. In 1870, Laidley, Hickox, and Dale executed to Jane Griffin a deed conveying the said property to her. In 1872 the ejectment suit of Hodgdon v. Griffin et al. was regularly tried upon its merits, and judgment was rendered therein in favor of Hodgdon, and against the said Griffin and others, for the recovery of the land involved therein, including that here in controversy, under which judgment Jane Griffin was dispossessed, and Hodgdon placed in possession. The single question in the present case is whether Jane Griffin and her co-plaintiff, who claims under her, are concluded by the judgment rendered against her in the ejectment suit. When Hodgdon commenced his action of ejectment, and when Jane Griffin filed her answer therein, the legal title to the property in controversy was in Jane Griffin, because of the deed executed to her by Gass. The title was, however, subject to be divested by the culminating step in the foreclosure proceedings, to-wit, by the execution of the sheriff's deed. The title was so divested in the year 1869. When Laidley, Hickox, and Dale received the deed from the sheriff they took the title as of December 17, 1858, the date of the mortgage by virtue of which the foreclosure proceedings were had. McMillan v. Richards, 9 Cal. 412. They thus became vested with the legal title to the property as of a date anterior to the deed from Gass to Jane Griffin, and anterior to the ejectment suit of Hodgdon; and, not being parties to that suit, they were, of course, unaffected by it. They could, therefore, undoubtedly have asserted their title against both Hodgdon and Jane Griffin. In 1870 they conveyed their title to Jane Griffin. It is true that that conveyance was made intermediate the filing of her answer in the ejectment suit and the trial of the action, but the title she got by the conveyance was not the same title she had when the suit was commenced, and when her answer was filed; for the title she had at those dates was subject to the mortgage, and therefore subject to be, as it was, divested by the execution of the sheriff's deed in pursuance of the sale made by virtue of the decree of foreclosure. The title she got by the deed from Laidley, Hickox, and Dale conveyed to her the absolute fee of the property as of date December 17, 1858, unaffected by any subsequent conveyance or action. This title Jane Griffin did not hold at the time she joined issue in the action brought against her by Hodgdon, but it was acquired by her intermediate that time and the entry of judgment in that case, and was not set up by supplemental answer. It was therefore not involved in that action, and was therefore unaffected by the judgment therein rendered. Valentine v. Mahoney, 37 Cal. 396; Thompson v. McKay, 41 Cal. 221; Bagley v. Ward, 37 Cal. 121. Judgment and order reversed, and cause remanded for a new trial.

McKinstry and McKee, JJ., concurred.

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[1] This case, filed August 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

(64 Cal. 87)

PEOPLE *ex rel.* STODDARD *v.* WILLIAMS.[1]

(*Supreme Court of California.* Aug. 22, 1883.)

COUNTIES—CLASSIFICATION BY CENSUS—JUDICIAL NOTICE.

1. The census referred to in Pol. Code Cal. § 4007, providing that "whenever a new census is taken the counties, on the 1st day of July thereafter, are, by operation of law, classified under such census," is the census taken by the United States.

2. A copy of the census returns or any part thereof, certified to by the superintendent of the census, is admissible in evidence to show the results of the census.

3. The courts will take judicial notice of the results of the census, as shown by the returns.

4. An order of the county board of supervisors consolidating county offices, must, under Pol. Code Cal. §§ 4106, 4107, be published by order of the board, and the publication of the proceedings of the board containing the order, in a newspaper, is insufficient.

In bank. Appeal from superior court, Santa Barbara county.

Action by the people at the relation of Henry Stoddard against A. B. Williams for usurping the office of recorder of Santa Barbara county. Judgment for relator. Defendant appeals. Affirmed.

W. C. Stratton, for appellant. *Jarrett T. Richards* and *Atty. Gen. Marshall*, for respondent.

THORNTON, J. This is an action for alleged usurpation of the office of recorder of Santa Barbara county by defendant Williams. The relator was elected recorder of Santa Barbara county at the election in 1882, and defendant was elected at the same time county clerk of said county. Defendant claims by virtue of his election as county clerk to be *ex officio* recorder. By section 4006 of the Political Code, the counties of this state, for purposes other than for roads and highways, are classified as follows: (1) Those containing 20,000 inhabitants or over constitute the first class; (2) those containing 8,000 inhabitants and under 20,000 are the second class; and (3) those containing less than 8,000 inhabitants constitute the third class. By section 4007 of same Code, "Whenever a new census is taken, the counties, on the 1st day of July next thereafter, are, by operation of law, classified under such census." Each county must have a board of supervisors, consisting of seven members, in counties of the first class, of five members in those of the second class, and of three in those of the third class. Pol. Code, § 4022. Under the provisions of section 4025 of the Political Code, whenever, under the classification above stated, the number of supervisors of any county is either increased or diminished, the board of supervisors must redistrict the county into supervisors' districts, to correspond with the number of supervisors to which it is, under the new classification, entitled. When the number is increased, at the first general election thereafter supervisors must be elected for such new districts in which no supervisors then acting reside.

The sections of the Code heretofore referred to, as well as those hereinafter referred to, were in force when the events occurred out of which the controversy in this case arose. Prior to the 1st day of July, 1881, the county of Santa Barbara was, by operation of law, a county of the second class; and on the 11th day of August, 1882, the board of supervisors thereof passed an order redistricting the county into supervisors' districts, so as to form five such districts, upon the ground that it had become, by an increase of population, a county of the second class, and thus entitled to have five members in its board of supervisors. In making this order, the board acted upon the census taken in 1880 by the authorities of the United States, under the provisions of the act of congress of March 3, 1879, entitled "An act to provide for taking the tenth and subsequent census." The census (the tenth) was to be taken on or for the date of June 1, 1880. Section 1, 20 St. at Large, p. 473. The enumeration to be made under the act of congress was to commence on the first Monday of June, 1880, and be made by enumerators appointed under the act, and it was required of each enumerator to complete the enumeration of his district, and to prepare the returns required by the act to be made, and to forward the same to the supervisor of his district on or before the 1st day of July, 1880; and, in any city having over 10,000 inhabitants under the census of 1870, the enumeration of population was to be taken within two weeks from the first Monday of June. Section 10 of Act. The returns of the enumerators were to be sent to the supervisors of the census, who were to scrutinize the same to see whether they were taken in compliance with law, and to forward the completed returns to the superintendent of the census at Washington city. Sections 2, 3, 5. By the census it appeared from a certificate of the superintendent of the census, which was offered in evidence on the trial, the population of Santa Barbara county was on the 1st day of June, 1880, 9,513, sufficient to raise it to a second-class county. It is argued that the census referred to in section 4007 of the Political Code above quoted is not the census of the United States. But in this contention the counsel for appellant has gone astray. We think it clear the reference is to such census. The census of the United States is a census of each particular state as well as of all the states. The enumeration taken under the act will show the inhabitants of each political division of the state. Section 11. In ordinary parlance, when we speak of a census of the inhabitants of a state or any of its political divisions, we mean the United States census; for that is the only census in this state which is regularly and periodically taken. The board of supervisors had the authority to act on this census, and it did act by authority when it redistricted the county in August, 1882.

It is contended that the court erred in admitting in evidence the certificate of the superintendent above mentioned. We do not think so. The records of this census were under the care and in the custody of that officer, and on common-law principles, as the record could not be taken from his custody, a copy of such census, or any part of it, could be proved by a copy certified by him. But, if this is not so, the court below and this court can take judicial notice of the results of such census, (section 1875, Code Civil Proc.,) and resort for information to appropriate documents of reference, (section 1875, Id.) That the census was complete when the board of supervisors acted on the 11th of August, 1882, and long before that period, we have no doubt. The most conclusive proof of it is found in the act of congress passed February 25, 1882, by which an apportionment of the representatives in congress among the several states under the tenth census was made. St. U. S. 1881–82, p 5. Congress would certainly not have legislated, in so important a matter as the apportionment of representatives among the several states, upon an incomplete census. But it is urged that the relator could not have been legally elected recorder in 1882, for there was no such officer, the office of recorder having been in August, 1880, consolidated with that of county clerk, which consolidation the board of supervisors had authority to make, and defendant had been, at the election in 1882, elected county clerk, by which he became *ex officio* county recorder. Conceding that the board of supervisors had power to consolidate the offices, as contended for, in 1880, still, in order to effect such consolidation, the order passed by the board for such purpose must have been published by order of the board. Sections 4106, 4107, Pol. Code. The publication in a newspaper of the proceedings of the board in which such order appeared was not sufficient. The board made no order for any publication, and therefore the publication above mentioned amounted to nothing, and the consolidation was not effected. Such was the ruling of this court in People v. Bailhache, 52 Cal. 310, and we see no reason to doubt its correctness. Judgment affirmed.

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[1] This case, filed August 22, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

MYRICK, ROSS, MCKEE, and MCKINSTRY, JJ., concurred.

(64 Cal. 99)

BROWN v. BURBANK *et al.*[1]

(*Supreme Court of California.* Aug. 28, 1883.)

CANCELLATION OF DEED—FRAUD—UNDUE INFLUENCE.

Where plaintiff, a girl of 19, who has resided with her grandparents as their ward since she was 9, conveyed to her grandmother all of her property, on the representations of her grandmother that the property really belonged to her grandfather, and that she (the grandmother) would devise it to plaintiff, the conveyance will be set aside for fraud and undue influence.

Department 1. Appeal from superior court, Sacramento county.

Suit by Clara L. Brown against P. D. Burbank and others to annul a conveyance on the ground of fraud. Judgment for defendants. Plaintiff appeals. Reversed.

W. H. Beatty, for appellant. *L. S. Taylor*, for respondents.

ROSS, J. Action to annul a deed of conveyance. The plaintiff's maiden name was Burbank. Her father, George W. Burbank, who died in August, 1866, when she was but nine years of age, was the son of the defendants. Plaintiff's mother died when she was but three years old. From the time of her father's death until her marriage she resided with her grandparents, the defendants, and was under their care and control. She had no other home, and was treated by them in all respects as their own child, and she regarded them as the only persons to whom she owed filial duty, or from whom she had support and protection. When George W. Burbank died, in August, 1866, he was the owner of a house and lot in the city of Sacramento. The plaintiff was left his sole heir. In October, 1866, the defendant P. D. Burbank obtained letters of administration upon his son's estate, and as such administrator took possession of the house and lot, and, with his wife,—his co-defendant herein,—has ever since occupied a portion of the house as a residence, and received the rents of the remaining portion. In his petition for letters of administration upon his son's estate, in the inventory of the estate filed by him, and in his verified accounts filed in the probate court and confirmed on his petition, P. D. Burbank invariably described the house and lot as the property of the estate of George W. Burbank. He made no claim upon the property, nor pretended that the estate was indebted to him. On the contrary, he charged himself in his accounts with the value of the use of that portion of the premises occupied by him, and with the rents of the remaining portion. On his petition he was allowed the use and rents of the property for the maintenance and education of the plaintiff. The order making this allowance was made in December, 1868, and from that time until May 17, 1877, P. D. Burbank continued to enjoy the same. His administration was never closed. On the day last mentioned the property was worth $5,000, and its annual rental value was $750. It constituted the only property of the plaintiff. She was at that time 19 years and 8 months old, but was still residing with the defendants, and under their care and protection. She had never been informed by them, or either of them, of her rights with respect to the property. Such being the situation and relations of the parties, the defendant Irene H. Burbank represented to the plaintiff that the property never really belonged to her deceased father, but was rightfully and in fact the property of P. D. Burbank, and thereupon requested the plaintiff to convey it to her, promising at the same time to make a will devising it to plaintiff, so that it would be hers after the death of the grandmother. The plaintiff, acting solely upon these representations and in obedience to the will and request of her grandmother, without other information, counsel, or advice, and in ignorance of the real motive of the defendants, executed a deed conveying the property to her grandmother, the defendant Irene. The real motive of the defendants in obtaining the deed the court below found to be this: "The defendants claimed to be the equitable owners of the property, and were afraid that the plaintiff, who was young and giddy-minded, might marry some designing person, who would deprive her and them of the property, and they desired the property conveyed to the defendant Irene, in order to prevent such a misfortune." The court further found that at the time of the execution of the deed the defendant Irene executed a will, by which she devised to the plaintiff all the property of which she might die seised. The facts above stated are established by the findings. They show, as is well said for the appellant, "that the plaintiff, while still an inexperienced girl, still under the care and control of her grandparents, still subject to the influence acquired by them in the double relation of parents and guardians of her person and estate, accustomed to consult their wishes and obey their commands, ignorant of her rights, purposely misled and kept in ignorance by those to whom she naturally looked for the protection of her interests, without the aid of legal advice or time for reflection, made a conveyance of her whole estate without any valuable consideration to one standing *in loco parentis.*" That a deed obtained under such circumstances cannot be permitted to stand is one of the clearest of propositions. Story, Eq. Jur. §§ 309, 317, et seq.; Kerr, Fraud & M. pp. 150–153, 177–179; Bigelow, Fraud, pp. 250–253, 263, 264. In view of the testimony of the defendants it is useless to order a new trial. Judgment and order reversed, and cause remanded, with directions to the court below to enter judgment for the plaintiff on the findings.

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[1] This case, filed August 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

McKINSTRY and McKEE, JJ., concurred.

Hearing in bank denied.

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64 Cal. 11

GORTON v. FERDINANDO.[1]

(*Supreme Court of California.* July 20, 1883.)

APPEAL—CASE INVOLVING TITLE TO REAL ESTATE.

Plaintiff brought in justice's court trespass for entry and cutting timber on his land. On defendant's alleging that he was the owner of the land, the cause was transferred to the superior court by an order permitting the filing of an amended complaint. Plaintiff filed an amended complaint alleging ownership and possession of certain land, and that defendant entered thereon at a certain time and cut timber. No answer was filed, and there was judgment by default. *Held* that, it not appearing that the trespass alleged in the amended complaint was the same as that alleged in the original complaint, or that the same premises were referred to in the two complaints, an appeal would not lie from an order in the case tried, as being in a case involving title to or possession of real estate.

Department 2. Appeal from superior court, Amador county.

Trespass by Gilman Gorton against L. Ferdinando. From an order recalling an execution for costs plaintiff appeals. Appeal dismissed.

A. C. Brown and *John A. Eagon*, for appellant. *Charles R. Gray*, for respondent

SHARPSTEIN, J. The appellant commenced an action in a justice's court against the respondent for the recovery of $100 damages, which appellant alleged he had sustained by reason of the respondent's entering upon appellant's land and cutting timber thereon. The respondent in his answer alleged that he was the owner of the premises upon which appellant alleged that said timber was cut, and thereupon the justice made an order transferring the case to the superior court, which permitted appellant to file an amended complaint, in which it was alleged that he was the owner, in the possession, and entitled to the possession, of certain described land, and that respondent entered upon it at a certain date, and without leave of appellant cut down and converted to his own use 100 trees, of the value of $50, standing on said land, and demanded judgment for $299.25. To this complaint respondent neither demurred nor answered, and judgment by default was entered against him for $299.25. Afterwards the court made an order setting aside said judgment, and remanding the case to the justice's court, on condition that appellant should serve and file his cost bill, and respondent should pay the costs within 20 days. Afterwards the defendant made a motion, which the court denied, to have the condition of the order relating to the payment of the costs stricken out. At some time between the 14th day of December, 1881, and the 27th of December, 1882, the clerk of said court issued an execution for said costs, which on motion of the defendant was recalled by an order of the court made and entered on the 6th day of January, 1883; and from that order this appeal is taken; and the first question to be determined is whether an appeal will lie in a case like this. The damages claimed were less than $300. The case, as stated in the complaint, does not involve the title or possession of real estate any more than an action of trespass *quare clausum* must necessarily involve such title or possession. As before stated, the defendant made no answer to the complaint, and the judgment, exclusive of costs, was for less than $300. It is by no means certain that the cause of action set out in the complaint filed in the superior court is the same as that set out in the complaint filed in the justice's court. It does not appear that the trespass alleged in the one was the same as that alleged in the other. For anything that appears on the face of said complaints, the premises on which it is alleged a trespass was committed may not be the same. The cause was tried upon the complaint filed in the superior court which took the place of the original complaint, which then ceased to perform any further function as a pleading. Barber v. Reynolds, 33 Cal. 497. Therefore the case transferred from the justice's to the superior court, on the ground that it involved the title or possession of real property, has never been tried. The case tried involved no such question; and, as the amount in controversy was less than $300, neither the judgment nor any order made after the judgment can be reviewed on appeal in this court. Appeal dismissed.

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[1] This case, filed July 20, 1883, is now published, by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

MYRICK and THORNTON, JJ., concurred.

Hearing in bank denied.

(64 Cal. 13)

KIRSCH *et al.* v. SMITH.[1]

(*Supreme Court of California.* July 20, 1883.)

EJECTMENT—AMENDMENT OF PLEADING—ABUSE OF DISCRETION.

In ejectment in the superior court an application to amend the answer by setting up a judgment of a county court as a bar is properly denied, such courts having jurisdiction of no action, judgment in which would bar ejectment.

In bank. Appeal from superior court, city and county of San Francisco.

Ejectment by Michael C. Kirsch and others against Josiah Smith. Defendant's application to amend his answer was denied and he appeals. Affirmed.

A. H. Griffiths, for appellant. *George A. Nourse*, for respondents.

PER CURIAM. The questions raised by appellant's counsel, with a single exception, were considered and decided adversely to his views in Kirsch v. Brigard, 63 Cal. 319. The question which distinguishes this case from that arises out of the ruling of the court upon an application of the defendant to amend his answer. The application was made more than three years after the filing of the original answer, and within five days of the commencement of the trial. The application was denied, and the ruling excepted to. The provision of the Code applicable to this subject is as follows. "The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding." Code Civil Proc. § 473. When the law gives to a lower court discretion, we will not reverse its order or ruling unless there appears to have been an abuse of discretion. The amendment which the defendant asked leave to file set up a judgment of a county court as a bar to this action. As this was an action of ejectment, and the county court had no jurisdiction of an action of ejectment, nor of any other action in which its judgment would be a bar to an action of ejectment, we do not think there was an abuse of discretion in denying the motion to file the amendment. Judgment affirmed.

(64 Cal. 14)

HICKS v. LOVELL.[2]

(*Supreme Court of California.* July 23, 1883.)

EJECTMENT — VENDEE IN POSSESSION — EVIDENCE AT FORMER TRIAL.

1. Where a vendee in possession, under a contract of purchase on which he has made part payment, refuses to further comply with the terms and conditions thereof, or to quit and surrender possession, the vendor is not obliged to stand on his contract, and sue for a breach, or seek specific performance, but he may maintain ejectment.

2. Under Code Civil Proc. Cal. § 1870, subd. 8, providing that the testimony of a witness out of the state, given in a former trial between the parties relating to the same matter, may be given in evidence, there is no error in overruling an objection to the official reporter's transcript of testimony given on a former trial, the only grounds of objection raised being that the testimony was not signed by the witness, that it was not his deposition, and that it was secondary evidence.

Department 1. Appeal from superior court, San Diego county.

Ejectment by John J. Hicks against D. J. Lovell. Judgment for plaintiff, and defendant appeals. Affirmed.

M. A. Luce and *Will M. Smith*, for appellant. *Leach & Parker*, for respondent.

MCKEE, J. Ejectment to recover several parcels of land in San Diego county. The answer to the complaint in the case contained a general denial, the defense of a former recovery, and of an equitable title to the land, and also a cross-complaint in equity. The statement of the cause of action in the cross-complaint showed that the defendant was in possession of the lands in controversy under two agreements in writing,—one dated September 10, 1879, and the other March 1, 1880,—by which he and one Wheeler had agreed to purchase the lands from the plaintiff, according to the terms and conditions of said agreements. Both vendees entered and occupied, under said agreements, until the fall of 1880, when Wheeler sold and transferred all his right under the agreements to the defendant, who has since occupied the lands solely for himself. Neither of the agreements have been performed; but the defendant averred in his cross-complaint that he was ready, able, and willing to perform the agreement of September 10, 1879, according to its terms and conditions, but had been prevented from performance by the plaintiff; and that, after prevention and before the commencement of the action, he had also offered to pay the plaintiff the purchase money due on the agreements, but the plaintiff refused to accept the same; and that as to the lands referred to and described in the agreement of March 1, 1880, he was also ready and able to perform his agreement whenever he could have a good and sufficient deed of conveyance of said lands; but as the plaintiff had no title to the same he could not comply with the agreement on his part. Therefore the defendant asked, as equitable relief, that the plaintiff's action at law be dismissed; that the contract of March 1, 1880, be canceled; and that the contract of September 10, 1879, be specifically performed. In his answer the plaintiff admitted the entry and occupation by the defendant under the agreements as stated in the cross-complaint; but he denied the readiness and ability of the defendant to perform any of the agreements, or that he had offered to perform any of them, or had been prevented from performing by the plaintiff. He also averred that the defendant had absolutely refused to perform, and had failed and refused to pay any portion of the purchase money due for the lands according to the terms and conditions of the agreements, except the sum of about $116, which he admitted having received on the agreements in the fall of 1880.

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[1] This case, filed July 20, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[2] This case, filed July 23, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Before trial a motion was made for judgment on the pleadings, upon the ground that they admitted the defendant was in possession of the lands under agreements of purchase and part performance. The motion was denied, and the ruling is assigned as error. But as the defendant denied the plaintiff's cause of action at law and as the plaintiff denied the defendant's cause of action in equity, there were issues raised by the pleadings in both actions to be tried and determined before judgment could be rendered in either; there was therefore no error in denying the motion. It is only where an answer admits, or leaves undenied, the material facts stated in the complaint, that a judgment can be rendered on the pleadings. Prost v. More, 40 Cal. 347.

By consent, the issues in the action at law and in the cross-action in equity were tried together. At the trial the plaintiff rested his case upon proof, which established a legal title in himself to the lands in dispute, possession by the defendant at the commencement of the action, and an absolute refusal by the defendant to comply with the terms and conditions of the agreements of purchase under which he was in possession, or to quit and surrender possession to the plaintiff. When the plaintiff rested the defendant moved for a nonsuit, upon the ground that the proofs and the pleadings in the case showed that the defendant was in possession under contracts of purchase which had been in part performed. The motion was denied, and that ruling is also assigned as error. But the ruling was correct, because, the legal title to the lands being in the plaintiff, he was in law entitled to judgment, unless the agreements of purchase under which the defendant entered and was in possession gave him an equitable right to the possession. But, according to the plaintiff's proofs, that right had ceased to exist because the defendant had refused to comply with the terms and conditions of the agreements, and repudiated them. A vendee in possession of land cannot repudiate his contract of purchase and at the same time hold the possession under it and by virtue of it. A repudiated contract is no protection to an intending vendee in possession against the legal title. If the defendant denied repudiation, and relied upon readiness and ability to perform, which was prevented by the plaintiff, or an offer to perform, which was rejected, those were matters in defense to the action at law, or for the consideration of the court sitting as a court in equity, in the equitable cross-action. Clark v. Lockwood, 21 Cal. 220; Meador v. Parsons, 19 Cal. 294; Lestrade v. Barth, Id. 666; Cadiz v. Majors, 33 Cal. 288; McCauley v. Fulton, 44 Cal. 356; Tormey v. True, 45 Cal. 105; Kenyon v. Quinn, 41 Cal. 325.

Upon the trial the court found that defendant had never performed, or in good faith offered to perform, either of the agreements, according to their terms and conditions; that he had not been prevented from performance by any act of the plaintiff; that plaintiff had tendered a deed and demanded performance, but defendant had absolutely refused, and that both he and Wheeler had wholly failed and refused to perform the agreements, o any part thereof, except to deliver to the plaintiff about 136 sacks of wheat, of the average weight of 135 pounds each, which the plaintiff received from them in the fall of 1880; and because of the delivery to the plaintiff of that quantity of wheat, in part performance of the agreements, and of the entry and possession by the defendant under the agreements, it is contended that ejectment is not maintainable by the plaintiff as vendor, against his vendee in possession, who has refused to comply with the terms and conditions of the agreements, or to quit and surrender possession of the lands, and that his only remedy is in equity to foreclose his vendor's lien for the purchase money Willis v. Wozencraft, 22 Cal. 614, and Bohall v. Diller, 41 Cal. 532, are cited to sustain the contention. But neither of those cases is analogous to the case in hand, nor does either sustain the contention of the appellant. In Willis v. Wozencraft the vendor and vendee had been in possession in common, each "having a 'full right' to an undivided half of the rents and profits." Being thus in possession, the vendee agreed to purchase the undivided interest of his co-tenant, who had the legal title to the entire estate in his name, and took from him a bond for a deed, upon payment of the purchase money, in which it was especially stipulated that the vendee had the right of possession to an undivided one-half of the premises. Against the vendee thus in possession in his own right, and under the contract of purchase, a grantee of the vendor brought ejectment, solely upon the ground that he had acquired the legal title to the land. But before suit she had made no demand to be let into possession of her share with the defendant, and there was no proof in the case of any special facts tending to show either an actual or constructive ouster of the plaintiff, nor was there any evidence tending to show the tender of a deed and demand and refusal to pay the purchase money after it became due, or that the purchase money had not been paid, or that the defendant had abandoned the purchase, or refused to complete it according to the terms of his contract. The defendant had therefore done nothing to forfeit the benefit of his contract; and, being rightfully in possession under his equitable title, he could not be disturbed. The defendant in Bohall v. Diller had also entered into possession of the land in dispute under a contract of purchase. The purchase money had become due and was unpaid at the commencement of the action, and, relying solely upon that fact, the vendor, without having put the vendee in default, brought a peculiar action against the vendee to recover damages for an alleged breach of the contract, possession of the land, and also the purchase money. But the supreme court held that he could not recover damages, because he had not alleged any; nor the purchase money, because, although it had become due before the commencement of the suit, yet, as there was no allegation of tender of a deed and of demand and refusal to pay, the defendant was not in fault; nor could he recover the land, because there was no evidence tending to show that the contract had been rescinded by the parties, therefore the right of possession was in the defendant, and must prevail.

The doctrine deducible from those cases, as well as from others in this state, is that ejectment is not maintainable by a vendor of real property against his vendee in possession under an executory contract of sale, who is not in default in the performance of his contract, or who has performed it and is in a position to demand a deed, or who seasonably and in good faith offers to comply with the terms of his purchase, and continues ready to comply with them. To a vendee in possession under such circumstances, the contract will avail him as an equitable defense to an action of ejectment brought against him by his vendor, or as a cross-action in equity to enforce a trust against his vendor, or to obtain a specific performance of the contract. Love v. Watkins, 40 Cal. 548; Gerdes v. Moody, 41 Cal. 336; Talbert v. Singleton, 42 Cal. 395; Willis v. Wozencraft, and Bohall v. Diller, supra; Railroad Co. v Mudd, 59 Cal. 585. But if after maturity of the purchase money the vendor tenders a deed, and demands payment, which the vendee refuses to make, or if the vendee has abandoned the purchase, and repudiates the title of his vendor, in such case the vendee forfeits the benefit of the contract, and he cannot avail himself of it as a defense to an action of ejectment by his vendor, (Pearis v. Covillaud, 6 Cal. 617; Whittier v. Stege, 61 Cal. 239; Thorne v. Hammond, 46 Cal. 530;) nor by way of a cross-action for specific performance. For it is well settled that a court of equity, in the exercise of its judicial discretion, will not decree specific performance of a contract for the sale of land in favor of a party who, by his own negligence or default, has prevented or unreasonably delayed the full execution of the contract. Conrad v. Lindley, 2 Cal. 173; Brown v. Covillaud, 6 Cal. 566; Green v. Covillaud, 10 Cal. 317; Willard v. Tayloe, 8 Wall. 557. That was the position of the defendant on his cross-complaint. By his own showing, he abandoned the purchase of one of the contracts, and disclaimed the title of his vendor; but having entered into possession under the title, and in subordination to it, he was estopped from denying it. Hoen v. Simmons, 1 Cal. 119; Salmon v. Hoffman, 2 Cal. 139; Walker v. Sedgwick, 8 Cal. 403. And as to the other contract, he neither averred a tender of the purchase money nor offered to pay it. Marshall v. Caldwell, 41 Cal. 611; Englander v. Rogers, Id. 420. One who appeals to a court of equity to defend him against the legal title to land, of which he is in possession, must do equity by paying the price which he agreed to pay. The maxim, "he who seeks equity must do equity," applies to him in full force. Eastman v. Plumer, 46 N. H. 464. The cross-complaint of the defendant, therefore, lacked the essential element of a complaint in equity. Nor had the defendant any equitable title which would serve as a defense to an action of ejectment. Having abandoned his purchase and repudiated his contracts, he was not a purchaser clothed with right, and his vendor was not bound to resort to a court of equity for relief; he may sue in ejectment. Keller v. Lewis, 53 Cal. 118. "The refusal of one party to perform his contract," says the supreme court of New York in Graves v. White, 87 N. Y. 465, "amounts on his part to an abandonment of it. The other party, therefore, has a choice of remedies. He may stand upon his contract, refusing assent to his adversary's attempt to rescind it, and sue for a breach, or in a proper case for a specific performance, or he may assent to its abandonment, and so effect dissolution of the contract by the mutual and concurring assent of both parties. In that event he is simply restored to his original position, and can neither sue for a breach nor compel a specific performance, because the contract itself has been dissolved. * * * An absolute refusal, a deliberate repudiation of the stipulations of the contract, gives to the other party as an alternative remedy the right to assent to such abandonment, and treat the contract as dissolved." In the present case such refusal was proved. The defendant undertook to repudiate the contract, and at the same time held the possession under and by virtue of it. If the plaintiff could have stood upon the contract, and compelled performance or recovered damages for the breach, he was not bound to adopt that remedy, but had the right to bring ejectment to recover back his land. In so doing, and giving the preliminary notice to surrender possession, he, too, gave his assent to the abandonment of the contract; and the parties who made it having thus by mutual assent rescinded it, its validity was gone and it ceased to exist. Neither party thereafter could invoke its terms or protection as against the other, and the plaintiff was at liberty to maintain ejectment to recover the possession of the land to which he had a legal title. Jackson v. Moncrief, 5 Wend. 26; Wright v. Moore, 21 Wend. 230; Pierce v Tuttle, 53 Barb. 167.

The court found that the former trial and judgment between the parties was not an adjudication of the matters contained in this action. The finding is sustained by the record of that case, which shows on its face that the questions involved in this were not raised, tried, and determined in that; and also by the evidence which the defendant gave, under his pleadings, as to the facts upon which that decision was based. Megerle v. Ashe, 33 Cal. 84. The former adjudication was therefore no bar to the action in hand.

Lastly, it is assigned as error that the court overruled the objections taken by the defendant to the official reporter's transcript of the testimony of a witness given on the former trial and offered in evidence by the plaintiff. No objection was made that the witness was not shown to be beyond the jurisdiction of the court, nor as to the mode of proving his testimony. The only objections were that the testimony itself was not signed by the witness, that it was not his deposition, and that it was secondary evidence. But by subdivision 8, § 1870, Code Civil Proc., it is provided that "the testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter," may be given in evidence. And as it was proved that the witness was out of the state, and no objection was made to the transcript as evidence of his testimony, there was no prejudicial error in the ruling. Judgment and order affirmed.

Ross and McKINSTRY, JJ., concurred.

Hearing in bank denied.

(64 Cal. 23)

FERRIER v. FERRIER.[1]

(*Supreme Court of California.* July 23, 1883.)

DEMURRER TO PART OF ANSWER—APPEAL—HARMLESS ERROR.

1. In an action by a husband against his wife for services in the management of her separate estate, a demurrer to a subdivision of the defense was properly overruled, where the subdivision only stated that plaintiff was the husband of defendant at the time the services were rendered, and was merely preliminary to a further averment that the services were rendered at plaintiff's own instance, in consideration of the benefits derived from his relation to defendant, as the sufficiency of a defense is to be tested by considering it as a whole.

2. The statement of a fact in an assignment of error will not be accepted as true when that fact does not appear in the record.

3. Under Code Civil Proc. Cal. § 475, which provides that the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect, the fact that the record fails to show that the trial court made any disposition of a demurrer to a cross-complaint will not be adjudged prejudicial error when plaintiff, without objection, went to trial on the merits, and no relief was granted defendant on the cross-complaint, nor was any order adverse to plaintiff made by reason thereof.

Department 1. Appeal from superior court, Santa Barbara county.

Action by George Ferrier against Catharine Ferrier for personal services. Judgment for defendant. Plaintiff appeals. Affirmed.

B. F. Thomas, for appellant. *Hall & Requa*, for respondent.

ROSS, J. There is no merit in this appeal. The action is by a husband against his wife for the value of his services alleged to have been rendered, under employment by the wife, in and about the management and cultivation of the wife's separate estate. There was a verdict and a judgment for the defendant. It is contended for the appellant that the court below erred in overruling his demurrer to the first subdivision of the second defense set up in the amended answer. But this subdivision only set forth the fact, not alleged in the complaint, that the plaintiff was, at the time stated in the complaint, the husband of defendant, and this only as preliminary to the further averment contained in the second defense set up, to the effect that any and all services rendered by plaintiff for which he sues were rendered at his own instance, without request, solicitation, or employment by the defendant, and in consideration alone of his relation to defendant, and of the benefits received by him by reason of that relation. The sufficiency of the defense is not to be tested by one of its subdivisions, but as a whole; and, considered as a whole, it put in issue the fact of employment, without which it is certain no cause of action was vested in the plaintiff.

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[1] This case, filed July 23, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

It is also contended that the court below erred in refusing to make an order precluding the defendant from giving any evidence in support of the matters set up in and by the third defense contained in the amended answer, because of the defendant's failure to furnish the bill of items demanded. If it be admitted that the court was in error in this respect, no injury to appellant appears to have resulted, for it does not appear that the defendant gave any evidence on the trial in support of the matters set up in the third defense. We observe that it is stated by counsel in their assignment of errors that such was the fact; but, of course, we cannot accept that statement as true. If such was the rule, there would be few, if any, cases in which an assignment of errors appears that would not have to be reversed.

Another point made for appellant is that it does not appear from the record that the plaintiff's demurrer to the cross-complaint filed by the defendant was disposed of by the court. This is true; but it is also true that the defendant went to trial upon the merits of the case without making any objection of this nature in the court below. No relief was awarded the defendant by reason of the cross-complaint, nor does it appear that there was any order or judgment made adverse to the appellant based on or in any manner growing out of that pleading. Moreover, upon looking into the cross-complaint, we do not see that it has any relation whatever to the alleged contract upon which the plaintiff's action was brought, for which reason it was probably abandoned in the court below. At all events, no possible injury could have resulted to appellant by reason of the failure of the court, if failure there was, to rule upon the demurrer; and, that being the case, the judgment should not be reversed. Code Civil Proc. § 475.[1] Judgment affirmed.

McKee and McKinstry, JJ., concurred.

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[1] Code Civil Proc. Cal. § 475, provides that the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.

91 Cal. 548

DENNIS v. SUPERIOR COURT OF LOS ANGELES COUNTY. (No. ——.)

(*Supreme Court of California.* Oct. 17, 1891.)

JUSTICE OF THE PEACE — JURISDICTION — STOCKHOLDER'S LIABILITY.

The personal liability of a stockholder of a corporation, for his proportion of the indebtedness of the corporation, is an obligation arising on contract, within Code Civil Proc. Cal. § 112, giving original jurisdiction to justices' courts in actions on contract for the recovery of money when the amount claimed is less than $300.

Application for writ of review directed to superior court, Los Angeles county.

Petitioner, Dennis, was sued by John Rebman in justice's court, to enforce petitioner's liability as a stockholder in the San Gabriel Valley Land & Water Company, on a debt contracted by said company. Rebman recovered a judgment for $299, and petitioner appealed to the superior court of Los Angeles county, where said judgment was affirmed. He now applies for this writ of review, alleging that the justice had no jurisdiction of the action, that the superior court had none on appeal, and that he objected to the jurisdiction in both courts. Writ denied.

Wells, Munroe & Lee, for petitioner.
Hourx & Haynes, for respondent.

PER CURIAM. We think that the personal liability of a stockholder of a corporation, for his proportion of the indebtedness of the corporation, is an obligation arising upon contract, within the meaning of section 112 of the Code of Civil Procedure, giving original jurisdiction to a justice's court in actions arising upon contract for the recovery of money, when the amount claimed is less than $300. The court of appeals of Maryland had before it the question of the nature of such a liability upon the part of a stockholder, in Norris v. Wrenschall, 34 Md. 492, and in that case it was held to be an obligation so far *ex contractu* as fairly to come within the spirit and intent of a statute intended to facilitate the recovery of judgments in suits "when the cause of action is a contract, whether in writing or not, or whether express or implied." We are satisfied with the conclusion there reached. It follows that the application for the writ applied for herein must be denied, and it is so ordered.

91 Cal. 669

FLYNN v. DOUGHERTY. (No. 13,032.)

(*Supreme Court of California.* Nov. 19, 1891.)

STATUTE OF FRAUDS—AGREEMENT TO CUT STONE—NONSUIT.

1. Civil Code Cal. § 1739, provides that no agreement to buy or sell personal property of the value of $200 or more is valid unless the same be in writing. Section 1740 provides that an agreement to manufacture a thing from material furnished by the manufacturer is not within the provisions of the last section. *Held*, that plaintiff's contract to cut and deliver to defendant stone for a building according to certain specifications, though not in writing, was valid.

2. The grounds of a motion for a nonsuit must be stated at the time the motion is made.

In bank. Appeal from superior court, city and county of San Francisco; FRS. E. SPENCER, Judge.

Action by one Flynn against one Dougherty on contract. From a judgment of nonsuit, plaintiff appeals. Reversed.

Jarboe, Harrison & Goodfellow, for appellant. *Chas. F. Wilcox*, for respondent.

PATERSON, J. The only question involved in this appeal is whether the contract of the plaintiff "to cut, furnish, and deliver" to defendant "the stone-work of the asylum to be built at Agnew station, according to the plans and specifications of Mr. Jacob Leuzen & Son, architects," is within the statute of frauds. Section 1739, Civil Code. There is no doubt that it is within the provisions of the statute, unless excepted therefrom by section 1740, Id., which is as follows: "An agreement to manufacture a thing from materials furnished by the manufacturer or by another person is not within the provisions of the last section." The plaintiff testified that, "if the stone had been cut according to his bid and the specifications, and had not been used in the construction of the asylum, it would not have been available for other purposes, or have been salable in the general market." On the subject of contracts of sale and contracts for labor there is much conflict of decision, but the weight of authority in this country supports the proposition that, where the seller is to furnish materials and fashion them according to specifications furnished by the purchaser, or according to some model selected, and when, without the special contract entered into by the parties, the thing furnished would never have been put in the particular shape or condition in which it was furnished, then the contract is essentially one for labor, and is not within the statute of frauds. The subject is carefully treated and the authorities fully reviewed in 1 Reed, St. Frauds, c. 9. The evidence in the case before us shows that the work which was to be performed by the plaintiff would have left the material unfit for the general market. The contract is one for labor,—work and labor were the main things. The material upon which the work and labor were to be done was simply the incident. The stone to be furnished was of no value to the defendant until shaped and carved according to the plans and specifications of the architect. Upon the authorities referred to above, we think the court erred in granting the defendant's motion for a nonsuit. The only grounds stated by the defendant in his motion for a nonsuit were that the contract was one for the sale of goods and chattels, "and that there was no note or memorandum thereof signed by the defendants, nor any acceptance or receipt of the goods, or any part thereof, nor any payment of purchase money, or any part thereof, as required by the provisions of section 1624, subd. 4, of the Civil Code; and on the further ground that plaintiff has failed to show that he has sustained any damage in any sum whatever." The rule is well settled here that a nonsuit cannot stand unless the ground upon which it is supported was called to the attention of the court and the plaintiffs at the time the motion was made. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; DE HAVEN, J.; GAROUTTE, J.; MCFARLAND, J.

HARRISON, J., being disqualified, did not participate in the foregoing opinion.

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91 Cal. 664

COOK v. RICE *et al.* (No. 13,062.)

(*Supreme Court of California.* Nov. 19, 1891.)

RES JUDICATA—PARTIES.

1. A judgment, though liable to be appealed from, is in force as final, unless suspended by appeal, and is competent evidence in support of a plea in estoppel.

2. In an action against a husband and wife, where the wife had no interest aside from that of her husband, defendants sought to introduce a judgment roll of a prior action in relation to the same controversy by plaintiff against the husband. *Held*, that the objection that the action was not between the same parties was untenable.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Action in trespass by John Cook against D. M. Rice and another. From a judgment for defendants, and an order denying motion for a new trial, plaintiff appeals. Affirmed.

Webb & Sherwood, for appellant. *Geil & Morehouse*, for respondents.

TEMPLE, C. The plaintiff in his complaint avers that on the 2d day of February, 1888, he was lawfully possessed of the E. ½ of the N. W. ¼ of section 4, township 21 S., range 9 E., Mt. Diablo meridian; that he had fencing on the same to the value of $50, which the defendants on said day maliciously destroyed, to his damage in the sum of $50. As a separate cause of action, that he has planted and sown on the same tract a crop of grain, in extent about 80 acres, of the value of $500, which he had fenced and inclosed; that defendants cut down and destroyed his fence, and drove their stock in and upon his grain, to his great and irreparable damage; that they threaten to tear down any fence which he has or shall construct to protect said grain, and, if not restrained, will tear down and destroy his fences, and drive their stock upon his grain, and destroy the same, to his damage in the sum of $500; that they are wholly insolvent. He therefore demands judgment for $300 damages, and that they be enjoined from cutting down or destroying his fences or from wasting his premises. The complaint does not aver any title in the plaintiff, but possession only; and does not deny that the respondents have title to the land, or that their entry was rightful. The answer denies the possession of plaintiff, the alleged trespass, and the damage. In the answer to the last cause of action, defendants admit the possession of plaintiff as to 10 acres of land, which is specifically described, and deny that they have ever in any way entered or trespassed upon the same. They aver, as to the remainder of the land, that the defendants have been in occupation and possession thereof since May, 1886, and that a large portion thereof had been plowed and sown by them, and that plaintiff, while they were so in possession, wrongfully and unlawfully entered with threats, force, and violence, and replowed and resowed and attempted to inclose the same, and to drive the defendants from the premises; and, except as to the said 10 acres, plaintiff has no possession, except the said forcible occupation. They also plead as an estoppel a judgment in favor of D. M. Rice against plaintiff, wherein it was duly adjudged that plaintiff was not possessed or entitled to the possession of any part of the land except the 10 acres specifically described; that plaintiff has, since the institution of said action, acquired no new or further right or title to said land; that the defendant Mrs. D. M. Rice is the wife of the said D. M. Rice, and claims no interest in the land, and her acts are those of a member of the family of the other defendant, and in privity with his title. The appeal is from the judgment and an order refusing plaintiff a new trial.

The land is public land of the United States, and both parties claim as pre-emptioners. The question is whether there was evidence to sustain the verdict and the findings in favor of the defendants. On the trial the defendant D. M. Rice testified that he moved upon the land in May, 1886, with his family, and built a good, comfortable house, barn, and chicken-house. That there was then no one living upon it, and no house or improvement except the small inclosure. There was a volunteer crop of barley on a long strip. In January, 1887, he commenced plowing, and had plowed 8 or 10 acres, when he was enjoined by Mr. Cook, who moved upon the land about 6 months after defendant. He never permitted his stock to run on the small inclosure, nor did he or his wife ever interfere with it. Mr. Cook, while defendant was enjoined from plowing, proceeded to fence and plow a large part of the land, leaving defendant's house outside of his inclosure, by extending to and round it a sort of *cul de sac*. Defendant filed his declaratory statement as a pre-emptioner May 25, 1886. It was shown that both plaintiff and defendant were qualified pre-emptioners; that Mrs. D. M. Rice tore down a portion of the fence with the knowledge of her husband, and without objection made by him. A judgment roll was put in evidence by defendants in the case of John Cook v. D. M. Rice, dated December 27, 1887. It avers possession on the part of plaintiff; that he had growing upon the land a volunteer crop of grain; that defendant unlawfully entered, and ejected plaintiff, and commenced to plow, dig up, and destroy the grain; that, although plaintiff had forbid him so to do, he continued to plow, dig up, and destroy the grain, and, unless enjoined, would continue so to do, to his great and irreparable damage. He demands judgment for $500 damages, to be restored to the possession of the demanded premises, and for an injunction. The answer specifically denies the possession of plaintiff, the various alleged trespasses and damage, and avers that defendant entered upon the land when unoccupied and uninclosed, as a qualified pre-emptor, under the laws of the United States, and while peacefully in possession he duly made his application to purchase the same. The case was tried September 28, 1887, and the court found that plaintiff was in the actual possession only of the tract specifically described in the answer in this case: that on the 23d of May, 1886, while all the land, except the 10 acres, was unoccupied, the defendant D. M. Rice entered upon the same, and, while in the peaceable possession of all, except the 10-acre tract, filed in the land-office his declaratory statement. It was adjudged that plaintiff recover the 10-acre tract, with damages, and that the restraining order be dissolved. The action was to recover possession, and admitted the possession of defendants, claiming that it was wrongful, because an intrusion upon the prior possession of plaintiff. It was adjudged that, except as to the small inclosure, defendants' possession was rightful, and that plaintiff had not been in possession before the entry of defendants. It must follow that when plaintiff entered, taking advantage of an injunction wrongfully restraining defendants from cultivating the land, he was intruding upon the possession of the defendants, and could not by such entry acquire a new right as against the defendants. Plaintiff objected to the introduction of the judgment roll, and now claims that the court erred in overruling his objections—

1. Because the judgment was not final, as the time for taking an appeal had not expired, and the cause was therefore still pending. It was not necessary that it should be final, in the sense that it was not liable to be reversed on appeal. It was enough that the judgment was in force, not suspended by an appeal or otherwise, and that, while in force, it finally disposed of the controversy. And—

2. It was objected that it was not between the same parties. Substantially it was between the same parties. Mrs. Rice made no claim to the land, and all she did was under the claim of her husband. Had she by her acts taken possession, the right, if any, thus acquired would have been common property, and the right to control and manage in her husband.

The question being whether there was evidence to support the findings, it is not necessary to consider the plaintiffs' evidence. We advise that the judgment and order be affirmed.

We concur: Vanclief, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

91 Cal. 405

Luco v. De Toro. (No. 12,566.)

(*Supreme Court of California.* Sept. 26, 1891.)

Express Trusts — Repudiation — Limitations—Suit for Partition—Evidence—Contract with Attorney.

1. Where O., owning an equitable interest in an undivided tract of unpatented land, employed an attorney to procure a patent thereto for the person through whom O. derived his interest, and agreed to give the attorney a certain portion of the land if he succeeded, the fact that another person employed by O. rendered valuable assistance in obtaining the patent did not affect the attorney's rights under the contract.

2. Such contract creates an express trust, and, when completed, vests in the attorney an equitable interest to his proportion of the land, and renders O. a trustee of the attorney to the extent of such interest. Beatty, C. J., and McFarland and De Haven, JJ., dissenting. 18 Pac. Rep. 866, overruled.

3. The statute of limitations does not begin to run in favor of such trustee till after an unequivocal repudiation of the trust by him, with notice thereof to the attorney. Brennan v. Ford, 46 Cal. 8, distinguished.

4. Where O. became administrator for the patentee, his mere refusal to convey to the attorney the interest due the latter is not a repudiation of the trust, since it was impossible for O. to make any conveyance without an order of the probate court, under Code Civil Proc. Cal. §§ 1597, 1598, 1600, which provide that, when a person who is bound by contract in writing to convey any real estate dies before making the conveyance, the court, on presentation of a verified petition, must appoint a time for hearing, and, if satisfied that the petitioner is entitled to a conveyance, must make a decree authorizing and directing the executor or administrator to make a conveyance to the petitioner.

5. Where O. had both actual and constructive notice that the attorney had assigned all his interest in the trust, O.'s refusal to convey to the attorney, if conceded to be a sufficient notice of repudiation of the trust as to the latter, will not be adjudged sufficient notice to the assignee.

6. Where, in an action by the assignee against the personal representative of O. to recover the attorney's interest, defendant contended that both attorney and assignee had abandoned the contract, evidence that until the procurement of the patent the assignee continued to expend large sums of money for that purpose was admissible.

7. In partition, plaintiff may assert any title he may have, legal or equitable. Watson v. Sutro, 24 Pac. Rep. 172, 25 Pac. Rep. 64, and 86 Cal. 527, followed.

In bank. Appeal from superior court, San Diego county; Thomas N. Bush, Judge.

Action by Juan M. Luco against Juan de Toro for partition of certain land. Judgment for defendant. Plaintiff appeals. Reversed.

I. N. Thorne, *H. S. Mulford*, *Oliver P. Evans*, and *E. W. McKinstry*, for appellant. *Henry M. Smith* and *Harry L. Titus*, for respondent.

Paterson, J. Appellant and several other plaintiffs brought this action against respondent and several other defendants for partition of a tract of land known as the "Rancho Mission" (or "Ex-Mission") of San Diego, a patent to which issued from the United States of America to Santiago Arguello, or his legal representatives, on the 1st day of September, 1876. The original complaint, which was filed August 8, 1882, contained all the allegations required by chapter 4, pt. 2, tit. 10, Code Civil Proc. On December 13, 1886, —after the cause was reversed on the former appeal, (70 Cal. 339, 11 Pac. Rep. 650,) —plaintiffs, by leave of the court, filed an amendment to the complaint, inserting between paragraphs 21 and 22 thereof the following: "Plaintiffs allege that the plaintiff Juan M. Luco owns an undivided equitable interest in the said rancho of Ex-Mission of San Diego, by reason that on and before the 3d day of February, 1869, said Augustin Olvera was the owner and in possession of an undivided share or interest of more than one-half of said rancho, and that on said day the said Augustin Olvera made and entered into a contract in writing with the said Isaac Hartman, now deceased, in the words and figures, to-wit: 'This agreement, made and entered into this 3d day of February, A. D. 1869, between Isaac Hartman, party of the first part, and Augustin Olvera, party of the second part, witnesseth as follows, to-wit: That the party of the first part, as attorney and counselor at law, undertakes and agrees with the party of the second part to procure a patent from the United States for the lands of the Ex-Mission of San Diego of San Diego county, bounded and described as follows: [Giving the specific boundaries of said rancho.] In consideration whereof the party of the second part agrees to pay the said party of the first part as follows: The sum of one thousand dollars for personal expenses incurred by the party of the first part in said business, but not to exceed in any case said sum of one thousand dollars. In addition to which the party of the second part is also to pay the costs of proceedings to obtain said patent, and to convey to the party of the first part an undivided interest in the lands to be patented of said Ex-Mission as follows: If the patent issues for five leagues, one-half league; if for six leagues, one league; if for seven leagues, one league; if for eight leagues, one and one-half leagues; if for nine leagues, one and one-half leagues; if for ten leagues, one and one-half leagues; if for eleven leagues, two leagues; and whatever amount is patented over and above eleven leagues is to be equally divided between the parties of the first and second parts; that is to say, that the party of the first part is to be entitled to the one undivided one-half of the excess over and above eleven leagues, and the four leagues of land in the immediate vicinity of said Ex-Mission are to remain exclusively for the parties of the second part. In testimony whereof the parties have hereunto, and to another instrument of same tenor and date, set their hands and seals the date first above written. [Seal.] ISAAC HARTMAN. AUGUSTIN OLVERA. Acknowledged in Los Angeles county, February 3, 1869, before JAMES F. LANDER, Notary Public. Filed for record in the recorder's office of San Diego county, February 20, 1871.' That the said contract was fully performed by the said Hartman on his part, so that on the 1st day of September, 1876, he procured to be issued a patent from the United States for the rancho of the said Ex-Mission of San Diego, as described in said contract, and to the extent of 58,875.38 acres. That theretofore, to-wit, on or about the 23d day of March, 1869, by his deed of that date, said Isaac Hartman, for a good and valuable consideration, conveyed all his right, title, and interest in said rancho, acquired under and by virtue of the aforesaid contract made by said Olvera with said Hartman, and of said conveyance from said Hartman to said Luco, he, the said Luco, became the owner, and was and is entitled to an interest or share, of ——— acres, undivided, in said rancho; and that he has now, and has had since the date of said conveyance, the just and equitable title thereto. That said Luco, as tenant in common for more than five years prior to the commencement of this suit, had been in possession of said premises, and has paid his proportionate share of all the costs and exenses attending the proceedings taken herein, for the partition of said rancho. That at the time of the death of the said Augustin Olvera, as aforesaid, he held the legal title to more than one-half, undivided, of said rancho, subject to the aforesaid equitable interest of the said Luco. Wherefore plaintiffs pray that by the decree of this court there be set off to the said Luco, in severalty, the said 6,083.2743 acres derived to him as aforesaid."

To this amended complaint an answer was filed, in which it is alleged that Augustin Olvera died on the 6th day of October, 1876, and that in June, 1882, the defendant Juan de Toro was duly appointed administrator of the estate of said Olvera, deceased, and that said decedent was at the time of his death seised in fee of 30,000 acres undivided of said Rancho Ex-Mission San Diego, and that his heirs and representatives have ever since been seised in fee of said interest. Further answering, said defendant Toro alleges that the plaintiff's cause of action is barred by the provisions of sections 318, 319, 337, 343, Code Civil Proc. He denies all the allegations of the complaint not admitted by said answer. By this all the material allegations of the complaint were denied, among which is the allegation of full performance by Hartman, on his part, of the contract between him and Olvera. Upon that issue the finding of the court is as follows: "That immediately after the execution of the agreement between Augustin Olvera and Isaac Hartman said Hartman entered upon the performance of the stipulations in said agreement contained on his part to be performed, and after his sale to plaintiff Luco, as found in finding 2, said Luco and Hartman continued in the performance of said stipulations, and did so continue by themselves, or their agents and attorneys, to prosecute to a final conclusion the agreements and stipulations in said agreement contained on the part of said Hartman to be performed. That owing to a quarrel between Hartman and Olvera, about the year 1874, Olvera became dissatisfied with Hartman, and, on behalf of himself and the heirs of Santiago Arguello, the confirmee of said Ex-Mission rancho, employed one A. St. Clair Denver, an attorney at law of Washington city, District of Columbia, to prosecute the claims of said heirs, and of the interest of said Augustin Olvera in and to the Rancho Ex-Mission of San Diego, before the proper department, at Washington city aforesaid; and thereafter, by the joint exertions of said A. St. Clair Denver and the Honorable Cornelius Cole, acting as attorney for Hartman and Luco, a patent was duly obtained, as alleged in the complaint, on the 1st day of September, 1876. That owing to the death of the principal parties to the said agreement, to-wit, Hartman and Olvera, the great lapse of time and uncertainty of recollection of surviving witnesses, under the evidence in this case, it is impossible to determine and measure the extent of performance of plaintiff or his vendor, Hartman, under the agreement aforesaid, and the court finds only that up to the time of the issuance of the patent aforesaid, there had not been a full and complete or substantial performance of that agreement on the part of Hartman or Luco as vendee, but only a partial performance thereof." Finding 5.

The appellant contends that a correct reading of this finding shows that Hartman fully performed, and that upon such performance his estate in equity became indefeasible. Respondent claims that the concluding sentence is a finding of the ultimate fact that there was not a full and cómplete or substantial performance of the agreement on the part of Hartman or Luco. The finding, in our opinion, is ambiguous and uncertain. Appellant was entitled to an unequivocal finding on the question of performance. If, however, the finding can be construed as a finding in favor of respondent on that subject, it is sufficient to say that, in our opinion, it is not supported by the evidence. We think it is clearly shown that Hartman and Luco fully performed the stipulations to be performed under the agreement. There is no substantial conflict in the evidence as to what was done by Hartman and his assignee, Luco, in procuring the patent. They did all that was necessary to be done in order that the patent might issue for the quantity of land which was finally granted. The fact that Olvera, in conjunction with other parties not parties to the contract with Hartman, deemed it proper to employ Denver to assist in procuring the patent, and that Denver did render valuable services in that connection, in no way affects the right of Hartman or Luco under the contract. Olvera could not by employing other persons defeat the rights of Hartman and Luco under the contract.

Whether the finding be regarded as contradictory and uncertain, or a finding that there was no substantial performance of the agreement on the part of Hartman and Luco, the judgment will have to be reversed, unless the finding that the cause of action was barred by the statute of limitations can be sustained. In their answer the defendants allege that plaintiff's cause of action was barred by the provisions of sections 318, 319, 337, 343, Code Civil Proc., and upon the issues thus raised the court found that the cause of action was barred by the provisions of sections 337 and 343, but made no reference to sections 318 and 319. We cannot agree with appellant in his contention that the findings of the court on these issues are not findings of ultimate facts, but are conclusions of law. It is necessary, therefore, to consider the question as to whether these findings are supported by the evidence. We think they are not.

The court found (finding 7) that after the issuance of letters testamentary to Olvera, and before they were revoked, to-wit, November 5, 1877, the plaintiff demanded of Olvera, as executor, a conveyance to him, Luco, as tenant in common, of 13,904.31 acres of the Mission rancho, under and in accordance with the terms of the contract between Olvera and Hartman; and also found (finding 14) that Olvera in his lifetime, "after the year 1874, and his representatives after his death, always repudiated any obligation under said contract to Hartman, or his assignee, Luco, and claimed to have and hold the whole interest to which he (Olvera) held the legal title when he died, adversely to Hartman or his assignee, free from any claim on the part of either under said contract." But these findings do not show a disavowal of the trust relations created by the contract, and notice to the plaintiff of such disavowal. We are left in ignorance as to the reason why Olvera refused to make the deed requested. It is not found that he refused to make the deed because he denied the existence of such relation of trustee and *cestui que trust*, nor is it found that he so stated to Luco, or that Luco so understood his refusal. Olvera was under no obligation, in fact had no authority, to make the conveyance demanded without an order of the probate court, and it was the duty of the party demanding the deed to apply to the court for the necessary order. Sections 1597,[1] 1598,[2] 1600,[3] 1606, 1607, Code Civil Proc. A repudiation of the trust by Olvera, and notice thereof, cannot, therefore, be predicated upon the facts found. It certainly cannot be said that the mere fact of refusal under the cir-

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Section 1597 provides that when a person who is bound by contract in writing to convey any real estate dies before making the conveyance, and in all cases when such decedent, if living, might be compelled to make such conveyance, the court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto.

[2] Section 1598 provides that on presentation of a verified petition by any person claiming to be entitled to such conveyance, setting forth the facts upon which the claim is predicated, the court, or judge thereof, must appoint a time and place for hearing the petition, etc.

[3] Section 1600 provides that if, after a full hearing upon the petition and objections, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner must be made, etc.

cumstances is sufficient to show notice to the beneficiary of such repudiation, and time begins to run against a trust only from the time it is openly disavowed by the trustee, and the adverse claim is clearly and unequivocally made known to the *cestui que trust.* Finding 14 we think is not supported by the evidence; but, assuming that it is, it simply shows a repudiation of any obligation under the contract, and an adverse claim without notice thereof to Hartman, or Luco, his assignee. The testimony of Forbes shows that there was a quarrel between Hartman and Olvera in 1874, and the court finds that about that time Olvera became dissatisfied with Hartman, but the nature of the quarrel is not stated. The trouble between Hartman and Olvera seems to have been caused by the attempt on the part of the former to have Olvera removed as administrator of the estate. Olvera claimed that Hartman was working against him. This claim could not have referred to the matter of procuring a patent, and the court has found as a fact that Hartman and Luco continued in the prosecution of the stipulations contained in the agreement. If it be assumed, however, that the quarrel related to and arose out of the matters referred to in the contract, the action of Olvera could not bind Luco. Hartman had assigned his interest in the contract to Luco long prior to the time of the conversation referred to, and of this fact Olvera had both actual and constructive notice. Olvera's repudiation could not affect the rights of Luco unless the latter had notice thereof, and there is nothing in the record to show that he ever gave notice to Luco of his intention to repudiate the claims of Hartman under the contract. Luco and Hartman continued to perform the stipulations of the contract on their part to be performed up to the time of the issuance of the patent. Luco made large expenditures in prosecuting the claim and in procuring the patent. He expended about $6,000, and gave Bolton, for the assistance rendered in the surveyor general's office, 500 acres of land.

By the terms of the contract between Hartman and Olvera an express trust was created. It is not necessary in the creation of an express trust to use any particular form of words. The relation of trustee and *cestui que trust* is established, and an express trust created, if the language used in the instrument creating the trust expresses the intention that one party shall hold the legal title and the other shall have the beneficial interest. The language of the contract before us is a clear declaration on the part of Olvera that thereafter he would hold the legal title in trust for Hartman, to the extent of the latter's beneficial interest under the contract. Full performance by Hartman created an indefeasible estate in equity, which could not be defeated or divested by Olvera without positive and unequivocal repudiation of the trust relation, and notice of such repudiation to the beneficiary. Miles v. Thorne, 38 Cal. 338; Love v. Watkins, 40 Cal. 547; Hearst v. Pujol, 44 Cal. 235; Hoffman v. Vallejo, 45 Cal. 572; Janes v. Throckmorton, 57 Cal. 388. In Hoffman v. Vallejo, supra, it was held that an agreement like the one before us is not against public policy, and constitutes the attorney the equitable owner of an undivided interest in the lands, and creates the relation of trustee and *cestui que trust.* The statute begins to run against the trust "as soon as it is openly disavowed by the trustee insisting upon an adverse right and interest, which is clearly and unequivocally made known to the *cestui que trust;* and when, for instance, such transactions take place between the trustee and *cestui que trust* as would, in the case of tenants in common, amount to an ouster of one of them by the other." Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. Rep. 610. Where there has been full performance by the vendee under a contract to convey the land, an indefeasible estate in equity vests in the vendee, and the possession of the vendor is presumed to be the possession of his *cestui que trust,* the vendee. The statute cannot run against one's own possession. Wright v. Ross, 36 Cal. 433. There can be no adverse holding "until the trustee denude himself of his trust by assuming to hold for himself, and notifies the *cestui que trust* of his treachery." Haynie v. Hall, 42 Amer. Dec. 427. Respondent claims that the word "repudiate," as used in finding 14, is equivalent to and implies notice. In the case cited (Hecht v. Slaney, 72 Cal. 366, 14 Pac. Rep. 88) it was held simply that denial or repudiation is not necessary in order to set the statute of limitations in motion in cases of implied trust. There may be disavowal and repudiation of the trust without knowledge or notice of the same being brought home to the beneficiary. Miles v. Thorne, supra. In Bennett v. Morrison, 120 Pa. St. 390, 14 Atl. Rep. 264, it was held that "the vendor of land sold under articles of agreement must not only in some way repudiate the agreement, but must take actual possession of the premises, either in person, by an agent, a tenant, or another vendee, in order to break the relation his vendee sustains to him under the agreement, before the statute will commence to run." In Love v. Watkins, supra, Mr. Justice TEMPLE said: "The conveyance from the trustee to the *cestui que trust* in such cases is but the execution of the trust; the right to obtain the legal title is but an incident to the estate of the *cestui que trust.* So long, therefore, as the estate exists, so long will the right to acquire the legal title subsist. It is like the right of a tenant in common to compel partition, and is not a cause of action which accrues in the sense of the statute of limitations, and which may be lost by the lapse of time. The trustee and *cestui que trust* have the same title, and do not hold adversely so long as the rights of neither are denied." Although the question presented for consideration in that case was whether a vendee in possession under an executory contract, who had fully performed the agreement on his part, but had not obtained a deed, could compel a specific performance after the lapse of four years from the time when he might have demanded a deed, yet the doctrine announced by the learned judge is sound in principle and supported by authority. In Harris v. King, 16 Ark. 122, it was held that a vendor who had received the purchase money became the trustee of the vendee, and, although actually in possession of the land, held the naked legal title in trust for him, and the statute of limitations was no bar to an action for a specific performance of the contract, if the vendor had done no act inconsistent with the vendee's title, other than simply holding possession. In Graham v. Nelson, 5 Humph. 605, it was held that the possession of the vendor before conveyance would be construed for the benefit of the *cestui que trust* where it could be reasonably presumed to be in accordance with the trust, and the statute would not run. In that case none of the parties was in possession of the land. See, also, Ang. Lim. §§ 137, 138; Hemming v. Zimmerschitte, 4 Tex. 159; Lewis v. Hawkins, 23 Wall, 119; Pom. Eq. Jur. §§ 105, 147, 155, 368, 1010, 1046. In Rush v. Barr, 1 Watts, 110, the court said: "The statute of limitations is a most useful one, and ought not lightly to be frittered away; but there are cases to which it does not apply. Whenever the legal title is in one, and the real interest in another, these form but one title, and the statute does not run between them until the trustee disclaims and acts adversely to the *cestui que trust*. * * * And so in all cases where two persons have each an interest in a tract of land of such kind that both their interests form but one title, and by their agreement one is to possess for his own use and the use of the other. In such cases the statute does not run until he in possession disclaims the right and interest of the other, denies his right and refuses possession, and such disclaimer and denial must be such that the other has notice of it. It is not sufficient that it is denied secretly, or an agreement inconsistent with it is made and concealed." See, also, Hill, Trustees, 264, note 3; Huntly v. Huntly, 8 Ired. Eq. 250; Tiff. & B. Trusts, 715-717. In Hemming v. Zimmerschitte, supra, Chief Justice HEMPHILL, speaking for the court, said: "It is an acknowledged principle that vendor and vendee, under an executory contract for the sale of lands, occupy, mutually and respectively, the relation of trustee towards each other, (Sugd. Vend. 160,) so long as they do not indicate by their acts an intention to refuse compliance with the obligations imposed by their contract. In this case, the vendee having performed his obligations, the vendor's subsequent possession or interest in the land was held in trust, and in subordination to the superior equitable right of the vendee; and this possession would continue to maintain its fiduciary character, until the vendor would manifest an intention to claim and enjoy the land as his own." In Holman v. Criswell, 15 Tex. 394, the court applied the same rule. In that case, like the one at bar. there had been no actual possession by either party. The court said: "The obligations of the vendee having been already discharged, limitation would not run against the vendee, until the vendor manifested an intention, by adverse possession or some hostile act, to claim and hold the land as his own."

In this case the transcript shows no words or conduct on the part of Olvera indicating an intention to repudiate the trust; at least, there is nothing in the record to show that Luco had any notice of such an intention. After the assignment by Hartman to the plaintiff, the former could not by any statement to Olvera prejudice the rights of Luco, unless thereafter there was a failure by him and plaintiff to perform the work required by the contract. At the time it was alleged and found that Hartman said he would have nothing further to do with the matter, no cause of action had accrued against which the statute of limitations could be put in motion, and, as we have seen, Hartman and Luco fully performed the conditions of the contract, and the estate of Olvera received the benefit of their work. Nearly all of the cases relied on by respondent are cases of resulting or implied trusts. In such cases it is uniformly held that possession is necessary to prevent the running of the statute. In cases of express trust cited by respondent, it is true the courts rested their decisions upon the ground that the possession of the *cestui que trust* was sufficient to prevent the bar. No authority has been cited holding that in case of an express trust the statute will run against the vendee after full performance because he is out of possession, except Brennan v. Ford, 46 Cal. 8; and what was said there on the subject was unnecessary to the decision, which went upon the ground that Brennan's cause of action did not accrue until the delivery of the deed, January 31, 1867, (within four years prior to the commencement of the action.) The actual possession of the vendor, or non-possession of the vendee, is a circumstance, of course, to be considered in determining whether there has been a repudiation of the trust and notice thereof to the vendee. But it is not controlling. The relations existing between vendor and vendee, after full performance, are governed by the same rules as those which exist between ordinary tenants in common, so far as repudiation of title and ouster are concerned. Speidel v. Henrici, supra.

Upon the issuance of the patent in September, 1876, the plaintiff became vested with an equitable estate in the land, and not merely a right to the land, as fully as if he had made a contract of purchase, and had paid the full amount of the purchase price. The defendant thereafter held the legal title in trust for him, and the constructive possession which followed the legal title inured to the benefit of the plaintiff, as well as to the benefit of the defendant. The plaintiff could be divested of this estate in the land by transfer or adverse possession, but not by mere lapse of time. The court did not base its decision upon any adverse holding of the defendant, but upon the ground that the action should have been commenced within four years after the plaintiff had acquired the right to a conveyance, or within four years after the repudiation of his claim by the defendant. It may be conceded that, if the action were merely to procure a deed of conveyance in accordance with the terms of the agreement, the statute of limitations would be a defense, upon the ground that such action, being purely personal, would be barred by lapse of time. It would not follow, however, that even upon such failure the plaintiff would be unable to maintain his action in partition. The deed of conveyance would be only additional evidence of his rights in the land. It is not necessary that the plaintiff in an action for partition should have the legal title to the land. Watson v. Sutro, 86 Cal. 527, 24 Pac. Rep. 172, and 25 Pac. Rep. 64. The facts establishing his right to the land can be shown in the suit for partition, and the same result must follow therefrom without regard to the character of evidence by which they are shown. Under our system of procedure, the form of action is disregarded, and the plaintiff seeking relief is required to state only the facts constituting his cause of action. This, however, is not an action "upon" the contract between Hartman and Olvera. That contract is simply a piece of evidence which the plaintiff uses in establishing his right to the land as he would a deed or any other evidence of title. A finding of the court that the contract had been completely executed on the part of Hartman would of itself be a determination that the plaintiff is entitled to the land provided for in the contract. The contract would then cease to be an element in the case, and such finding of complete performance would throw upon the defendant the burden of showing some act upon his part subsequent thereto sufficient in law to divest the plaintiff of his right to the land.

We do not think the amendment to the complaint filed December 13, 1886, stated a new cause of action. The action was originally commenced for a partition of the rancho. The amendment merely stated more particularly the source and evidence of plaintiff's title. That evidence does not constitute the cause of action. We think that in this action for a partition there can be no doubt that the parties may assert any title which they have, legal or equitable. Gates v. Salmon, 35 Cal. 593; Martin v. Walker, 58 Cal. 596; Watson v. Sutro, supra. In equity the plaintiff has a perfect title. At the time this action was commenced he had the legal title to several thousand acres of land, besides the equitable title to the lands in controversy. The court had jurisdiction of the subject-matter, and acquired jurisdiction of the parties.

It is claimed by respondent that the specifications of insufficiency of the evidence are not made with sufficient particularity to entitle appellant to question the findings of the court. We think this point is not well taken.

A number of errors are assigned by appellant, but in one only we think there is merit. The plaintiff offered to prove that he and Hartman expended large sums of money to preserve the estate of Arguello. The offer was rejected, and plaintiff excepted. In view of the fact that defendant claimed Hartman had abandoned his demand under the contract, it was material and relevant, we think, to show that Hartman and Luco were performing services and spending large sums of money to preserve the estate of Arguello, in order that there would be something to divide after payment of the debts and expenses of administration, and after the patent should be issued. Judgment and order reversed, and cause remanded for a new trial.

We concur: HARRISON, J.; SHARPSTEIN, J.; GAROUTTE, J.

BEATTY, C. J. I dissent. There was nothing in the contract between Olvera and plaintiff's assignor, Hartman, to distinguish it from any other executory contract to sell land. A right of action to enforce specific performance of Olvera's contract to convey accrued, if ever, upon the issuance of the patent in September, 1876, and was barred in four years. This action, as between Luco and De Toro, is in effect nothing more nor less than an action on that contract,—to specifically enforce it,—and it was not commenced until more than six years after the statute had begun to run, and two years after the bar had attached. As to other points discussed in the opinion of the court I express no opinion.

DE HAVEN, J. I dissent from the judgment, and concur in the foregoing opinion of Chief Justice BEATTY.

MCFARLAND, J. I dissent from the judgment of reversal, and adhere to former opinion. 18 Pac. Rep. 866.

(91 Cal. 632)

MOORE v. EARL *et al.* (No. 14,106.)

(*Supreme Court of California.* Nov. 11, 1891.)

WILLS—PROBATE—CITATION TO HEIRS—EXECUTOR'S BOND—SURETY—ESTOPPEL.

1. Recitals, in an order admitting a will to probate, that due proof was made to the satisfaction of the court that notice had been given of the time appointed for proving the will and hearing the petition, and that citations were duly issued and served as required by the previous order of the court, and that notice had been given according to law to all persons interested, warrants the presumption that an order had been regularly made directing the issuance of a citation to the heirs residing in the county, as required by Probate Act Cal. 1851, § 14, providing that, if the heirs reside in the county, the court shall direct citations to be issued and served on them to appear and contest the probate of the will at the time appointed.

2. A recital in an executor's bond that, "by order of the probate court * * * duly made and entered, * * * the above-bounden H. was appointed executor," etc., estops the surety to deny that the order appointing the executor was duly made and entered.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Action by F. J. Moore on the bond of C. W. Hathaway as executor and D. W. Earl as surety. Judgment for plaintiff. Defendant Earl appeals. Affirmed.

Johnson, Johnson & Johnson, for appellant. *Catlin & Blanchard*, for respondent.

Vanclief, C. This is an action upon the bond of an executor for the faithful execution of his trust according to law. The plaintiff recovered judgment, and the defendant Earl, who is a surety on the bond, appeals from the judgment, and also from an order denying his motion for a new trial. The defendant Hathaway was appointed executor in May, 1868, and, upon the execution of the bond in suit, letters testamentary were issued to him, upon which he indorsed his official oath as required by law, and thereupon took possession of the estate of the testator of the value of $16,637, and returned and filed an inventory thereof on May 11, 1868. Upon a final settlement of his accounts in September, 1889, the court found in his hands a balance of $12,577. This balance, by the decree of distribution, was given to the plaintiff, who brought this suit on the executor's bond to recover the full penalty thereof, which is $6,000. The only point made for the appellant is that the probate court acquired no jurisdiction to probate the will, or to issue letters testamentary, and therefore that, as to the surety, the executor's bond is void. The only alleged defect in the proceedings, by reason of which it is claimed that the probate court failed to acquire jurisdiction, is that no order of that court, directing the issuance of a citation to the heirs residing in the county, as required by section 14 of the probate act of 1851, is found upon the records or files of the court, except so far as it appears by recital in the order admitting the will to probate. Section 14 of the act of 1851 provides: "If the heirs of the testator reside in the county, the court shall also direct citations to be issued and served upon them to appear and contest the probate of the will at the time appointed." The order admitting the will to probate, and appointing Hathaway executor, recites, among other things, that due proof was made, to the satisfaction of the court, "that notice has been given of the time appointed for proving said will, and for hearing said petition, and that citations have been duly issued and served, as required by the previous order of this court, and it appearing to this court that notice has been given according to law to all parties interested," etc. In the absence of any other record, evidence of an order that a citation issue to the heirs residing in the county, or of its service, I think these recitals sufficient to warrant the presumption that such order had been regularly made, and that the citations had been duly issued and served. It might be otherwise if it appeared of record that an insufficient order relating to the citation had been made, or that the citation issued was not in substantial compliance with the order, or that the mode of service was fatally defective, as, in such case, it would not be presumed that a different order had been made or a different citation issued, or that service had been made in a different mode; but the record does not show, or purport to show, the form or substance of the order, or of the citation, nor the mode of service; and therefore the presumption that the order to issue and serve the citation was regularly made, and that the citation was regularly issued and served, does not contradict the record in any respect, but is in perfect accord with the recitals of the order admitting the will to probate. Freem. Judgm. §§ 125, 180; Black, Judgm. § 277; Irwin v. Backus, 25 Cal. 214; Fox v. Minor, 32 Cal. 120. Again, the bond in suit recites that "by order of the probate court of the county of Sacramento, duly made and entered on the 11th day of May, A. D. 1868, the abovebounden Charles W. Hathaway was appointed executor of the estate of Ferris Jewett Moore, deceased, upon executing a bond," etc. Under the circumstances of this case, both Hathaway, the principal, and Earl, the surety, are estopped by this recital in the bond from denying that the order appointing Hathaway executor was "duly made and entered." People v. Jenkins, 17 Cal. 500; Fox v. Minor, 32 Cal. 120; Bigelow, Estop. 361, and cases cited; Brandt, Sur. §§ 29, 30; People v. Falconer, 2 Sandf. 83; McClure's Case, 80 Pa. St. 167; Foster v. Com., 35 Pa. St. 148. I think the judgment and order should be affirmed.

We concur: Belcher, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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91 Cal. 636

Harms v. Silva *et al.* (No. 13,801.)

(*Supreme Court of California.* Nov. 14, 1891.)

Mortgages — Certificate of Acknowledgment — Subsequent Incumbrancers.

Civil Code Cal. § 2957, provides that a mortgage on growing crops is void "as against creditors of the mortgagor and subsequent purchasers and incumbrancers for value and in good faith, unless" accompanied by a certain affidavit and acknowledgment, proved, certified, and recorded in like manner as grants of real property. *Held* that, where plaintiff took a mortgage on growing crops, knowing that defendants held a prior mortgage thereon, but without knowledge that such mortgage was defective for want of the prescribed certificate, plaintiff is not a subsequent incumbrancer in good faith, and defendants' mortgage is valid as against plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; John K. Alexander, Judge.

Action by George Harms against M. Bruno Silva and L. B. Keating to recover 100 tons of baled hay, or its value. Judgment for defendants. Plaintiff appeals. Affirmed.

Geil & Morehouse and *G. W. Roadhouse*, for appellant. *Dorn & Parker* and *Frederick Sherwood*, for respondents.

Temple, C. This action is to recover 100 tons of baled hay, or the value. Defendants had judgment, and plaintiff appeals from it and the order refusing a new trial. The hay was raised by Silva, who on January 21, 1889, mortgaged the same, then a growing crop, to Keating, to secure the sum of $350, with interest; also "whatever further necessary costs that may be needed to guard and care for said crops." The mortgage was duly executed, and had attached to it the affidavit required by section 2957 of the Civil Code; but the officer neglected to certify the acknowledgment, and Keating had the mortgage recorded by the county recorder, without the certificate. Afterwards, March 29, 1889, Silva mortgaged the same crop to plaintiff to secure a debt due from Silva to him. Plaintiff took his mortgage with full knowledge of Keating's mortgage, and expecting at the time to obtain a second lien, being unaware of any defect. Plaintiff's mortgage was duly executed, and was recorded on the day it was executed. Each mortgage contains a stipulation giving the mortgagee a right to take possession of the crop when harvested. June 12, 1889, the hay having been cut and baled, the plaintiff attempted to take possession, and did receive and haul away eight bales. Returning for more, he found defendant Keating in possession, whereupon he commenced this action.

The only question in the case is whether Keating's mortgage is void as to plaintiff. Section 2955 of the Civil Code prescribes that chattel mortgages may be made upon certain personal property therein enumerated, and including growing crops. Section 2956 provides a form with which such mortgage must substantially comply. Keating's mortgage does substantially comply with the prescribed form. The next section makes such mortgage void, "as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless" accompanied by a certain affidavit and acknowledgment, proved, certified, and recorded in like manner as grants of real property. The fact that the mortgage, in the absence of a proper record, is expressly made void as to purchasers and incumbrancers for value and in good faith, implies that it is valid as to all others without such record. Plaintiff, having taken his mortgage with full knowledge of Keating's mortgage, is not an incumbrancer in good faith. Gassner v. Patterson, 23 Cal. 299, is not in point. As the statute then stood, (St. 1861, p. 197,) it provided that no chattel mortgage should be valid (except as between the parties thereto) unless made, executed, and recorded according to the provisions of that act. As the statute then stood, it might well be said that a chattel mortgage was a privilege to be secured only by a strict conformity to the act. The Code provisions as to those chattels on which a mortgage is permitted puts them, except as to certain specified conditions, on the same basis as mortgages upon real estate. It matters not that plaintiff was a creditor, admitting that he is shown to have been such. He is here claiming as a subsequent incumbrancer only, and has no rights in this matter unless he acquired them by his mortgage. We advise that the judgment and order be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

91 Cal. 649

STEVENSON v. COLGAN. (No. 14,605.)

(*Supreme Court of California.* Nov. 16, 1891.)

CONSTITUTIONAL LAW—LEGISLATIVE POWERS—INVASION BY THE JUDICIARY.

Where an act of the legislature appropriating money to an individual for services rendered the state is valid on its face, courts cannot look into evidence *aliunde* to determine whether it was a gift in violation of Const. Cal. art. 4, § 31, providing that the legislature shall have no power to make any gift of any public money.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Petition by Jonathan D. Stevenson for *mandamus* to compel one Colgan, as state comptroller, to draw a warrant on the state treasurer. Judgment for petitioner. Defendant appeals. Affirmed.

Barham & Bolton, (*Atty. Gen. Hart, amicus curiæ,*) for appellant. *Geo. A. Wentworth* and *A. P. Van Duzer,* for respondent.

DE HAVEN, J. This is an application for a writ of *mandamus* to be directed to the defendant as state comptroller, and commanding him to draw a warrant on the state treasurer for the sum of $125, to which amount petitioner claims that he is entitled by virtue of the provisions of an act of the legislature approved March 31, 1891. The act is entitled "An act for the relief of Jonathan D. Stevenson, and to appropriate money therefor," and, so far as necessary to be stated here, it is as follows: "Section 1. The sum of one hundred and twenty-five dollars per month, payable monthly, for the period of twenty-one months, is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, for the relief of Col. Jonathan D. Stevenson: provided, however, that said appropriation shall cease upon the death of said Stevenson, if he shall die before said period has elapsed; the sums paid under the provisions of this act to be accepted by the said Stevenson in full payment and satisfaction of all claims of every kind and nature that he may have, or claim to have, against said state for services or otherwise." The answer of the defendant alleges that petitioner never at any time had or has "any claim of any kind or nature whatsoever against the state of California for services rendered, or for any other thing done, had, or performed by the said Jonathan Stevenson, or for anything of value furnished to the state of California;" and that the appropriation made by the said act of the legislature was intended as a gift to the petitioner. The answer then proceeds in an informal way to allege that, prior to the admission of California as a state, the petitioner expended money and performed services "in surveying and preparing charts of the bay of Suisun and the Sacramento and San Joaquin rivers," and, in substance, avers that this service and expenditure of money constitute the foundation of petitioner's alleged claim against the state, and for which the appropriation contained in the act referred to was made. A demurrer to the answer was sustained by the court below, and thereupon judgment was rendered in favor of petitioner, as demanded in his petition. The defendant appeals.

Section 31, art. 4, of the constitution, provides that the legislature shall have no power "to make any gift, or authorize the making of any gift, of any public money or thing of value, to any individual;" and section 32 of the same article also declares: "The legislature shall have no power to grant, or authorize any county or municipal authority to grant, any extra compensation or allowance to any public officer, agent, servant, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part." By these provisions of the constitution there is denied to the legislature the right to make direct appropriations to individuals from general considerations of charity or gratitude, or because of some supposed moral obligation resting upon the people of the state, and such as a just and generous man, although under no legal liability so to do, might be willing to recognize in his dealings with others less fortunate than himself. It was because of abuses which had crept into legislation by reason of the unlimited power theretofore exercised by the legislature in determining what individual claims should be recognized by private act, and to relieve in some degree legislators from the importunities of persons interested in securing such appropriations, that the power of the legislature was thus limited by the present constitution of this state. In this view there can be no doubt that if the facts are as alleged in the answer of defendant the act under consideration ought never to have been passed. But these facts do not appear upon the face of the act itself, and the question is thus presented whether it is competent for the court in this or any form of action to receive evidence *aliunde* to establish such facts, and thus to impeach and overthrow a law which, upon its face and independent of proof, is presumptively valid. This case, as thus presented, is to be distinguished from those in which it has been held that the court may look into the journals of the legislature for the purpose of determining whether a statute was in fact passed by the requisite votes required by the constitution. In such cases the question is whether the law was in fact enacted, and not whether the legislature in passing the statute properly discharged its duty by the preliminary ascertainment of facts which alone would justify such legislative action.

In our opinion, the question which we have stated as the one for decision here must be answered in the negative. While the courts have undoubted power to declare a statute invalid, when it appears to them in the course of judicial action to be in conflict with the constitution, yet they can only do so when the question arises as a pure question of law, unmixed with matters of fact, the existence of which must be determined upon a trial, and as the result of, it may be, conflicting evidence. When the right to enact a law depends upon the existence of facts, it is the duty of the legislature before passing the bill, and of the governor before approving it, to become satisfied, in some appropriate way, that the facts exist; and no authority is conferred upon the courts to hear evidence and determine, as a question of fact, whether these co-ordinate departments of the state government have properly discharged such duty. The authority and duty to ascertain the facts which ought to control legislative action are, from the necessity of the case, devolved by the constitution upon those to whom it has given the power to legislate, and their decision that the facts exist is conclusive upon the courts, in the absence of an explicit provision in the constitution giving the judiciary the right to review such action. We therefore hold that, in passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice. If the law, when thus considered, does not appear to be unconstitutional, the court will not go behind it, and by a resort to evidence undertake to ascertain whether the legislature in its enactment observed the restrictions which the constitution imposed upon it as a duty to do, and to the performance of which its members were bound by their oaths of office. "If evidence was required, it must be supposed that it was before the legislature when the act was passed; and, if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be equivalent to such finding." Cooley, Const. Lim. *187. This view seems to be sustained by the decisions of the highest courts of other states, and is in harmony with the central idea of the constitution in prescribing the independence and equality of the three great departments of the state. The following are some of the cases which in principle sustain the conclusion we have reached: Manufacturing Co. v. Shanahan, (N. Y. App.) 28 N. E. Rep. 358; Rumsey v. People, 19 N. Y. 41; Hovey v. Foster, 118 Ind. 502, 21 N. E. Rep. 39; Lusher v. Scites, 4 W. Va. 11; De Camp v. Eveland, 19 Barb. 81.

If experience shall demonstrate that further restriction upon legislative power over the subject of appropriations of public money is necessary, it is within the power of the people to so amend the constitution as to provide that, notwithstanding an appropriation made by the legislature for its payment, the legality of every claim against the state shall or may be the subject of judicial investigation as to the facts upon which it rests. But, in the absence of a plain direction to that effect, the courts are not authorized to institute such an inquiry. As already stated, the act in question does not show upon its face the nature of the claim which the petitioner made against the state, or that the appropriation thereby made is a gift. The statute is unusual in form, and it may be difficult to assign any good reason for the singular provision that the state shall discharge by monthly installments the indebtedness which the act admits, and, in the event of petitioner's death before it is fully paid, shall be released from the payment of any balance then due; but this does not affect the question of the power of the legislature to so provide, nor authorize the court to declare that the act was enacted in absolute disregard of the constitution. Judgment affirmed.

We concur: GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

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91 Cal. 555

MARRINER v. DENNISON. (No. 14,154.)

(*Supreme Court of California.* Nov. 17, 1891.)

On rehearing. For former report, see 27 Pac. Rep. 927.

PER CURIAM. The opinion heretofore filed in the above-entitled cause is hereby modified by striking therefrom that portion which is included under the subdivisions numbered, respectively, 2 and 3.

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91 Cal. 655

LILLEY *et al.* v. PARKINSON. (No. 13,951.)

(*Supreme Court of California.* Nov. 18, 1891.)

OPINION EVIDENCE—MEDICAL BOOKS.

On trial of an action for damages for negligence and unskillfulness of a physician in setting plaintiff's broken arm, it is error to permit plaintiff to read to her medical witnesses, in their examination in chief, extracts from a standard work on surgery, and then to ask them if what was so read corresponds with their own judgment.

Department 2. Appeal from superior court, Contra Costa county; J. P. JONES, Judge.

Action by Sarah E. Lilley against Dr. Parkinson for damages. Judgment for plaintiff. The defendant appeals. Reversed.

Geo. A. Knight and *A. C. Hartley*, (*Knight & Heggerty*, of counsel,) for appellant. *Eli R. Chase*, (*C. Ed. Miller*, of counsel,) for respondent.

DE HAVEN, J. The defendant is a physician and surgeon, and this action is to recover damages for his alleged negligence and unskillfulness in setting a broken arm of the plaintiff, Sarah E. Lilley. The plaintiff recovered a judgment for $1,000. The defendant appeals. Upon the trial the plaintiff was permitted, in the examination in chief of medical witnesses called by herself, to read extracts from Agnew's Surgery, shown to be a standard work and authority on that subject, and then to ask the witnesses if what was so read corresponded with their own judgment. The decision of the court in overruling the objection of defendant to this mode of examination was erroneous. The only effect of these questions and answers was to place before the jury the opinion of the author of the book referred to, and it is also apparent that this was the object sought. But it is not permissible, in this manner, to evade the general rule of evidence, which excludes medical books and opinions found therein as incompetent. Com. v. Sturtivant, 117 Mass. 122; Gallagher v. Railway Co., 67 Cal. 17, 6 Pac. Rep. 869. In the cases of Marshall v. Brown, 50 Mich. 148, 15 N. W. Rep. 55; Fisher v. Railroad Co., 89 Cal. 399, 26 Pac. Rep. 894; City of Bloomington v. Shroch, 110 Ill. 219,—it was held not competent, upon cross-examination of a witness, to read to him extracts from medical books, and ask him whether he agreed in opinion with the author, when it was apparent that the sole object of so doing was to get before the jury the extracts so read as original evidence to sustain the theory of the party so cross-examining the witness. The principle upon which those cases were decided applies with even more force to the facts of this case, where the same forbidden result was accomplished by the manner in which the direct examination of the witnesses for plaintiff was conducted. Judgment and order reversed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

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91 Cal. 659

ESTEP v. ARMSTRONG. (No. 13,990.)

(*Supreme Court of California.* Nov. 18, 1891.)

RIGHTS OF HEIRS—RECOVERY OF LAND.

Under Code Civil Proc. Cal. § 1452, providing that an executor or administrator is entitled to the possession of all the real and personal estate of his decedent, and the rents and profits of the real estate until the estate is settled, or until delivered over by order of the court to the heirs or devisees, and that the heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same against any one except the executor or administrator, an heir at law may maintain an action against one not the executor to recover possession and rents of real estate of which the testator died seised in fee, and which his will directed should be converted into money by his executrix as soon as practicable in her judgment, since such direction does not vest title to the land in the executor.

Department 2. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Action of ejectment by Amanda C. Estep against James B. Armstrong. Judgment for defendant. The plaintiff appeals. Reversed.

T. H. Osment and *J. H. Gove*, for appellant. *R. W. Crump* and *Woods Crawford*, for respondent.

SHARPSTEIN, J. This is an appeal from a judgment entered against the plaintiff and in favor of the defendant in an action of ejectment. The record consists of the pleadings, findings, judgment, and a bill of exceptions. The court found that the plaintiff, Amanda C. Estep, is the daughter and heir at law of Joseph H. Estep, deceased. That the said Joseph H. Estep was, at the time of his death, seised in fee and possessed of those certain lands and premises in the complaint mentioned known as the "Fitzgerald Tract," describing the same according to the United States survey. That at the time of his death said Joseph H. Estep was the owner of the undivided one-half of all the remainder of the land described, as a tenant in common with the defendant James B. Armstrong, who owned the other undivided half thereof. That the defendant, at the time of the commencement of this action, was, and still is, in possession of certain of the lands in the complaint described, which lands are fully and particularly described in said finding. That said Joseph H. Estep left a last will and testament, of which a copy is set out in said finding, one clause of which only is material in this case, and that is as follows: "It is my will that, so soon after my decease as practicable in the judgment of my executrix hereinafter mentioned, all my property, whether real, personal, or mixed, be converted into money." That said will was duly admitted to probate by the probate court of Lake county on the 21st day of February, 1876. That plaintiff has never at any time been the owner, or seised in fee or otherwise, or possessed or entitled to the possession, of the lands described in the amended complaint herein, or in any cause or causes of action herein, or of any interest in said lands, or any part thereof, or of any of them That defendant never at any time did oust or eject plaintiff from any of the lands described in said amended complaint, or in any cause or causes of action set out in said complaint. The bill of exceptions shows that the facts found by the court in the 1st, 2d, 3d, and 4th findings were admitted, and plaintiff then offered evidence to show the value of the rents of the premises, admitted to have been in defendant's possession at the commencement of this action, to which defendant objected, on the ground that such evidence was incompetent, irrelevant, and immaterial, for the reason that plaintiff had shown by her own evidence that she was never at any time the owner of any right to or interest in the land. The court sustained the objection, and plaintiff excepted.

An heir may maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator. Code Civil Proc. § 1452.[1] Does the direction contained in the will, to have all his property converted into money as soon as practicable after the death of the testator, deprive the heir of the right to maintain an action for the possession of the real estate of which the testator died seised in fee? There is no express devise in the will of any of the real estate of which the testator died seised in fee. In Bergen v. Bennett, 1 Caines, Cas. 1, Kent, J., said: "If a man by his will directs his executors to sell his land, this is but a bare authority, without interest; for the land in the mean time descends to the heir at law, who, until the sale, would at common law be entitled to the profits." It was as well settled when this was said, as it is now, that where there is a direction in a will to have land converted into money the conversion takes place as from the death of the testator. The provision of the Code that, "where a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the death of the testator," is simply declaratory of the common law. It was said by the chancellor in Haxtun v. Corse, 2 Barb. Ch. 521, that, "to deprive an heir or distributee of the property which the law gives him in case of intestacy, the testator must make valid and effectual disposition thereof to some other person." "We think," says the supreme court of Indiana, that "it is well settled by the current of American as well as of English decisions that mere direction to an executor to sell lands for the purpose of paying legacies or making distributions does not vest any title to the land in the executor. To cut off the heir at law the estate must be devised expressly or by implication to some other person." Clendenning v. Lanius, 3 Ind. 441. The Code, in our opinion, has not changed the law in this respect. The Code does not declare that a direction to convert land into money shall vest the title to the land in the executor. It leaves the law, as it always has been, that the direction in wills to convert land into money, or money into land, is for the benefit of those for whose use the conversion is intended to be made, and that, as to them, it is deemed to have been made from the death of the testator. But the Code does not provide that such a direction in a will shall operate as a devise of the land directed to be converted to the executor. In the absence of any devise of the land, the title vests in the heir on the death of the ancestor, and the heir may maintain an action to recover the possession of it against any person other than the administrator or executor. The findings that the plaintiff is the heir at law of Joseph H. Estep, deceased, and that he died seised in fee of certain of the demanded premises, are in conflict with the finding "that plaintiff has never been the owner, or seised in fee or otherwise, or possessed or entitled to the possession, of the lands described in the amended complaint herein, or in any cause or causes of action herein, or of any interest in said lands, or any part thereof, or of any of them." That is a sufficient ground for reversing the judgment. The court erred in excluding evidence of the value of the rents of the demanded premises while in the defendant's possession. As the heir at law, she was entitled to the rents, issues, and profits of the land so long as she was wrongfully kept out of the possession thereof. Judgment reversed, and cause remanded for a new trial.

We concur: De Haven, J.; McFarland, J.

91 Cal. 654

Langan v. Langan. (No. 13,593.)

(*Supreme Court of California.* Nov. 18, 1891.)

Divorce—Alimony.

1. The court had jurisdiction, in a divorce case, to order defendant to pay plaintiff $25 per

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[1] Code Civil Proc. Cal. § 1452, provides that an executor or administrator is entitled to the possession of all the real and personal estate of his decedent, and to receive the rents and profits of the real estate until the estate is settled, or until it is delivered over by order of the court to the heirs or devisees, and that the heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same against any one except the executor or administrator.

month alimony, though issue of fact had not been joined, and there was pending a demurrer to the complaint.

2. The order was not erroneous because the requirement to pay the amount fixed by it was not expressly limited to such time as the action should be pending.

Department 2. Appeal from superior court, city and county of San Francisco; WALTER H LEVY, Judge.

Action by Langan against Langan for a divorce. Defendant was ordered to pay $25 per month alimony to the plaintiff, and from such order he appealed. Affirmed.

Matthews & Morse, for appellant. *John E. Sundstrom*, (*Manuel Eyre*, of counsel,) for respondent.

DE HAVEN, J. This is an appeal by the defendant from an order made in an action for divorce, allowing the plaintiff therein alimony. The order is as follows: "The order to show cause having been heretofore submitted to the court for consideration and decision, and now, the court having fully considered the same, it is ordered that the defendant pay to the plaintiff the sum of twenty-five dollars ($25) per month alimony."

1. This order was made before any issue of fact was joined in the said action for divorce, and while there was pending a demurrer to the complaint, which demurrer was afterwards sustained. The order is not erroneous for this reason. The action for divorce was pending at the time it was made, and the court had undoubted jurisdiction to make it.

2. The order is not erroneous because the requirement to pay the amount fixed by it is not expressly limited to such time as the action in which it is made shall be pending. By necessary implication it ceases to have any operation after the entry of judgment.

3. We cannot say that in making the order upon the facts before it the court committed any abuse of discretion. Order affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

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91 Cal. 657

BYRUM v. STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS. (No. 14,183.)

(*Supreme Court of California.* Nov. 18, 1891.)

CHANGE OF VENUE.

In an action for breach of warranty of a harvesting-machine sold plaintiff by defendant, and which plaintiff alleged failed to work, defendant moved for a change of venue to S. county on an affidavit alleging that its principal place of business was in said county, that the contract sued on was made there, and that the breach, if any, did not occur in the county in which the action was brought. On the hearing of the motion plaintiff merely read his verified complaint, showing that he was a resident of the county in which suit was brought, and alleging that the breach of contract occurred there, but not stating where the contract was made or was to have been performed. *Held*, that the change of venue should have been granted.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; W. O. MINOR, Judge.

Action by Martin Byrum against the Stockton Combined Harvester & Agricultural Works. Defendant appeals from an order refusing a change of venue. Reversed.

W. L. Dudley, for appellant. *W. E. Turner* and *L. J. Maddox*, for respondent.

TEMPLE, C. Appeal from an order refusing a change of venue. The plaintiff resides in Stanislaus county, where the action was brought, and is a farmer. He purchased from defendant a Shippee Combined Harvester, which, as he avers, defendant guarantied would do good and satisfactory work, but which wholly failed to perform as guarantied, by reason whereof he was damaged. Defendant moved for a change of venue to San Joaquin county, upon an affidavit showing that the principal place of business of defendant is in Stockton, San Joaquin county, and that the contract sued upon was made at defendant's said principal place of business; also that the breach of said contract, if any, did not occur in Stanislaus county. There was also an affidavit of merits. On the hearing of the motion the plaintiff read in answer only his verified complaint. It is there averred that defendant is doing business in the state of California, and, among other counties, in the county of Stanislaus; that, among other things, the business of the corporation was to manufacture and sell a certain kind of machinery, known as the Shippee Combined Harvester, with Shippee and Grattan improvements. A contract is set out whereby defendant sold a machine to plaintiff with a guaranty as to performance, to wit, that said harvester would do and perform good and satisfactory work in the harvesting, cutting, and saving of grain, and would harvest plaintiff's grain in Stanislaus county at a greatly reduced expense, etc. It is shown that, relying upon the representations and guaranty, he purchased the machine, took it to his farm in Stanislaus county, where it wholly failed to perform; that the failure was owing wholly to the faulty manufacture and construction of said machine; "that this action is brought to recover damages sustained by plaintiff, growing out of the breach of contract of defendant as aforesaid; and that said breach occurred in the county of Stanislaus, and the liability of defendant thereon occurred in said county." The complaint does not state where the contract was made, or was to have been performed. The affidavit of defendant states that the contract was made in the county of San Joaquin, where the principal place of business of the corporation is. It is quite immaterial whether the corporation did business in Stanislaus county, if this contract was not made or was not to have been performed there. The affidavit of the moving party is positive to the effect that the contract, the breach of which is the subject of the action, was made in San Joaquin county. This fact is not controverted in the complaint, but it is there stated that the breach occurred in Stanislaus county. This is, however, a mere legal conclusion, probably drawn by the pleader from the fact that the failure of the machine to perform was in that county. It is merely an erroneous opinion. It is not stated on either side where the machine was delivered to plaintiff, but as the sale was at Stockton, defendant's principal place of business, the presumption is that it was delivered there. If the machine was, as charged, wholly inadequate and unadapted to perform according to the guaranty, the breach was there and then, and not when it failed to perform on plaintiff's farm in Stanislaus. The order appealed from should therefore be reversed, and defendant's motion to change the place of trial should be granted.

We concur: Vanclief, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the order appealed from is reversed, and defendant's motion to change the place of trial is granted.

92 Cal. 1

Tromans v. Mahlman *et al.* (No. 13,149.)

(*Supreme Court of California.* Nov 19, 1891.)

Homestead—Residence on Land.

Defendants, husband and wife, were living in S. until August 21, 1883, when they and their children left the city with part of their furniture, and went to the homestead claimed, where they stayed that night. The following morning the husband returned to S., and telegraphed his wife to meet him at O., which she did, and there had executed and recorded a declaration of homestead, when she returned to the alleged homestead. The day following, the wife returned with her children to her husband at S., where they all remained. *Held*, that there was no actual residence on the land, within the homestead law, (Civil Code Cal. § 1263.)

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; Noble Hamilton, Judge.

Action by Joseph Tromans against Henry Mahlman and Mary Jane Mahlman to recover the possession of a house and lot claimed by defendants as a homestead. Judgment for defendants. Plaintiff appeals. Reversed.

Metcalf & Metcalf and *Benj. Williams*, for appellant. *R. Percy Wright*, for respondents.

Belcher, C. In June, 1882, one Lee conveyed to the defendant Henry Mahlman a lot of land in the town of Haywards, Alameda county. In May, 1883, Mahlman conveyed the lot as a gift to his wife, the defendant Mary Jane Mahlman. When these conveyances were executed, one Fisk held a mortgage made by Lee on the lot, and both conveyances were made subject to the mortgage. On the 22d day of August, 1883, Mrs. Mahlman executed and caused to be recorded a declaration of homestead on the lot, which was in all respects in accordance with the provisions of section 1263 of the Civil Code. In January, 1884, Fisk commenced an action against the mortgagor, Lee, and Mrs. Mahlman to foreclose his mortgage, and such proceedings were subsequently had that a decree of foreclosure was duly made and entered against the defendants therein. Under this decree an order of sale was issued, and the property was regularly sold to the plaintiff herein, who in August, 1887, received the sheriff's deed therefor. In December, 1887, the plaintiff commenced this action to recover possession of the lot, alleging in his complaint that he was the owner of the same in fee-simple absolute. The defendants, by their answer, denied that plaintiff was the owner of the lot, or of any part thereof, in fee-simple absolute, or at all. After trial the court found the facts as follows: "(1) That the plaintiff, Joseph Tromans, is not the owner of the tract of land mentioned and described in the complaint herein, or of any part thereof, either in fee-simple absolute or at all. (2) That the defendants, Henry Mahlman and Mary Jane Mahlman, are the owners of said tract of land, and of every part thereof." Judgment was accordingly entered in favor of the defendants, from which, and from an order refusing a new trial, the plaintiff appeals.

It is admitted by counsel for appellant that, since Henry Mahlman was not made a party to the foreclosure suit, the judgment should be affirmed if the demanded premises had become the homestead of defendants before that suit was commenced; but it is contended that the declaration of homestead, which was executed and filed for record by Mrs. Mahlman, did not create a valid homestead, for the reason that she was not at the time actually residing upon the premises. It is objected by respondents that the statement on motion for new trial contains no sufficient specifications of the particulars in which the evidence is alleged to be insufficient to justify the decision of the court, and hence that this point cannot be considered; but we think the specifications should be held sufficient. "The purpose of the statute is apparent. It was to direct the attention of the court and counsel to the particulars relied on by the moving party, to the end that the evidence bearing on the specifications of error might be inserted in the statement, and considered by the court." Eddelbuttel v. Durrell, 55 Cal. 279. In Pralus v. Mining Co., 35 Cal. 37, a specification similar to that found here was admitted to be sufficient.

The evidence as to the homestead was as follows: Mrs. Mahlman testified: "I am one of the defendants in this case, and was residing on the land in controversy in this action, which is situated at Haywards, Alameda county, at the time the declaration of homestead which has been spoken of was made and filed for record. There was a dwelling-house on the land then. My father and all the family I had in August, 1883, were living there with me at the time. Cross-examined: My husband was living with me on the place at Haywards on the 22d day of August, 1883. Before that time we were living at 717 Stockton street, in San Francisco. Was not living at 717 Stockton street on the 22d of August, 1883. That is a rooming-house. My furniture was not all there. Took part of the furniture to the place at Haywards. I took all household utensils; everything up to a broom. The furniture was there long before. It was sent over in January, 1883. My husband, my father, and all my four children went to Haywards on the 21st of August, 1883. My husband stayed there one night, and went to San Francisco the following morning. I stayed there two nights, and then went back to San Francisco. We did not live in the house at Haywards before we went on the 21st of August, 1883. After August 23, 1883, resided continually in San Francisco, until about November, 1886. * * * My husband went to San Francisco by the morning train on the 22d of August, 1883, and sent me a telegram to meet him at Oakland that day, and I met him there. The declaration of homestead was signed and acknowledged by me at Oakland, and after it was taken to the recorder's office my husband put me into the Haywards train, and he went to San Francisco. I returned to the house at Haywards, and remained there until the following day. I and my children and my father slept in the house at Haywards on the night of the 22d of August, 1883. We all left and returned to San Francisco on the 23d of August, 1883. I took the blankets, sheets, pillow-cases, and pillows back with me to San Francisco. I had no other property but that at Haywards at the time the declaration of homestead was filed. My husband had not filed a declaration of homestead at that time. All the land except that on which the house stands was used as a garden and orchard, and it was all inclosed with a fence. Redirect examination: My idea in making the declaration of homestead was that my children should have a home."

Henry Mahlman testified: "I am one of the defendants in this case. Remember the declaration of homestead, which has been spoken of here, being filed. On the night of the day before it was filed I was stopping in the house at Haywards, with my wife and family. Went there on the 21st of August, 1883. I went alone. My wife and children went the same day, along with her father, Mr. Miller. Went next morning to San Francisco, to attend to business. Had a declaration of homestead made out there, and telegraphed my wife to come to Oakland. She came in the afternoon, and signed and acknowledged the declaration of homestead, which was recorded, and then my wife returned to Haywards. Cross-examination: I rented the house 717 Stockton street, San Francisco, about 1879. Paid the rent to Madison & Burke for the months of August and September, 1883, and right along for two or three years after that. My furniture and things were there in August, 1883. In January, 1883, sent part of the furniture over to the house in Haywards. Only stayed one night there in August, 1883; that was the night between the 21st and 22d of August."

George W. Miller also testified: "I am the father of the defendant Mary Jane Mahlman. Remember going with her to Haywards, and taking the children. I remember Mahlman went there the same evening. Remember going to Haywards before that with an expressman. When I went with my daughter and the children we took supper at the house of a man named Geary, who lived close by. I went over to the house from Geary's, and made it as comfortable as possible. It was a small house, about 24x12, with two rooms. We all slept there that night. The next day my daughter got a dispatch, and went to Oakland. I remained there with the children. She came back, and stayed with the children and me at the house that night."

It is settled law in this state that to constitute a valid homestead, the claimant must actually reside on the premises when the declaration is filed. Prescott v. Prescott, 45 Cal. 58; Babcock v. Gibbs, 52 Cal. 629; Aucker v. McCoy, 56 Cal. 524; Pfister v. Dascey, 68 Cal. 572, 10 Pac. Rep. 117; Lubbock v. McMann, 82 Cal. 228, 22 Pac. Rep. 1145. The question, then, is, does the evidence show that Mrs. Mahlman was actually residing on the premises in controversy when she filed her declaration of homestead? We are unable to see how this question can be answered otherwise than in the negative. The obvious purpose of the statute in providing for the selection of a homestead was to thereby make a home for the family, which neither of the spouses could incumber or dispose of without the consent of the other, and which should at all times be protected against creditors. To effect its purpose the statute has been liberally construed in some respects, but the requirement as to residence at the time the declaration is filed has been strictly construed. Thus this court has many times used and emphasized the word "actually," to show that the residence must be real, and not sham or pretended. In Babcock v. Gibbs, supra, the homestead claimants went to their lot in the evening, and spread a blanket for a roof, and slept under it. The next day they filed a declaration of homestead, and commenced the erection of a house, which they completed and moved into in about a month. It was held that they were not actually residing on the premises when the declaration was filed, and hence that no homestead was thereby selected. Here it clearly appears from the evidence that the respondents went to Haywards, not to make their home or place of abode there, but only to spend a night or two, and then return to their home in San Francisco. This was not enough to constitute an actual residence. In our opinion, the judgment and order should be reversed, and we so advise.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

92 Cal. 38

ANDERSON v. STRASSBURGER. (No. 13,519.)

(*Supreme Court of California.* Nov. 21, 1891.)

VENDOR AND VENDEE—CONTRACT TO PURCHASE—RECOVERY OF PART PAYMENT.

Where one who has a contract by which he can at any time acquire the legal title to land, sells to another who knows of such contract, giving him 10 days to examine the title, and agreeing to refund a part payment if the title does not prove satisfactory, the failure of the vendor to obtain a conveyance within the 10 days, so that he can convey to the vendee, will not entitle the vendee to rescind the contract and recover the money paid, in the absence of any demand on the vendor for a deed, or offer to complete the purchase, or notice of objection to the title.

Department 2. Appeal from superior court, city and county of San Francisco; W. T. Wallace, Judge.

Action by one Anderson against one Strassburger. Judgment for defendant. Plaintiff appeals. Affirmed.

T. J. Rogers, for appellant. *E. F. Preston*, for respondent.

De Haven, J. This action is to recover $500, received by defendant from plaintiff, "as a deposit and in part payment" for a block of land in the city of San Francisco, which plaintiff agreed to purchase from defendant. The contract contained the following stipulations: "Title to prove satisfactory, or the money to be refunded. * * * Ten days allowed for examination of title and completion of purchase." The court below found, among other things, that at the date of the contract the title to the property agreed to be sold was in the defendant, and was a satisfactory title, and that the plaintiff was not, during the 10 days named in the contract, nor at any other time, ready or willing to pay the remainder of the purchase price; and that, immediately after making the contract, he left San Francisco, where the contract was made, and where the defendant kept a business office, "and during all of said ten days thereafter the plaintiff avoided the defendant for the purpose of preventing and defeating the completion of said contract, and a tender of a deed to him by defendant in pursuance of said contract." Upon these findings judgment was entered for the defendant, and the plaintiff appeals.

The findings are sufficient to support the judgment, and the evidence sustains the findings. It appears that at the date of the contract the legal title to the property which plaintiff thereby agreed to purchase was in one Lees, the defendant being entitled by contract with Lees to a conveyance of the same at any time upon the payment of a certain balance upon the purchase price. This fact was known to plaintiff at the time when he made the purchase. The defendant did not in fact acquire the legal title to the property he agreed to sell plaintiff until more than 10 days after the date of plaintiff's contract to purchase, and because of this fact plaintiff claims the right to rescind the contract and recover his deposit, but we do not think so. The title was at all times potentially in the defendant, and he was not in default, simply because no formal conveyance was made to him by his grantor within the time allowed plaintiff for examination of the title, nor was there any necessity for him to acquire such title in order to carry out his agreement, until plaintiff notified him that he was ready to complete the contract upon his part. The plaintiff was allowed 10 days within which to examine the title, and the agreement, in view of all the facts surrounding the parties at the time it was made, contemplated that defendant should receive notice of the approval of the title he was to obtain from Lees, or, if not approved as satisfactory, that he should be informed of any objection which after such examination plaintiff might have to the same, and he was entitled to a reasonable time thereafter within which to perfect his title or remedy any defects discovered by plaintiff; and not until the giving of such notice, and an offer by plaintiff to fully perform the contract on his part upon receiving a perfect title, and the refusal of defendant thereafter to convey in accordance with the terms of his agreement, would plaintiff have the right to rescind the agreement and recover the amount paid by him thereon. These views are fully sustained by the cases of Englander v. Rogers, 41 Cal. 420; Dennis v. Strassburger, 89 Cal. 583, 26 Pac. Rep. 1070; and Easton v. Montgomery, (Cal.) 27 Pac. Rep. 280,—and are decisive of all questions involved in this appeal. Judgment and order affirmed.

We concur: McFarland, J.; Sharpstein, J.

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92 Cal. 41

People v. Hong Quin Moon. (No. 20,820.)

(*Supreme Court of California.* Nov. 21, 1891.)

False Pretenses — Sufficiency of Evidence— New Trial.

1. On a prosecution for obtaining money under false pretenses the prosecuting witness did not testify that he believed the alleged false statements, or that they induced him to pay over the money. There was a substantial conflict in the other evidence, but it seemed to preponderate in favor of defendant. *Held*, that a verdict of guilty should not be disturbed on appeal. Paterson, J., dissenting.

2. A new trial on the ground of newly-discovered evidence is properly refused where substantially the same matters set forth in the affidavit were testified to by the witnesses at the trial, the only difference being that a certain statement made by defendant was testified to by witnesses as having been made before the trial, while the affidavit referred to statements made subsequent to the trial.

In bank. Appeal from superior court, Santa Cruz county; F. J. McCann, Judge.

Information against Hong Quin Moon for obtaining money under false pretenses. Judgment of conviction. Defendant appeals. Affirmed.

Lucas F. Smith, for appellant. *Carl E. Lindsay* and *Atty. Gen. Hart*, for the People.

Per Curiam. The defendant was charged with having obtained from one Dong Toy the sum of $150 by means of false and fraudulent pretenses and representations. The information is sufficient, and there were no errors in the instructions of the court. The jury were instructed that before the defendant could be convicted it must be shown beyond a reasonable doubt that the representations alleged were false, and made with intent to defraud Dong Toy, and that they induced him to part with his money. Dong Toy did not testify that he believed the alleged statement of the defendant, or that it induced him to pay over the money; but in cases of this kind, while the testimony of the prosecutor is ordinarily the best evidence of the effect which the alleged statements had upon him, it is not essential to a conviction that he should testify expressly that the false pretenses induced him to act as he did. The jury may be fully satisfied on the testimony of others, and from all the circumstances in the case, that the representations did induce him to turn over the property to the defendant. State v. Thatcher, 35 N. J. Law, 449. Although the evidence seems to preponderate in favor of the defendant, there is a substantial conflict, and it cannot, therefore, be said that the evidence is insufficient to support the verdict.

The court did not err in its refusal to grant a new trial on the ground of newly-discovered evidence. The witnesses for the defendant testified at the trial to substantially the same matters set forth in the affidavit on motion for a new trial; the only difference being that the statement of the defendant, testified to by the witnesses at the trial, were made in November, 1890, and those referred to in the affidavits were made subsequent to the trial. The judgment and orders appealed from are affirmed.

PATERSON, J., (*dissenting*.) I am unable to concur in the order affirming the judgment. While it is true that in cases of this kind the jury may be satisfied from the testimony of witnesses other than the prosecutor, or from all the circumstances in the case, that the representations induced the injured party to part with his property, yet the fact is one which, like every other element in a criminal offense, must be proved beyond a reasonable doubt. In this case the evidence is so overwhelmingly in favor of the defendant, not only upon that matter, but upon the question as to whether or not the representations alleged were in fact made, that I think the judgment of conviction ought not to be permitted to stand. There are no circumstances, except the fact that money was paid to the defendant, tending to show that he was induced by defendant's representations to pay the money. The evidence tended strongly to show that Dong Toy had lent the defendant the sum of $40, and, upon the refusal of the latter to pay him that amount, had resorted to criminal proceedings to coerce payment. He sued the defendant in the justice's court for $150, and attached the laundry he claims to have purchased. Although he visited the laundry at the time he claims to have made the purchase,—December 6th,—and again, several days after the purchase, when he conversed with Hong Sing, one of the proprietors of the laundry, he made no claim thereto. I do not lose sight of the rule, so often applied here, that this court will not interfere where there is a substantial conflict in the evidence; but, after reading the statement of the evidence contained in the record several times, I am unable to see how the jurors, giving to the evidence that fair and impartial consideration which is due in every criminal case, could say they had an abiding conviction as to the guilt of the defendant,—that his guilt was established to a moral certainty, beyond a reasonable doubt.

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92 Cal. 44

SHIRLEY v. SHIRLEY *et al.* (No. 14,216.)

(*Supreme Court of California.* Nov. 23, 1891.)

ADVISORY VERDICT—FINDING BY COURT.

Where the evidence as to whether there was a parol gift is conflicting, the court does not abuse its discretion in disregarding the advisory verdict of a jury, and finding that there was not.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Ejectment by L. F. Shirley against Kate Shirley and H. M. Kutchin. Judgment for plaintiff. Defendants appeal. Affirmed.

Hunsaker, Britt & Goodrich, for appellants. *Collier & Watson*, (*Works, Gibson & Titus*, of counsel,) for respondent.

FOOTE, C. This action in ejectment was brought by Mrs. L. F. Shirley, the mother of one Frank B. Shirley, deceased, against his widow and her tenant, H. M. Kutchin. An answer and cross-complaint were filed by the defendants, alleging a parol gift of the premises in controversy by the plaintiff to her son, Frank B. Shirley; that he was dead, and had left by will all his property to his said wife; that he had before his death complied with all the conditions of the parol gift and promise made by his mother; and asking for a specific performance thereof. The contentions thus raised were submitted to a jury upon special issues, all of which were found in favor of the defendant Kate Shirley. The court below declined to accept the advisory verdict of the jury, and rendered a decision upon the issues made directly contrary thereto, and judgment was entered accordingly. The appeal here is taken from that judgment, and from an order refusing a new trial.

The only real contentions here are whether the court was guilty of an abuse of discretion in finding, as it did, upon the allegations of the cross-complaint, and in refusing to admit certain evidence. In a contest of this kind, to establish and enforce a parol gift of land, "the evidence must be clear and definite; and, if there is such a conflict of evidence as makes it uncertain what the material terms of the agreement were, the court will refuse to interfere." Wat. Spec. Perf. § 291. The court below adhered to the belief, from the evidence that no such parol gift, as asserted to have been made, and of which specific performance was claimed in the cross-complaint, was intended, and, there having been a conflict of evidence as to the matter, we cannot say that the legal discretion vested in that tribunal was abused.

Neither do we perceive any error in refusing to permit answers to the interrogatories propounded to the witness Morris about a certain letter. It was written by the son of the plaintiff to his sister, and related to matters entirely foreign to those here involved, and even conceding that the alteration was made by the plaintiff, which is not made perfectly clear, yet we do not see how it could affect the issues here made. Suppose the plaintiff did think that her son had put money into "Silver Terrace" property, instead of loaning it to her, and she had made this addition of the words above quoted in the letter, as expressing her dissent from what he had written, how could that have anything to do with the case here? Certainly it does not relate to her alleged promise and agreement, nor does it touch her credibility as a witness; and even if it had gone to her credibility, in view of all the other evidence in the case, we are unable to perceive that it could have affected the result. The legal title to the property in dispute was, without question, in the plaintiff. There was certainly some evidence that the party under whom the defendant claimed was a tenant at will only, and that he was dead. We cannot say, therefore, that the court below erred in the course pursued. For these reasons we advise that the judgment and order be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

92 Cal. 33

DOBINSON *et al.* v. McDONALD. (No. 14,354.)

(*Supreme Court of California.* Nov. 20, 1891.)

RELEASE OF CONTRACT—FRAUD—RESCISSION.

1. Defendant appointed plaintiffs his agents to sell land, and agreed to pay them $5,000 if they should make a sale, and to pay said commission if he (defendant) should sell within a year. Before the year expired defendant sold through another agent, without plaintiffs' knowledge, and procured from them a release of the contract for $1,000, by fraudulently representing that he had not sold, and had determined not to sell. *Held* that, on defendant's sale of the land, he became obligated to pay plaintiffs $5,000, and, on their discovery of the fraud by which he procured the release, they were entitled to rescind it, and recover the balance of $4,000.

2. In an action by plaintiffs against defendant for such balance, defendant cannot deduct therefrom the commission paid by him to the agent who made the sale, even though plaintiffs are liable to such agent under an agreement between them and such agent made after their agreement with defendant, since the agent's right to part of plaintiffs' commission could not be established in an action to which he is not a party.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by G. A. Dobinson and others against E. N. McDonald. Judgment for plaintiffs. Defendant appeals. Affirmed.

Stephen M. White and *Chapman & Hendrick*, for appellant. *Lee & Scott*, for respondents.

HARRISON, J. In March, 1886, the defendant executed to the plaintiffs the following instrument: "Los Angeles, Cala., 20 Mar., 1886. To Messrs. G. A. Dobinson, J. A. Fairchild, and T. E. Rowan: I hereby appoint you sole agents for the sale of my ranch, containing about four thousand two hundred (4,200) acres, situate in Los Angeles county, California, and being part of the San Pedro ranch. I will sell said ranch for one hundred and twenty-six thousand ($126,000) dollars, payable one-third cash, and balance in deferred payments at one, two, and three years, secured by mortgage on land, and drawing interest at 8 per cent. per annum net to me. You will advertise and push the sale of said property at your own expense, and in consideration of your services I will pay you a commission of five thousand ($5,000) dollars, in the event of a sale of the whole of the ranch at above price, or by your procuring a customer who will buy on said terms. * * * I agree to pay you the commission as above if I should sell or agree to sell said ranch, or part of it, to any one in the twelve months next ensuing, and afterwards until you are notified that this agreement is at an end. You are authorized to accept a deposit and to give a binding receipt to a purchaser on the above terms, and I will furnish abstract of title at my expense. E. N. McDONALD." After the execution of this instrument the plaintiffs under its authority, and until December 1, 1886, acted as the agents for the defendant in endeavoring to effect a sale of said property, expending money, and carrying on negotiations therefor, and used reasonable diligence therein. On the 24th of November, 1886, the defendant gave to one Frye written authority to sell the same property, under which, on the same day, Frye effected a sale thereof to one Boyce, which the defendant by his written agreement ratified and confirmed on the 26th of November, 1886. After this sale had been so ratified and confirmed by him, viz., December 1, 1886, the defendant represented and stated to the plaintiffs that he had changed his intention as to selling said land, and no longer desired or intended to sell the same, but had withdrawn it from market; and also stated and represented to them that he had not sold said land, and did not intend or expect to sell the same, and offered to pay them $1,000 for the surrender of the above agreement. The plaintiffs, relying upon these representations and statements, and not knowing that he had already sold the land, accepted his offer, surrendered the agreement to him, and received from him $1,000 as the consideration therefor. The court, in addition to the above facts, finds that these representations and statements by the defendant were false and fraudulent, and were made by him with the intent to deceive and defraud the plaintiffs, and that he fraudulently concealed from them the fact that he had already sold the land; and also finds that the plaintiffs relied upon the said statements and representations, and were induced thereby to accept his said offer of a thousand dollars, and to surrender said agreement. In September, 1888, the plaintiffs learned that, at the time of the said statements and representations, the defendant had already sold the land, and that his representations to them in reference thereto were false, and thereupon they rescinded said surrender, and gave him notice thereof, and demanded from him the remainder of the $5,000 specified in the agreement, and also offered to repay to him the $1,000 received from him, on condition that he redeliver to them said agreement. Upon the refusal to pay said sum or accept said offer this action was commenced to recover from the defendant the sum of $4,000, with interest from December 1, 1886. The action was tried by the court without a jury, and judgment rendered in favor of the plaintiffs. From this judgment, and an order denying a new trial, the defendant has appealed.

The issues determined by the court below depended almost entirely upon the weight to be given to contradictory and conflicting evidence, and the counsel for the respective parties have presented to this court elaborate briefs, in which that evidence is reviewed, and wherein we are asked to weigh the same, and determine the conflict between the testimony of the plaintiffs and of the defendant, and the corroboration given to either. It would seem hardly necessary at this day to repeat the oft-asserted rule that the determination of the trial court upon such evidence is conclusive in this court, and that after that court, upon a motion for a new trial, has affirmed its former decision, it is a needless consumption of time and labor, as well of counsel as of the members of this court, to attempt here a review of the correctness of such determination, or to ask of us to determine the relative weight to be given to the respective statements of the witnesses.

By the terms of the agreement between the defendant and the plaintiffs, they became entitled to receive from him the sum of $5,000, if he "should sell or agree to sell said ranch, or part of it, to any one, in the twelve months next ensuing" after March 20, 1886. When, therefore, on the 26th of November, 1886, the defendant sold the ranch through Frye to Boyce, an obligation was created against him, by virtue of his aforesaid contract, to pay to the plaintiffs the sum of $5,000, for which they had an immediate right of action against him. This obligation could not be extinguished by part performance on the part of the defendant, unless such part performance was expressly accepted by the creditor in writing in satisfaction, or rendered in pursuance of an agreement in writing for that purpose. Civil Code, § 1524. The obligation could, however, be extinguished by an agreement on the part of the plaintiffs to accept less than that to which they were entitled, provided such agreement was executed on the part of the defendant. Civil Code, §§ 1521-1523. Such an agreement is, however, subject to all the rules applicable to other agreements. If the consent of the plaintiffs thereto was obtained through fraud, exercised by the defendant, they had the right to rescind the agreement, (Civil Code, § 1689;) provided such rescission was made promptly upon discovering the facts which entitled them to rescind, coupled with an offer to restore to him what they had received from him, (Civil Code, § 1691.) Any false representation, or affirmation of any matter which was material, as an existing fact, distinguished from mere opinion, or intention, or promise, as an inducement to enter into the agreement, was such a fraud as would authorize a rescission. Marriner v. Dennison, 78 Cal. 211, 20 Pac. Rep. 386. Within these principles the facts found by the court below fully sustain the judgment. The false statement by the defendant to the plaintiffs, that he had not sold the property at the time he offered to give them the thousand dollars for a surrender of his agreement, was such a fraud upon them as to entitle them to a rescission of their agreement to surrender it; for it is not to be supposed that, if he had then told them the truth, and informed them that he had already sold the land, they would have accepted the thousand dollars in satisfaction of an obligation against him, which had already matured in their behalf, for the sum of $5,000.

The claim on the part of the appellant, that he is entitled to a deduction of $1,250, paid by him to Frye, cannot be maintained. It is conceded by counsel upon both sides, in their briefs, that this amount of money was paid by him to Frye, although we have been unable to find in the record any evidence of more than an agreement on his part to pay it. But, assuming that it was paid by him, he paid it upon an independent agreement between himself and Frye, and not in pursuance of his agreement with the plaintiffs Whatever right Frye had to a portion of the $5,000 agreed to be paid to plaintiffs by the defendant was derived under an agreement with them subsequent to their agreement with the defendant, and could be established only in an action to which Frye was himself a party. The defendant was not authorized to administer upon the assets of the plaintiffs in his hands, and disburse the same in payment of such claims against them as he might consider just. The judgment and order are affirmed

We concur: GAROUTTE, J.; PATERSON, J.

Ex parte HOLMQUIST. (No. 20,840.)

(*Supreme Court of California.* Nov. 13, 1891.)

LIQUOR LICENSE — CONSTITUTIONALITY OF ORDINANCE.

1. Order No. 1589 of the city of San Francisco, as amended by order No. 1845, relative to liquor licenses, provides for the payment of a specified license fee, and declares a violation of the order a misdemeanor punishable by a fine of not more than $1,000, or by imprisonment for not more than six months, or both. Pen. Code Cal. § 435, provides that any person carrying on a business for which a license is required by the laws of the state, without the license so prescribed, is guilty of a misdemeanor. Section 19 prescribes, as a punishment for misdemeanors not otherwise provided for, imprisonment for not more than six months, or a fine not exceeding $500, or both. *Held* that, though the punishment provided by the ordinance conflicted with that prescribed by the statute, this portion of the ordinance could be rejected, and that providing for the license could stand, as they were not dependent on each other.

2. So, too, portions of the ordinance in conflict with the provisions of the Code of Civil Procedure relative to evidence may be rejected.

3. The provisions of the ordinance making the issuance of a license dependent upon the permission of a majority of the board of police com-

missioners, and the approval of adjacent property owners, is not in violation of the federal constitution, there being no question of interstate commerce.

McFarland, J., dissenting.

Ex parte Christensen, 24 Pac. Rep. 747, 85 Cal. 208, followed.

In bank. Original proceeding for writ of *habeas corpus* instituted against the chief of police of San Francisco county. Prisoner remanded.

Alfred Clark, for petitioner. *Davis Louderback*, for respondent.

Per Curiam. This case is not, in any material respect, different from Ex parte Christensen, 85 Cal. 208, 24 Pac. Rep. 747, and upon the authority of that case the petitioner herein is remanded to the custody of the chief of police of the city and county of San Francisco.

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92 Cal. 14

JANIN v. LONDON & SAN FRANCISCO BANK.

(No. 13,387.)

(*Supreme Court of California.* Nov. 19, 1891.)

BANKS—PAYMENT OF FORGED CHECK — LIABILITY TO DEPOSITOR.

1. Where a bank allowed over three months to elapse before it returned to a depositor a forged check drawn on his account and payable to "currency or bearer," that it had paid without requiring the bearer's indorsement or identification, and there was no evidence that the bank could have retrieved its loss if notified of the forgery, the depositor's neglect within a reasonable time after the return of his canceled checks to examine them, and give notice of the forgery, was not a defense to an action to recover the money paid on such check; and hence the bank was not prejudiced by an erroneous instruction to the effect that the depositor was not guilty of negligence in failing to examine the checks and bank-book, and that he became bound to give notice of the forgery only after he had discovered it. Paterson, J., dissenting.

2. The jury were properly instructed to find for plaintiff unless defendant was deprived of an opportunity to save itself from loss by his failure to examine the checks and bank-book, and to give notice of the forgery.

In bank. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Janin against the London & San Francisco Bank to recover money deposited by plaintiff with defendant, and paid by the latter on a forged check. From a judgment for plaintiff, defendant appeals. Affirmed.

Winans, Belknap & Godoy and *John B. Harmon*, (*Jarboe, Harrison & Goodfellow*, of counsel,) for appellant. *W. H. L. Barnes*, (*H. L. Gear*, of counsel,) for respondent.

De Haven, J. The plaintiff was a depositor in the bank of defendant, and the controversy in this action grows out of the payment by defendant of a check for $16,700, purporting to have been signed by plaintiff, and for which amount defendant claims that it is entitled to debit the account of plaintiff. The complaint alleges that this check was a forgery. This is denied in the answer; and as another and separate defense it is averred, in substance, that the plaintiff is estopped to deny the genuineness of said check, because of his negligence in not examining his balanced pass-book and returned checks, including the one in dispute, within a reasonable time, and giving notice that such check was forged, "by reason of which laches defendant was prevented from tracing out the forger of said check or said signature, if it was a forgery, and proceeding against him, for a period of nearly five months, and until all trace of said forger was lost." The defendant also avers that the account between itself and plaintiff had become a stated one. The check was paid on May 29, 1878, and on September 4, 1878, the defendant returned to plaintiff his pass-book, showing the statement of his account at that date, and that he was charged with the amount of this check, which was also returned to him as one of the vouchers. On December 11, 1878, another statement of plaintiff's account was rendered by defendant, in which appeared the balance shown by the previous account. The evidence also tended to show that plaintiff did not at once examine the check in dispute when it was returned to him with his balanced pass-book on September 4, 1878, nor until some time in the month of December, 1878, and that he first intimated to defendant a doubt of its genuineness about December 28, 1878, but did not give notice that he actually claimed it to be a forgery until February 1, 1879. The verdict of the jury in favor of plaintiff must be deemed, on this appeal, to have conclusively established the fact that the check was a forgery, as there was evidence sufficient to establish such a finding, and it is not claimed that there was any error in the instructions of the court, so far as they relate to that particular point. It is well settled that a bank in receiving ordinary deposits becomes the debtor of the depositor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it, and it is not entitled to debit his account with any payments except such as are made by his order or direction. Crawford v. Bank, 100 N. Y. 50, 2 N. E. Rep. 881; Bank v. Risley, 111 U. S. 125, 4 Sup. Ct. Rep. 322. All unauthorized payments, such as upon forged checks, are therefore made at the peril of the bank, and it is not justified in charging them against the depositor's account unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless by his subsequent conduct in relation to the matter he is upon equitable principles estopped to deny the correctness of such payments. This view of the law cannot be well questioned, and finds abundant support in the decisions of courts. Shipman v. Bank, 126 N. Y. 318, 27 N. E. Rep. 371; Hardy v. Bank, 51 Md. 562; Weinstein v. Bank, 69 Tex. 38, 6 S. W. Rep. 171; Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. Rep. 657.

It is not claimed in this case that plaintiff was guilty of any prior negligence which induced the defendant to pay the check in dispute, and we are therefore to consider only the one general question, whether, upon the evidence before it, the court committed any error to the prejudice of the defendant in giving or refusing instructions relating to the defense of estoppel, and this we proceed to do. The plaintiff was in no manner responsible for the action of the defendant in paying the check. In making such payment it parted with its own money, and not that of plaintiff; and the loss consequent thereon was its own, and should not be transferred to the plaintiff, unless, from all the circumstances in the case, it appears reasonably probable that, but for his alleged negligence, the defendant could have protected itself. The defendant has not in fact discharged its indebtedness to plaintiff, and should not be permitted to debit him with any amount as an offset thereto unless it appears that by reason of the negligent conduct of plaintiff it has omitted to take proceedings which it otherwise would and could have taken to indemnify itself from loss. This seems to us clear upon the plainest principles of justice. The balancing of the pass-book in September, and charging the plaintiff therein with the amount of this check, and its return to him at the same time, constituted a statement of the account between himself and the defendant; and it thereupon became the duty of the plaintiff to examine the same within a reasonable time, and give to defendant, without unreasonable delay, notice of any objection which he had to it; and, unless such objection was made within a reasonable time, it became an account stated, and there was imposed upon the plaintiff the burden of showing that the check with which he was debited was a forgery; and, in addition to this, if the circumstances attending the entire transaction were such as to make it reasonably probable that the bank had suffered prejudice by plaintiff's unreasonable acquiescence in the account as stated, he would not be permitted to open the account by proof of its incorrectness.

Upon the trial the court instructed the jury, in substance, that, if they found that the check in dispute was a forged one, they must find for the plaintiff, unless it was shown that plaintiff's failure to examine his checks deprived the defendant of an opportunity to save itself from loss on account of the money paid thereon; and they were further instructed that, if "the plaintiff was guilty of negligence in respect to his treatment of his checks, including the disputed check, after he received them at the September balancing and the December balancing, or by reason of his making the discovery of the forgery, or of the facts which put him on inquiry respecting it some months before he gave any notice to the bank of such discovery, whereby the bank was or may have been injured, they may find for the defendant." So far, this was a correct statement of the law, and, with other instructions given, conveyed to the jury with sufficient clearness the law as we have declared it. But the court also gave the following: "In considering the fact that Mr. Janin's bank-book was balanced, and that the bank's statement of the balance was apparently acquiesced in for a considerable length of time, I instruct you that the plaintiff was under no contract to the bank to examine with diligence his returned checks and bank-book. In contemplation of law, the book was balanced and the checks returned for the protection of the depositor, not for the protection of the bank; and when Mr. Janin failed to examine it, the only consequence was that the burden of proof was shifted. Mr. Janin then became bound to show that the account was wrongly stated. This right he has preserved so long as the claim was not barred by the statute of limitations." This instruction, although supported by the authority of Weisser v. Denison, 10 N. Y. 68, is not, in our opinion, entirely correct, and is in conflict with other instructions referred to. When considered in connection with a portion of another instruction given, to the effect that it "was sufficient to give notice when the forgery was discovered," this clearly implied that plaintiff could not be charged with negligence in not examining his checks within a reasonable time, and that the jury were only to consider whether he was guilty of unreasonable delay in giving notice after he made the examination and discovered the forgery. This is not the true rule. This error, however, will not, in view of the undisputed evidence, justify a reversal of the judgment. Conceding that the plaintiff was guilty of negligence in not earlier examining his checks, discovering the forgery, and giving notice thereof, there is nothing in the evidence from which it can be reasonably inferred that the defendant sustained any loss thereby, or that its position with reference to the check, because of not having earlier notice, was in any manner changed to its disadvantage, and the court would have been justified in so charging the jury. The check was paid on May 29, 1878; and it was not until September 4, 1878, that it was returned to plaintiff. The check was payable to "currency or bearer," and when paid the person who presented it was not identified, or required to indorse it. This case was tried in 1885, and there is nothing in the evidence pointing to the fact that, if notice had beeen given on the very day the check was returned, the defendant would have been in any better position to discover the forger, or the person who uttered it, or to avail itself of any of the coercive measures known to the law by which to retrieve its loss, than it was at the time it received notice. If plaintiff was negligent, it was not shown that the defendant suffered any damage thereby, and for that reason such negligence cannot be allowed as a defense to plaintiff's right to recover in this action.

There may be some general language in the case of Bank v. Morgan, 117 U. S. 115, 6 Sup. Ct. Rep. 657, which would seem to imply that it is not necessary that the evidence should tend to show that any pecuniary benefit would have accrued to the defendant if reasonable notice had been given it; but this general language is limited by the facts of that case, and the more specific rule which the court announced, viz.: "Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was thereby prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution." In the case of Continental Nat. Bank v. National Bank, 50 N. Y. 576, cited by appellant, it is said that the arrest and detention of a swindler are powerful means of coercing restoration of property, and that the loss of this means in relying upon the declaration of another would estop such person from denying the truth of the statement upon which reliance was made. But this language is to be considered in connection with the particular facts then before the court, from which it appears that the declaration held to be an estoppel was the direct admission of the genuineness of the check afterwards claimed to be forged, and that, "had the teller of the certifying bank disclaimed the forged certificate and pronounced it a forgery when presented, the holder of the check would have had ample time to arrest the swindler at the Bank of the State of New York before he had received the money on the gold checks, and before he went to the subtreasury with his gold certificates." White v. Bank, 64 N. Y. 322. The distinction between such a case as that and one like this, in which there is nothing in the evidence to indicate that all trace of the forger was not lost before the check in controversy was returned to plaintiff, months after its payment, is a marked one; and in White v. Bank, just cited, what we conceive to be the rule applicable to the facts in this record is thus stated. "In the case at bar it is the merest conjecture, with scarcely a possibility to support it, that the defendant, or those from whom it received the bill, could at any time after the transmission of the foreign bill of exchange to Baltimore have taken any effectual measures either for arresting the swindler or reclaiming the bill bought and paid for upon the credit of the bill. Estoppels cannot be based upon mere conjectures, even if a proper foundation is laid for them in other respects." There is nothing in Bank v. Keene, 53 Me. 103, in conflict with this. In that case, and upon its peculiar facts, it was held proper to instruct the jury "that, if the plaintiffs, relying on the defendant's admission, were induced to refrain from obtaining security from Judson by his arrest or by an attachment of his property, and they thereby sustained an injury, then the defendant would be estopped from denying his signature." But, of course, to justify such an instruction, there must be some evidence tending to show the facts upon which it is predicated. In this case the burden of proof to show that it sustained damage or injury by the negligence of plaintiff was upon the defendant, and this it was required to show by evidence having some reasonable tendency to establish such fact. In order to justify the submission of any question of fact to the jury the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference the court may properly refuse to submit the question to the jury, and in our opinion the evidence in this case was not such as would have warranted the jury in finding as a fact that the delay of plaintiff in giving it notice that the check in question was a forgery, lost to it any rights or remedies which otherwise it might have resorted to, in order to save itself from the loss incurred by its own mistake or negligence in the first instance, and which it now asks the plaintiff to bear, and therefore the error we have pointed out in the instruction of the court was without prejudice to the defendant. Judgment and order affirmed.

We concur: Beatty, C. J.; Sharpstein, J.; Garoutte, J.; McFarland, J.

Harrison, J., being disqualified, did not participate in the foregoing opinion.

Paterson, J., (*dissenting*.) I concur in the views of Mr. Justice De Haven on the main questions of law discussed in the opinion, but think that the question whether the defendant sustained any loss by reason of the plaintiff's failure to notify the defendant earlier of the discovery of the forgery should have been left to the jury. The evidence shows that the plaintiff had notice of the forgery several months prior to the time when he informed the officers of the bank of the fact, and, when asked why he had not before spoken of the matter, he replied that he had been working up the case himself. It seems to me that, whatever may be said of the duty of a depositor to examine his checks promptly, it must be conceded that when he has discovered the fact that his signature has been forged, or is informed of circumstances which would put him upon inquiry as to the fact, it is his duty to report the matter immediately to the officers of the bank. If he has willfully withheld from the bank any information he may have had, he ought to be estopped from claiming that the bank could not have protected itself. Under the decision of the majority it seems to me a dishonest depositor will be enabled without peril to himself to perpetrate a fraud upon the bank. If he discover that he has been negligent in examining his checks he will nevertheless be entitled to recover unless the bank can show that it was prejudiced by his negligence. Now he will know that the longer he withholds notice of the forgery from the bank, the more difficult it will be for the bank to prove that it could have detected and arrested the forger, and therefore the easier it will be for him to recover. This, it seems to me, is putting a premium upon laches, and encouraging a dishonest depositor even to assist the forger in covering up his tracks. There is no doubt in my mind that Mr. Janin acted in the utmost good faith, but it is a question of fact which should be left to the jury whether his long delay in giving the bank notice of the forgery did or did not prejudice the bank. The latter was entitled to immediate notice of plaintiff's discovery, and it does not follow that because plaintiff failed to detect the forger the officers of the bank also would have failed to do so. The arrest and detention of a forger is often a strong and effectual means for the restoration of the money, and, although it may be a difficult question to determine in certain cases whether the injured party has been deprived of or delayed in the exercise of this coercive power by the negligence of the depositor, it is for the jury, reasoning to practical results from all the circumstances, to say whether it is fairly probable that the defendant could and would have taken effective measures to protect itself. Continental Nat. Bank v. National Bank, 50 N. Y. 575; Voorhis v. Olmstead, 66 N. Y. 113. In Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. Rep. 657, the court said: "If the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the bank. An inquiry as to the damages in money actually sustained by the bank by reason of the neglect of the depositor to give notice of the forgeries might be proper if this were an action by it to recover damages for a violation of his duty; but it is a suit by the depositor, in effect, to falsify a stated account, to the injury of the bank, whose defense is that the depositor has, by his conduct, ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration and payment from the person committing the forgeries was in itself a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectively, exercising it. * * * It seems to us that if the case had been submitted to the jury, and they had found such negligence upon the part of the depositor as precluded him from disputing the correctness of the account rendered by the bank, the verdict could not have been set aside as wholly unsupported by the evidence. In their relations with depositors, banks are held, as they ought to be, to a rigid responsibility; but the principles governing those relations ought not to be so extended as to invite or encourage such negligence by depositors in the examination of their bank-accounts as is inconsistent with the relations of the parties, or with those established rules and usages sanctioned by business men of ordinary prudence and sagacity, which are, or ought to be, known to depositors." See, also, Hardy v. Bank, 51 Md. 562; Bank v. Keene, 53 Me. 103. It is true that was the case of an altered check, and this is a case of forged signature, but the principles announced by Mr. Justice HARLAN are as applicable on the question before us to one case as to the other. A banker is not bound to know the handwriting of the body of the check, but is bound to know the depositor's signature. He is not bound to detect a skillful alteration, which can only be known to the drawer of the check; and the latter is therefore bound to detect the alteration at the earliest opportunity, and inform the bank thereof. In these and many other respects the principles applicable to the two cases are different; but when it appears that the plaintiff's negligence contributed to the injury the question whether the bank was prejudiced by the failure of the plaintiff to exercise ordinary care is as material in one case as in the other, and must be determined by the same rules. I do not claim, as intimated in the opinion above quoted, that the law would presume the bank was prejudiced by the long delay and negligence of the depositor in failing to detect and report the forgery. That is a question, I think, which should be left to the jury. Dana v. Bank, 132 Mass. 156.

It is claimed by respondent that there is no evidence tending to show that the bank was prevented from tracing and discovering the forger, or from exercising its right to recover the money, through reliance on plaintiff's implied admission of the correctness of the account rendered. On the other hand, it is claimed by appellant to be clearly shown by the evidence that the bank was misled to its prejudice through such negligence. The fact that the bank did not require the signature of the stranger to whom the money was paid, that it took no evidence as to his identity, and made no effort to detect the forgery at any time, but constantly insisted that the check was genuine, although possessed of evidence tending to show that Hooper was the forger, are matters for the consideration of the jury. So also the fact that the plaintiff allowed long periods of time to elapse between the occasions when he presented his bank-book to be balanced, and that he frequently asked the teller of the bank for his balance, instead of consulting his bank-book; that he neglected to examine the book with the return checks for several months after September 4, 1878; that he had expressed surprise at the smallness of the balance, as shown by the books of the bank; and his failure to notify the bank until February, 1879, eight months after he began to doubt the genuineness of the check,—are all matters to be considered by the jury in determining the questions at issue. The court cannot say, it seems to me, that as a matter of law, under such circumstances, the plaintiff is entitled to recover. I am unable to see any force in the suggestion that the officers of the bank took no steps at the time the check was paid to identify the person who presented it. Unless the paying teller has a suspicion as to the genuineness of the signature of a check payable to bearer, he is not called upon to make and preserve evidence as to such identity, and, if such precautions had been taken in this case, that fact would have been conclusive evidence that the bank had notice of facts which put it upon inquiry. In such a case, of course, the bank would have no defense, even if the depositor was guilty of negligence. It is said that there is no evidence from which it can be reasonably inferred that the plaintiff's delay prejudiced the defendant; but the inability of the defendant to produce such evidence may have been caused by the lapse of time between the time when plaintiff, acting as a prudent man, ought to have discovered and given notice of the forgery, and the time when such notice was in fact given. This is peculiarly a question for the jury under proper instructions from the court.

1. 211

People v. Whitely.[1]

(*Supreme Court of California.* Oct. 3, 1883.)

Larceny—Verdict—Degree of Crime—Preliminary Hearing—Evidence.

1. A verdict finding a defendant "guilty as charged" is a sufficient finding of the degree of the crime when she is charged with grand larceny.

2. On an appeal from a conviction of grand larceny, the fact that the record contains a commitment signed, "James Lawler, Judge of the Police Judge's Court No. 2 of the City and County of San Francisco," is sufficient to show that an examination was had before a police magistrate.

In bank. Appeal from superior court, city and county of San Francisco.

Information for grand larceny against Adeline Whitely. Verdict of guilty, judgment thereon, and order refusing new trial. Defendant appeals. Affirmed.

C. H. Wolff and *H. M. Swain*, for appellant. *The Attorney General*, for the People.

Per Curiam. We think it appears that the examination was before a police magistrate. The commitment is signed by "James Lawler, Judge of the Police Judge's Court No. 2, of the City and County of San Francisco." The defendant was charged with the crime of grand larceny, and the jury, by their verdict, found her "guilty as charged." This was a sufficient finding of the degree. Judgment and orders appealed from affirmed.

64 Cal. 42

Chester v. Bakersfield Town-Hall Ass'n.[2]

(*Supreme Court of California.* July 27, 1883.)

Res Adjudicata—Striking Out Evidence—Appeal-Bond.

1. A judgment in an action of ejectment, to which the holder of the legal title was not a party, is not a bar to an action by him to quiet title.

2. Unless evidence is clearly immaterial and irrelevant, a motion to strike it out on that ground should not be granted.

3. One undertaking is sufficient upon an appeal, both from the judgment and order denying a new trial.

Department 2. Appeal from superior court, Kern county.

Action by George H. Chester against the Bakersfield Town-Hall Association to quiet title to land. Judgment for plaintiff. Defendant appeals. Affirmed.

The defendant had previously obtained judgment against Julius Chester in an action of ejectment (55 Cal. 98) to recover possession of land of which the premises in controversy formed part, but to which action the plaintiff herein was not a party.

Flournoy, Mhoon & Flournoy and *W. J. Tuska*, for appellant. *Stetson & Houghton* and *C. C. Cowgill*, for respondent.

Per Curiam. The plaintiff alleges in his complaint that he is the owner in fee-simple of certain premises described in his complaint, and that at the time of the filing of said complaint he is, and for more than three years immediately preceding the filing thereof has been, in the actual, quiet, and exclusive possession of said premises, and that the defendant claims some right, title, or interest therein adverse to the plaintiff, and that said claim of the defendant is without any right, etc.; wherefore plaintiff prays to have said claim determined, etc. The defendant in its answer denies that the plaintiff is the owner, or that he and those under whom he claims have been for more than three years, or then were, in actual, peaceable, quiet possession of said premises, but alleges that the defendant has been in the open, notorious, exclusive, and adverse possession, with claim of title, ever since the 9th day of November, 1871. The defendant also alleges that the plaintiff is estopped both by judgment and *in pais*. The facts which it is claimed constitute said alleged estoppels are set out at length in said answer. The court found, upon sufficient evidence, that on the 23d day of October, 1869, one Thomas Baker, who then claimed to own said premises, conveyed the same by deed to the plaintiff, who, on the 3d day of January, 1872, conveyed to Julius Chester, who, on the 18th day of September, 1878, conveyed to one Fisher, who, on the 29th day of June, 1880, conveyed to the plaintiff. On the 12th day of December, 1877, said Baker obtained a patent of said premises from the state. The findings as to the foregoing facts are not attacked. But counsel for appellant in their brief rely (1) on an estoppel *in pais;* (2) by judgment; and (3) on the statute of limitations as a bar to the action. Upon each of these issues it is claimed that the evidence is insufficient to justify the findings of the court.

We are satisfied that there are not uncontroverted facts sufficient to constitute an estoppel *in pais.*

The judgment in the case of Association v. Chester, 55 Cal. 98, which was commenced more than a month after said Julius had conveyed the premises to Fisher, who subsequently conveyed to the plaintiff herein, cannot operate as a bar to this action.

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[1] This case, filed October 3, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[2] This case, filed July 27, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

As to the bar of the statute of limitations, it is sufficient to say it was not established by evidence free from substantial conflict. No objection was made to the testimony of Julius Chester until after it was all in, and then a motion was made to strike out a part of it on the ground that it was irrelevant and immaterial. A motion to strike out on that ground ought not to be granted unless the evidence is clearly irrelevant and immaterial. The evidence which the court refused to strike out is not, in our opinion, clearly of that character. The court seems to have found the facts which the counsel for defendant sought to elicit from the witness Brundage, by questions to which objections were made by plaintiff's counsel and sustained by the court. It is therefore clear that if said rulings were erroneous, the defendant was not prejudiced thereby. The practice of filing but one undertaking where appeals are taken, as in this case, both from the judgment and order denying a new trial, is about as well settled as any question of that kind can be, and we do not think that it should now be treated as an open one. Judgment and order affirmed.

Hearing in bank denied.

CALIFORNIA REPORTER

28 PACIFIC REPORTER

91 Cal. 592

Lee Chuck v. Quan Wo Chong *et al.* (No. 13,088.)

(*Supreme Court of California.* Nov. 4, 1891.)

AFFIRMANCE ON APPEAL.

Where, in the absence of findings, the record does not show that they were not waived, a judgment granting no relief in excess of that demanded in the complaint, which states a cause of action, will be affirmed.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Action of unlawful detainer by Lee Chuck against Quan Wo Chong & Co. From a judgment for plaintiff, defendants appeal. Reversed.

Smith & Murasky, for appellants. *Chas. S. Wheeler*, for respondent.

Per Curiam. This is an appeal from the judgment, and the case comes before us on the judgment roll alone. The complaint states a cause of action. We have to presume, in the absence of findings, that they were waived, there being nothing in the record to show affirmatively that they were not waived, and the judgment does not grant any relief in excess of that which was demanded in the complaint. The judgment is therefore affirmed.

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91 Cal. 598

LEE CHUCK v. QUAN WO CHONG *et al.* (No. 13,700.)

(*Supreme Court of California.* Nov. 4, 1891.)

APPEALABLE ORDERS—UNLAWFUL DETAINER—NOTICE—ACTION BY CO-TENANT.

1. Orders denying motions to set aside a judgment from which an appeal has been taken, and to strike out the adverse party's cost-bill, are non-appealable.

2. Code Civil Proc. Cal. § 1161, providing that a tenant holding over after the expiration of his term without permission of his landlord is guilty of unlawful detainer, "but in case of tenancy at will it must be terminated by notice," does not require notice to be given a tenant by sufferance.

3. Under Code Civil Proc. Cal. § 384, which provides that any number less than all of the tenants in common may jointly or severally prosecute or defend any action for the enforcement or protection of their rights, one co-tenant can maintain an action of unlawful detainer.

4. Code Civil Proc. Cal. § 633, provides that, in unlawful detainer, "in giving the decision, the facts found and conclusions of law must be separately stated;" and section 634 provides how findings of fact may be waived, which are made applicable to proceedings in unlawful detainer by section 1177; and section 1174 requires the court, when such proceeding is tried without a jury, to "assess the damages." *Held*, that where the complaint alleged that the monthly value of rents and profits was $125, and the answer denied that it was more than $75, and the record showed that findings of fact were not waived, the court's failure to determine the monthly value of the premises was error.

5. Where such action was commenced three days after the alleged expiration of defendants' term, a judgment for $375, "being trebled rent for said premises," which was based upon said pleadings, without evidence of value, was erroneous.

6. Where the complaint alleged that plaintiff and another were tenants in common, and defendants were in possession with the consent of plaintiff's co-tenant, in the absence of evidence that defendants refused to allow plaintiff to enjoy the premises with them plaintiff cannot recover from defendants the restitution and possession of the premises.

7. Where the facts upon which is based a contention that a notice of a motion for a new trial was served too late were considered on a petition for a writ of mandate to compel the settling of appellants' statement on motion for a new trial, and a peremptory writ was issued therein, the regularity of the notice cannot be controverted on appeal.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action of unlawful detainer by Lee Chuck against Quan Wo Chong & Co. From an order denying defendants' motion for a new trial, an order made after final judgment, denying defendants' motion to vacate and set aside a judgment for plaintiff, and from an order refusing defendants' motion to strike out plaintiff's cost-bill, defendants appeal.

Smith & Murasky, for appellants. *Chas. S. Wheeler*, for respondent.

PATERSON, J. This is an action of unlawful detainer. It is the same case as No. 13,088, 28 Pac. Rep. 44, (decision this day filed,) but the appeal herein is from an order denying the defendants' motion for a new trial, from an order made after final judgment denying the defendants' motion to vacate and set aside the judgment from which an appeal was taken in No. 13,088, and from an order refusing defendants' motion to strike out the plaintiff's cost-bill. The last two orders referred to are non-appealable. The appeal therefrom is, therefore, dismissed. Railroad Co. v. McGrath, 74 Cal. 49, 15 Pac. Rep. 360.

It is claimed by the appellants that the complaint does not state a cause of action against the defendants, because there is no allegation that the defendants were given the three-days notice required by section 1161, Code Civil Proc.[1] But the tenancy alleged in the complaint is a tenancy at sufferance, and not at will; and, as the action is based upon the first subdivision of the section referred to, no notice was required. Canning v. Fibush, 77 Cal. 196, 19 Pac. Rep. 376; Stoppelkamp v. Mangeot, 42 Cal. 322. It is also claimed by appellants that Chay Yune should have been made a party plaintiff, because it is shown in the complaint that he and the plaintiff are co-tenants. Section 384, Code Civil Proc., answers this objection. It provides that any number less than all of the tenants in common may jointly or severally prosecute or defend any action for the enforcement or protection of their rights.

There are several grounds, however, upon which the judgment must be reversed. The complaint alleges that the monthly value of the rents and profits of the premises was the sum of $125. The answer denied that the rental value of the premises was the sum of $125, or any sum greater than the sum of $75. There is no finding upon this issue, and the record shows affirmatively that findings were not waived. There was an issue also—and it seems to have been the only question inquired into at the trial—as to whether the defendants were holding possession of the premises by and with the consent of Chay Yune. Upon this issue, also, there was no finding. It is claimed by respondent that findings in actions of this kind are not required. This position, however, is manifestly untenable. Sections 633, 634, 1174, 1177, Code Civil Proc.[2]

The evidence does not support the judgment. It is expressly alleged in the complaint that "this plaintiff and one Chay

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[1] Code Civil Proc. Cal. § 1161, provides: "A tenant of real property for a term less than life is guilty of an unlawful detainer (1) when he continues in possession * * * after the expiration of the term * * * without permission of his landlord; but in case of tenancy at will it must first be terminated by notice," etc.

[2] Code Civil Proc. Cal. § 633, provides that "in giving the decision the facts found and the conclusions of law must be separately stated," and section 634 provides the manner in which findings of fact may be waived. Section 1174 provides that "the court, if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff * * * by an unlawful detainer;" and section 1177 makes the general provision of sections 633 and 634 applicable to such cases, except as otherwise provided.

Yune are successors in interest of said E. L. Goldstein, and to said building on the north-west corner of Dupont and Clay streets, and in and to said lease executed to Pee Han, and that they hold title to the same as tenants in common." The uncontradicted evidence shows that the defendants were in possession of the property, with the consent of said Chay Yune. All that the plaintiff was entitled to, therefore, was to be let into possession with the defendants,—to enjoy their moiety. Freem. Co-Ten. §§ 180, 220; Pickard v. Perley, 45 N. H. 191; Ord v. Chester, 18 Cal. 80. One tenant in common may, "by either lease or license, * * * confer upon another person the right to occupy and use the property of the co-tenancy as fully as such lessor or licensor himself might have used or occupied it if such lease or license had not been granted. If either co-tenant expel such licensee or lessee, he is guilty of a trespass. If the lessee has the exclusive possession of the premises, he is not liable to any one but his lessor for the rent, unless the other co-tenants attempt to enter, and he resists or forbids their entry, or unless, being in possession with them, he ousts or excludes some or all of them." Freem. Co-Ten. § 253. There is no evidence tending to show that the defendants ever refused to allow the plaintiff to enjoy the use of the premises with them. The judgment does not confine the plaintiff's right of recovery to his own moiety, but provides that the plaintiff shall have and recover from defendants the restitution and possession of the premises described in the complaint.

The judgment is erroneous in another regard. As stated before, there was an issue as to the rental value of the premises. The court gave the plaintiff judgment for the sum of $375, "being trebled rent for said premises." The record fails to show that any evidence on the question of rental value was offered by either party. The action was commenced three days after the alleged expiration of the defendants' term. It is difficult to see, therefore, how any evidence under the allegation as to rental value could have justified the allowance of $375. Even as against a trespasser, a tenant in common cannot recover all the rents and profits. Muller v. Boggs, 25 Cal. 175. There is evidence tending to show that the plaintiff and his cotenant had entered into an agreement by the terms of which each was to collect the rents for every alternate period of six months. Perhaps, under this agreement, the plaintiff, in a proper action, would be entitled to recover all rents and profits due for the periods allotted to him.

It is claimed by respondent that the order denying the motion for a new trial should be affirmed, because the notice of intention was served too late. The facts upon which this contention is based were considered in Quan Wo Chong v. Superior Court,[1] (No. 13,237,) upon a petition by the defendant for a writ of mandate to compel the superior court to settle the appellant's statement on motion for a new trial. A peremptory writ was issued therein on May 24, 1889. The order denying the motion for a new trial is reversed.

We concur: HARRISON, J.; GAROUTTE, J.

92 Cal. 76

MOISANT v. MCPHEE. (No. 13,957.)

(*Supreme Court of California*. Nov. 27, 1891.)

MORTGAGES—LIEN—GROWING TREES.

1. A deed of land absolute in form, but intended merely to secure a debt to the grantee, is, in effect, a mortgage, and does not convey title to the land, or vest in the grantee the ownership of bark cut from trees on the land by the grantor, and sold to a third person, after the execution of the deed.

2. A contract by which the grantor was to cut bark from trees on the land at the expense of the mortgagee, who agreed to sell it, and apply the proceeds in paying the expenses and the debt secured by the deed, the balance to go to the grantor, is not sufficient to create a lien on the bark, after it has been severed from the trees, in favor of the grantee, and against a purchaser from the grantor for value without notice.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge. Affirmed.

An action to recover the value of tanbark. Judgment for plaintiff.

J. A. Cooper and *T. L. Carothers*, for appellant. *Yell & Seawell* and *R. P. Clement*, for respondent.

BELCHER, C. This is an action to recover the value of 156 cords of oak tanbark, alleged to have been in the possession of and owned by the plaintiff, and to have been wrongfully taken by the defendant, and converted to his own use, on the 5th day of June, 1888. It appears from the findings and evidence that on the 11th day of January, 1884, one Warren was the owner of a tract of land in Mendocino county, and on that day conveyed the same to the defendant and one Markle, who were partners doing business under the firm name of McPhee & Markle. The conveyance was by a deed absolute in form, but was intended as a mortgage to secure the payment of about $200, then owing by the grantor to the grantees for goods, wares, and merchandise. In May, 1886, the $200 being still unpaid, Warren made a contract with McPhee & Markle, by the terms of which he was to go upon the land conveyed, and peel tan-bark thereon, and put it on the road; and they were to advance to him, to pay the expenses of preparing the bark, not exceeding $5.50 per cord; and when the bark was ready for shipment, they were to ship it to San Francisco, and sell it, and, after deducting from the proceeds expenses of hauling, freight, and all advances, were to apply the balance in payment of his indebtedness, and, if any surplus remained, pay it over to him. During the year 1886, Warren peeled 183 cords of bark, and delivered it over to McPhee & Markle, and McPhee subsequently, having assumed the bark contract as between himself and Markle, sold it, and applied the proceeds as agreed. During the summer of 1887, Warren peeled and prepared the bark in controversy on the deeded land, and, while doing so, defendant furnished him supplies and money to meet his expenses. In the fall of the year, at the request of Warren, defendant sent and paid a teamster to haul the bark to Bear Harbor landing. One Keller was foreman at the landing, and Warren asked him where he should pile the bark, and a space was allotted him for that purpose. The bark was piled by Warren on the space allotted, and, after it was all delivered, was shedded in by him to protect it from the rains. In December, 1887, plaintiff, Warren, and Keller met at the landing, and, after measuring the pile of bark, Warren sold it to plaintiff for $1,404, and executed to him a bill of sale of it. Plaintiff then put Keller in charge of the bark for him, and subsequently put up notices on it that he was the owner Plaintiff paid the purchase price in full, and at the time of his purchase had no notice that defendant had or made any claim to it. At the time of this sale Warren was indebted to the defendant for supplies furnished and money paid out and advanced, as before stated, in about the sum of $1,000. This sum not being paid, defendant, on June 5, 1888, shipped the bark to San Francisco, and converted it to his own use. Upon these facts the court below gave judgment for the plaintiff, from which, and from an order refusing him a new trial, the defendant appeals.

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[1] No opinion written.

The principal contention of appellant is that the title and right to the possession of the bark were in him at the time of the alleged conversion, and hence that the judgment should be reversed. At the trial both Warren and appellant testified that the deed put in evidence was given only to secure the payment of an indebtedness on account. The deed was therefore a mortgage, and did not pass the title to the land which it purported to convey, (Taylor v. McLain, 64 Cal. 514, 2 Pac. Rep. 399; Healy v. O'Brien, 66 Cal. 519, 6 Pac. Rep. 386; Raynor v. Drew, 72 Cal. 309, 13 Pac. Rep. 866;) and when the bark was severed from the trees, and moved away, it was freed from the lien of the mortgage, (Buckout v. Swift, 27 Cal. 433; Hill v. Gwin, 51 Cal. 47.) The contention that appellant had title to the bark cannot, therefore, be sustained. The only question then is, did appellant acquire a valid lien upon the bark after it was severed from the trees? We are unable to see under what statute or rule of law it can be said that he did. A lien is created by contract or by operation of law. Civil Code, § 2881. Appellant was not a mortgagee or pledgee of the bark, and the evidence fails to show that any contract was made which would create a lien of any kind. But, if it be admitted that he had a lien, still the possession of the bark was not taken by him, and hence his lien was void as against the plaintiff, who purchased the property in good faith and for value. Civil Code, § 3440. Some other minor points are presented, but we do not think they need be discussed. We see no prejudicial error in the rulings or findings of the court, and therefore advise that the judgment and order be affirmed.

We concur: **FITZGERALD, C.; TEMPLE, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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91 Cal. 640

Ex parte NICHOLAS. (No. 20,870.)

(*Supreme Court of California.* Nov. 14, 1891.)

FILING INFORMATION—EXAMINATION AND COMMITMENT—PRESUMPTION.

1. Under Const. Cal. art. 1, § 8, permitting prosecution by information "after examination and commitment by a magistrate," and Pen. Code Cal. § 1165, imposing on the court the duty of ordering the detention of the defendant, that a new information may be preferred, where he is acquitted on the ground of a variance between the charge as alleged and the proof, one who has been examined and committed on the charge of grand larceny may, after a trial and disagreement, by direction of the court be charged by a new information with embezzlement, without any new examination and commitment, if the evidence taken on the first examination justifies an information for embezzlement. PATERSON, J., dissenting.

2. On application for writ of *habeas corpus* alleging the filing of the new information without a new examination and commitment, it will be presumed that the depositions taken at the original examination justified the information for embezzlement.

In bank.

Petition of Chris Nicholas for writ of *habeas corpus.* Writ discharged.

John O'Byrne, for petitioner. *Wm. S. Barnes*, Dist. Atty., for respondent.

BEATTY, C. J. The petition filed on behalf of the said Nicholas alleges, in substance, that his detention is illegal, because he has been charged by information with the crime of embezzlement without any previous examination and commitment by a magistrate for such crime, and because the superior court has denied his motion to dismiss the information, which motion, he says, was based upon the ground that said information had not been found and filed according to law. In my opinion, the petition is upon its face wholly insufficient to justify the issuance of the writ. Construed with the utmost liberality in favor of the petitioner, all that it shows is that an information has been filed in the superior court charging him with an offense within the jurisdiction of that court; that he has moved the court on one of the grounds enumerated in the statute (Pen. Code, § 995) to set aside the information; and that the court has erroneously denied his motion. But the error of the superior court in denying his motion does not make his imprisonment illegal in a sense which will entitle him to be discharged, or to raise the question on *habeas corpus.* The superior court had jurisdiction to hear and determine whatever questions of law or fact were involved in his motion, and its decision, although it may be erroneous, is not void. On the contrary, it is valid and binding until reversed on appeal.

But I need not dwell upon this aspect of the case. A writ was issued, a hearing has been had, and the case may now be determined upon the sheriff's return, the petitioner's traverse of the return, and the facts disclosed at the hearing. From these it appears that on the 6th of April, 1891, the petitioner had an examination in the police court of the city and county of San Francisco on a charge of larceny of property exceeding $200 in value; that as a result of such examination he was regularly committed upon the charge made, viz., grand larceny. Thereupon, and within due time, an information was filed in the superior court charging him with the crime of grand larceny. Upon this information he was brought to trial, but the jury failed to agree upon a verdict, and were discharged. After the jury had been so discharged, the district attorney, by direction of the court, dismissed the information for larceny, and, without bringing the petitioner again before a committing magistrate for examination, filed a new information, charging him with the crime of embezzlement. Upon this state of affairs the petitioner contends that his constitutional rights have been violated by the filing of an information without any previous examination and commitment upon the charge set forth in the information. But this does not appear to us to be so. He has been examined upon a charge which the committing magistrate has denominated "larceny," but it may well be that the depositions prove embezzlement. It not unfrequently happens that the facts of a particular case leave it extremely doubtful under which definition the offense falls, that of larceny or embezzlement, and if the committing magistrate should give it a wrong designation in his order of commitment that would not prevent the district attorney from charging it correctly in the information. On the contrary, it would be his duty so to do. People v. Lee Ah Chuck, 66 Cal. 662, 6 Pac. Rep. 859; People v. Vierra, 67 Cal. 231, 7 Pac. Rep. 640; Ex parte Keil, 85 Cal. 312, 24 Pac. Rep. 742. And if the district attorney should fail to discover and correct the mistake of the committing magistrate before filing an information, we know of no reason why, under leave of the court, he could not correct it subsequently by withdrawing the first information and filing an amended one. If he did not, the only result would be that the defendant would have to be acquitted on the ground of a variance between the charge as alleged and the proofs offered to sustain it, in which case the statute expressly imposes upon the court the duty of ordering the detention of the defendant, to the end that a new information or indictment may be preferred. Pen. Code, § 1165.

But surely it could never be held that the court and the district attorney, although they can clearly see from an inspection of the depositions that a trial of the defendant on the information, as framed, can only result in his acquittal on the ground of variance, must nevertheless go through the form of a trial and acquittal in order to bring the case within the literal terms of section 1165, before making the amendment that is inevitable at the end in order to prevent a ridiculous miscarriage of justice. Courts, even in criminal proceedings, are not rendered quite so impotent as this. *Lex non cogit ad vana*, is a maxim universally applicable.

And again, if the variance between the charge and the proofs is not disclosed until the trial, and if the case is so doubtful that the court does not become satisfied, until after a failure of the jury to agree, that the information should be corrected in order to avoid a variance, (which is the case here,) can it be pretended that the power of the court to order the filing of another information is less ample after a mistrial, by a failure of the jury to agree, than it is after they have agreed to acquit? Surely not. It must be true that if, upon an acquittal of the defendant upon the ground of variance, the court may order the filing of another information, it may make such order at any earlier stage of the proceeding when the necessity for it becomes apparent.

The superior court, therefore, did not exceed its power in directing the filing of a new information against this petitioner after the mistrial. Nor does it follow that it was necessary to bring the petitioner again before the committing magistrate for the purpose of a new examination and commitment before filing a new information. If the evidence taken on the first examination was in the possession of the district attorney,—as it must have been,—and was such as to justify an information for embezzlement, it would have been a vain and useless thing to go through the form of taking the same testimony over again, and neither the statute nor the constitution require that this should be done. The petitioner had been examined once in a manner to conserve all his legal and constitutional rights, and there are neither substantial nor formal grounds for saying that he had not been examined and committed before information filed. It is true it does not appear in this proceeding that the depositions taken at the original examination justify the present information, but it is sufficient to sustain our conclusion that they may justify it. The superior court has decided that they do, in passing upon petitioner's motion to dismiss the information, and, in the absence of a showing to the contrary, it must be presumed that the ruling was correct. It does not appear, therefore, that the superior court has even erred in the ruling complained of, much less that it has in any manner exceeded its jurisdiction. Writ discharged, and prisoner remanded.

We concur: DE HAVEN, J.; HARRISON, J.; SHARPSTEIN, J.

PATERSON, J., (*dissenting*.) I concur in the order discharging the writ, but am unable to concur in the views expressed by the majority. Our constitution provides that "offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law." Section 8, art. 1. It was for a long time claimed by many that the proceeding by information was in conflict with the provision of the fourteenth amendment of the constitution of the United States, that no state should deprive any person of liberty without "due process of law." The question was finally settled by the supreme court of the United States in the Hurtado Case, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 292. It was there held that a proceeding under the provisions of our constitution and Penal Code, resulting in a conviction of murder, was not in violation of any provision of the fourteenth amendment, it appearing that the party convicted had been examined before a magistrate, who, after the accused had been heard, (with the aid of counsel and the right of cross-examination of witnesses, whose testimony was reduced to writing,) had filed the proper certificate that the offense described in the complaint had been committed, and that there was sufficient cause to believe the accused guilty thereof, and it appearing that the offense charged in the information was the same as that set forth in the affidavits, and for which the accused was committed. After full consideration of the opinion in that case, and the dissenting opinion of Mr. Justice HARLAN, I am satisfied that the supreme court of the United States would hold, in a case like the one before us, that the words, "due process of law," necessarily require that the accused, before being put upon trial under an information charging him with felony, must have had the opportunity to be heard, with the aid of counsel and the right of cross-examination, before the committing magistrate examining into the same charge. No other construction of the provision of our constitution, that the information can be filed only "after examination and commitment by a magistrate," can afford any protection to a person accused of a felony. In People v. Parker, (Cal.) 27 Pac. Rep. 537, I was constrained to concur in the opinion of Mr. Justice GAROUTTE because the question had been settled by the decisions of our own court. A review of all the cases, however, will show that they are not entirely consistent. Thus, while it is held in People v. Lee Ah Chuck, supra, that the judgment of the district attorney must be exercised on the testimony found in the depositions, and that he may proceed by information against the defendant for any offense appearing by the depositions, regardless of the judgment of the magistrate, thus exercising judicial functions, it is held in Ex parte Sternes, 82 Cal. 248, 23 Pac. Rep. 38, that the district attorney is a mere ministerial officer, and can exercise no judicial functions whatever, so far as an inquiry into the question of probable cause is concerned. If he is a ministerial officer for one purpose, he is for the other, and it is difficult to see why he has not as much power to disregard the opinion of the magistrate, and inquire into the question of probable cause, as he has to determine what offense the evidence shows to have been committed. It is said in People v. Vierra, supra, that "it would be a strange requirement which permitted the justice to determine the offense for which the defendant should be prosecuted, instead of the district attorney, who was selected on account of his learning in the law, and especially charged with duties requiring an acquaintance with the criminal law." But it may be that the framers of the constitution thought that it would be safer to intrust the liberty of the citizen and the rights of the people to a judicial officer, selected for the exercise of judicial functions, than it would be to intrust them to an attorney employed expressly to prosecute persons charged with crime. If the framers of the constitution had intended the discretion of the district attorney to be superadded to that of the committing magistrate, it would have been easy to say so. Under the construction which is given to the provisions of section 8, art. 1, a person charged with grand larceny, and committed by the magistrate for that offense, may be informed against and tried upon that charge; and then, without any further preliminary hearing, upon a charge of robbery; then upon a charge of burglary; then upon a charge of obtaining property under false pretenses; then upon a charge of embezzlement,—if it appear from the depositions on the examination upon the charge of grand larceny that witnesses have said anything which would authorize the district attorney to say there had been shown reasonable cause to believe that the defendant had at some time committed such offenses. A person charged with robbery, after an examination upon that charge alone, may be prosecuted without any preliminary hearing upon an information for an assault with intent to commit murder, or any other offense, although the question as to whether such offense had been committed by the defendant never arose in the mind of anybody until after he was acquitted on the charge of robbery. Such, surely, cannot be "due process of law." A person charged with crime has no right to be heard before the grand jury; that is a tribunal selected from the people, and consisting "of so large a body as to be supposed to be beyond the influence of prejudice or passion, and whose judgment" has for centuries been held conclusive. While the people have provided an alternative of a more speedy character, they have carefully provided that, before a man can be put upon his trial, there must be an investigation before a judicial officer, and the accused must be given the right to be heard by himself and his witnesses, with the aid of counsel. Of what avail is this right if, after a hearing and a determination by the judicial officer selected for that purpose, a mere ministerial officer—and he one employed and paid to prosecute persons charged with crime, and one who we all know is often overzealous in his efforts to secure conviction—can put a man upon trial for an offense which he has never had an oportunity to meet? (Of course, there has been no attempt to unduly press this petitioner, and I refer simply to what may occur.) No one is more desirous of adhering to our own decisions than myself, and, if it were a case involving a construction upon which property rights may have been built up, I should not depart from prior decisions; but in a case like this, involving the construction of a provision of the constitution which is intended to preserve the liberty of the citizen, I do not feel bound by what may have been said in prior cases. Furthermore, as this is a question which must be ultimately decided by the supreme court of the United States, it is our duty to follow the decisions of that court, as we understand them. Another point: Section 809 of the Penal Code expressly provides that, "when a defendant has been examined and committed, * * * it shall be the duty of the district attorney, within thirty days thereafter, to file in the superior court * * * an information charging the defendant with such offense." If it be true that the district attorney may, after a trial upon the charge for which the defendant has been committed, file an information and put him upon trial for another offense, I think his authority to do so should affirmatively appear.

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92 Cal. 9

SHANAHAN v. CRAMPTON *et al.* (No. 14,167.)

(*Supreme Court of California.* Nov. 19, 1891.)

QUIETING TITLE.

Where land, paid for out of a husband's savings since his marriage, was conveyed to his wife "as her separate property and estate," without his knowledge, and contrary to his intention to take a conveyance to himself and wife, he could not assert his equitable rights in an action to quiet his title against his wife's grantee, founded upon Code Civil Proc. Cal. § 738, which provides that any person may bring an action against another "who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." Swain v. Duane, 48 Cal. 359, followed.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Action to quiet title to land by Shanahan against Crampton et al. From a judgment of nonsuit plaintiff appeals. Affirmed.

Johnson, Johnson & Johnson, for appellant. *Isaac Joseph*, *A. L. Hart*, and *Matt. F. Johnson*, for respondents.

VANCLIEF, C. This is an action founded upon section 738 of the Code of Civil Procedure to quiet plaintiff's alleged title to a block of land in the city of Sacramento.[1] The plaintiff brings this appeal from a judgment of nonsuit against him, rendered upon the evidence on which he rested his case. The substance of the complaint is that the plaintiff is, and for a long time has been, the owner of the land in question, and that the defendants, without any right or title whatever, claim and assert an interest therein adverse to the plaintiff. Prayer that the adverse claims of defendants may be determined; that plaintiff be adjudged to be the exclusive owner of the land, etc. The complaint was not verified. The separate answers of the defendants each specifically denies the alleged ownership of the plaintiff, and claims an interest in a portion of the land, derived from Coleman and Bates through a conveyance from Julia K. Shanahan, the wife of the plaintiff; and further alleges that the plaintiff is estopped from denying defendants' title, and specially sets forth the grounds of the alleged estoppel. At the commencement of the trial it was admitted by all the parties that Coleman and Bates were the owners of the land on February 27, 1884. The plaintiff then put in evidence the following deed from Coleman and Bates to plaintiff's wife: "We, William P. Coleman and Geo. E. Bates, of the county of Sacramento, state of California, grant to Julia K. Shanahan, of the same place, as her separate property and estate, all that real property situate in the city of Sacramento, state of California, and designated as lots Nos. one, two, three, four, five, six, seven, and eight, in square bounded by S and T and Twenty-Ninth and Thirtieth streets, (29th and 30th streets.) City taxes now due to be paid by the grantee. Consideration, $400. Witness our hands this 27th day of February, 1884. [Seal.] GEO. E. BATES, [Seal.] W. P. COLEMAN." This deed was duly recorded on the 18th day of June, 1884. The plaintiff next put in evidence his own deposition, in which he deposed that he and Julia K. Shanahan were husband and wife, having been married in October, 1882, and having lived together as such ever since; that his wife never had any separate property; that the whole consideration for the deed of Coleman and Bates to his wife was paid from his earnings since his marriage; that it was his intention to have said deed executed to himself and wife, and he did not know that it was executed to her alone until about three months after it was executed; that he had never sold or disposed of the land, nor authorized any other person to do so; and that he had made and paid for improvements on the land, and had paid the taxes thereon until July, 1887. On cross-examination he deposed that his wife had sold the land to the defendant Crampton in July, 1887, without his knowledge or consent, but that he had notice of such sale about one month thereafter, and more than two years before the commencement of this action, yet had never asked his wife to convey the land to him, because he thought it was all right; that he had never notified Crampton that he (plaintiff) claimed any interest in the land, nor that his wife had no authority to sell it, until he did so by the commencement of this action; that he had never restored, or offered to restore, to Crampton any part of the purchase money paid by the latter to his wife; that he had never received any part of that purchase money; that his wife had always claimed the land as her separate property, and claimed the right to do as she pleased with it and the purchase money received for it; that he did not notify Crampton of his claim to the land before the commencement of this action because he did not know that he was entitled to any remedy until a short time before this suit was commenced; and he further deposed that his wife, without his knowledge or consent, executed a mortgage on the land in June, 1885, to the Germania Building & Loan Association, to secure a loan of $550, of which he had no notice until eight months thereafter. Plaintiff next put in evidence a deposition of Maurice Dwyer, who deposed that he was the father of plaintiff's wife; that she had no separate property when she married, and had acquired none since to his knowledge; and that the sale of the land in question by plaintiff's wife has caused much trouble between her and the plaintiff. The foregoing is the substance of all the evidence on which plaintiff rested his case.

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[1] Code Civil Proc. Cal. § 738, provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

The motion for nonsuit was made on the following and other grounds: (1) That it appears by the deed from Coleman and Bates to Mrs. Shanahan that it was the intention of the grantors to convey the property to her as her separate property, and that it was so conveyed, and, if plaintiff has any equitable rights to the property, he cannot assert them in this action to quiet his title; (2) that the plaintiff has not restored, or offered to restore, to Crampton the purchase money paid by him to plaintiff's wife; and (3) that, under the circumstances appearing, the plaintiff is estopped from denying that the land was the separate property of his wife. I think the nonsuit is justifiable on the ground first above stated. The legal title was conveyed to the wife. Swain v. Duane, 48 Cal. 359. If, as testified by the plaintiff, the purchase money was paid from community property, (his earnings after marriage,) and the wife took the title in her name, without his knowledge or consent, and held it adversely to him, she took and held it in trust for the marital community. The trust resulted from the fact that the purchase money was community property. Civil Code, § 853; Hill v. Bugg, 52 Miss. 401; Bent v. Bent, 44 Vt. 555. Having at least the legal title, she could convey it to the defendants; and, if the plaintiff is entitled to any relief against them, it can be only an adjudication that they hold the legal title in trust for the benefit of the marriage community. But it is well settled that such relief is not appropriate in an action merely to quiet plaintiff's title under section 738 of the Code of Civil Procedure. Learned v. Welton, 40 Cal. 349; Von Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. Rep. 518; Brewer v. Houston, 58 Cal. 345; Harrigan v. Mowry, 84 Cal. 457, 22 Pac. Rep. 658, and 24 Pac. Rep. 48. I think the judgment should be affirmed.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

MCFARLAND, J. I concur in the judgment solely upon the ground of Swain v. Duane, 48 Cal. 359. If the question were an open one, I should be of opinion that land conveyed to a wife for a money consideration is presumptively community property, subject to the control of the husband, and that its character could not be changed by any language which the grantor might choose to put into the deed.

(92 Cal. 53)

DAGGETT *et al.* v. COLGAN. (No. 14,630.)

(*Supreme Court of California.* Nov. 23, 1891.)

CONSTITUTIONAL LAW—APPROPRIATIONS—"WORLD'S FAIR."

1. Act Leg. Cal. March 6, 1891, providing for the appointment by the governor of a commission to control the expenditure of all moneys appropriated by the state for constructing buildings and collecting and maintaining an exhibit of the products of the state at the World's Fair Columbian Exposition, to be held in Chicago in 1893, and appropriating $300,000 for this purpose, is not unconstitutional as conflicting with Const. Cal. art. 4, § 22, which declares that no money shall ever be appropriated for the use or benefit of any institution not controlled by the state, since it appears from the act itself that the appropriation is to be expended by the state itself, and used for state purposes.

2. Such act is not unconstitutional on the ground that the appropriation is not for a public use, since the legislature is the sole judge of what is for a public use.

In bank.

Original application by Daggett and others for a writ of *mandamus* against one Colgan. Granted.

E. W. McKinstry, for plaintiff. *Barham & Bolton* and *Wm. R. Davis*, for defendant. *Atty. Gen. Hart, amicus curiæ.*

DE HAVEN, J. This is an original application to this court for a writ of mandate to compel the defendant, as comptroller, to draw his warrant on the state treasurer, in payment of a claim contracted and audited by the petitioners, as members of the California World's Fair commission, in pursuance of the authority given such commission by an act of the legislature of this state, approved March 6, 1891. St. 1891, p. 24. The act provides for the appointment by the governor of a commission who "shall have the exclusive charge and control of the expenditure of all moneys appropriated by the state of California for the construction of buildings and maintaining an exhibit of the products of the state of California at the World's Fair Columbian Exposition, to be held in the city of Chicago, state of Illinois, in eighteen hundred and ninety-three." By section 3 of the act the sum of $300,000 is appropriated "to meet the expenses of erecting buildings and maintaining an exhibit of the products of the state of California at the World's Fair Columbian Exposition" at Chicago, and the comptroller is directed to draw his warrant on the treasury from time to time in favor of such persons as the majority of the commissioners provided for by the act shall direct. The defendant demurs to the petition, upon the general ground that the facts therein stated do not entitle petitioners to the writ demanded, and in support of this demurrer contends:

1. That the act of the legislature referred to is in conflict with that provision of section 22 of article 4 of the constitution which declares that "no money shall ever be appropriated or drawn from the state treasury for the use or benefit of any corporation, association, asylum, hospital,

or any other institution not under the exclusive management and control of the state as a state institution, nor shall any grant or donation of property ever be made thereto by the state."

In considering the question thus presented the court will take judicial notice of the fact that the World's Fair Columbian Exposition, referred to in the statute under consideration, is to be held under and by virtue of the provisions of an act of congress approved April 25, 1890, (27 U. S. St. at Large, 62,) and that such exposition will not be conducted under the exclusive management and control of this state as a state institution, but, on the contrary, that the same will be under the general management of the national commission, created by that act; and that the chief agency relied upon to effect the design of congress is a private corporation of the state of Illinois, which is authorized by the act of congress to charge such entrance and admission fee to such exhibition "as shall be fixed and established by said corporation, subject, however, to such modification, if any, as may be imposed by a majority of said commissioners." But, while conceding these to be the facts, unless the act under consideration makes an appropriation for the use and benefit of the national commission, or in aid of a private corporation, through the instrumentality of which the exposition is in great part to be conducted, and from the success of which that corporation expects to derive a pecuniary profit, it is clear that the provision of the constitution, above quoted, and relied upon by defendant, can have no application. It is claimed by the defendant that the statute under consideration does in effect make such an appropriation, but we are not able to find anything in its language which would justify the contention of defendant on this point. On the contrary, it appears from the act itself that the appropriation is to be expended by the state itself, disbursed by its own agents or officers, and is to be used only for the purpose of "erecting buildings and collecting and maintaining an exhibit of the products of the state of California." Even if it could be said with any degree of certainty that the private corporation referred to in the act of congress will increase its receipts because of the fact that the state is to place its products on exhibition, or that it may derive a benefit from the rent of its grounds to the state, or realize other profits, still this would not affect the question we are considering, or bring the appropriation within the prohibition of the section of the constitution above quoted, as it is apparent that the main object of the statute is not to confer such incidental benefit, but rather to promote what is assumed to be a matter of public concern, and for the public good. In every public expenditure, individuals derive incidental aid and benefit, in the sense that they are paid for services rendered or articles furnished to the state in the prosecution of the public improvement or business of the state, and the expenditure contemplated by this act will not be exceptional in this respect; but there is nothing upon the face of the statute to indicate that the private corporation referred to, or any individual, will or can, if the appropriation is honestly expended, receive one dollar as a gratuity, or by way of assistance, or except in return for something of value which the officers charged with its disbursement shall deem necessary to secure, in order to effect the general purpose and object of the act.

2. The defendant further contends that the statute is unconstitutional, for the reason that the appropriation thereby made is not for a public use, such as the state is authorized to make; that the maintenance of an exhibition of the products of the state in the manner contemplated does not fall within the legitimate authority of the state government.

In passing upon this proposition it is necessary to bear in mind that what is for the public good and what are public purposes "are questions which the legislature must decide upon its own judgment, in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive. * * * Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes; not those implied restrictions, which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." Cooley, Const. Lim. p. 154. It is undoubtedly true that public money can be rightfully expended only for public purposes, but, as was well said by that eminent jurist, Judge Cooley, in delivering the opinion of the court in People v. Salem, 20 Mich. 452: "Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people." In view of these principles of constitutional law, which are so well settled as to be placed beyond discussion or dispute, it is manifest, we think, that the court is not authorized to declare the act under consideration void upon the theory that the expenditure thereby authorized can in no manner be considered as tending to promote the public welfare, which it is one great object of government to secure. The question whether the public interests of the state would be at all advanced by an exhibition of its products such as is contemplated by the act was an appropriate one for discussion in the halls of the legislature before its enactment, and for the consideration of the governor before approving it, but it is not one for this court to decide, upon the individual views of its members concerning the wisdom or expediency of such legislation. There is no difference, except in degree, between the appropriation contained in this act and those which for years have been made, without any question as to their validity, for the support of the state agricultural fair and the various district agricultural societies throughout the state. The fact that this exhibit of the products of the state is to be made without the limits of the state does not change its essential character, or make it any less an occasion or purpose in which, in an enlarged sense, it may be said that the people of the state have an interest. So, also, it would be hard to distinguish this appropriation in principle from those appropriations which have been made from time to time for the maintenance of horticultural, viticultural, and other similar commissions. None of these, strictly speaking, are required for the proper administration of the government of the state, and possibly, in the opinion of many, call for an unjustifiable and useless expenditure of money. But the power of the legislature to create such commissions has never been doubted. We know from the express declaration of the act of congress authorizing the Columbian Exposition that the purpose of the exposition is to commemorate the four hundredth anniversary of the discovery of America, "by an exhibition of the resources of the United States of America, their development, and of the progress of civilization in the new world;" and that such exhibition is to be of a "national and international character, so that not only the people of the Union and of this continent, but those of all nations as well, can participate." We have no doubt that it was fairly a matter within the power of the legislature to determine whether this state should join with its sister states, and with the government of the United States, in celebrating in the way suggested the historical event referred to. It has been held in many cases that a municipal corporation has no authority, under the general powers usually given such corporations, to appropriate money for the celebration of the anniversary of important events in the history of our country, such as the Fourth of July, (Hodges v. Buffalo, 2 Denio, 110; Hood v. Lynn, 1 Allen, 103,) and the surrender of Cornwallis, (Tash v. Adams, 10 Cush. 252.) See, also, The Liberty Bell, 23 Fed. Rep. 844. These decisions, however, all rest upon the principle that municipal corporations have no powers except such as are specifically granted by the act of incorporation, or are necessary for the purpose of carrying into effect the powers expressly granted. But it has never been doubted that the state could confer upon a city or town the authority to celebrate such important events in the history of the country as appeal to the patriotism or higher sentiments of the people, and to tax their citizens to pay the expense thereof. Thus it was held that the city of Philadelphia had the power under its charter to provide for the entertainment of distinguished visitors upon the occasion of the celebration of the Centennial Anniversary of American Independence. Tatham v. Philadelphia, 11 Phila. 276. So, also, in Massachusetts, by general statutes, the power has been conferred upon towns to celebrate the centennial anniversary of their incorporation, (Hill v. Easthampton, 140 Mass. 381, 4 N. E. Rep. 811,) and also to appropriate money for the celebration of holidays, and for other public purposes, (Hubbard v. Taunton, 140 Mass. 467, 5 N. E. Rep. 157.) These cases are authority for the proposition that the state itself, unless restrained by its constitution, has the power to make appropriations for such purposes, because, unless it possesses the power, it could not confer it upon its municipal corporations. Such expenditures are justified under the general power which the state has to provide for the public welfare, the limits of which are perhaps not capable of exact definition, and are the same in principle as appropriations made for the building of monuments to commemorate great historical events, or for the erection in public places of the statues of those who by common consent are classed among the patriots or benefactors of the nation. Undoubtedly this power may be the subject of great abuse, but this is no argument against its existence. The only protection against reckless and improvident appropriations for public purposes must be found in the character of those intrusted with the power of legislation, and in the integrity and firmness of the chief executive of the state. The demurrer of defendant is overruled, and a peremptory writ of *mandamus* ordered in accordance with the prayer of petitioners.

We concur: BEATTY, C. J.; GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.; HARRISON, J.; PATERSON, J.

(92 Cal. 65)

STEEN v. WILLIAMSON. (No. 13,590.)

(*Supreme Court of California.* Nov. 25, 1891.)

NEGLIGENCE OF SERVANT—LIABILITY OF MASTER.

In an action against a master for personal injury, caused by the negligence of his servant, it is not error to instruct the jury that, "if you believe that the injury sustained was occasioned by an unavoidable accident on the part of the agents of defendant without negligence on their part, you should render a verdict for defendant," where the evidence failed to show negligence or carelessness on the part of the defendant's servants.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action for personal injury by one Steen against Williamson. From a judgment for defendant, plaintiff appeals. Affirmed.

Ferral & Payson, for appellant. *E. F. Preston*, for respondent.

SHARPSTEIN, J. This appeal is from a judgment and order denying plaintiff's motion for a new trial in an action to recover damages sustained by plaintiff by reason of the falling of a piece of gas-pipe from the hands of defendant's employe while engaged in screwing it into another pipe. The cause was tried by a jury, which returned a verdict in favor of the defendant. The court, at the request of the defendant, instructed the jury as follows: "If you believe that the injury sustained by the plaintiff was occasioned by an unavoidable accident on the part of the agents of the defendant, without negligence on their part, you should render a verdict for the defendant." Plaintiff excepted on the ground that there was no evidence of unavoidable accident. We think there was. The witness Robert Brown, on cross-examination, testified as follows: "I was attending to my business. I have been in the plumbing business going on three years. I have done this kind of work before. I was accustomed to it. I was screwing this pipe in a T-joint. This piece of pipe was about six or eight feet long. It was not very heavy. It was a half-inch pipe, and not very heavy. Question. Could you have stopped it from falling? Answer. No; it accidentally slipped. I was trying to screw this pipe into the other pipe, and the pipe was between the two joists, and I had a piece nailed across the two joists, and the end of the pipe lay right in the joist, and I was leaning over the joist trying to screw this piece of pipe into the T, and it accidentally slipped. I was on the edge of the joists, leaning over the joist. The joists were about thirty inches apart. The joists were about 2 by 4 inch, and the two-inch edge turned up. It was attending to my business. There were no other boys up there. There was nothing to attract my attention particularly, more than at any other time. I was doing the best I could. I could not stop the pipe. I certainly would not have let it fall if I could have stopped it. I do not think I saw Mr. Steen under me then. He was not directly under me. He was two floors below, and the pipe went through both stories. Steen was working at the folding doors on the ground floor, while I was putting in the center drop of the second story, and that is nearer the front of the house than the center drop in the room below. The accident was not caused by my pushing a pipe. It was the one I was trying to fix into the T-joint. It accidentally slipped and fell. The pipe that fell was lying parallel with the floor joists." This evidence tends to prove that the injury sustained by the plaintiff was the result of unavoidable accident, and there is no evidence tending in any degree to prove that it was the result of negligence or carelessness. Therefore the exception is based upon an untenable ground; and there is no other ground upon which it could be based. Judgment and order affirmed.

We concur: De Haven, J.; McFarland, J.

92 Cal 75

Eaton v. Malatesta. (No. 13,848.)

(*Supreme Court of California.* Nov. 27, 1891.)

Mechanics' Liens—Enforcement—Variance.

In an action to enforce a mechanic's lien, the contract alleged was to furnish materials and erect a certain building on defendant's land, while the proofs showed that the work done was to raise up, move back, and repair two houses. *Held*, that plaintiff could not recover.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; Francis E. Spencer, Judge.

Action by William Eaton against Antonio Malatesta to enforce a mechanic's lien for materials furnished and labor performed. Plaintiff had judgment, and defendant appeals. Reversed.

Wm. P. Veuve, for appellant. *Lamar & Castle*, for respondent.

Foote, C. This action was to enforce a mechanic's lien upon certain property belonging to the defendant, by an original contractor, for work done and materials furnished and used in the construction and erection of a certain building of the defendant. The complaint sets up that the contract upon which the lien is sought to be enforced is that the plaintiff agreed to furnish the material and erect for the defendant a certain building, upon certain land, within a reasonable time, and that the defendant agreed to pay therefor $150 upon the completion of the work. The notice of lien leaves it uncertain whether the contract was to erect and furnish materials for one building or two. In the bill of exceptions the evidence shows, without conflict, that the real nature of the contract, and the work actually performed, was to raise up, move back, and repair two houses, and furnish material therefor. It is therefore evident that the proof made neither conforms to the nature of the contract, as averred in the complaint or in the notice of lien, and that the decision is not supported by the evidence in most important respects. For these reasons we advise that the judgment be reversed.

We concur: Belcher, C.; Temple, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed.

92 Cal. 4

Arroyo Ditch & Water Co. v. Superior Court of Los Angeles County. (No. 14,444.)

(*Supreme Court of California.* Nov. 23, 1891.)

Superior Court—Jurisdiction—Waiver of Objections.

1. Under Const. Cal. art. 6, § 5, which declares that "the superior court shall have original jurisdiction * * * in all cases at law which involve the * * * legality of any tax, impost, assessment, toll, or municipal fine," the term "assessment" does not include installments or "calls" which are made under Civil Code Cal. § 315, by a private corporation on its stockholders, and the superior court acquires no jurisdiction of an action on a note given for such installment, where the justice of the peace, before whom the action was brought certifies it to the superior court, under Code Civil Proc. Cal. § 838, which provides that the justice shall so certify a case involving such question, whereupon "the superior court shall have over the action the same jurisdiction as if it had been commenced therein."

2. The fact that a party, after his objection to the jurisdiction of a court has been overruled, proceeds to try the cause, does not preclude him from thereafter questioning the jurisdiction.

In bank.

Writ of review by Arroyo Ditch & Water Company, a corporation, to superior court of Los Angeles county. Proceedings annulled.

Holloway & Kendrick, for petitioner. *Robinson, Willis & Appel*, for respondent.

Harrison, J. The plaintiff, a private corporation, brought an action against one E. J. Standlee in the justice's court for Downey township, in Los Angeles county, upon a promissory note for $21 executed to it by him. The defendant filed a verified answer to the complaint, alleging that the sole consideration for which the note had been given was a pretended assessment by the plaintiff upon its capital stock, of which he held a certain number of shares, and that the said assessment was illegal and void. Upon filing the answer the defendant moved the court to transfer the action to the superior court upon the ground that it necessarily involved the question of the legality of an assessment, and thereupon the court suspended all further proceedings in the action, and certified the pleadings to the county clerk of Los Angeles county. After the pleadings had been filed with the county clerk the plaintiff moved the superior court to remand the cause to the justice's court upon the grounds that that court erred in transferring the cause to the superior court, and that the superior court had no jurisdiction of the matter. This motion was denied, and the court thereafter tried the cause, and rendered a judgment in favor of the defendant. At the instance of the plaintiff a writ of review was issued out of this court to the superior court, and in obedience thereto a transcript of the records and proceedings of that court in the matter has been certified to this court. The constitution, art. 6, § 5, declares that "the superior court shall have original jurisdiction * * * in all cases at law which involve the * * * legality of any tax, impost, assessment, toll, or municipal fine." The term "assessment" used in this provision does not include the installments or "calls" which are sometimes termed "assessments," made under the provisions of section 315 of the Civil Code, by a private corporation upon its stockholders, in accordance with an agreement on their part, express or implied, to pay into its treasury the amount subscribed by them to its capital stock. It has reference to such assessments as are authorized by those provisions of the constitution which relate to revenue and taxation, and to such as may be made under the authority of a municipal or other public corporation for the purpose of meeting the cost or expense of some public improvement. Taylor v. Palmer, 31 Cal. 241. The other words in the clause, in connection with which the term is associated, serve to illustrate its meaning, and resolve any doubt that might otherwise be raised respecting the sense in which it is to be interpreted. Each of these subjects, viz., tax, impost, toll, municipal fine, of which jurisdiction is thus conferred upon the superior court, implies a charge imposed by public authority for some public purpose, and, under the rules by which the maxim *noscitur a sociis* is applied, it is clear that the "assessment" referred to is of a kindred nature. Inasmuch, therefore, as the constitution has not conferred upon the superior court any original jurisdiction to determine the legality of the assessment alleged in the answer of the defendant, it follows that the justice's court had full jurisdiction to determine all questions relating to such assessment that might be presented upon the trial of the cause, and had no authority to certify the pleadings to the superior court. The proposition of the respondent that the determination of this question by the justice was conclusive cannot be maintained. While a justice of the peace has jurisdiction to pass upon any question of fact or of law which is involved in the trial of an issue properly before him, so that his judgment in the cause will be binding upon the parties in the absence of any appeal or review, yet he has not the jurisdiction in this summary mode to divest himself of jurisdiction, or to transfer a cause which is within his jurisdiction to a tribunal which has no jurisdiction to determine it. If, in the present case, he had tried the cause, and rendered judgment therein for the defendant upon the ground that the justice's court had no jurisdiction to determine the subject-matter presented by the defense, or to try the cause, an appeal could have been taken from that judgment to the superior court, and the superior court would then have had the power, under its appellate jurisdiction, to pass definitively upon the question. He could not, however, determine the question in advance of trying the cause, and give to such determination the effect of a judgment.

Nor did the superior court acquire jurisdiction of the cause by the fact that the justice had certified the pleadings to the county clerk. The constitution has given to it original and appellate jurisdiction, but it can exercise its original jurisdiction only in those cases provided by the constitution, and its appellate jurisdiction only in such cases as may be prescribed by law. It cannot exercise original jurisdiction in those matters in which its jurisdiction is only appellate. The jurisdiction that it exercises under the provisions of section 838, Code Civil Proc., is original, and not appellate, and the provision in that section, that "from the time of filing such pleadings or transcript with the clerk the superior court shall have over the action the same jurisdiction as if it had been commenced therein," implies that, if it would have had no jurisdiction over the action if it had been commenced therein, it can have no jurisdiction by the filing of the pleadings certified by the justice. Although the exercise of jurisdiction by the superior court will be presumed to have been rightful, yet if it appears upon its own records of its action in any matter that it had not acquired jurisdiction either of the subject-matter, or of the parties, this presumption is destroyed. It cannot exercise jurisdiction in any instance until after it has acquired it, and it can acquire it only in the mode prescribed by statute. Merely certifying to the county clerk by a justice of the peace the pleadings in a case pending before him does not confer jurisdiction upon the superior court of a matter of which jurisdiction has not been conferred upon it by the constitution.

Nor does it acquire jurisdiction of the parties to that cause by thereafter determining that it has jurisdiction, and by proceeding in the trial of the cause and rendering judgment therein. The fact that a party, after his objection to the jurisdiction of a court has been overruled, proceeds, under such objection, to try the cause, does not preclude him from thereafter questioning the power of the court to take any steps in the matter. Lyman v. Milton, 44 Cal. 630; Harkness v. Hyde, 98 U. S. 479. If the court never acquired jurisdiction over him, it does not acquire it because he may have chanced to be in the court-room when the case was called for trial, and, while protesting against the trial, endeavors to protect his rights against the claims of his adversary. "The jurisdiction of the [superior] court, under section 838, was special, and that court could hear and determine the cause only after the pleadings before the justice were filed with its clerk. The [superior] court had jurisdiction only because the pleadings had before the justice and filed with its clerk presented the issue of the legality or validity of the tax or impost, and could then take jurisdiction only for the purpose of trying the issue as to the legality of the tax or impost; since, the amount being less than three hundred dollars, the justice's court had jurisdiction to pass upon every other issue." City of Santa Cruz v. Railroad Co., 56 Cal. 147. Inasmuch as the only mode in which it is claimed that the superior court acquired any jurisdiction of the action brought by the plaintiff against Standlee was from the act of the justice of the peace in certifying the pleadings therein to the county clerk, and as we have seen that such act was unauthorized, it follows that the action was never legally before the superior court for determination, and that it was without any jurisdiction to render a judgment in the case. It is therefore ordered that the judgment of the superior court, and all orders and proceedings by it taken in the case, be and they are hereby annulled.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; GAROUTTE, J.; DE HAVEN, J.; PATERSON, J.; McFARLAND, J.

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92 Cal. 74

WHARTENBY v. REAY *et al.* (No. 14,577.)

(*Supreme Court of California.* Nov. 25, 1891.)

SUBSTITUTION OF PARTIES.

The attorney of a deceased plaintiff's executors is not deprived of authority to move to dismiss an appeal, though the executors were not substituted as plaintiffs until the motion came on for hearing.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. SANDERSON, Judge. Granted.

Action by James Whartenby against James W. Reay and others. Motion to dismiss appeal.

George E. Lawrence, for appellants. *A. N. Drown*, for respondent.

PER CURIAM. This is a motion to dismiss an appeal upon the ground that no transcript of the record has been filed in this court. It is conceded by appellant that the time allowed by law for filing the transcript expired long since, but he insists that the attorney who filed the moving papers has no authority to act in the matter. The attorney in the lower court was A. N. Drown, and the motion to dismiss the appeal is signed by A. N. Drown as attorney for plaintiff; but it appears by affidavit that the plaintiff Whartenby died in the year 1890, and at the time this motion was noticed for hearing the executors of deceased had not been substituted in this court as parties plaintiff. At the time the notice of motion was given, executors of the estate of said deceased, Whartenby, had been appointed by the lower court, had qualified, and said Drown was acting as thir attorney. When appointed, all rights and interests in this litigation vested in them; they were the real parties in interest, and the fact that the order of this substitution *pro forma* as plaintiffs had not been made in this court at that time (and which was made upon the hearing of the motion) is not sufficient to deprive the executors' attorney of the authority to make the motion. Let the appeal be dismissed.

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92 Cal. 86

GRUHN v. STANLEY *et al.* (No. 13,253.)

(*Supreme Court of California.* Nov. 27, 1891.)

JOINT ACTION—RECOVERY AGAINST ONE DEFENDANT.

Where defendants in an action to recover money deny that they are both indebted, but one avers in his separate answer that he is indebted as set forth in the complaint, and no misjoinder of defendants is pleaded, it is error for the court to give judgment in favor of both defendants.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge. Affirmed in part and reversed in part.

Action by William Gruhn against Bertha Stanley and William H. M. Stanley to recover money loaned. Judgment for defendants. Plaintiff appeals.

H. H. Lowenthal, for appellant. *Ferral & Payson*, for respondents.

VANCLIEF, C. This is an action to recover $1,000 "for money loaned and advanced" by plaintiff to defendants, in which the trial court gave judgment for the defendants. The plaintiff appeals from the judgment and from an order denying his motion for a new trial. The complaint avers that the "defendants * * * are indebted to the plaintiff in the sum of $1,000 for and on account of moneys loaned and advanced by said plaintiff to said defendants;" and "that defendants promised and agreed to pay said sum to plaintiff upon demand," etc. By her separate answer, the defendant Bertha, for herself alone, specifically denies each allegation of the complaint, so far as it applies to her; but she does not plead any misjoinder of defendants. The separate answer of the defendant William denies that the defendants are indebted, etc., for moneys loaned or advanced to the defendants; denies that defendants promised or agreed to pay, etc.; but "avers that he is individually indebted to plaintiff for money loaned to this defendant personally by said plaintiff, but that said defendant Bertha Stanley was not a party to said last-mentioned transaction." The court found as facts that the defendants were not indebted to plaintiff for money loaned or advanced by plaintiff to defendants; that defendants did not agree or promise to pay said sum or any sum; and that there was no sum of money due from defendants to plaintiff by reason of money loaned by plaintiff to defendants; and, as a conclusion of law, found "that defendants are entitled to judgment, and for their costs," taxed at $11.50. These findings must be construed to mean merely that the defendants were not jointly indebted, because the defendant Bertha was not indebted at all; since there was no issue as to the indebtedness or liability of the defendant William. His answer conclusively admits that he, individually, contracted the debt, and denies only that Bertha was a party to the contract. The same issue, and no other, is made by the answer of Bertha, who denies that she, individually, or jointly with William, contracted the debt or promised to pay it. The findings simply negative the alleged indebtedness and liability of the defendant Bertha; and, so understood, they are justified by the evidence, which tends to prove that the loan was made to William alone. It is admitted that he applied for the loan to himself, and that the money loaned was delivered to him. There is no evidence that the defendant Bertha received any part of the money or any benefit therefrom. There was no necessity for any finding as to the separate individual liability of William, for that was admitted, and conclusively established by the pleadings, to the full extent of the sum demanded, (Walker v. Brem, 67 Cal. 599, 8 Pac. Rep. 320; Taylor v. Railroad Co., 67 Cal. 615, 8 Pac. Rep. 436;) and this is consistent with the finding that the defendants were not jointly liable. The motion for new trial was therefore properly denied. But, since no misjoinder of the defendants was specially pleaded, if any there was, it was waived; and the court erred in giving judgment in favor of both defendants, as the plaintiff was entitled to a judgment, on the pleadings, against the defendant William for the full sum demanded in the complaint. Code Civil Proc. §§ 433, 434; Rutenberg v. Main, 47 Cal. 213; Gillam v. Sigman, 29 Cal. 637; Pom. Rem. §§ 289–292. I think the order denying a new trial, and the judgment in favor of the defendant Bertha Stanley, should be affirmed, but that the judgment in favor of William H. M. Stanley should be reversed, and that the court below should be directed to render judgment for plaintiff against William H. M. Stanley, on the pleadings, for the full sum demanded in the complaint.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order denying a new trial, and the judgment in favor of the defendant Bertha Stanley, are affirmed, and the judgment in favor of William H. M. Stanley is reversed, and the court below is directed to render judgment for plaintiff against William H. M. Stanley, on the pleadings, for the full sum demanded in the complaint.

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92 Cal. 108

BURKE v. BOURS *et al.* (No. 13,912.)

(*Supreme Court of California.* Nov. 27, 1891.)

PURCHASE OF PRINCIPAL'S LAND BY AGENT—EQUITABLE TITLE.

In ejectment defendant claimed an equitable title. Plaintiff's testator, A., formerly owned the land, and placed it with F. to sell, who intrusted it, with A.'s consent, to defendant. In a short time defendant wrote to F. that he had an offer, and inclosed a deed for A. to sign with the name of the grantee omitted. On return of the deed signed and acknowledged, defendant inserted his name as grantee, and forwarded a check to F. for the price, who cashed the check, and credited A.'s account. The deed was void because of the failure to insert the grantee's name before delivery. *Held* that, on account of defendant's fiduciary relation to A., he took no equitable title.

In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge. Reversed.

Action in ejectment by W. G. Burke, administrator, against B. W. Bours and others. Judgment for defendants. Plaintiff appeals.

Geo. D. Collins, for appellant. *Jas. H. Budd*, for respondents.

GAROUTTE, J. This is an action in ejectment. Defendant claims to be in possession under a perfect equitable title, and this appeal is taken by plaintiff from the judgment upon a bill of exceptions. The cause has been in this court before, (67 Cal. 447, 8 Pac. Rep. 49,) and it was there held that the deed to defendant to the realty in dispute, made by plaintiff's predecessor in interest, was void, by reason of the fact that the grantee's name was not inserted therein until after it was signed and acknowledged. At the time of the alleged sale of this land, which is situated in the city of Stockton, one Arguello, who resided at Santa Clara, was the owner thereof, and Faulkner, Bell & Co., residing in San Francisco, were his agents in attending to his property interests. Respondent Bours resided in the city of Stockton, and, as the agent of Faulkner, Bell & Co., had charge of this property, collecting rents, etc. Bours and Arguello were strangers to each other. Upon August 19, 1876, the following letter was written to Bours: "Mr. Arguello thinks of selling his real estate in your town, and requests us to ascertain the price it would probably realize. Yours, FAULKNER, BELL & Co." In answer Bours replied that business was dull, and he did not think the property would sell for over $5,000. This letter was forwarded by F., B. & Co. to Arguello, to which he replied to F., B. & Co., among other things: "Needing some money, I wish you would communicate with Mr. Bours, and try to sell this property at a price as near $5,000 as possible." This letter was forwarded to Bours by F., B. & Co., with the statement: "Trusting you will soon be able to advise the disposal of this property, we are, Yours, FAULKNER, BELL & Co." To this Bours wrote to F., B. & Co. that he had ordered an abstract of title to the property, had placed the matter in the hands of a competent broker, and hoped soon to report the sale of the property. This letter was also forwarded by F., B., & Co. to Arguello. Shortly afterwards Bours wrote to F., B. & Co. that he had received an offer of $4,500, free of all commissions, etc., for the property, and had accepted the offer, subject to the approval of the owner, and inclosed in the letter a deed to the property, to be signed and returned to him if Arguello approved the sale. The name of the grantee in the deed was omitted. This letter and deed were forwarded to Arguello by F., B. & Co., he signed the deed and returned it to them. It was then sent to Bours, who inserted his name as grantee therein, and thereupon forwarded his personal check to F., B. & Co. for the amount of the purchase price, and they credited Arguello's account to that extent.

The foregoing deed was declared void in 67 Cal. 447, 8 Pac. Rep. 49, for the reason heretofore stated.

If the business relations existing between Arguello, F., B. & Co., and Bours, as indicated by the foregoing facts, were not such as in equity prohibited Bours from purchasing this property, then he undoubtedly has a perfect equity, which must prevail in this action as against plaintiff's legal title. In section 959, Pom. Eq. Jur., the author says that "equity regards and treats the relation of principal and agent in the same general manner, and with nearly the same strictness, as that of trustee and beneficiary," and this rule is even more rigidly recognized by section 2322 of the Civil Code, which provides that "an authority expressed in general terms, however broad, does not authorize an agent to do any act which a trustee is forbidden to do by article 2, c. 1, tit. 8, of this Code." These provisions define the duties and obligations of trustees towards their beneficiaries fully and clearly, and are strictly in line with the principles laid down in Pom. Eq. Jur. § 959, where it is said: "The underlying thought is that an agent should not unite his personal and representative characters in the same transaction; and equity will not permit him to be exposed to the temptation, or brought into a situation where his own personal interests conflict with the interests of his principal, and with the duties which he owes to his principal." And, referring to a sale made under these circumstances by an agent to himself, the author says: "It will always be set aside at the option of the principal; the amount of consideration, the absence of undue advantage, and other similar features are wholly immaterial." This principle is elementary, and supported by authority both numerous and uniform. Michoud v. Girod, 4 How. 554; Gardner v. Ogden, 22 N. Y. 343.

The law being established, let us see from the evidence what position defendant Bours occupied as to the property and as to Arguello and F., B. & Co. Section 2349 of the Civil Code provides that "an agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others: "Subd. 4. When such delegation is specially authorized by the principal." It is unnecessary to pass upon the question as to whether Bours became the subagent of Arguello, under the foregoing provision of law, taken in connection with the letter written by Arguello to F., B. & Co., which was forwarded by them to Bours, wherein he said: "Needing some money, I wish you would communicate with Mr. Bours, and try to sell the property at a price as near as possible to $5,000." Neither is it necessary, in order to justify a reversal of the judgment, to hold that Bours was the direct agent of Arguello, although the evidence would probably sustain findings to that extent. There cannot be the slightest question but that Bours, in the transaction of finding a purchaser for this real estate, was either the agent or subagent of Arguello, or the agent of F., B. & Co., and, as the law reads, his position from either standpoint is fatal to his claims, whenever and wherever judicially viewed by a court of equity. If he was the agent or subagent of Arguello in assisting in the consummation of a sale of his land, then, by becoming a purchaser thereof, he placed himself in a position which would naturally create a conflict between self-interest and integrity to his principal. Where a person buys from himself as the agent of his principal, danger surrounds the best interests of the principal, and it is the policy of equity to remove every temptation from the agent, by rigidly discountenancing all such transactions; and, under the broad principles heretofore referred to, relating to the duties and obligations of trustees and agents, defendant's purchase of the realty cannot be sanctioned.

If we assume that defendant was simply the agent of F., B. & Co. in this matter, then he is equally unfortunate in resting upon unstable ground. If the purchase in this case had been made by F., B. & Co., as we have seen, no court would countenance it. The same principle must necessarily apply to a purchase made by their agent; no substantial distinction can be discerned in the *status* of the two parties. His duties and obligations to Arguello are required to fill the same measure as is demanded of his employer, and such should emphatically be the requirement in this case; for, as the agent of F., B. & Co., he had the possession of all correspondence of Arguello relating to this matter, whereby he became acquainted with his anxiety to sell; the objects and motives actuating him in such desire; indeed, by this correspondence he became possessed of a knowledge of all the facts and circumstances pertaining to the property. If Faulkner, Bell & Co. could do by their agent what they were forbidden to do themselves, all the mischievous results would be present which the law we have adverted to was designed to prevent. In Sugd. Vend. p. 887, it is said: "Any persons who, by being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable of purchasing such property themselves." In

Gardner v. Ogden, 22 N. Y. 350, this question was directly involved, and the court said: "The defendant Smith was the clerk or assistant of his principals. * * * Whatever disabilities they labored under equally attached to him. It would work an entire abrogation of the rule to hold the principal subject to the operation of this rule, and exempt his clerks and agents from its effect. It would be opening the door to its evasion, so that it would lose all its vitality and virtue." Continuing, the learned justice writing the opinion said: "I think this is the spirit of all the authorities, and that the honesty and fairness of transactions between principals and their agents demand a firm adherence to these rules, and to bring within their operation, not only the agent himself, but those in his immediate employ, and who are engaged in the transaction of his business, which is, necessarily, the business of the agent's principal."

As we have already seen, it matters not that there was no fraud in this transaction, or that no injury resulted to Arguello from the sale. The rule is intended to prevent the possibility of wrong; and, assuming that Bours paid full value for the property, and even acted in entire good faith throughout the transaction, still such facts form no defense, where the purchase was made by the agent without knowledge of his principal. While a trustee may purchase the trust property where he deals openly with his beneficiary in the sale, and the transaction is in all respects fair and just, and the consideration full and adequate, yet that is not this case. Neither does the evidence disclose that Arguello ratified and confirmed the sale to Bours after a full knowledge of all the facts. Aside from the fact that Bours sent his personal check to F., B. & Co. for the amount of the purchase price, there is nothing in the record to indicate that Arguello had any knowledge whatever that Bours was the purchaser; and, as to that matter, it appears that the check was payable to F., B. & Co., cashed by them, and the amount credited to Arguello's account, and nothing is disclosed by the record to indicate that Arguello ever saw the check, or even imagined such a check was ever drawn. In ejectment the legal title must prevail, unless overcome by a paramount equity. Having decided that defendant occupied such relations towards Arguello that he would not be allowed to become a purchaser of this real estate, unless the sale was made with the full knowledge and consent of Arguello, or ratified and confirmed by him after a full knowledge of all the facts, neither of which conditions exists in this case, it necessarily follows that he is not the vendee under an executed contract of sale, is not in a position to enforce specific performance, and possesses no equity sufficient to defeat plaintiff's right to the recovery of the possession of this tract of land. Let the judgment be reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; DE HAVEN, J.; MCFARLAND, J.; SHARPSTEIN, J.; HARRISON, J.

64 Cal. 53

PEOPLE v. O'BRIEN.[1]

(*Supreme Court of California.* July 28, 1883.)

LARCENY—INDICTMENT—FORM.

In an indictment for grand larceny, where the formal conclusion, "contrary to the form, force, and effect of the statute," is immediately preceded by an allegation of a prior conviction for a similar offense, the defect of form is without prejudice to defendant, and does not invalidate the indictment or affect the conviction thereunder.

Department 2. Appeal from superior court, city and county of San Francisco.

This was an indictment against John O'Brien for grand larceny. There was judgment of conviction, an order denying a motion for new trial, and an order denying a motion in arrest of judgment, from which defendant appeals. Judgment and orders affirmed.

Charles B. Darwin, for appellant. *Atty. Gen. Marshall*, for the People.

SHARPSTEIN, J. The indictment charges the defendant with grand larceny, and then alleges a previous conviction of a similar offense, winding up with the words, "contrary to the form, force, and effect of the statute," etc. Counsel for appellant suggests that as these words directly follow the allegation of a prior conviction, which follows the clause containing the charge on which he was tried, there is a material departure from the form prescribed in the Code. Any defect or imperfection in matter of form,—and that relied on here is nothing more,—which does not tend to the prejudice, which this defect does not, of a substantial right of the defendant upon the merits, does not render the indictment insufficient, nor affect the trial, judgment, or other proceedings thereon. Pen. Code, § 960. The Code provides that an indictment may be substantially in a given form. But the pleader is not limited to that form, although we would advise a strict compliance with it; particularly in a matter of form, such as the concluding stereotyped phrase, which, in this instance, the pleader seems to have misplaced. Judgment and orders affirmed.

THORNTON and MYRICK, JJ., concurred.

64 Cal. 77

In re CHALMERS' ESTATE.[2]

CHALMERS v. STOCKTON BUILDING & LOAN SOC. *et al.*

(*Supreme Court of California.* Aug. 9, 1883.)

PROBATE JURISDICTION — SETTING APART HOMESTEAD—MORTGAGES.

Upon petition by a widow to have certain real estate set apart to her as a homestead, the superior court, sitting as a probate court, has no power to adjudicate as to mortgages upon the homestead property executed by the husband prior to the declaration of homestead; nor can the court, in its decree setting apart the property, declare the same subject to the lien of the mortgages.

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[1] This case, filed July, 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[2] This case, filed August 9, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Appeal from superior court, El Dorado county.

Petition by Louisa M. Chalmers, widow of Robert Chalmers, against Stockton Building & Loan Society and Hugh Chalmers, to set apart a homestead. Decree setting apart homestead, subject to lien of mortgages held by defendants. Petitioner appeals. Reversed in part, and affirmed in part.

Charles F. Irwin, for appellant. *George G. Blanchard* and *W. L. Dudley*, for respondents.

Myrick, J. The widow of deceased petitioned that certain real estate be set apart to her as a homestead. Opposition thereto was made by persons holding mortgages of the real estate executed by the deceased in his life-time. The court found, as facts, the execution of the mortgages, adjudged that the mortgagees are entitled to have the mortgages foreclosed, and that the mortgages are subsisting liens and incumbrances upon the property, and made a decree setting apart to the widow as a homestead the premises described in the petition, "subject, however, to the lien and payment of each of the said mortgages in the findings herein set forth." From the clause of the decree above quoted the widow appealed. Doubtless the court below, sitting as a probate court, would have power to consider the existence or non-existence of a mortgage upon a specific parcel of real estate of the deceased, for the purpose of determining what parcel should be set aside, in case of a selection to be made by the court; but where, as in this case, the declaration of homestead was made during the lifetime of the deceased, (the mortgages being executed prior to the declaration,) we find nothing in the statute which requires the adjudication of the court as to the mortgages, or which authorizes the court to set apart the property subject to the lien. Whatever remedy might exist under section 1241, Civil Code, would be for application in proceedings for foreclosure, not in the probate proceedings for setting apart. It is barely necessary to remark that the provisions of section 1475, Code Civil Proc., are not for consideration on this appeal.

The cause is remanded, with instructions to strike from the decree the clause above quoted; in other respects the decree is not appealed from.

Sharpstein and Thornton, JJ., concurred.

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64 Cal. 78

Dean v. Walkenhorst *et al.*[1]

(*Supreme Court of California.* Aug. 9, 1883.)

Fraudulent Conveyances—Sale without Change of Possession.

Code Civil Proc. Cal. § 3440, provides that a transfer of personal property, not accompanied by immediate delivery, and followed by change of possession, is fraudulent and void as against the seller's creditors while he retains possession. *Held* that, where a sale of cattle was made without delivery of possession, the seller and purchaser thereafter intermarrying, and the seller,—the husband,—with his wife's consent, branded the cattle with his recorded brand, and subsequently, under his wife's directions, though without her joining in the bill of sale, again sold the same, but still retained possession, neither the wife nor the last purchaser had any title as against an execution creditor.

Department 2. Appeal from superior court, Modoc county.

Action for an alleged unlawful seizure of personal property, brought by Charles Dean against J. W. Walkenhorst, a constable, and the sureties on his official bond. Judgment for defendants. Plaintiff appeals from the judgment, and from an order refusing a new trial. Affirmed.

E. V. Spencer and *E. M. Barnes*, for appellant. *F. W. Ewing* and *Matt. F. Johnson*, for respondents.

Myrick, J. Action against a constable and his sureties for an alleged unlawful seizure of 29 head of cattle and a bay filly. Judgment went for defendants, and plaintiff appealed. On the 28th of August, 1876, one Swift was the owner of the property in question. On that day he sold the property to Mary Crowder, but no delivery or effort of delivery of possession was then or at any subsequent time had. A few days after the sale Swift and Mary Crowder intermarried, and have been ever since, and are, husband and wife. Swift had possession and control of the property, with the knowledge and consent of his wife, until the seizure by the constable, March 26, 1881. While so in his possession the cattle were branded with the recorded brand of said Swift, with the knowledge and consent of his wife. On the 1st of March, 1880, Swift, with the knowledge and consent of his wife, in his own name, executed to plaintiff a bill of sale of the cattle. Mrs. Swift did not sign the bill of sale, but directed the transaction, and her husband acted fully and solely under her directions. Plaintiff paid $540 for the cattle. He did not take possession, but they remained, as before, in the possession of Swift. The debt on which the constable seized the property was created in 1880 and 1881. Under such circumstances, neither the plaintiff nor Mrs. Swift could be heard to say the property was not the property of Swift, and liable to seizure for his debt. Mary Crowder, while single, and subsequently when Mrs. Swift, permitted the property to remain in the possession and control of Swift, permitted him to place his brand upon it, and to execute a bill of sale of it in his own name. The plaintiff took the bill of sale from Swift as of his property. Section 3440, Code Civil Proc., reads: "Every transfer of personal property * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession," etc. Swift had the possession and control of the property at the time of the alleged transfer to Mary Crowder, and such possession and control continued until after the creation of the debt for which it was seized, and until the seizure. Therefore the transfer from Swift to her was void as to his creditors, and plaintiff took no title from her. Watson v. Rodgers, 53 Cal. 401. In either view, whether the plaintiff claims under Swift or under Mrs. Swift, he cannot recover.

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[1] This case, filed August 9, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Judgment and order affirmed.

SHARPSTEIN and THORNTON, JJ., concurred.

64 Cal. 72

BURNS *et al.* v. HODGDON.[1]

(*Supreme Court of California.* Aug. 9, 1883.)

RES JUDICATA — EJECTMENT — SUBSEQUENT TITLE.

A judgment in ejectment is no bar to another action for the same land, where it is based on a title which plaintiffs have acquired since the former suit, and which was not in issue therein.

Appeal from superior court, Sacramento county.

Action by Joseph Burns and others against Wadsworth Hodgdon to quiet title to a city lot, in which defendants pleaded in bar a judgment in ejectment between the same parties. Plaintiffs relied on a title which they had purchased after the commencement of the action of ejectment. There was judgment for plaintiffs, from which defendant appeals. Affirmed.

M. L. G. O'Brien and *S. Solon Hall*, for appellant. *Freeman & Bates*, for respondents.

ROSS, J. This case comes up upon the judgment roll. The point made for the defendant is that the plaintiffs are concluded by the judgment rendered in a certain action entitled Hodgdon v. Griffin et al. As conclusive against the defendant on this point, it is sufficient to refer to the sixth finding of the court below, which reads: "The right, title, and claim now set up by the plaintiffs herein are not the same which were tried and determined in said suit brought by said Hodgdon, but the plaintiffs here have title in fee to said premises, and a right to the possession thereof, which were not tried nor determined, nor within any of the issues involved, in said suit brought by Wadsworth Hodgdon." Judgment affirmed.

MCKINSTRY and MCKEE, JJ., concur.

64 Cal. 73

BYERS *et al.* v. BOURRET.[1]

(*Supreme Court of California.* Aug. 9, 1883.)

PARTNERSHIP—ACTIONS—FICTITIOUS NAME—CERTIFICATE.

Under Civil Code Cal. § 2468, which provides that persons transacting business under a designation not showing the names of the persons interested as partners therein, shall not maintain any action on contracts made in their partnership name, until they have filed the certificate prescribed by section 2466, and made publication of it for four weeks, as required therein, such partnership is not entitled to begin the action until the publication has been completed.

Department 2. Appeal from superior court, Plumas county.

Action by J. D. Byers and others against Oliver Bourret. There was judgment for plaintiffs, from which defendant appeals. Reversed.

W. W. Kellogg and *E. T. Hogan*, for appellant. *R. H. F. Variel*, for respondents.

MYRICK, J. The plaintiffs, J. D. Byers and J. O. Hemler, allege themselves to be partners under the firm name of J. D. Byers & Co., and sue to recover the amount due on a promissory note executed by the defendant to them as such partners, which note was made payable to J. D. Byers & Co. The answer of defendant, in the nature of a plea in abatement, alleged that the plaintiffs had no right to maintain the action, for the reason that they had not complied with the provisions of sections 2466 and 2468 of the Civil Code, regulating the filing and publishing a certificate of the partnership. The case was tried on the issue thus presented on the 15th of December, 1882, and on the same day findings were filed and a judgment rendered for plaintiffs for the amount of the note, with interest and costs. The court found that at the time the action was commenced the plaintiffs had not filed or published the certificate of partnership required by the sections above referred to, but that on the 7th of December, 1882, and prior to the day of the trial, the plaintiffs did file a certificate in due form, and commenced the publication thereof in a weekly newspaper, and that publication thereof had been made once before the trial; and as conclusion of law the court held that the plaintiffs were entitled to recover. This was error. Section 2468 of the Civil Code declares that persons transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, shall not maintain any action upon or on account of any contracts or transactions had in their partnership name, in any court of this state, until they have first filed the certificate and made the publication required by section 2466. The certificate must state the names in full of all the members of the partnership, and their places of residence, and must be published once a week for four successive weeks in a newspaper. The commencement of an action is a part of the maintaining of it. In this case it was incumbent on the plaintiffs to have shown that the certificate had been filed, and published once a week for four successive weeks before the commencement of the action. We find the law very plainly written, and must hold accordingly. The judgment is reversed, and the cause is remanded, with instructions to render judgment for the defendant; such judgment, however, not to be a bar to another action, if plaintiff shall be advised to commence it after full publication.

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[1] This case, filed August 9, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Sharpstein and Thornton, JJ., concurred.

(64 Cal. 83)

Flint v. Cadenasso *et al.*[1]

(*Supreme Court of California.* Aug. 16, 1883.)

Novation.

Land was conveyed in consideration of an agreement between the grantor and grantee, but not set out in the conveyance, to pay a debt of a prior grantor, secured by mortgage on the land. *Held*, that the prior grantor, although not a party to the agreement, had a right of action, upon payment of the debt by him, against the said grantee.

Department 2. Appeal from superior court, Yolo county.

Action by Hannibal Flint, assignee, against J. Cadenasso and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Bell & Craig, *S. C. Denson*, and *Rhodes & Barstow*, for appellants. *George P. Harding* and *R. Clark*, for respondent.

Myrick, J. The facts of this case, as presented by the complaint, and as found by the court, may be briefly stated thus: Joel Wood, being the owner of a tract of land, and being indebted to Flint, (the plaintiff,) executed his promissory note, and a mortgage upon the land to secure the payment thereof. Subsequently Joel Wood conveyed the premises to Albert Wood, by deed expressing a money consideration, while the consideration, in fact, was an agreement that Albert Wood should pay for Joel Wood the amount of the note and mortgage. Thereafter Albert Wood conveyed to the defendants, by deed also expressing a money consideration, while, in fact, a part of the consideration was the agreement of the defendants to pay to said Flint for said Joel Wood the amount due and unpaid, and to become due, from said Joel Wood to said Flint, as secured by the mortgage above mentioned. The note being unpaid, plaintiff brought suit thereon against Joel Wood, and recovered judgment, which judgment he (Joel Wood) paid. Joel Wood then assigned to plaintiff his right of action against defendants to recover the amount so paid by him, and this suit is brought by plaintiff, assignee of Joel Wood, to recover of the defendants the said amount. We have no doubt of the liability of the defendants on their agreement. It is true, they made no agreement to and with Joel Wood, but their agreement was for his benefit, and, upon their failure to perform, he had a right of action against them. We think the complaint properly states a cause of action. Whether or not the agreement was made, as alleged, was a question of fact, upon which the evidence was conflicting, and the court found in favor of plaintiff. Judgment and order affirmed.

Thornton and Sharpstein, JJ., concurred.

(64 Cal. 106)

People v. Perazzo.[2]

(*Supreme Court of California.* Aug. 28, 1883.)

Perjury—Materiality of Testimony.

In an action to recover personal property by one claiming title through an execution sale, where the defense was that the note on which the judgment was rendered was given to defraud the makers' creditors, the payee of the note testified that he loaned the makers a sum of money at a time subsequent to the institution of his suit. *Held*, that this testimony was immaterial, and, though false, did not constitute perjury.

Department 1. Appeal from superior court, city and county of San Francisco.

Information against Giuseppe Perazzo for perjury. Verdict of guilty, and judgment thereon. Defendant appeals therefrom, and from orders overruling motions for new trial and in arrest of judgment. Reversed.

Charles B. Darwin and *L. Quint*, for appellant. *Atty. Gen. Marshall* and *W. H. Payson*, for the People.

Ross, J. The allegations in the information upon which the defendant was convicted are that on the trial of a certain action entitled Sherwood and Meyers v. Desmond it became and was material to its determination to know whether the defendant, Perazzo, had, on or about the 9th day of September, 1880, or at any other time, loaned to M. Grossini and John Tiscornia the sum of $3,000 in United States gold coin; and that Perazzo on said trial testified that he did, on or about the 9th day of September, 1880, loan to the said Grossini and Tiscornia the sum of $3,000 in such coin; whereas in truth and in fact he did not, on or about the 9th day of September, 1880, or at any other time, make such loan, or any other loan of money, to the said Grossini and Tiscornia. It is plain that the negation of the pleader cannot add to the testimony assigned as false, which is that defendant swore falsely in testifying that he loaned to Grossini and Tiscornia $3,000 in United States gold coin, on or about the 9th day of September, 1880. If such testimony could not have been material to any issue involved in the action entitled Sherwood and Meyers v. Desmond, its falsity could not amount to perjury in law, because to constitute perjury the false testimony must be upon a matter material to the issue involved in the inquiry. Sherwood and Meyers v. Desmond was an action of claim and delivery, brought for the recovery of certain articles of personal property. Upon the trial of that action the plaintiffs deraigned title through a sale under execution based on a judgment rendered in an action entitled Perazzo v. Grossini and Tiscornia, which last-named action was commenced in August, 1880, and was brought upon a promissory note for $4,000, alleged to have been executed to Perazzo by Grossini and Tiscornia. The defendant to the suit of Sherwood and Meyers v. Desmond sought to avoid the judgment in Perazzo v. Grossini and Tiscornia, and the sale made thereunder, by showing that that action was founded upon a simulated note executed for the purpose of withdrawing the property of the makers from the reach of their creditors by means of the judgment and execution sale. From this statement it will be seen that in no aspect of the case of Sherwood and Meyers v. Desmond could it have been material to inquire whether Perazzo did or did not loan to Grossini and Tiscornia the sum of $3,000, at any time during the month of September, 1880, because the making or non-making of such a loan could not have affected to any extent the action of Perazzo v. Grossini and Tiscornia; the complaint in which, as has already been said, was filed in August, 1880, and was based on an alleged cause of action theretofore arising. As, therefore, the false swearing charged in the information was not material to any issue involved in the action on the trial of which it is alleged to have been committed, it could not amount to perjury, and the judgment of conviction cannot be permitted to stand. Nothing is better settled or more rational than that an indictment for one crime cannot be supported by proof of another; the crime charged must be proven. A case somewhat similar to the present one will be found reported in 9 Gray, p. 119, entitled Com. v. Monahan. Judgment and order reversed, and cause remanded for a new trial.

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[1] This case, filed August 16, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[2] This case, filed August 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

McKinstry and McKee, JJ., concurred.

64 Cal. 108

Harris v. Harris *et al.*[1]

(*Supreme Court of California.* Aug. 29, 1883.)

Bill of Sale—Mental Incapacity—Innocent Purchasers.

A bill of sale made by one mentally incompetent to transact business is invalid, both as against the purchaser and as to innocent purchasers from him.

Department 1. Appeal from superior court, Lassen county.

Action by Nettie D. Harris, administratrix of J. H. Harris, against E. A. Harris and others, to have a bill of sale made by the intestate declared void. Judgment for defendants. Plaintiff appeals. Reversed.

E. V. Spencer and *C. McClaskey*, for appellant. *Hart & White*, for respondents.

McKee, J. The appeal under consideration is from the judgment alone. From the findings it appears that on the 17th of May, 1880, James H. Harris was the owner and in possession of the band of horses which is the subject of controversy, and that on that day he conveyed the band by a bill of sale, which he signed, executed, and delivered to the defendant E. A. Harris, who afterwards, on November 1, 1880, sold and delivered the horses to his co-defendants, Moulton and Myers. But the court also found as follows: "That for several days prior to the said 17th day of May, and up to his death, on the 18th day of May, 1880, the deceased was completely paralyzed in his body and limbs, so as to be utterly and entirely helpless, and incapable of doing any act or thing, and was so affected in his mind and reasoning faculties as to be incompetent to transact any business whatever. That while deceased was so helpless, and without understanding of the nature and quality of his acts, and but a few hours before his death, the defendant E. A. Harris procured to be made the said bill of sale, purporting to convey all of the said band of horses to E. A. Harris for the consideration of one thousand dollars, and that the deceased was induced to sign, execute, and deliver said bill of sale without understanding or comprehending the nature, scope, or extent thereof, he, the deceased, being at the time without mind, without reason, and without will, either to act or not to act." And upon the findings judgment was entered in favor of the defendants Moulton and Myers, and against the defendant E. A. Harris. The findings are ambiguous. If the court meant to find as a fact that the original vendor, James H. Harris, sold and delivered the property to his vendee, E. A. Harris, by a bill of sale, duly executed and delivered, then the title to the property passed to the vendee, and his subsequent vendees became the owners of the property. But if there was no such transfer, by reason of the mental incapacity of James H. Harris to execute the bill of sale, then the transaction was absolutely void, (section 1550, Civil Code;) the title of the owner did not pass either to the defendant E. A. Harris, or his co-defendants, Moulton and Myers, (Boggs v. Hargrave, 16 Cal. 560; Robinson v. Haas, 40 Cal. 474; Mitchell v. Hockett, 25 Cal. 538;) and the plaintiff was entitled to recover. Construing, however, the findings as a whole (as they are entitled to be construed) to mean that the execution and delivery of the bill of sale was mere form, which only purported to transfer, but did not in fact transfer, the property, because of the mental incapacity of James H. Harris to execute such a document, or to enter into a contract of sale, the decision of the court is erroneous. The judgment must therefore be reversed, and the cause remanded for a new trial. So ordered.

Ross and McKinstry, JJ., concurred.

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[1] This case, filed August 29, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

64 Cal. 116

PEOPLE v. McNUTT.[1]

(*Supreme Court of California.* Aug. 29, 1883.)

BURGLARY—EVIDENCE—OTHER CRIMES.

On an indictment for burglary alleged to have been committed on November 19, 1882, the admission of evidence tending to show larceny committed by defendant on the same premises on December 12, 1882, is prejudicial error.

Appeal from superior court, city and county of San Francisco.

This was an indictment charging Miller McNutt with having committed burglary on November 19, 1882, at the room of one Frank Scott, in the city and county of San Francisco. Scott testified that on the night of the above date a suit of clothes and other articles were taken from his room, and his testimony tended to show that defendant was the thief. Scott's wife testified that on December 12, 1882, some of her jewelry was stolen from her room. Defendant was convicted, and from the judgment and an order refusing a new trial he appeals. Judgment and order reversed.

John D. Whaley, for appellant. *Atty. Gen. Marshall*, for the People.

THORNTON, J. The evidence of Mrs. Louisa Scott as to the jewelry which she says she lost, and was stolen, on the 12th of December, 1882, was clearly inadmissible. It had no proper relevancy to the burglary charged in the indictment, as committed on the 19th of the preceding month. It is urged that no injury was done to the defendant by the ruling of the court; that it is a case of error without injury. We cannot so view it. Evidence tending to prove a larceny by the defendant on the 12th of December, 1882, might well have had an effect on the minds of the jury prejudicial to the defendant. For this error we think the cause should go back for a new trial. We find no other error in the record. Judgment and order reversed, and cause remanded for a new trial.

SHARPSTEIN, McKEE, ROSS, MYRICK, and McKINSTRY, JJ., concurred.

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[1] This case, filed August 29, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

(92 Cal. 135)

COFFEY v. LYMAN. (No. 14,387.)

(*Supreme Court of California.* Nov. 28, 1891.)

ELECTIONS—BALLOTS.

The words "Regular Prohibition Ticket," printed at the head and on the face of a ballot, are not such part of the ticket as renders it illegal under Pol. Code Cal. § 1191, providing that the word "For" shall comprise the top line of all tickets used at an election, as the ticket consists merely of the words showing for whom and for what office the ballot is cast. Coffey v. Edmonds, 58 Cal. 521, followed.

Commissioners' decision. Department 2. Appeal from superior court, Sutter county; P. O. HUNDLY, Judge. Affirmed.

Action by A. B. Coffey against G. B. Lyman to settle the result of an election. Judgment for plaintiff. Defendant appeals.

W. H. H. Hart and *M. E. Sanborn*, for appellant. *W. T. Phipps* and *K. S. Mahon*, for respondent.

TEMPLE, C. This is an election contest. The parties were opposing candidates for the office of superintendent of schools in the county of Sutter. The sole question here is whether the court ruled correctly in counting for contestant 42 votes cast for him upon the Prohibition ticket, and, as they were alike, one ruling will dispose of them all. If contestant was entitled to them, he was elected; if not, the respondent rightfully holds the certificate. It was admitted that the Prohibition party did not adopt a vignette or caption, or file one in Sutter county; and neither of the tickets had the name or number of the precinct or district in which the same was to have been or might be voted. Thirty-nine ballots each contained the words "Regular Prohibition Ticket" underscored, printed at the head on its face

The other three had the same heading, with the addition of two stars over the words. It is contended that these ballots should be rejected, because they do not conform to the provisions of the Political Code upon the subject. In 1878 was passed what is called the "Vignette Law," expressly allowing a heading upon the face of ballots. Prior to that time, it is contended, no heading whatever was allowed, for section 1191 of the Political Code prescribes that the word "For" shall constitute the top line; and section 1208, that all ballots which do not conform to that section shall be rejected. Therefore it is plausibly contended no heading is allowed now except in strict conformity with the vignette law. That act prescribes with great particularity under what conditions a heading can be placed upon a ticket. (1) It must be regularly adopted by the managing committee of a regular party; (2) it must show the district, ward, or precinct; (3) it must state that it is the regular ticket of the party, and must be that ticket, and be of certain fixed dimensions, and have certain prescribed spaces; and (4) it should be sealed up in an envelope, and filed with the county clerk at least 10 days before the election. None of these requirements were complied with in this case, and it is contended that, as these provisions make an exception to the general rule, it necessarily follows that a heading not so made is contrary to the law, and fatal to the validity of the ballot. It is illegally marked, calculated to distinguish the persons or class of persons voting it, and particularly is a violation of section 1191 of the Political Code. A good part of the argument of appellant is answered by the recent case of Rutledge v. Crawford, (Cal.) 27 Pac. Rep. 779, in which it was held that it must appear that the mark was designed for the purpose of distinguishing the ballots from others, and thus destroy the secrecy of the ballot. It is evident that these ballots were not designed for that purpose. That such a device might have been used with that intention does not justify their rejection. Inasmuch as it is expressly enacted that any ticket not conforming to section 1191 shall be rejected, there would seem to be some force in the objection that they do not conform to that section if it is necessary to hold that the words "Regular Prohibition Ticket" constitute a part of the ticket; for then it is evident the word "For" does not constitute the first line of the ticket, as required by that section, and the heading, not being within any authorized exception, would make the ticket illegal. But, although on the ballot, these words are not a part of the ticket, which consists of the words showing for whom and for what offices the ballot was cast. And the point has been expressly decided in Coffey v. Edmonds, 58 Cal. 521. Some ballots had written at the top, under the vignette, "For President, Hancock and English." This court held they were properly counted. So far as the contention is concerned that these tickets do not conform to section 1191 of the Political Code, this case seems in point. We advise that the judgment be affirmed.

We concur: Foote, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

(91 Cal. 611)

FULMORE v. McGEORGE. (No. 13,775.)

(*Supreme Court of California.* Nov. 6, 1891.)

ARBITRATION AND AWARD.

1. Under an agreement to arbitrate partnership differences between two partners, an award containing an itemized statement of the partnership accounts, and finding a balance due by one partner to the other, secured by a pledge on the debtor's interest in a specified partition of the partnership property, in all of which the partners are equally interested, subject only to the lien of the pledge, is sufficiently definite to be enforced.

2. An award is conclusive as to matters submitted when no transcript of the testimony given before the arbitrators, which was reduced to writing, is filed with the court, and the affidavits of the parties as to what the testimony was are contradictory.

3. An award that a certain agreement constituted a pledge for a debt, and not a bill of sale to one partner by the other of his interest in certain partnership property, is proper, under a submission of "partnership matters and accounts."

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge. Affirmed.

Smith Fulmore and Peter McGeorge agreed to submit their partnership differences to arbitration. Fulmore's motion to vacate or modify the award in the superior court was denied.

P. F. Hart and *E. W. Wilson*, for appellant. *J. D. H. Chamberlin*, for respondent.

Vanclief, C. This is a matter of arbitration between the parties, and the appeal is from an order of the superior court denying appellant's motions to vacate or to modify the award. The written agreement of the parties to submit to arbitration, which had been entered as an order of the court, is as follows: "Whereas, differences are now existing between Smith Fulmore, of the county of Humboldt, and Peter McGeorge, of the same place, in relation to divers partnership matters and accounts: Now, therefore, we, the undersigned, Smith Fulmore and Peter McGeorge, do hereby agree that James Smith, of Ferndale, J. D. Ferrill, of Ferndale, and C. M. Wheeler, of Eureka, or any two of them, shall arbitrate, award, judge, and determine of and concerning all said differences now existing between us in relation to our said partnership matters and accounts. And we do hereby mutually covenant and agree to and with each other that the award to be made by the said arbitrators, or any two of them, shall in all things by us, and each of us, be well and faithfully kept and observed; provided, however, that the said award be made in writing under the hands of the said arbitrators, or any two of them, and ready to be delivered to the said parties in differences, or such of them as shall desire the same, on the 12th day of June, 1888. It is hereby further stipulated and agreed, by and between the parties hereto that this submission to arbitration shall be entered as an order of the superior court of the county of Humboldt, state of California. In witness whereof the above-named parties have hereunto set their hands and seals this the 21st day of May, 1888. SMITH FULMORE. [L. S.] PETER MCGEORGE. [L. S.]" The award contains an itemized statement of the partnership accounts, showing a balance in favor of Fulmore and against McGeorge of $302.70, to secure the payment of which it is found that the former has a lien by pledge upon the latter's interest in a specified portion of the partnership property. The award also contains a complete schedule of the existing partnership property, in which it is awarded that the parties are equally interested, subject to said lien upon McGeorge's interest in a specified portion thereof.

1. It is contended for appellant that the award is too indefinite to be enforced. Upon its face the award seems to be perfectly definite, to settle the partnership accounts, and to determine the respective rights of the parties as to all existing partnership property. Why it cannot be performed, if the parties are disposed to abide by it, is not perceived. Under this head it is said that it does not provide that either party shall have or recover any sum or any thing from the other party; nor that any disposition, sale, or division of the existing partnership property shall be made. These, however, are not valid objections on the ground of indefiniteness of the award. But it does award that McGeorge owes, and consequently that he should pay, to Fulmore, the definite sum of $302.70. The agreement submitted to arbitration only all differences existing between the parties "in relation to partnership matters and accounts." It does not appear that either party desired to divide or to dispose of the property, nor that there was any difference between them in that respect; much less that any such difference was submitted to the arbitrators. The award appears to determine all matters submitted. It does not appear that further inquiry is necessary to ascertain a sum of money to be paid, or any act to be done by either party in relation to the matters submitted. Porter v. Scott, 7 Cal. 313.

2. It is contended that the arbitrators committed gross error in charging appellant with three items, amounting to $42.86. But it does not apear upon what evidence these items were charged by the arbitrators. The contradictory affidavits of the parties as to what that evidence was cannot be considered here. It is stated in the affidavit of respondent, and not denied by appellant, that the testimony of the parties and their witnesses was reduced to writing by the arbitrators, but no part of it is contained in the transcript brought here; nor does it appear that it was introduced on the hearing of the motion in the court below. It is admitted that the items in question were submitted to the arbitrators. Under these circumstances, the award, as to them, is conclusive.

3. One of the differences settled by the award was whether certain instruments in writing constituted an absolute bill of sale of respondent's interest in a portion of the partnership property to appellant, and an agreement on the part of appellant to reconvey the same, or a mere pledge to secure the payment of a certain sum of money which appellant advanced to the partnership concern for the respondent. The award as to this was that the instruments constituted a mere pledge, and that the property remained partnership property subject to the lien of the pledge. The only objection made to this action of the arbitrators is that it was *ultra vires*, because the matter is not included in the submission of "partnership matters and accounts." The property was claimed by appellant to be his individual property, while the respondent contended that it was partnership property, his interest in which was subject to the lien of the pledge. To determine a difference between partners as to what is partnership property as distinguished from the individual property of one of the partners is clearly a partnership matter, and falls within the written submission in this case. Furthermore, it was necessary to determine this difference in order to adjust the partnership accounts. I think the order should be affirmed.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(91 Cal. 617)

HEWITT v. DEAN *et al.* (No. 14,011.)

(*Supreme Court of California.* Nov. 7, 1891.)

RESTITUTION ON APPEAL.

Under Code Civil Proc. Cal. § 957, providing that on reversal or modification of a judgment or order the appellate court may make complete restitution of all property and rights lost by the erroneous judgment, an order of the appellate court, reducing the amount of a judgment, is not such a modification as will entitle the judgment debtor to restitution, where the property taken in execution is not more than enough to satisfy the judgment as modified.

In bank. Appeal from superior court, Los Angeles county; J. W. TOWNER, Judge. Motion denied.

Motion by Dean and others to set aside a sale of property to Hewitt, the respondent, made under a judgment in his favor. For former reports, see 26 Pac. Rep. 1101; 27 Pac. Rep. 423.

Victor Montgomery, for appellants. *Ray Billingsley*, for respondent.

HARRISON, J. Motion on behalf of the appellants to set aside a sale of property made under the judgment at the instance of the respondent. The court below rendered judgment in favor of the plaintiff and against the defendants for the sum of $3,149.60, the amount of the promissory note sued on, and $300 attorneys' fees, and directed that the lands mortgaged to secure the same be sold by the sheriff. From this judgment the defendants appealed to this court, but did not file an undertaking staying proceedings upon the judgment appealed from. After the appeal was taken, the plaintiff caused an order of sale to be issued upon the judgment, and at a sale thereunder made August 8, 1890, purchased the mortgaged premises for the sum of $3,000, which was credited upon the amount of the judgment. Upon the determination of the appeal in this court the court below was directed "to modify the judgment by reducing the amount allowed for attorneys' fees to $125 as of the date the judgment appealed from was entered," and, as so modified, the judgment was to stand affirmed. Section 957, Code Civil Proc. provides: "When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order," etc. This provision has been a part of the rule of procedure in this state since June, 1853. St. 1853, p. 289; Prac. Act, § 345. In Farmer v. Rogers, 10 Cal. 335, the supreme court, construing this provision, say: "It applies only to those cases where the judgment operates upon specific property in such a manner that its title is not changed, as by directing the possession of real estate, or the delivery of documents, or of particular personal property in the hands of the defendant, and the like." In that case, however, the sale under the judgment appears to have been made to parties other than the plaintiffs in the action, and in that respect differs from the case under consideration, but the language of the court is general in its statement of the application of the provision. The provision of the Code under which the relief is sought authorizes this court to make restitution "of all property and rights lost by the erroneous judgment," in case the judgment appealed from is reversed or modified. The judgment in the present case was not reversed, nor was it modified to such an extent that the defendants can be said to have "lost" any property or rights thereby. The judgment as originally entered was for the sum of $3,492.50, besides costs of suit, and it was modified by the judgment of this court by merely striking therefrom the sum of $175, and in other respects was affirmed, whereas the sum for which the property was sold was only $3,000.

The rule under which property bid in by the plaintiff at an execution sale under his judgment is restored to the defendant if the judgment be afterwards reversed has no application. In such a case the reversal of the judgment is a judicial determination that the plaintiff was not entitled to the judgment, and it would be contrary to reason to hold that the defendant should not be restored to the estate which had been taken from him by the plaintiff under a process of law for the purpose of satisfying a demand which it was afterwards judicially determined he did not owe. If the judgment is reversed, there would be no foundation for the title under which the plaintiff claims to hold the property of the defendant, and he must surrender it. For such purpose, however, he must make application to the court out of which the process issued. That court is the custodian of the records in the suit, and is the proper tribunal to supervise the action of its officers in enforcing its judgments, or to cause restitution to be made of property improperly applied in satisfaction of its judgments. Unless, however, the judgment is reversed, the principle does not apply, and upon a modification of the judgment to such an extent merely that the defendant is thereby relieved from only a part of the judgment, it cannot be said that he has "lost" any property or rights "by the erroneous judgment," unless more of his property has been taken than the amount for which the judgment has been affirmed. In the present case, inasmuch as it appears from the affidavit on behalf of the defendants that property amounting to only $3,000 has been taken in part satisfaction of a judgment amounting to a much greater sum, it would be not in accordance with either equity or the provisions of the Code to order the property to be restored to them. The motion is denied.

We concur: BEATTY, C. J.; PATERSON, J.; GAROUTTE, J.; DE HAVEN, J.; SHARPSTEIN, J.

(92 Cal. 60)

VISHER v. SMITH. (No. 14,527.)

(*Supreme Court of California.* Nov. 23, 1891.)

MANDAMUS TO JUDGE—RES JUDICATA.

Where application is made for a *mandamus* to compel a judge to settle a bill of exceptions, but the proceeding is dismissed for want of prosecution, a mandate will not issue against his successor to compel such settlement, since the original ruling of the judge is then a final determination.

In bank.

Application for a writ of *mandamus* by S. Visher against Ansel Smith. Denied.

L. W. Elliott, for petitioner. *Baldwin & Campbell*, for respondent.

HARRISON, J. Petitioner asks for a writ of mandate to compel the respondent, as judge of the superior court of San Joaquin county, to settle a bill of exceptions in the case of Johnson v. Visher. That action was tried in said superior court before the Honorable J. G. SWINNERTON, judge of said court, and judgment was rendered therein in favor of the plaintiff, March 20, 1889. The petitioner, who was the defendant in said action, having within due time thereafter prepared a draft of a bill of exceptions, and no amendments having been proposed thereto, appeared before said judge for the purpose of settling the same on the 22d of June, when the attorney for the plaintiff moved to strike out the bill, for the reason that it was a "skeleton bill," and not a bill of exceptions. This motion was denied, but the defendant was allowed three days "in which to prepare and serve a bill of exceptions." No further extension of time was granted, either by order or stipulation, nor did the defendant prepare or serve any bill of exceptions in accordance with this order until December 26, 1889. In the mean time, however, the defendant's attorney prepared "amendments" to the original bill, and presented them with said original bill to the judge for settlement, but the judge directed that the bill and amendments be engrossed and served upon the plaintiff. The bill, as thus engrossed, was not, however, served upon the plaintiff until December 26th. When this bill was presented to the judge for settlement, the plaintiff's attorney objected to any settlement of the same on the ground that it had not been prepared or served within the time allowed by law or by the court, and upon this objection the judge refused to settle the same. Thereafter, to-wit, July 12, 1890, the petitioner obtained an alternative writ of mandate from this court, directed to said judge, commanding him to settle said bill, or show cause before this court why he should not do so. Upon the return-day of this writ the judge appeared and made answer thereto, and thereafter said petition was dismissed for want of prosecution. Said judge, having on the 5th day of January, 1891, ceased to hold his said office, the petitioner thereafter presented said bill of exceptions to the respondent herein, as the successor in office of said Swinnerton, with the request that he settle the same. The respondent thereupon appointed June 2, 1891, as the day for the settlement thereof, at which time counsel for plaintiff and Judge SWINNERTON were present; whereupon, upon ascertaining from an examination of the petitioner's counsel and Judge SWINNERTON the foregoing facts connected with the preparation of said bill, the respondent refused to settle the same, "upon the ground that the petitioner did not comply with the order of the court of June 22, 1889, in preparing and serving said bill of exceptions; and upon the further ground that the trial judge, with all of said facts before him, had refused to settle the same bill of exceptions for the same reason, to-wit, that the same had not been presented or served within the proper time." Upon this refusal of the respondent the petitioner made this application.

We must assume, upon the facts presented by the petition and answer herein, that the draft of the bill which was originally presented to Judge SWINNERTON for settlement was a "skeleton bill," and that his action in refusing to recognize it as entitled to settlement, and in directing a proper draft of a bill to be prepared and served within three days, was correct. People v. Sprague, 53 Cal. 422; Frazer v. Superior Court, 62 Cal. 49; Hearst v. Dennison, 72 Cal. 227, 13 Pac. Rep. 628. The permission of the judge to supply this defect, and to enable the petitioner to avoid the consequences of having no bill of exceptions in the case by preparing and serving another, was a favor which was to be accepted by the petitioner according to its terms. His neglect to do so placed him in the same position as if he had originally failed to prepare and serve a draft of his bill within the time allowed by law. After that time, and such additional time as the court might grant, had expired without his preparing and serving any draft, the judge had no authority to settle any bill, and the action of Judge SWINNERTON in refusing to settle the bill was correct. Bunnel v. Stockton, 83 Cal. 319, 23 Pac. Rep. 301; Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. Rep. 50. If there were any circumstances connected with such neglect which would have afforded a legal excuse therefor, they should have been presented to Judge SWINNERTON for determination. If thereupon the judge had made an erroneous ruling, it could have been corrected under a *mandamus* from this court. The petitioner could not permit the ruling of Judge SWINNERTON to remain unquestioned, and afterwards present the same bill to his successor in office, and ask a different ruling upon the same state of facts. The refusal of Judge SWINNERTON was an adjudication that the bill ought not to be settled. The petitioner did make application to this court for a mandate compelling Judge SWINNERTON to settle said bill, and in that proceeding he had the opportunity to set aside his ruling, if the facts would have authorized it; but, instead of prosecuting that proceeding to such determination, it was dismissed for want of prosecution. This left the original ruling of the judge as a final determination that he was justified in refusing to settle the bill, and, if so, the respondent herein cannot be compelled to settle it. The application for the writ is denied, and the alternative writ heretofore issued is discharged.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; PATERSON, J.; GAROUTTE, J.; MCFARLAND, J.

(92 Cal. 69)

VITORENO v. COREA. (No. 14,161.)

(*Supreme Court of California.* Nov. 25, 1891.)

NONSUIT—STATEMENT BY ATTORNEY.

In replevin, the attorney for plaintiff stated that he would show that a brother of defendant represented to plaintiff that one of his creditors was about to attach plaintiff's property, and that he had better transfer it to defendant; that plaintiff was the owner of property much in excess of the debt; that the creditor had no intention of attaching; that from these representations plaintiff made a bill of sale, and delivered the property to defendant; that the consideration for the sale was immediately returned to defendant, according to agreement. A motion to nonsuit plaintiff on the ground that he had transferred the property in order to defraud his creditor was overruled. *Held* that, since plaintiff had other property to satisfy the debt, defendant alone was guilty of fraud, and that the motion was properly refused.

Department 2. Appeal from the superior court, Contra Costa county; JOSEPH P. JONES, Judge. Affirmed.

Action of replevin by one Vitoreno against one Corea. Verdict and judgment for plaintiff. Defendant appeals.

Thomas Scott and *J. E. McElrath*, for appellant. *Chase, Chase & Meller*, for respondent.

SHARPSTEIN, J. This is an action to recover the possession of personal property. The jury rendered a verdict in favor of the plaintiff. Defendant moved for a new trial upon a statement. The motion was denied, and defendant appeals from the judgment and order denying his motion for a new trial.

The statement shows that after the jury had been sworn the plaintiff's attorney stated the issue and his case as follows: "Mr. Chase: I will first read to you the pleadings, which show the issues of this case, and then will state briefly the facts we expect to prove under those issues. [Reads the complaint and answer.] Now, these parties, the plaintiff and defendant, live over in the south-east part of the county beyond Clayton, and are farmers. The plaintiff is in very good circumstances, and owns the property which is described in the complaint and answer. The defendant's relative came to the plaintiff, and without any cause whatever made up a story,—a lie in fact,—and told the plaintiff that one Thomas Williams was about to attach him, the plaintiff. The plaintiff was owing him, and that he had better put his property over in his brother's hands. He had real estate there. He had hay. He had property a good many times the value of the property which the plaintiff was owing this Williams; but the defendant's brother worked upon the fears of the plaintiff in that way, telling him that Williams was about to attach him, and that he should put his property over in the defendant's hands, and keep it a while, and turn it back again. The facts are, right there, that Williams had no idea of attaching him. He did not intend to. He knew the plaintiff was perfectly good. He had plenty of property to pay his debts; and this story was manufactured out of whole cloth. But, after conversing a while, the plaintiff and defendant went to Antioch, and a pretended bill of sale of the property was made out, and the property was temporarily turned over to the hands of the defendant. At Antioch the pretended purchase money for the property was paid out to the plaintiff,—some two hundred odd dollars, I think $150 or $200,—and a bill of sale was signed; and then, when they got out, according to a previous agreement, the money was returned by the plaintiff to the defendant. A part of it was borrowed there in Antioch, and it was returned to the defendant and the parties it was borrowed from. Time passed along, and the defendant stated to confidential friends who lived in the community that this was only a sham sale, and the property did not belong to him, the defendant, at all; it belonged to the plaintiff and that it would soon be returned to him. He told several that fact. That subsequently the defendant got the impression that he could hold this property, and decided that he would keep it, and some discussion arose out of it,—some lawsuits arose out of it,—until the feeling between them became such that the defendant determined that he would hold the property, and the result was the bringing of this action for the recovery of the property or its value. These are substantially the facts we expect to prove." Mr. McElrath, attorney for defendant, said: "Upon the opening statement of Mr. Chase we move that he be nonsuited. If Mr. Chase's statement is correct, it is that the defendant's brother went to the plaintiff and informed the plaintiff that a man by the name of Williams, and who was a creditor of the plaintiff, was going to attach him, and the plaintiff, for the purpose of hindering, defrauding, and swindling this creditor, transferred his property, to the defendant. Of course, I don't admit such are the facts. I say upon the plaintiff's own statement, if those are the facts, the doors of this court-house are closed against him, and he is not entitled to come in here. He is in that condition of fraud that he does not come into court with clean hands. I refer your honor to the case in 25 Cal. p. 654,—Gregory v. Haworth. We move for a nonsuit, and ask a judgment for the value of the property, or for its return and for costs, after argument." The court, after hearing argument, overruled the motion, and defendant excepted.

According to this statement of plaintiff's attorney to the jury, the defendant obtained possession of the property sued for without giving any consideration therefor, by fraudulent misrepresentation. The misrepresentation consisted in defendant's representing to plaintiff that a creditor of his was intending to attach his property, when in fact the creditor named had no such intention, and plaintiff had plenty of other property to pay his debts. If the property had been placed by the plaintiff in the hands of the defendant for illegal purposes, and the defendant refused to return it, the plaintiff would have to abide the loss, for *in pari delicto, melior est conditio possidentis.* But courts, both of law and equity, have held that two persons may concur in an illegal act without being deemed to be *in pari delicto.* In this case the defendant alone was guilty of fraud. He cannot avail himself of his own fraud as a defense, "for no man shall set up his own iniquity as a defense, any more than as a cause of action." Per Lord MANSFIELD in Montefiori v. Montefiori, 1 W. Bl. 364. It does not appear that plaintiff consented to the transfer of the property with the intent to hinder, delay, or defraud any creditor. If not, he was simply an innocent victim of the defendant's wiles. To permit the defendant to retain what he had thus fraudulently obtained the possession of, would be to enable him to take advantage of his own wrong, contrary to the maxim, *nullus commodum capere potest de imperia sua propria.* The maxim, *in pari delicto, melior est conditio possidentis,* is one of public policy, and public policy could not best be subserved by applying it to this case. The motion for a nonsuit was properly overruled. The evidence of the plaintiff tended to prove a stronger case than the statement of his attorney, which we have above considered. We cannot hold that his evidence is insufficient to justify the verdict of the jury, although it conflicts in many respects with the evidence of the defendant. Judgment and order affirmed.

I concur: MCFARLAND, J.

DE HAVEN, J. I concur in the judgment. The evidence upon the trial was such as to bring the case fairly within the rule laid down in Bump, Fraud. Conv. pp. 441, 442.

(92 Cal. 80)

ROGERS v. JONES. (No. 13,672.)[1]

(*Supreme Court of California.* Nov. 27, 1891.)

MORTGAGES—ABSOLUTE DEED—RATE OF INTEREST.

1. Where a deed is absolute on its face, but the parties at the time of its execution sign a memorandum reciting that "Jones [the grantor] is to have the land again by deed whenever he pays all the amount borrowed, and other debts due me," such memorandum proves the deed to be in fact a mortgage.

2. A stipulation that "on each item I am to have one per cent. interest," means 1 per cent. per annum, under Civil Code Cal. § 1916, providing that where a contract prescribes a rate of interest, "without specifying the period of time by which such rate is to be calculated, it is to be deemed an annual rate."

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; RODNEY J. HUDSON, Judge. Modified and affirmed.

Action by J. T. Rogers against David Jones to foreclose a mortgage. Judgment for plaintiff. Defendant appeals.

Bond & Fishback, for appellant. *J. T. Rogers*, for respondent.

VANCLIEF, C. Action to foreclose an alleged mortgage. The instrument alleged to be a mortgage is, in form, an absolute conveyance of 40 acres of land, dated February 11, 1885; but it is averred in the complaint that at the time it was executed it was understood and agreed by the parties that it was to have the effect of a mortgage merely, to secure the payment of future advances of money by plaintiff, to and for the use of the defendant, not to exceed $750. It is further averred that, in accordance with such agreement, the plaintiff paid for and at the request of the defendant, to different persons, sums of money amounting in the aggregate to $267.72, which the defendant promised to repay to plaintiff, with interest at 1 per cent. per month. The prayer is that the mortgaged premises be sold, etc. The answer denies that it was agreed or understood that the instrument should be considered a mortgage, or that it was executed as security for any debt; denies three items of the alleged indebtedness, amounting to about $100; and denies that defendant promised to pay interest at any rate. The court found for the plaintiff upon all the issues, and rendered judgment accordingly. The defendant appeals from the judgment, and also from an order denying his motion for a new trial.

1. The court did not err in admitting in evidence the written memorandum signed by the parties contemporaneously with the execution of the deed, of which the following is a copy: "Memorandum, made February 11, 1885. David Jones deeds to me 40 acres. Still due the state, $52. J. T. Campbell is to deed me 120 acres, and I am to pay $130 (or thereabouts) to Campbell. Then I am to borrow on said 160 acres about $750, and I am to use said money for Jones: (1) Pay to J. J. Scrivner, attorney, 320 California St., S. F., $500; (2) J. T. Campbell, attorney, Santa Rosa, Cal., $130; (3) pay taxes of E. Davis and D. Jones,—$32.77; (4) pay balance to state on said 40 acres,—$52; (5) pay taxes on land hereafter. On each item I am to have one per cent. interest. Jones, in said matter, is to have the land again by deed whenever he pays all the amount borrowed, and any other debts due to me. If the money can be borrowed, the above is to be done. J. T. ROGERS. DAVID JONES.

2. This memorandum, under the circumstances appearing, sufficiently tended to prove that the deed was intended as mere security for debts, and was, therefore, a mortgage, to justify the finding of the court to that effect.

3. The evidence was also amply sufficient to justify the finding of the indebtedness of defendant to plaintiff in the principal sum of $267.72 for money paid to divers persons at the request of defendant, but was not sufficient to justify the finding of interest thereon at the rate of 1 per cent. per month, amounting to $122.46, as estimated by the court. The only competent evidence of the contract rate of interest is that afforded by the written memorandum, which states only that "on each item I am to have one per cent. interest." This, interpreted by the rule of the Civil Code, § 1916, means only 1 per cent. per annum; therefore, only 1 per cent. per annum should have been allowed. The amount of interest allowed by the court in excess of what should have been allowed is $112.25. For this error I think the judgment should be reversed, and a new trial granted, unless the respondent shall, within 20 days from date of the filing of this opinion, remit from the judgment and decree $112.25, in which case the judgment and order should be affirmed.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment will be reversed, and a new trial granted, unless the respondent shall, within 20 days from date of the filing of this opinion, remit from the judgment and decree $112.25, in which case the judgment and order shall stand affirmed.

(92 Cal. 96)

FIRST NAT. BANK v. VILLEGIA. (No. 13,608.)

(*Supreme Court of California.* Nov. 27, 1891.)

ADJOINING LAND-OWNERS—LATERAL SUPPORT.

Under Civil Code Cal. § 832, giving the owner of land the right to excavate for building purposes, taking due precautions to sustain the adjacent land, and giving notice to the owner of his intentions, the excavator cannot recover for money expended in sustaining the adjacent land. The notice required does not impose a duty upon the adjacent property owner, for the neglect of which a liability could be created in favor of the excavator.

Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge. Affirmed.

Action for money expended for the benefit of defendant by First National Bank of San Francisco against A. Villegia. Judgment for defendant on demurrer to an amended complaint.

Lloyd & Wood, for appellant. *George W. Chamberlain*, for respondent.

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[1] For supplemental direction as to judgment, see 28 Pac. Rep. 488.

GAROUTTE, J. This is an appeal from a judgment sustaining a demurrer to the amended complaint. The parties own adjoining lots of land in the city of San Francisco. The plaintiff was about to excavate for the purpose of building. Upon defendant's lot is a brick building. Plaintiff, in accordance with the requirements of section 832 of the Civil Code, notified defendant of his intention to excavate for the purpose of laying the foundation of his building. Defendant neglected to take any action towards the protection of his property from the danger arising from such excavation, and plaintiff, in order to prevent said building from falling in and upon his lot, was compelled to expend $1,400 in the support of the adjacent walls of defendant's lot, which would not have been necessary had it not been for defendant's building. The action is brought to recover the amount of money thus expended.

Section 832 of the Civil Code is as follows: "Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjacent land, subject to the right of the owner of the adjacent land to make proper and usual excavations on the same for the purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations." If plaintiff's acts have created a liability against defendant to the extent of $1,400, it must be upon an obligation arising upon contract, or from some character of tort. There is nothing in the complaint indicating anything in the nature of a contract between these parties, and no tort is shown unless defendant has violated some provision of the section just quoted; but the service of the notice, as required by that section, did not cast any duty upon the defendant, for neglect in the performance of which a liability could be created in favor of the plaintiff. The purpose of the notice required was to give the adjacent land-owner an opportunity to protect his property from possible damage if he so desired. If he did not so desire, or was willing to assume the risk brought about by the threatened excavation, then, if dire results to his property should follow, the liability for such results would lie at his own door. The purpose of the section, in its broadest scope, was to enable the excavator to relieve himself from liability, not to create a liability in favor of himself upon the adjacent owner. It clearly appears that plaintiff expended this money for his own benefit and his own advantage, and not for the benefit and use of the defendant. A party cannot of his own volition create an obligation in his own favor by doing some act for his own interests, and the necessity for which was caused by himself. This is in no sense an action brought for the recovery of money advanced for and to the use of defendant. No legal duty rested upon the defendant to perform the work for which this money was expended, and plaintiff cannot create for himself the position of creditor against the will of the alleged debtor. It is unnecessary to pass upon other matters discussed in appellant's brief. Let the judgment be affirmed.

We concur: HARRISON, J.; PATERSON, J.

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92 Cal. 117

SUTRO *et al.* v. RHODES. (No. 13,916.)

(*Supreme Court of California.* Nov. 27, 1891.)

COUNTY BONDS—OVERISSUE — SALE BY HOLDER—WARRANTY.

1. Where, under a statute, a county was authorized to issue bonds, "not to exceed in all one hunded and fifteen thousand dollars," and a record of the number, date, and amount of each bond was to be kept, and the county issues bonds in excess of the amount named in the statute, the "overissue" bonds are invalid. Sutro v. Pettit, 74 Cal. 332, 16 Pac. Rep. 7, followed.

2. Defendant sold plaintiffs nine of such "overissue" bonds in good faith, without any representations and without warranty. *Held*, that there was no implied warranty, under Civil Code, § 1764, providing that a mere contract of sale "does not imply a warranty," and section 1774, which provides that one who sells an instrument purporting to bind any one to the performance of an act thereby warrants good faith on his part.

GAROUTTE, J., dissenting.

In bank. Appeal from superior court, San Joaquin county; JOSEPH H. BUDD, Judge. Affirmed.

Action by Charles Sutro and others against R. M. Rhodes to recover the purchase money paid for nine bonds. Judgment for defendant. Plaintiffs appeal.

Baldwin & Campbell, for appellants. *Hall & De Vries* and *August Muenter*, for respondents.

MCFARLAND, J. An act of the legislature was passed March 25, 1868, entitled "An act in relation to the funded indebtedness of Calaveras county, and to provide for the funding of unpaid claims against said county." By this act fund commissioners were created, and the board of supervisors were authorized to have prepared, executed, and issued bonds of the county in denominations of $100 and $500, but "not to exceed in all one hundred and fifteen thousand dollars." The bonds were to be signed and sealed in a certain prescribed manner, were to mature and bear interest (with interest coupons attached) as specially provided in the act; and a record of the number, date, and amount of each bond issued was to be entered upon the journal of the board. They were negotiable in form, being payable to a party named or holder. Under this act bonds were executed and issued in form as provided therein, to the amount of the said $115,000; and afterwards additional bonds, similar in form to the first ones, and executed in the same manner, were issued to the amount of about $40,000 in excess of said $115,000. Nine of these latter "overissued" bonds, each of the par value of $500, were sold by defendant to plaintiffs on July 18, 1888, for $4,675; and plaintiffs bring this action to recover said last-mentioned sum of money. The court below rendered judgment for defendant, and plaintiffs appeal from the judgment and from an order denying a new trial.

It is averred in the complaint that at the time of the sale defendant "falsely and fraudulently represented and warranted to plaintiffs that said pretended bonds were good, valid, and legal," and that such representation was made "for the express purpose of cheating and defrauding them;" and that the bonds were not good, valid, and legal bonds of Calaveras county, but were entirely worthless; and that these facts were known to defendant, and unknown to plaintiffs. It is further averred that "as soon as plaintiffs ascertained" the worthless character of said bonds they tendered them to defendant, and demanded the repayment of said money; but that defendant refused to accept them or repay the money. The answer admits the sale of the bonds, but denies nearly all the other material averments of the complaint. The court found that defendant did not make any false or fraudulent representations "as to the goodness, validity, or legality" of the bonds, and did not warrant the same, nor did he make any representations as to their value; but that he "made the sale of said bonds in good faith, without any representations whatsoever, and without warranty," and that "at no time did the plaintiffs act or rely upon any representations made to them by the defendant in the sale of said bonds by defendant to the plaintiffs." The court also found, in finding 2, "that the said bonds were not worthless, but are good, valid, and legal bonds of Calaveras county, in this state." The said last-named finding (No. 2) is clearly erroneous. The said bonds were issued, and purport upon their face to have been issued, under said act of March 25, 1868; and by said act the power to issue bonds is expressly limited to the amount of $115,000. It is not necessary to discuss the question at length, or to cite authorities to the point that the bonds involved in the case at bar, being an overissue, are invalid; because the point was definitely settled in the recent case of Sutro v. Pettit, 74 Cal. 332, 16 Pac. Rep. 7, and the question presented there cannot be distinguished from the one presented here. The said bonds sold by defendant to plaintiffs were therefore invalid, as legal obligations of the county of Calaveras.

But we are satisfied that the judgment should be affirmed upon the other findings, notwithstanding the said erroneous finding of the validity of said bonds. We must take the other findings of the court to be supported by the evidence. The only witnesses examined were the defendant and the plaintiff Gustav Sutro, with whom the transaction occurred. There was a difference between them as to one or two material matters; but as to those matters it was for the trial court to determine which statement should be taken as correct. There was therefore no express warranty of the legal validity of the bonds. Neither was there any implied warranty. Section 1764 of the Civil Code provides that, "except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty;" and none of the other sections of the article applies to the case at bar except section 1774. And that section not only shuts out any claim of warranty in the present case, but it seems to exclude the authorities marshaled by appellant to the point that upon some principle of law, as, for instance, failure of consideration, he ought to recover in this action. The section is as follows: "One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act thereby warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause." The transaction between respondent and appellant was not the assignment of a debt, as the transfer of a non-negotiable obligation is sometimes construed to be; it was the sale of an instrument, within the meaning of the Code, and the section just quoted is the law upon the subject. It seems to be an express declaration and warning to purchasers of such instruments that the rule of *caveat emptor* applies, and that they must examine for themselves, and exercise their own judgment, or take a guaranty.

Outside of our Code, and among the general authorities, there is, no doubt, some conflict in the decisions on the question here involved; but the weight of them, we think, supports the conclusion above stated. The supreme court of the United States so held in Otis v. Cullum, 92 U. S. 447, and it was a case precisely like the one at bar. In that case the city of Topeka issued bonds under certain acts of the legislature, and sold them to a bank, which put them upon the market and disposed of them. Afterwards the courts held that the legislature had no power to pass the acts, and that the bonds were void; and thereupon the purchasers sued the bank to recover the money paid for them upon the ground of failure of consideration. But it was held that, "as the bank gave no warranty, it cannot be charged with a liability it did not assume." The court in its opinion says: "The plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one while none exists. * * * Such securities throng the channels of commerce which they are made to seek, and where they find their market. They pass from hand to hand like banknotes. The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate his own terms, and refuse to buy unless it be given. * * * It would be unreasonably harsh to hold all those through whose hands such instruments may have passed liable according to the principles which the plaintiffs in error insist shall be applied in this case." This is the highest authority upon the question, and we do not deem it necessary to review the many other cases cited by counsel for both parties.

In the case at bar, as in Otis v. Cullum, the appellants "got exactly what they intended to buy, and did buy," that is, certain written instruments in form negotiable, made and signed by the persons, and in the manner, and under the law, as stated on their face. They purported to have been issued under said act of March 25, 1868. The statute provides for a public record of bonds issued under it, so that it could easily have been ascertained whether the said bonds sold were overissued; and, moreover, plaintiffs were bound to know the powers of the municipal corporation and its officers by whom the bonds were issued. Sutro v. Pettit, supra; Wallace v. Mayor, 29 Cal. 181; Anthony v. Jasper Co., 101 U. S. 697. It appears, also, that plaintiffs were bankers and dealers in "state, county, and municipal bonds of the state of California," and had the numbers of these bonds in their office to which they referred. And it is found that they did not rely upon any representations made by respondent. If, therefore, appellants made any mistake as to the validity of the bonds, it was a mistake of law. Indeed, the whole question involved—that is, whether the said bonds created a legal liability against the county of Calaveras—was a question of law. Upon that question lawyers and judges have differed; and plaintiffs, no doubt, had erroneous views upon the subject. Judgment and order affirmed.

We concur: Sharpstein, J.; Harrison, J.; De Haven, J.

Beatty, C. J. I concur. There is a conflict of authority upon the principal question involved in this case, but I think the best-considered decisions support the conclusions reached by Justice McFarland. If a vendor contracts to deliver goods of a certain description, he must deliver sound articles of that description; and if he fails to do so there is a failure of consideration for the price paid. But if a vendor submits specific articles to the inspection and examination of the purchaser; if he conceals no fact within his knowledge and makes no false representation; if each party has equal knowledge, or means of knowledge, respecting every fact affecting the soundness and value of the article,—then, if a price is agreed upon, and a sale made, the purchaser cannot, upon the subsequent discovery that the articles sold were in fact worthless, recover the price paid upon the ground of failure of consideration. For, having got precisely what he bargained for, he cannot say that there has been any failure of consideration. If he can recover at all it must be upon the ground of a breach of some implied warranty by the vendor. Now, in this case, there was no executory contract for the sale of Calaveras county bonds issued under the act of 1868, which would have undoubtedly required the delivery of bonds regularly and lawfully issued under the act. On the contrary, certain specific bonds, purporting on their face to have been issued under the act, were offered for sale. The defendant concealed no fact within his knowledge touching their validity, nor did he misrepresent any fact. Everything he knew the plaintiff knew, and, if the plaintiff did not know that they were part of an overissue of bonds, it was only because he chose voluntarily to forego the means of knowledge open and easily accessible to him. He therefore got precisely what he bargained for, and he cannot recover the price paid upon the ground of failure of consideration; and, since there was no express warranty, he must rely upon such warranties as the law implies from the nature of the transaction. On this point it seems to me that section 1774 of the Civil Code, especially in view of the clause eliminated *ex industria*, by the amendments of 1874, is conclusive against the right to recover.

Paterson, J. I concur in the views expressed by Mr. Justice McFarland. Young v. Cole, 3 Bing. N. C. 724, is a case directly in point, and would support the contention of the appellants here unless a different rule has been established in this state. Section 1774, Civil Code, as originally enacted, provided as follows: "One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act thereby warrants the instrument to be what it purports to be, and to be binding according to its purport upon all the parties thereto; and also warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause." The Code commissioners, in their notes under this section, cite the case of Young v. Cole, supra. But in 1874 that section was modified by striking therefrom the following clause: "Thereby warrants the instrument to be what it purports to be, and to be binding according to its purport upon all the parties thereto." I cannot understand what purpose would be subserved by this amendment, unless the legislature intended to change the rule, and to declare that one who sells an instrument like the one in controversy should not thereby be held to have warranted the instrument to be what it purports to be, or binding according to its purport upon the parties thereto. Nearly all of the cases cited are cases of fraudulent misrepresentation, deceit, or forgery of non-negotiable instruments. As to the latter instruments, the courts seem to treat the assignment of them as an assignment of the indebtedness, and not the sale of an instrument like those referred to in section 1774.

Garoutte, J., (*dissenting*.) I concur in the opinion of Mr. Justice McFarland as to the invalidity of the bonds, but dissent wherein he concludes that plaintiff purchased at his peril, and is prevented, upon the principle of *caveat emptor*, from recovering the money paid defendant. In this case there is no question of fraud practiced by the seller, and no question of negligence involved upon the part of the buyer. Both parties thought these instruments were valid bonds of Calaveras county. It was an honest mistake of fact and *caveat emptor* never applies to a mistake of fact. If plaintiff's mistake had been a mistake of law, that is, if Sutro had known at the time of the purchase that these bonds were an overissue, such knowledge would have defeated his right of recovery, but there can be no mistake of law unless the facts are known. The question involved here is not a question of warranty, but a total failure of consideration, the existence of which fact is fatal to all contracts, and this principle has been fully and repeatedly recognized by this court. Keller v. Hicks, 22 Cal. 457; Fuel Co. v. Tuck, 53 Cal. 305; Redington v. Woods, 45 Cal. 429. As a case involving the legal principles involved here, we will suppose that one blind man should sell to another blind man a lump of clay, both believing at the time that it was gold. There was no express waranty, and, under the sections of the Code cited, there is no implied warranty, upon which to base a recovery of the price paid, yet it must be conceded that the right of recovery exists. If a plaintiff's right of recovery is to be limited only to those cases where there is a violation of an express or implied warranty, then there can be no recovery in this state where one innocent party sells another innocent party a forged or counterfeit bond or note; for, under the provisions of the Civil Code, there is no implied warranty that the instrument is genuine; yet no court, to my knowledge, either in this country or England, ever denied the right of recovery in such a case. In Redington v. Woods, supra, the principle was recognized and recovery had, not by reason of any warranty, but by reason of the fact that the money was paid without consideration, under an innocent mistake; and the court said: "The authorities in support of this view of the question are numerous and uniform, and we have been referred to none to the contrary." Story, Sales, § 377, says: "There is a class of cases which it may be well to notice in this connection, and which are usually included under the head of implied warranty, but to which the doctrine of warranty does not properly seem to be applicable; * * * that is, where the parties suppose themselves to be buying and selling one thing, when in point of fact they are contracting for the purchase and sale of an entirely different thing * * * But, where there is neither fraud nor an express warranty, the case seems to be one of pure mistake with reference to the subject-matter, and mistake is properly the ground of the seller's liability. But it does not seem that the doctrine of implied warranty would properly apply, nor is it at all necessary to found a right of recovery in the vendee, * * * for in matters of pure mistake the doctrine of *caveat emptor* would not seem to apply. * * * A vendee only warrants by implication the epithet or adjective, but not the substantive." This doctrine is sustained by Benj. Sales, §§ 77, 618, 619, 918, 1005; 4 Wait, Act. & Def. c. 98, §§ 18, 21; Wood v. Sheldon, 42 N. J. Law, 421; Whitney v. Bank, 45 N. Y. 304; Terry v. Bissell, 26 Conn. 23; Paul v. Kenosha, 22 Wis. 266; Hurd v. Hall, 12 Wis. 136; and many other cases unnecessary to cite. In the case of Hurd v. Hall, supra, Chief Justice DIXON, having first decided that the vendor and vendee contracted under a mistake of fact, says: "I also think the action could be maintained upon the ground of a failure of consideration by reason of the plaintiff's not having obtained what he bargained for; that the instruments did not answer the description of those the defendant professed to sell or the plaintiff to buy. The instruments assigned, though resembling school-land certificates, were not such certificates at all. They were mere worthless pieces of paper, drawn up in the form of such certificates. The fact that they were signed by the commissioners in their official capacity can make no difference. So long as they were wholly unauthorized to do so their acts in signing and issuing them, under the circumstances, were wholly void, and the certificates in that respect were no better than if they had been signed by some other persons, and were sheer forgeries, except so far as recovering back the money already paid was concerned." The equities existing between the innocent vendor and vendee of invalid municipal bonds, whether those bonds are the skillful work of a forger or the illegal work of fund commissioners, would seem to stand upon the same plane. Such bonds are equally worthless to a vendee, whether conceived in crime or in illegality. Their nullity in both cases consists in want of legal capacity to make them. In this case the vendor thought that he was selling valid bonds of Calaveras county, and the vendee thought that he was buying valid bonds of Calaveras county; but both parties labored under a mistake of fact, as they were not valid bonds of Calaveras county, or bonds at all, but worthless pieces of paper. The consideration totally failed, and, both parties being equally innocent, they should be restored to their original condition prior to the sale, for the vendor has money which in equity and good conscience belongs to the vendee.

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92 Cal. 83

SHAINWALD *et al.* v. CADY. (No. 13,704.)

(*Supreme Court of California.* Nov. 21, 1891.)

REAL-ESTATE AGENTS—COMMISSIONS.

Defendant authorized plaintiffs to sell some real estate, and agreed that, if he (defendant) sold the property during the continuance of the agency, he would allow plaintiffs a commission on the amount of such sale. Defendant afterwards contracted to sell one M. the property at any time within a year. A part of the purchase money was paid, and defendant put M. in possession of the property, and granted him the privilege of selling any portion of it. M. failed to make the deferred payments, and thereupon surrendered the contract and the possession of the property to defendant. *Held*, that the transaction was a sale, sufficient in law to entitle plaintiffs to the commission agreed on in their contract with defendant, though no conveyance was made to M.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge. Affirmed.

Action by Shainwald, Buckbee & Co. against M. K. Cady to recover commissions on a sale of real estate. Judgment for plaintiffs. Defendant appeals.

C. K. Bonestell, for appellant. *J. T. Rogers*, for respondents.

GAROUTTE, J. This is an action by real-estate brokers to recover commissions upon a sale of real estate. Judgment in the lower court went for plaintiffs, and defendant appeals from that judgment and the order denying his motion for a new trial. There are no briefs on file, and upon the examination of the record there appears to be but one assignment of error requiring our consideration. In the written agreement given by appellant to respondents, authorizing them to find a purchaser for a certain tract of land, to-wit, the town-site of Agua Caliente, it was stipulated that, if appellant himself made sale of the property within the life of the agreement, the brokers were to be allowed 2 per cent. commissions upon the amount of such sale, and the cause of action in this case is based upon an alleged breach of that provision of the agreement; the brokers claiming that the appellant Cady made a sale of the property, while he insists that such is not the fact, and that the property has not been sold. The trial court found that appellant sold the property to one George H. Maxwell for the sum of $15,000, and it is as to the sufficiency of the evidence to support this finding that our attention is specially directed. There is no conflict in the evidence upon this point, and it is as follows: Appellant Cady and his wife, Gail Cady, entered into a written contract with one George H. Maxwell, whereby they agreed to sell said Maxwell at any time within one year from March 5, 1888, certain real estate, (including the aforesaid town-site,) together with all the personal property now on said premises, free and clear of all incumbrances, for the purchase price of $30,000, "provided that said Maxwell shall pay to said M. K. Cady $1,000 on the delivery of these presents, and a thousand dollars April 1, 1888, and $1,000 June 1, 1888, and shall pay to Ignatz Steinhart the interest accrued to March 1, 1888, amounting to $1,984 on mortgages held by said Steinhart on said property, the amount of all such payments to be deducted from said purchase price of $30,000; * * * and said parties of the first part agree that said party of the second part may sell any portion of said land at any time during the term of this agreement, and that, upon such sales being made, they will execute and deliver deeds," etc.; and it was further provided that all moneys received upon such sale should be first applied to the payment of certain mortgages, and that, when such mortgages were paid, all further moneys received from such sales were to be applied as payments upon the balance of the purchase price; and it was further provided that Maxwell should have exclusive possession of the property, with the right to make alterations and improvements thereon, and that he should have an extension of the agreement for the further term of two years, by paying interest in advance upon the purchase price, at the rate of 10 per cent. per annum, etc. There are other provisions of this contract not necessary to notice. It was signed by all parties, and under its provisions Maxwell took possession of the property, paid the three installments of $1,000 each upon the purchase price when due under the contract, paid the interest upon the Steinhart mortgages as provided, and some months later failed to make additional payments as demanded by the agreement, and thereupon surrendered the contract and possession of the property to appellant, Cady, who continues to hold the same. By entering into this contract, appellant not only placed it beyond his power to transfer this property to any one save Maxwell for the period of three years, but absolutely placed it out of the power of respondents to make a sale of the property at all. Appellant received $5,000 on the purchase price, gave up possession of the property, granted Maxwell the privilege of selling any portion of it, and therefore we think it can be fairly said, from the provisions of the contract and from the acts of the parties, that a sale was consummated, sufficient in law to create a liability in favor of respondents under their agreement. In Eaton v. Richeri, 83 Cal. 185, 23 Pac. Rep. 286, the court said, "the word 'sold' does not necessarily and in all connections mean that a conveyance must be made or that the title must pass." And in Pettinger v. Fast, 87 Cal. 463, 25 Pac. Rep. 680, the case of Eaton v. Richeri was cited and approved, and, speaking of a contract of sale, the court said: "The fact that no money was received by appellant on the contract is immaterial. The transaction was none the less a sale, and by it the equitable title of the property sold passed to Culbert." As to the consideration of the sale of the Agua Caliente town-site, the evidence is conflicting, and the finding of the court will not be disturbed. Let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

(92 Cal. 69)

RICHARDSON v. CITY OF EUREKA. (No. 14,475.)

(*Supreme Court of California*. Nov. 25, 1891.)

APPEAL—RECORD—DISMISSAL.

1. An appeal will not be dismissed on the ground that appellant's transcript did not contain a copy of the judgment roll, as required by Code Civil Proc. Cal. §§ 661, 952, if the judgment roll is supplied before the motion is heard.

2. In California, the notice of intention to move for a new trial forms no part of the record on appeal. Pico v. Cohn, 20 Pac. Rep. 706, 78 Cal. 384, followed.

Department 1. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Action by Charles Richardson against the city of Eureka, Cal. Judgment for plaintiff. Defendant appeals. Plaintiff moves to dismiss the appeal.

J. N. Gillett, for appellant. *E. W. Wilson* and *J. W. Turner*, for respondent.

GAROUTTE, J. Respondent moves to dismiss the appeal herein from the judgment and order denying a new trial, upon the ground that appellant has not furnished this court with a transcript containing a copy of the judgment roll in said cause, as required by sections 661 and 952 of the Code of Civil Procedure. Respondent further insists that the appeal from the order denying the motion for a new trial should be dismissed, upon the grounds that (1) the transcript on appeal shows that appellant did not file with the clerk or serve any notice of his intention to move for a new trial in said cause; (2) that the transcript shows that appellant did not move for a new trial in said cause; (3) that the transcript shows that appellant did not prepare or serve upon respondent any draft of a statement of the case, etc.

Since the motion to dismiss this appeal was noticed for hearing, appellant has supplied the judgment roll with a certified copy of the verdict, and there now appears to be nothing wanting necessary to a complete determination of the appeal. In Paige v. Roeding, 89 Cal. 69, 26 Pac. Rep. 787, it was held that an appeal would not be dismissed by reason of a defective judgment roll, when all the portions of the roll are before this court, which are requisite to a full determination of the cause. In Pico v. Cohn, 78 Cal. 384, 20 Pac. Rep. 706, it was held that the notice of intention to move for a new trial was no part of the record on appeal. In that case the court said: "When the case comes to us, we must look to the statement or bill of exceptions and the specifications, in which the decision of the court below is not sustained by the evidence, and the specifications of error of law, as our guide in reviewing the case, and to this alone." Any defects alleged to exist in the statement of the case will be considered when the cause comes before us upon its merits. Let the motion to dismiss the appeal be denied.

We concur: HARRISON, J.; PATERSON, J.

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92 Cal. 93

LYFORD v. NORTH PAC. C. R. CO. (No. 13,527.)

(*Supreme Court of California.* Nov. 27, 1891.)

COVENANTS RUNNING WITH THE LAND.

A railway company obtained a right of way through land owned by a married woman in consideration of one dollar, and the covenants to maintain a depot, run daily trains, etc. The road-bed was abandoned, but not until after title to the property was acquired by the husband. *Held*, that the covenants, not being "made for the direct benefit of the property, or some part of it," as required by Civil Code, § 1462, did not run with the land, and the husband, not showing an express assignment of his wife's interest in the contract, and his wife not having joined in the action, cannot recover for failure on the part of defendants to perform.

Commissioners' decision. Department 1. Appeal from superior court, Marin county; E. B. MAHON, Judge. Affirmed.

Action by Benjamin F. Lyford against the North Pacific Coast Railroad Company. Judgment for defendant.

E. S. Lyspitt and *T. J. Crowley*, for appellant. *H. Wilkins* and *W. H. L. Barnes*, for respondent.

TEMPLE, C. In January, 1873, Mrs. Lyford, wife of the plaintiff, owned, as her separate property, a tract of land in Marin county, known as "Strawberry Point." At that time plaintiff and his wife contracted with the defendant to convey to it a right of way for its railway along a designated line, in consideration of one dollar and the mutual covenants contained in said contract. Several covenants were contained in the contract to be performed by defendant. It would build its road within two years, and thereafter maintain and run regular daily passenger and freight trains to and from San Francisco to San Rafael; maintain a depot at a point designated; erect and maintain five passage-ways for cattle, four under the track and one by a bridge over it; and carry at all times upon its regular passenger trains and ferries, to and from San Francisco, said Lyford, his wife, and children free from charge during the life-time of said Lyford and wife, or either of them. The railroad was built and run as agreed until February 19, 1884, when the defendant ceased to use the right of way, took up the rails, and removed its road some distance from plaintiff's land, and since has declined to carry plaintiff or his family free of charge, and has finally and wholly abandoned the road along the right of way over plaintiff's land. Plaintiff claims that his land was suitable for suburban residence, and by the road was made accessible to San Francisco, and therefore valuable, but by the discontinuance of the road was rendered inaccessible, and was greatly damaged; and he avers that the sole consideration for the grant of the right of way was the personal advantage to himself and wife, and that the road would enhance the value of the land. In the answer the point is specially made that Mrs. Lyford was a necessary party, and should have been joined as plaintiff. On the trial plaintiff did not show an express assignment to himself from Mrs. Lyford of her interest in the contract, but he proved that on July 31, 1879, she conveyed the land to John J. Reed, who conveyed the same to plaintiff August 6, 1879. In each of these deeds was inserted this provision: "Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said Hilarita Reed de Lyford."

It is obvious that the agreement to continue to operate the railway is not a covenant which, under the Code, would run with the land. It is not a covenant for the direct benefit of the property, *i. e.*, the estate granted, as required by section 1462 of the Civil Code. The best that could be said would be that, like the agreement to maintain the cattle-ways, it was a condition in the grant of the easement. But the theory of plaintiff's case is that the easement has been abandoned. We think the covenant to continue to operate the road was a personal covenant, and plaintiff, not being the assignee of Mrs. Lyford, cannot maintain this action alone. We therefore think the judgment should be affirmed.

We concur: FOOTE, C.; VANCLIFF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

92 Cal. 89

CALLAHAN v. EEL RIVER & E. R. Co. (No. 13,640.)

(*Supreme Court of California.* Nov. 27, 1891.)

NEGLIGENCE—DANGEROUS PREMISES.

Where a child six years old was injured on a turn-table of a railway company while playing with other children, no employes being about, and the turn-table was only kept in place by an ordinary iron latch, which could be easily lifted, the company is liable for injuries received by the child while the table was turned by other boys, even though the employes of the company had always ordered children away when observed playing on the turn-table. Barrett v. Southern Pac. Co., 27 Pac. Rep. 666, followed.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge. Affirmed.

Action of Timothy B. Callahan, by his guardian *ad litem*, against the Eel River & Eureka Railway Company. Judgment for plaintiff.

Horace L. Smith and *S. M. Buck*, for appellant. *Ernest Sevier* and *T. H. Selvage*, for respondent.

BELCHER, C. The material facts of this case are very nearly the same as those of Barrett v. Southern Pac. Co., 27 Pac. Rep. 666, (decided by this court September 21, 1891.) It appears here that on the 5th of August, 1887, the defendant owned and was operating a railroad, one terminus of which was at the city of Eureka, in the county of Humboldt. At this terminus it had a turn-table, which was held in place by the customary fastening of an iron latch dropped in a slot. By lifting the latch from the slot the table could be revolved. The plaintiff was a child, six years old, whose parents lived a short distance from the turn-table. On the day above named he returned from school about 3 o'clock P. M., and thereafter was about the house and yard of his parents till he got his supper. His mother directed him not to leave the yard, but between 6 and 7 o'clock he, with some other boys, ran away down to the turn-table. He got onto the turn-table to have a ride, and sat down with his right leg over the side of it. The other boys turned the table, and as it went round his leg was caught between it and the timbers of the track, and so badly crushed that it had to be amputated above the knee. Before this, boys had frequently played around and ridden on the turn-table, and, when seen doing so by the employes of defendant, had been ordered away. At this time no employes were about. The plaintiff brought this action to recover damages for his injury, and asked judgment for the sum of $30,000. The case was tried by a jury, and a verdict returned, on which judgment was entered for $5,000. The defendant moved for a new trial, which was refused, and has appealed from the judgment and order. The appellant contends that its motion for nonsuit should have been granted, and that numerous errors were committed by the court in its rulings and in giving and refusing certain instructions to the jury. We do not think it necessary to discuss the points presented at length. They are made upon the theory that the plaintiff was a trespasser, and that defendant was not guilty of negligence; and they all seem, in effect, to have been considered and decided against appellant's contention in the Barrett Case. Upon the authority of that case we advise that the judgment and order be affirmed.

We concur: FITZGERALD, C.; VANCLIEF, J.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

92 Cal. 131

BENNETT v. HYDE. (No. 14,159.)

(*Supreme Court of California.* Nov. 28, 1891.)

SPECIFIC PERFORMANCE — TIME OF THE ESSENCE OF THE CONTRACT.

Where a contract, sought to be specifically enforced, recites that, if plaintiff "fail to comply with any one of the agreements herein specified, and at the time specified, then this contract shall immediately become void," and defendant, in a letter extending the time for making the last payment under the contract, says that "time must be the special and essential ingredient in the extension, as it was intended to be in the original contract," the evidence is conclusive that time is of the essence of the contract.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge. Affirmed.

Action by E. Bennett against J. D. Hyde for the specific performance of a contract for the sale of land. Judgment for defendant. Plaintiff appeals.

Lambertson & Taylor, for appellant. *N. O. Bradley* and *G. E. Lawrence*, for respondent.

TEMPLE, C. Plaintiff appeals from the judgment and an order refusing a new trial. The action is to enforce specific performance of a written contract for the sale of lands. There was no error in striking out portions of the complaint if the court correctly determined, as we think it did, that time was of the essence of the contract sued on. Furthermore, that ruling is not specified as an error upon which the plaintiff would rely on his motion for a new trial. There is abundant evidence to sustain all the findings excepted to. The only real question in the case is whether time was of the essence of the contract, and to consider this question it is not necessary to determine whether the specifications as to the alleged insufficiency of the evidence comply with the requirements of the Code or not. All the necessary facts appear in the pleadings and findings. The contract was made July 25, 1885. By its terms the purchaser was to pay $256 upon its execution, and the same sum on the 25th day of July in each year of the three succeeding years, and also all taxes. The residue, $3,200, was to be paid July 25, 1889; making $4,224 in all. The purchaser was let into immediate possession, and has paid all installments due and all taxes, but has not made the last payment of $3,200. July 16, 1889, the last payment not having been made, defendant voluntarily and without consideration extended the time until August 5th of the same year. In the contract the purchasers agreed to make the payments as specified, and further stipulated: "In the event the parties of the second part fail to comply with any one of the agreements herein specified, and at the time specified, then this contract shall immediately become void, and the party of the first part shall be released from all obligations at law or in equity to convey said land; and the parties of the second part agree that they will, upon failure by them to comply with any one of their agreements herein specified, at the time specified, forfeit all claim to said land, and will deliver up said land, peaceably and without process of law, to the party of the first part. The party of the first part, upon receiving the several payments herein specified, at the time specified, agrees," etc. In the letter extending the time, defendant said: "I would extend the time of payment required by said contract to August 5, 1889, but not longer; and that time must be the special and essential ingredient in the extension, as it was intended to be in the original contract." The case is almost the counterpart of Grey v. Tubbs, 43 Cal. 359. It differs from it only in that the parties seem to have taken even greater pains to show that they intended to make time of the essence of the contract, and, if they have failed to do so, it is simply because that cannot be done without inserting the very words in the contract, as was said in Grey v. Tubbs. Appellant seems to concede that such would be the effect of the language used but for section 1492 of the Civil Code, which he claims renders it necessary for the parties, in their contract, to declare, in so many words, that time is of the essence of the obligation to give it that effect. At law, time has always been considered of the essence of the contract. But equity, unwilling to permit a forfeiture if it can be avoided, has held otherwise, except when the parties have so expressed their intent, or it is clearly to be inferred. This rule, we think, it was intended to adopt in the Code provision, limiting it, however, where the delay is capable of exact compensation, by requiring that the intent shall expressly appear in the contract. But courts of equity have always held that such intention is expressed when the contract provides, as in this case, that performance must be on time, or the party or parties shall lose all rights under it. Time is of the essence of the contract when performance must be on time to entitle a party to its performance by the other party. Where this is expressed in the contract, the parties have expressly declared that time is of the essence of the obligation. The extension of time granted was voluntary, and upon the express condition that "time must be the special and essential ingredient in the extension." To avail himself of this privilege, plaintiff should have complied with the condition. He did not do so. In the contract it was, in effect, three times repeated that time was of the essence of the contract. It was emphasized in the extension. To compel the execution of the deed in this case would be to make a contract for the parties, and then to absolutely enforce it. The defendant is not attempting to recover upon the contract, and was not, therefore, required to prove performance, or an offer to perform. It was not necessary for him to tender a deed in order to put the plaintiff in default. Whether the plaintiff can recover the amount paid on the contract is not involved in this case. We advise that the judgment and order be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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92 Cal. 152

SANBORN v. DOE *et al.* (No. 13,580.)

(*Supreme Court of California.* Dec. 1, 1891.)

INSOLVENCY—DISCHARGE—SETTING ASIDE DECREE.

A person who purchases claims against an insolvent after his discharge cannot sue to set aside the decree of discharge on the ground of fraud, under Insolvent Act Cal. 1880, § 53, providing that such action may be maintained by any creditor of the insolvent "whose debt was proved or provable against the estate in insolvency."

Department 2. Appeal from superior court, Mendocino county; ROBERT MCGARVEY, Judge. Affirmed.

Action by one Sanborn against Doe and others to set aside a decree discharging defendants from all liabilities. Judgment for defendants. Plaintiff appeals.

A. E. Bolton and *T. L. Carothers*, for appellant. *J. A. Cooper*, for respondents.

DE HAVEN, J. The defendants were copartners on November 11, 1886, and on that day filed in the superior court of Mendocino county their petition in insolvency, and such proceedings were had therein that on May 4, 1887, the court duly made and entered its decree discharging them from all their debts and liabilities. The plaintiff was not at that date a creditor of either of said defendants, but thereafter several of those who were such creditors, and whose claims were discharged by said decree, assigned their claims to plaintiff, and he thereupon commenced this action to set aside the said order or decree of discharge, upon the alleged ground that certain creditors were improperly influenced not to oppose the same, and that therefore the said decree was fraudulent. A demurrer to the complaint was sustained, and judgment thereupon rendered in favor of defendants. The plaintiff appeals.

The demurrer was properly sustained. Section 53 of the insolvent act of 1880 provides: "Any creditor of said debtor whose debt was proved or provable against the estate in insolvency, who shall see fit to contest the validity of such discharge on the ground that it was fraudulently obtained, and who has discovered the facts constituting the fraud subsequent to the discharge, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same; or, if the same shall have been pleaded, the effect thereof may be avoided collaterally upon such ground." But the plaintiff, not being within the terms of this section, can derive no authority from it to maintain this action. He was not a creditor of defendants at the date of the rendition of the judgment which he now seeks to set aside, and was in no wise injured by it, and for that reason the complaint fails to state a cause of action, independently of the section of the insolvent act just quoted. It is true, the assignees of plaintiff would, upon the facts alleged, have the right to set aside the decree referred to, but this right was not the subject of transfer, either by direct assignment, or as an incident to the assignment of the claims which were affected by the decree of discharge. Dickinson v. Seaver, 44 Mich. 631;[1] Milwaukee & M. R. Co. v. Milwaukee & W. R. Co., 20 Wis. 183; Carroll v. Potter, Walk. Ch. 355; 3 Pom. Eq. Jur. § 1276. In Dickinson v. Seaver, supra, the supreme court of Michigan, in passing upon a state of facts not in principle different from those alleged in this complaint, say: "The present complainant, according to his own proofs, has merely purchased claims for the purpose of this litigation, or of some litigation. He was never defrauded. It would be against every rule of equity to allow a party to buy up stale claims, and then seek to establish fraud committed against his assignors. A right to complain of fraud is not assignable, and the claims in controversy have nothing involved which could keep them alive, unless fraud would do so. Being nothing more than an assignment of an action for fraud, it is well settled that it will not be enforced." The same rule was recognized by this court in Cross v. Bank, 66 Cal. 462, 6 Pac. Rep. 94, in which case it was said, quoting with approval from section 1040 of Story's Equity Jurisprudence: "An assignment of a bare right to file a bill in equity for a fraud committed on the assignor will be held void, as contrary to sound policy." It follows from these views that the judgment appealed from must be affirmed. So long as the decree discharging the defendants from their debts and liabilities remains in force, the claims assigned to plaintiff can have no validity; and as he did not by such assignment acquire the right to attack or set aside that decree, he really took nothing by such assignment, and has no cause of action against defendants. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

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[1] 7 N. W. Rep. 182.

PEOPLE v. STANFORD.[2]

(Supreme Court of California. July 23, 1883.)

LARCENY—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—INDICTMENT AND INFORMATION—DESCRIPTION OF PROPERTY.

1. On a trial for larceny of a hog, the prosecution introduced evidence that former ear-marks had been changed for the purpose of concealing the identity of the hog. Defendant showed that he had with witnesses, before the trial, called upon the prosecuting witness, who had possession of the hog, to examine the ear-marks, and was refused permission to do so. At the trial defendant asked that the hog be produced at his expense, but was refused. Defendant controverted the testimony of the prosecuting witness as to the ear-markings. After defendant's conviction, he moved for a new trial on the ground of newly-discovered evidence, and produced affidavits of several persons who examined the hog after the trial, alleging that the ear-markings were not as testified by the prosecuting witness, but as represented by defendant. *Held*, that defendant was entitled to a new trial, since the point raised by the affidavits were material, and the defendant had been precluded by the prosecution from inquiring into the matter until after his conviction.

2. An information upon which the larceny of a hog is charged is sufficient in alleging that the property stolen was "a certain hog, said hog being the property and chattel of one L.," and it is not essential that the indictment should state the color, kind, weight, mark, or brand.

In bank. Appeal from superior court, Shasta county.

Prosecution by the people against George N. Stanford for larceny. Defendant was convicted, and appeals from the judgment, and an order refusing a new trial. Reversed, and remanded for a new trial.

The defendant contended that the information in the indictment should have been specific in describing the stolen property by color, kind, name, weight, mark or brand, or by some description whereby the hog could be identified, the allegation being that the stolen property was a "certain hog, said hog being then and there the property and chattel of one Albert Long."

A. C. Furguson, for appellant. *Atty. Gen. Marshall*, for respondent.

ROSS, J. Justice demands a new trial of this case. The defendant was charged by information with the larceny of a certain hog. That the hog was in defendant's possession was not denied by him, and the case shows that the main controversy on the trial was whether his possession was criminal, or whether it was an innocent possession, maintained under an honest belief of ownership in himself. For the purpose of showing that the former was the case, the prosecution introduced testimony tending to show that former ear-marks of the hog had been changed, and were then of a certain description. The purpose of this testimony was, of course, to show that the defendant had attempted to conceal the identity of the hog, and thus to establish a guilty circumstance. From the affidavits filed in support of a motion for a new trial it appears that after the arrest of the defendant on the charge in question, and before the trial, he went, with two other persons whom he desired as witnesses, to the premises of the prosecuting witness, where the hog was, for the purpose of seeing it and examining the ear-marks, and that the prosecuting witness refused to permit defendant or his witnesses to make the desired inspection. The bill of exceptions recites that, upon the closing of the case on the part of the prosecution, the defendant asked that the hog be produced, that the jury might see that the witnesses for the prosecution had not testified truly with respect to the marks, and offered to send for it at his own expense, and to deposit double the value of the hog as security for its safe return; but both the prosecuting witness and the court refused to accede to the proposition, and the offer was refused. It appears, further, from the affidavits, that immediately after the trial, which resulted in the conviction of the defendant, several persons (each of whom makes affidavit of the fact) went to the premises of the prosecuting witness for the purpose of inspecting the subject of the alleged larceny, and were then permitted to do so, and that the hog was not marked as testified on the part of the prosecution, but was marked as represented by the defendant. The case mainly turned upon the question of marks, and, under such circumstances, to permit the prosecution to withhold from the defendant the means of making counter-proof until after his conviction, and then to open the door to him, but to say, when he comes with affidavits of third persons tending to show the testimony given on the part of the prosecution at the trial was untrue, "You are too late; you did not use due diligence,"—would be gross injustice. The point to which the affidavits go was a material point in the trial of the case. The defendant was precluded by the attitude assumed by the prosecution from inquiring into the facts in relation to the matter until after he was convicted, and, upon the most obvious principles of right and justice, he ought to be allowed an opportunity to present his testimony thus subsequently discovered upon the point in question. The information we think sufficient. People v. Salazar, 6 Pac. Coast Law J. 569. Judgment and order reversed, and cause remanded for a new trial.

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[2] This case, filed July 23, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

SHARPSTEIN, MCKEE, MCKINSTRY, and THORNTON, JJ., concurred.

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64 Cal. 24

FORRESTER *et al.* v. FLORES.[1]

(*Supreme Court of California.* July 23, 1883.)

SPECIFIC PERFORMANCE — STATUTE OF FRAUDS—PART PERFORMANCE—PLEADING.

1. An oral agreement to convey land is not taken out of the statute of frauds by the payment of the purchase money.

2. Where, in an action for specific performance of an agreement to convey land, the complaint fails to state that the agreement was in writing, but avers the payment of the purchase money, and the answer denies the agreement, and avers that there was no agreement in writing, plaintiff is not entitled to judgment on the pleadings, though the answer fails to deny the receipt of the money.

Department 1. Appeal from superior court, Santa Barbara county.

Action for specific performance of an agreement to convey land, by Lucien L. Forrester and another against Juan Flores. Judgment for defendant. Plaintiffs appeal. Affirmed.

Hall & Requa, for appellants. *A. A. Oglesby*, *Thomas McNulta*, and *W. C. Stratton*, for respondent.

MCKEE, J. Action in equity for specific performance. By the complaint it is claimed that about March 18, 1880, the defendant was the owner of the lot of land in dispute, and "agreed" to sell the same to the plaintiffs for a stipulated price, and, upon payment thereof, to execute and to deliver to the plaintiffs a good and sufficient deed to the land. The plaintiffs aver that they have fully performed the agreement on their part by paying the entire purchase money, but the defendant, although he has taken and kept the money, refuses to execute and deliver his deed to the land. In his answer, the defendant admits his ownership of the land, leaves undenied the allegations of the complaint as to payment of the money, but does deny that he entered into any such agreement with the plaintiffs as that set forth in the complaint, and at the same time he avers that there was no contract or agreement in writing between him and the plaintiffs for a sale of the land or the execution and delivery of a deed to it. Substantially, therefore, the defense is a denial of the contract as set forth in the plaintiffs' complaint and the statute of frauds. The defendant had judgment, and the appeal is on the judgment roll and a bill of exceptions. Upon the trial the court found there was no such agreement between the parties as is alleged in the complaint. There is no attack upon the finding. It is therefore conclusive, and upon the facts as found there is no error in the judgment roll.

But in the bill of exceptions it is contended that the court erred in denying a motion made by the plaintiffs for judgment on the pleadings, on the ground that, as the answer left undenied the ownership of the land, the payment and receipt of the purchase money for it, and the refusal to convey by the execution and delivery of a deed, solely on the ground that the agreement between the parties was not in writing, the plaintiffs were entitled to the relief demanded. But, assuming that the pleadings showed a parol agreement between the parties for a sale and conveyance of the lot, such an agreement was invalid under the statute of frauds. Sections 1971, 1973, Code Civil Proc., and section 1741, Civil Code. But it is also true that a court of equity will take such an agreement out of the statute in case of part performance, (section 1972, Code Civil Proc.,) and it is upon that basis that plaintiffs rest their cause of action. To entitle a party in a court of equity to the performance of an oral agreement for the sale of land, the terms of the agreement must distinctly appear, or be made out to the satisfaction of the court. It is well settled that a party who claims a right to a conveyance of land under a parol contract on the ground of part performance must make out by clear proof the agreement as alleged, and the acts of performance alleged and proved must be unequivocal evidence of such agreement. Blum v. Robertson, 24 Cal. 129. Here the pleadings on which the plaintiffs' motion was made deny the very existence of the alleged agreement. It was therefore a matter in issue. And, although there was no denial of the allegations as to the payment of the money, yet no inference could be drawn from the fact of payment that the moneys were paid to the defendant on account of and in the performance of the alleged agreement. Besides, if such an inference could be drawn from the fact, neither the fact, nor the inference, nor both together, would amount to such proof of part performance as would take the parol agreement out of the statute of frauds; for the mere payment of the purchase money of such an agreement is not, according to the general practice in courts of equity, sufficient for that purpose. "By an unbroken current of authorities running through many years it is settled too firmly for question that payment, even to the whole amount of the purchase money, is not to be deemed part performance, so as to justify a court of equity in enforcing the contract." Browne, St. Frauds, § 461; Fry, Spec. Perf. § 403; Story, Eq. Jur. § 761. It is only where the payment is accompanied by a change of possession in the land, or the expenditure of money upon it, on the faith of the oral agreement, and where the failure to perform by the vendor would work a gross fraud upon the vendee, that a court of equity will decree specific performance by compelling the execution of a deed. Story, Eq. Jur. § 761. For money paid under an invalid contract, the party who pays has an adequate remedy at law. There was no error in denying the motion for judgment on the pleadings. Judgment affirmed.

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[1] This case, filed July 23, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

McKINSTRY and ROSS, JJ., concurred.

(64 Cal. 102)

CURTIS *et al.* v. CITY OF SACRAMENTO.[1]

(*Supreme Court of California.* Aug. 28, 1883.)

ARBITRATION AND AWARD—NOTICE OF HEARING.

Arbitrators appointed under an agreement between a claimant and the trustees of a city, to pass upon a claim against the city, held meetings, received testimony, and made an award, without giving notice to the mayor of the time and place of hearing, but the trustees were present at one meeting and testified in behalf of the city. *Held*, that the award was void for want of such notice.

Department 1. Appeal from superior court, Sacramento county.

Action by N. Green Curtis and Thomas J. Clunie against the city of Sacramento on an award by arbitrators. Judgment for defendant, and order refusing a new trial. Plaintiffs appeal. Affirmed.

Freeman & Bates, for appellants. *W. A. Anderson* and *A. P. Catlin*, for respondent.

McKEE, J. The plaintiff sued upon an award made in pursuance of an instrument in writing, purporting to have been made on the 29th of July, 1878, "by and between the plaintiffs and the board of trustees of the city of Sacramento, representing and acting for said city." Pursuant to the terms of the instrument the question of the value of some professional services which had been rendered by the plaintiffs for the city of Sacramento was referred to two arbitrators,—one to be selected by the plaintiffs, and the other by the board of trustees,—who were to meet as soon as convenient, and, after hearing such statements as would be made on behalf of either party, were to determine and report in writing to each of the parties; but, in case of a disagreement, power was given them to select a third arbitrator; and it was stipulated that the award of any two of the three arbitrators would be regarded as the award of all, and entered as a judgment against the city, after being allowed by the board of trustees. Two persons were selected pursuant to the terms of the submission; and the court found that soon after the selection they had a meeting, at which they received the unsworn statements of those who were present to testify. The plaintiffs were present at the meeting, but the mayor of the city was not present; and no notice of the meeting was given to or served upon him, either by the arbitrators or by the plaintiffs, and he had no opportunity to be present. Two of the trustees were present as witnesses, one of whom withdrew after making his unsworn statement to the arbitrators. The arbitrators were unable to agree, and they selected a third person, who, upon being notified, accepted the appointment, and the three arbitrators were then sworn and qualified according to law. But they gave no notice to the defendant of a hearing, or of a meeting to be held for hearing the parties and their witnesses, nor did they take any testimony. The original arbitrators handed to the third arbitrator a transcript in long-hand of the phonographic reporter's notes of the statements made to them. Upon that transcript the third arbitrator *ex parte* took the unsworn opinions of professional men, and those opinions and the transcript of the statements made to the original arbitrators formed the basis upon which the arbitrators made their award. The court held that the award was invalid and void for want of notice to the defendant of the time and place of hearing the cause.

It is contended that the decision is erroneous, because, as the award was a judgment rendered by a tribunal of the parties' selection, having jurisdiction of the subject-matter submitted to it, and of the parties by whom the submission was made, the want of notice of the time and place of meeting for the hearing and determination of the matter submitted does not invalidate the award, and constitutes no defense to an action at law upon it. But the validity of an award does depend not only upon the due and proper appointment of the arbitrators, but upon the regularity of their proceedings, (Crowell v. Davis, 12 Metc., Mass., 296,) and we think if these proceedings are had *ex parte*, and without notice to the parties of a hearing, their award is invalid and void. That, it is contended, is contrary to the English rule which makes an award conclusive at law. We do not understand that such a rule prevails in the English courts. It is true that in Tittenson v. Peat, 3 Atk. 529, which was decided in 1747, where the defendant pleaded an award, and objection was made that the arbitrators did not give sufficient notice of the time they intended to meet, or of the particular place at which they were to meet, Chancellor HARDWICKE overruled the objection as immaterial, saying that "the arbitrators were not bound to give notice, and that the only ground to impeach an award is collusion or gross misbehavior in the arbitrators, for otherwise, being made the judges of the parties' own choosing, it is final and binding upon all the parties." But that seemed to the courts most unreasonable; and in Paschal v. Terry, W. Kel. 132, (decided in 1760,) the court of king's bench set aside an award which had been made without notice given to one of the parties to the appointment of an umpire, or of a hearing, upon the ground that it was repugnant to the submission; and that it was unreasonable and contrary to natural justice to make an award without giving notice to the parties to attend. "The umpirage," said the court, "was made upon the defendant's evidence alone, *parte altera inaudita;* the plaintiff was neither heard, nor had any opportunity given him to be heard." The principle of that decision, viz., that every man ought to have an opportunity to be heard in defense of his rights, has been ever since acted upon by the English and American courts, and it runs through all the cases in the books. Whatley v. Morland, 2 Dowl. Pr. 249, 4 Tyrw. 255; Salkeld v. Slater, 12 Adol. & E. 767; Fetherstone v. Cooper, 9 Ves. 67; Russ. Arb. 165; Morse Arb. 116, 118; Railroad Co. v. Thomas, 21 N. J. Eq. 205; In Falconer v. Montgomery, 4 Dall. 232, where an umpire had, without hearing the parties in person, decided the case upon the facts as stated to him by the original referees, the supreme court of Pennsylvania said: "The plainest dictates of natural justice must prescribe to every tribunal the law that no man shall be condemned unheard;" and Justice STORY, in Lutz v. Linthicum, 8 Pet. 178, said: "Without question, due notice should be given to the parties of the time and place of hearing the cause, and, if the award was made without such notice, it ought, upon the plainest principles of justice, to be set aside." See, also, Rigden v. Martin, 6 Har. & J. 403; Passmore v. Pettit, 4 Dall. 271; Walker v. Walker, 28 Ga. 140; McKinney v. Page, 32 Me. 513; Maynard v. Frederick, 7 Cush. 247; Crowell v. Davis' supra; Conrad v. Insurance Co., 4 Allen, 20; Frissell v. Fickes, 27 Mo. 557; Day v. Hammond, 57 N. Y. 479. It is true, as has been urged, that an award is the judgment of the tribunal selected by the parties to the submission; but greater effect cannot be given to it than is given by law to the judgment of an inferior court. As an inferior tribunal, the authority of the arbitrators was limited by the agreement of submission; and the agreement cannot be interpreted to authorize the plaintiffs to institute an *ex parte* hearing beore the arbitrators. The right to notice of a time and place for a hearing upon the matter submitted was implied in the agreement to submit, unless it was expressly waived by the terms of the submission. Peters v Newkirk, 6 Cow. 103; Paschal's Case, supra. To take away a man's property or his rights in property, without a hearing, trial, or judgment, or opportunity of making known his rights therein, is violative of that section of the bill of rights which declares that "no person shall be deprived of life, liberty, or property without due process of law." An award made *ex parte*, and without the appointment of a time and place for hearing the allegations and evidence of the parties, is therefore invalid and void; and in an action at law upon such an award the want of notice may be pleaded as a defense at law. "It is," says Chancellor WALWORTH, "purely a legal question, upon the ground that it was not within the authority of the arbitrators to make any award without notice." Elmendorf v. Harris, 23 Wend. 628. Judgment and order affirmed.

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[1] This case, filed August 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

ROSS and MCKINSTRY, JJ., concurred.

Hearing in bank denied.

64 Cal. 29

Ex parte MARKS.[1]

(*Supreme Court of California.* July 24, 1883.)

CONDITIONAL PARDON — REARREST—HABEAS CORPUS.

On representations that a prisoner was partially idiotic, and that he had brothers who would furnish means to send him to friends in Poland, a pardon was granted, on the condition that he forthwith leave the state and never return. On his promise to leave the state on the following evening, the pardon was handed to him, and he was released from custody. His brothers offered him sufficient funds to take him to Poland, but he refused to go, and declared his intention to remain unless he received $1,000, and thereupon he was again taken into custody. *Held*, that he was not entitled to a discharge from rearrest on *habeas corpus;* the governor being authorized by Const. Cal. art. 5, § 13, to grant pardons "upon such conditions, and with such restrictions and limitations, as he may think proper."

In bank. Application by E. Marks on *habeas corpus* for discharge from rearrest. Denied.

Holl & Buckley, for petitioner. *Hart & White*, opposed.

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[1] This case, filed July 24, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Ross, J. The petitioner, who was undergoing imprisonment in the state-prison under judgment of conviction of the crime of murder in the second degree, was, by the governor of the state, granted a pardon upon condition that he forthwith leave the state and never return thereto. The governor, it seems, was induced to grant the pardon upon representations made to him to the effect that the prisoner was partially idiotic; that his parents resided in Poland, and would take care of him if permitted to go to them; and that he had brothers of wealth in this state, who would furnish him with the means necessary to take him there, and would thereafter provide for his support. The pardon was given by the governor to the warden of the prison, to be by him delivered to the prisoner, whenever the same was properly accepted. Upon its receipt the warden tendered the pardon to the prisoner, who refused to accept it unless it should be stipulated that he should be permitted to remain in the state for the period of 80 days after his discharge from the prison. The result of course was that he remained incarcerated. Some weeks afterwards he indicated to the warden—who meanwhile had retained the pardon in his possession—his willingness to accept it, and to faithfully perform the conditions upon which it was granted. Upon this representation, and upon the prisoner's promise to leave the state on the train going east the following evening, the warden handed him the pardon, and released him from custody. His brothers thereupon offered him sufficient funds to take him to his parents in Poland, but he refused to go as he had promised, but declared his intention to remain in California unless his brothers gave him $1,000. Thereupon he was again taken into custody by the warden, and now claims the right to be discharged on *habeas corpus*. We think it clear that he is not entitled to be so discharged. There is no doubt that the governor was authorized to grant the pardon upon the conditions stated, for he is by the constitution empowered to make such grants "upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons." Const. § 13, art. 5. The pardon in question contained two conditions,—one, that the prisoner should forthwith leave the state; the other, that he should never return to the state. The one was a condition precedent; the other, a condition subsequent. That is to say, the governor, in effect, said to the prisoner: "By virtue of the power vested in me by the constitution, I exempt you from the punishment the law inflicts for the crime you have committed: provided, you forthwith leave the state: and provided, further, you never return to the state." Until he actually leaves the state the pardon does not become operative at all. This must be so from the very nature of the first condition attached to it. When that condition is performed, the pardon becomes operative, but it nevertheless remains subject to be defeated by the breach of the condition subsequent, to-wit, by the prisoner's subsequent return to the state. 1 Bish. Crim. Law, § 760; Ex parte Wells, 18 How. 311; State v. Smith, 1 Bailey, 283; Lee v. Murphy, 22 Grat. 789; Flavell's Case, 8 Watts & S. 197. The pardon, therefore, never having taken effect, it results that the prisoner is not entitled to his discharge. It is no answer to say that the pardon was delivered to the prisoner. Apart from what has been already said, delivery of such an instrument is not complete without an acceptance in good faith. The bad faith of the prisoner was demonstrated almost as soon as he got out of prison. Besides, the pardon was given to the prisoner by the warden upon the distinct agreement on his part to leave the state on the train going east the following evening. The subsequent conduct of the prisoner showed that he had no intention of doing any such thing. A pardon obtained by misrepresentation amounting to fraud is void. 1 Bish. Crim. Law, §§ 753, 754. Nor is there any force in the suggestion that in such cases the person pardoned may be deprived of the opportunity to comply with the conditions of the pardon. No court has the power to compel any executive officer to afford the person to whom a pardon has been conditionally granted an opportunity to comply with the conditions, for that would be to exercise the pardoning power in part. When the pardon has once taken effect, then the party to whom it is extended acquires a right which the courts can, and will, of course, protect. There is no reason, however, to suppose that in any case any executive officer would refuse to afford the party to whom a conditional pardon should be granted an opportunity to comply with the conditions, and thereby secure its benefits. Every presumption is the other way. Should the fact be otherwise in any case, perhaps some means might be discovered for giving effect to the governor's power. At all events, in the present case, ample opportunity was given the prisoner, which, instead of availing himself of, he abused. Let the prisoner be remanded to the custody of the warden.

Sharpstein, Myrick, and Thornton, JJ., concurred.

64 Cal. 117

Mitchell v. Beckman *et al.*[1]

(*Supreme Court of California.* Aug. 30, 1883.)

Banks — Transfer of Assets — Stockholders' Liability—Limitation.

1. An agreement by which one bank assigns and transfers to another all its assets in consideration of the latter's assumption of all its liabilities is valid where the assets transferred are sufficient to satisfy all the debts assumed.

2. Where the stockholders of such second bank have received the dividends paid by it on the deposits transferred to it under this agreement, it is too late for them to set up the defense of *ultra vires* in a suit by one of the depositors to enforce their individual liability after the bank has stopped payment.

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[1] This case, filed August 30, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

3. To render a stockholder in a bank individually liable for its debts, it is not essential that he shall have paid for the stock for which he subscribed, for a corporation may give credit for its stock, as well as for any other property sold by it.

4. Nor is it essential to that end that certificates of stock shall have been issued to him, for they are merely the proof of property, which may exist without them.

5. A right of action against the stockholders of a bank accrues to a depositor when the bank stops payment, and where there has been no prior default the statute of limitations does not begin to run until then.

6. Articles of incorporation stated that the "corporation was organized for the following named purposes: To do a general savings and commercial banking business; to buy and sell real and personal property; to discount bills, notes, and other commercial and negotiable paper and instruments; to buy and sell exchange; to receive money on deposit; to borrow and loan money; and to do any and all acts incident to or necessary to the transaction of any and all the matters above stated." *Held*, that this corporation is not a mere savings bank, but has all the attributes of an ordinary commercial bank.

7. The objection that irrelevant evidence was admitted in a case tried by the court is not tenable on appeal unless it is plainly apparent that the court rested its decision on the irrelevant evidence.

In bank. Appeal from superior court, Sacramento county.

Action by Elanora S. Mitchell against William Beckman and others, as stockholders of the Odd-Fellows' Savings & Commercial Bank. There was judgment for plaintiff, and an order refusing a new trial, from which defendants appeal. Judgment and order affirmed.

Geo. Cadwalader, for appellants. *Catlin & Hamburger* and *Henry Edgerton*, for respondent.

THORNTON, J. So much of the opinion of department 2 in this cause, as follows, is adopted as a correct exposition of the law herein: "The complaint in this case alleges that the Odd-Fellows' Savings & Commercial Bank is a corporation, existing under the laws of California, ever since the 10th day of February, 1875, and organized for the purpose of carrying on a commercial banking business; that the defendants are subscribers to the capital stock of the bank in amounts specified in the complaint; that on the 21st day of December, 1878, the corporation above named was indebted to the plaintiff in the sum of $6,625.72, upon an account for so much money at and before that time had and received by the said corporation from the plaintiff to and for plaintiff's use, and at the special instance and request of said corporation, which sum said corporation thereafter, to-wit, at the place and on the day last aforesaid, undertook and promised to pay plaintiff when it should be thereunto afterwards requested; that plaintiff has recovered a judgment against the corporation for that amount, no part of which has been paid; that the defendants were at the time such indebtedness accrued stockholders in the corporation named; that the corporation suspended all business and closed it doors on the 21st day of September, 1878, since which time it has not resumed business," etc. The action is brought under the statute, and the allegations in the complaint are sufficient. The case has been argued at great length, and with much ability; but it does not seem to us that the points involved are of difficult solution. The main leading facts are that the corporation (the bank) was doing a commercial banking business in the city of Sacramento; that the plaintiff deposited a certain amount of money in it, which has never been repaid; that the plaintiff brought an action and recovered a judgment for the amount against the bank, which judgment remains in full force and effect; whereupon plaintiff seeks to charge the defendants in this action as subscribers to the capital stock of the corporation.

It appears from the evidence in the case that plaintiff's money was originally deposited in the Odd-Fellows' Bank of Savings as early as the year 1873, and that on the 1st day of March, 1875, an agreement was entered into between the two institutions above named, by the terms of which all the assets of the last-named institution were assigned and transferred to the Odd-Fellows' Savings & Commercial Bank, and thereupon that institution assumed all the liabilities of the former bank. It is claimed that this assumption of the liabilities of the old bank by the new one was void for several reasons; but it is sufficient for us to say on this branch of the case that the new bank received all of the assets of the old, which were sufficient, as appears from the evidence of Samuel Poorman, the president of both corporations, to satisfy all the debts of the old bank. He was asked by the court the following question: "Were all the assets transferred to the new bank, and were the assets sufficient to discharge the liability of the Odd-Fellows' Bank of Savings? Answer. Well, I believe they were more than sufficient. I had been president of the Odd Fellows' Bank of Savings for a considerable time before that, and was president of the Odd-Fellows' Savings and Commercial Bank for nearly three years after that, and was familiar with the assets and their values." It may be added, if anything more in this connection is required, that the new corporation opened an account with the plaintiff, crediting her with the amount in her pass-book as a deposit, and paid dividends on the same for more than three years. Of these dividends the defendants received their respective shares, in proportion to the number of shares subscribed for by them, and it is too late now for them to urge the defense of *ultra vires*.

Another point made in the case is that several of the defendants never paid for the whole amount of the stock subscribed for, and never received certificates therefor. But to make one an owner it is not necessary that he should have paid for his stock. A corporation may give credit for its stock as well as for any other property sold by it. Nor is it necessary that certificates should have been issued. These only constitute proof of property which may exist without them. When the corporation has agreed that a person shall be entitled to a certain number of shares in its capital, to be paid for in a manner agreed upon, and that person has agreed to take and pay for them accordingly, he becomes their owner by a valid contract made upon a valuable consideration. Chaffin v. Cummings, 37 Me. 83. See, also, Spear v. Crawford, 14 Wend. 20; Glass Co. v. Dewey, 16 Mass. 94; In re South Mountain Consolidated Min. Co., 7 Sawy. 30, 5 Fed. Rep. 403; Civil Code, § 322.

The statute of limitations is relied on by appellants as a defense. This point has been determined adversely to the contention of appellants in Green v. Beckman, 59 Cal. 545. The statute did not commence running until the bank stopped payment, which was less than two years before the commencement of the action. We cannot see how it could have begun to run sooner. There was no right of action against the bank by the express terms of the by-laws until a demand and presentation of the depositor's book. The stoppage of payment by the bank gave at once the right of action. It had never refused payment before. It was in no default until the day indicated, when it closed its doors, and by its acts spoke as significantly as words to that effect: "We refuse to pay any one. It is useless to present your bank-book or demand, as we cannot pay." Then the depositor had a right to sue, and not before. It follows, "as the night the day," that the right of action against the stockholders did not commence sooner. How could it? If, on demand, the bank had paid, the stockholders were discharged. Can it be maintained that there was no right of action against the bank, and still one against the stockholders? They are primary debtors, co-ordinately responsible, (see Mining Co. v. Woodbury, 14 Cal. 265,) but one is not responsible before the other. The conclusion here reached is a fair deduction from the principles declared in the case just cited, and it is expressly stated in Davidson v. Rankin, 34 Cal. 505, that the right of action against the corporation and the stockholder accrues at the same time. In what has been said on this point we are not to be regarded as deciding that the cause before us, as to the bar of the statute, is not within the terms of section 348, Code Civil Proc., passed in 1874, and that there is really no limitation of this action. We do not decide it, because we think it better to rest the conclusion reached herein on the grounds above expressed.

It is contended that the deposit here sued for was in a savings bank, which was the agent of the plaintiff to invest her money, and, inasmuch as it was lost through the instrumentality of her agent, she could not maintain this action against the stockholders. Conceding that this would be so were the plaintiff's claim here sued for a deposit in a savings bank, the proof here is conclusive that the Odd-Fellows' Savings & Commercial Bank was a commercial, and not a savings, bank. This is plainly shown by the articles of incorporation. In these articles it is stated: "Said corporation is organized for the following named purposes: To do a general savings and commercial banking business; to buy and sell real and personal property; to discount bills, notes, and other commercial and negotiable paper and instruments; to buy and sell exchange; to receive money on deposit, with or without agreement to pay dividend or interest thereon; to borrow and loan money; to improve and lease real estate; and to do any and all acts incident to or necessary to the transaction of any and all the matters above stated." This is very different from a savings bank. For a definition of a savings bank, see Grant, Banks, 546; Huntington v. Bank, 96 U. S. 388; Coite v. Society, 32 Conn. 173; Osborn v. Byrne, 43 Conn. 155. See, also, Civil Code, §§ 571-579, both inclusive. The Odd-Fellows' Savings & Commercial Bank had all the attributes of an ordinary commercial bank, as the articles indicate.

There was no error in admitting the judgment against the bank for which the judgment or order should be reversed. There was other evidence from the books of the bank to show the indebtedness, and because it was offered for this purpose the objection to its admissibility is urged. The cause was tried by the court, and when so tried we do not understand the objection of irrelevancy is tenable unless it is plainly apparent that the court has rested its decision on the irrelevant testimony. Arthurs v. Hart, 17 How. 6.

As to the number of shares owned by the defendants, we think the finding was sustained by the evidence. We find no error in the rulings of the court below, and the judgment and order are affirmed.

MYRICK, SHARPSTEIN, MCKINSTRY, MCKEE, and ROSS, JJ., concurred.

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64 Cal. 60

PEOPLE v. STEWART.[1]

(*Supreme Court of California. July 30, 1883.*)

CRIMINAL LAW—TRIAL—SICK JUROR—PEREMPTORY CHALLENGES.

1. Where a juror on a murder trial becomes sick, after the jury is sworn and some evidence introduced, and is discharged, and another is called in his place, it is error to overrule defendant's peremptory challenge to the latter, on the ground that his peremptory challenges were exhausted in the selection of the original jury; for Pen. Code Cal. § 1123, provides that in such emergencies "a new juror may be sworn, and the trial begin anew," so that defendant is thereafter entitled to all the peremptory challenges he had in the first instance.

2. Defendants' request, before the beginning of such trial *de novo*, to have pleas of former acquittal and former jeopardy entered, should be granted.

In bank. Appeal from superior court, Colusa county.

Indictment against George W. Stewart for murder. There were judgment of conviction, and an order denying a new trial, from which defendant appeals. Judgment and order reversed.

Jackson Hatch, for appellant. *Atty. Gen. Marshall*, for the People.

SHARPSTEIN, J. During the trial a juror became sick, and was discharged by the court. A new juror was called, who was peremptorily challenged by the defendant's attorney. The challenge was denied, on the ground that the defendant, in the selection of the original jury, had exhausted his peremptory challenges. The Code provides that, in case of the discharge of a juror on account of sickness, "a new juror may be sworn, and the trial begin anew, or the jury may be discharged, and a new jury then or afterwards impaneled." Pen. Code, § 1123. What is implied by the clause, "and the trial begin anew?" The title of the chapter which provides for challenging the jury is, "Of proceedings after the commencement of the trial and before judgment." We think, within the meaning of the Code, a trial commences when the case is called for trial, unless the trial be then postponed; that everything that transpires in the case after that, and before judgment, is a part of the trial. That being so, it follows that the defendant was entitled, after the change had been effected, to all the challenges which the law gave him in the first instance. Within that limit he not only had a right to challenge the new juror, but likewise any or all of the original eleven. Bishop says, in such a case, "the prisoner should be offered his challenges over again as to the eleven," and they "should be sworn *de novo*, and the trial begin again." In this case the "new juror" only was challenged, and, if the defendant had a right to challenge the eleven over again, he certainly had a right to challenge the new one. Instead of having a new juror sworn, the court might have discharged the original jury, and impaneled an entirely new one. If that had been done, the right of the defendant to peremptorily challenge any of them would be no clearer than it is to so challenge the new juror called to supply the place of one discharged. The request of the defendant to have pleas of former acquittal and once in jeopardy entered, was made before the commencement of the trial *de novo*, and should have been granted, although we are not now prepared to hold that the judgment ought to be reversed on that ground alone. Judgment and order reversed, and cause remanded for a new trial.

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[1] This case, filed July 30, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

ROSS, MCKEE, MCKINSTRY, and THORNTON, JJ., concurred.

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64 Cal. 62

RICHARDS v. DOWER.[1]

(*Supreme Court of California.* July 31, 1883.)

INJUNCTION — IRREPARABLE INJURY — FINDINGS— REVIEW.

1. The construction of a tunnel, permanent in its character, through a lot, is an injury irreparable in its nature, against which the owner is entitled to an injunction, without regard to the trespasser's solvency.

2. In a suit for such injunction, a finding that the injury is not irreparable is inconsistent with a finding that the tunnel is of a permanent character.

3. The rule under which the appellate court declines to interfere with the granting or refusing of injunctions, as matters within the discretion of the court below, does not apply to the dissolution of a preliminary injunction after final hearing on the merits.

Appeal from superior court, Nevada county.

Action by Philip Richards against John Dower, Jr., for an injunction against the construction of a tunnel through plaintiff's lot by defendant. The purpose of the tunnel, whose dimensions did not appear, but which was 20 feet below the surface, and ran 150 feet through plaintiff's lot, was the development of a quartz ledge, and the removal of rock and other material therefrom. The court, on final hearing, dissolved the preliminary injunction, and rendered judgment for defendant, from which plaintiff appeals. Judgment reversed.

J. M. Walling, for appellant. *Johnson & Mason*, for respondent.

SHARPSTEIN, J. The court found that at the time of the commencement of this action the defendant had excavated and projected a tunnel under the lot of the plaintiff a distance of 15 feet, and was engaged in the further extension thereof, and threatened to continue the same, but that said tunnel has not affected, and will not, if completed, affect, injuriously or otherwise, the surface ground of plaintiff's said lot. There is a further finding "that the driving of the tunnel was not, and will not, if completed, cause the plaintiff irreparable injury, or injure said lot in any way." And another "that the defendant is not insolvent." And, as a conclusion of law from the foregoing facts, the court found that the defendant was entitled to a dissolution of an injunction previously granted, and ordered judgment to be entered to that effect. From that judgment the plaintiff appealed, and the questions which the record presents are: (1) Did the court err in its said conclusion of law? (2) Was the continuation or dissolution of the injunction by the court which granted it so much a matter of discretion as to preclude any interference here with the action of that court in the premises? As late as Mogg v. Mogg, Dick. 670, Lord THURLOW was unable to find a precedent for granting an injunction to restrain a mere trespasser from cutting timber on another person's land. But in Flamang's Case, where a landlord of two closes had let one to a tenant, who took coal out of that close, and also out of the other, which was not demised, the difficulty was whether the injunction should go as to both, and Lord THURLOW ordered it as to both; and on the authority of that case Lord ELDON, in Mitchell v. Dors, 6 Ves. 147, granted "an injunction against the defendant, who, having begun to get coal in his own ground, had worked into that of the plaintiff." In Thomas v. Oakley, 18 Ves. 184, Lord ELDON expressed the opinion that it had then been settled in England that an injunction would be granted to restrain a mere trespasser from cutting timber or taking coal or lead ore from another person's land, and in that case he granted an injunction to restrain the defendant from removing stone from the plaintiff's quarry, on the ground that the defendant was taking the substance of the inheritance,—removing that which was the plaintiff's estate. He said the difference in value between stone and coal or stone and lead ore could not be considered in that case. From which we infer that in his opinion the right to an injunction in such a case did not depend on the value of the substance which was threatened with removal, but upon the fact of its constituting the inheritance or estate of its owner; and, in that light, the kind or quality of the substance would be quite as immaterial as the value of it. And such we understand to be the rule in this state. In More v. Massini, 32 Cal. 594, the court says: "The *gravamen* is a threatened trespass upon land. The trespass is in the nature of waste, and it will be committed unless the defendant is restrained. Should the threat be fulfilled, the plaintiff would be deprived of a part of the substance of his inheritance, which could not specifically be replaced. In the class to which this case belongs no allegation of insolvency is necessary. The injury is irreparable in itself." Citing Mining Co. v. Fremont, 7 Cal. 322; Hicks v. Michael, 15 Cal. 116; Leach v. Day, 27 Cal. 646; People v. Morrill, 26 Cal. 360. The findings show that the tunnel which the defendant is constructing through the plaintiff's land is of a permanent character. It disturbs the plaintiff's possession, and, if permitted to continue, will ripen into an easement. That, of itself, is sufficient to entitle him to an injunction. Poirier v. Fetter, 20 Kan. 47; Johnson v. City of Rochester, 13 Hun, 285; Williams v. Railroad Co., 16 N. Y. 97. The finding that the injury is not irreparable is inconsistent with the findings which describe the character of the work which it is sought to have enjoined. "The injury is irreparable in itself," and the solvency of the defendant is an immaterial circumstance. The findings leave no room for doubt as to the plaintiff's title to the premises, and that, coupled with the fact that the threatened injury is *per se* irreparable, entitles the plaintiff to the relief demanded in his complaint; and we think the error committed by the court in dissolving the injunction should be corrected. Cases of palpable error or abuse of discretion are excepted from the rule under which this court declines to interfere with the granting, refusing, continuing, or dissolving of injunctions; and that rule applies more especially, if not exclusively, to preliminary injunctions. We do not think that it applies to a case in which an injunction is continued or dissolved after trial and findings upon all the material issues. In that case, as in any other in which the findings do not support the judgment, it should be reversed. Judgment reversed, and cause remanded, with directions to the court below to enter judgment on the findings that the injunction issued in the first instance be perpetual, and that the plaintiff recover his costs.

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[1] This case, filed July 31, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

MYRICK and THORNTON, JJ., concurred.

PHELAN v. TYLER *et al.*[1]

(*Supreme Court of California.* Aug. 15, 1883.)

SURVIVAL OF ACTIONS — DEATH OF PARTY PENDING APPEAL—RES JUDICATA.

1. Under Code Civil Proc. Cal. § 385, which provides that an action shall not abate by the death of a party when the cause of action survives, and the case may, upon the death of a party, be continued against his representative or successor in interest, the death of a party pending an appeal does not oust the jurisdiction of the supreme court, and a failure to substitute his representative does not render its judgment void.

2. A judgment in a former action of ejectment is a bar to a present action between the same parties, as to the same questions, although the patent of the land, which is the subject of contention, had not at that time been granted to the person under whom both parties claimed.

Department 2. Appeal from superior court, Los Angeles county.

Action of ejectment by Thomas Phelan against Montgomery Tyler and others. Judgment for plaintiff. Defendants appeal. Reversed.

Thom & Stephens, for appellants. *S. Haley*, *H. K. S. O'Melveny*, and *Bicknell & White*, for respondent.

SHARPSTEIN, J. The defendants are the legal representatives of William Standifer and John Dunlap, deceased, and the court finds "that said William Standifer and John Dunlap, in 1873, commenced an action of ejectment against Thomas Phelan for the recovery of the possession of the land described in said answer, to-wit, the two small tracts comprising about twenty-one acres, from defendants herein, and that such proceedings were afterwards had in said action and upon the trial thereof that a judgment was entered by the district court in this county, wherein the same was pending, and in favor of the defendant in that action, for costs, in March, 1875; and that afterwards, on the 10th day of June, 1875, said Standifer and John Dunlap took an appeal to the supreme court of the state, but did not perfect said appeal by filing the transcript in said court until July 14, 1875, before which last date, viz., on the 7th day of July, 1875, the said John Dunlap had departed this life; that no suggestion of the death of said John Dunlap was ever made, and no person or legal representative of said deceased was ever substituted in said supreme court for said John Dunlap, deceased; but, without any such suggestion or substitution, the cause was argued and submitted to the supreme court for final determination on the 19th day of October, 1875, and thereupon, then and there, said supreme court rendered its judgment, from the bench, of reversal of the judgment of said district court, and remanded same, with directions to said district court to enter judgment for the plaintiffs in that action on the findings, and on the 30th day of November, 1875, issued its *remittitur* to said district court;" from which the court reached the conclusion, "that the supreme court, at the time the decision and judgment of that court was rendered, * * * had no jurisdiction, and that said judgment was void." If the death of John Dunlap, occurring at the time it did, operated as an ouster of the jurisdiction of the supreme court of the case, the conclusion at which the court arrived is doubtless correct. But the death of a party pending an appeal does not have that effect in any case. "An action or proceeding does not abate by the death or disability of a party * * * if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest." Code Civil Proc. § 385. There is nothing in the Code which would justify the inference that the death of a party pending an appeal ousts the jurisdiction of the supreme court, and renders its judgment void, unless before the rendition thereof a representative of said deceased party be substituted in his stead. This question was not directly involved in Ewald v. Corbett, 32 Cal. 493, or in McCreery v. Everding, 44 Cal. 284, although there are expressions in both which militate against the view which we entertain on the subject, and which seems to us to be supported by a preponderance of the authorities. The reason why, "in such cases, the judgment is simply erroneous, but not void, * * * is because the court, having obtained jurisdiction over the party in his life-time, is thereby empowered to proceed with the action to final judgment; and, while the court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal if the fact of the death appears upon the record, or by writ of error *coram nobis* if the fact must be shown *aliunde*." Freem. Judgm. § 153. As we view it, the judgment in the former action is no less a bar by reason of its being rendered before a patent for the land had been issued. Both parties then claimed, and now claim, under Pico, and their conflicting claims were in no way affected by the issuance of the patent. The question to be determined in the former action and in the present one is the same,—that is, which party acquired Pico's interest in the land. Such being the case, the former adjudication, in our opinion, constituted a bar to the present action. Byers v. Neal, 43 Cal. 210. Judgment reversed, with directions to the court below to enter a judgment in favor of the defendants upon the findings.

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THORNTON, J., and MYRICK, J., concurred.

Hearing in bank denied.

64 Cal. 54

WARRING v. FREEAR.[1]

(*Supreme Court of California.* July 30, 1883.)

INJUNCTION—VERDICT—FINDINGS BY COURT.

1. In a suit to enjoin defendant from interfering with the accustomed flow of water in a stream, plaintiff claimed by appropriation and use "all the water in the stream to the extent of 60 square inches, measured under a four-inch pressure." Defendant claimed the water as a riparian owner, and the issues were submitted to a jury. Their verdict found plaintiff entitled to 45 inches of water of the stream in question under a 4-inch pressure. *Held*, this does not cover the issues, which involve the respective rights of both parties.

2. It is the duty of the court, in such a case, to find on the issues not covered by the verdict, unless such findings are waived; failing which, its judgment will be reversed, and a new trial granted.

In bank. Appeal from superior court, Ventura county. Reversed.

Suit by B. F. Warring against J. B. Freear for an injunction. There were judgment for plaintiff on the verdict of a jury, and an order refusing a new trial, from which defendant appeals.

Blackstock & Shepherd and *John F. Godfrey*, for appellant. *Williams & Williams* and *C. A. Storke*, for respondent.

MCKEE, J. This case arises out of an action to enjoin the defendant from maintaining a dam across a running stream of water in Ventura county, known as the "Arroyo Circo," and from interfering with the accustomed flow of water therein. According to the statement in the complaint of the plaintiff's cause of action, the plaintiff claimed to have acquired the right, by appropriation and use from November, 1869, until March, 1881, to "all the water of the stream to the extent of sixty square inches, measured under a four-inch pressure, for irrigation and domestic purposes." The right thus asserted by the plaintiff was denied by the defendant, who claimed by his answer to have been a riparian owner on the stream from the month of May, 1869, until the commencement of this action; and, as such, was entitled to use, and had used, peaceably and continuously, from May, 1869, the water of the stream for watering his animals and for other domestic purposes; and he admitted that he had, in March, 1881, built a dam across the creek on his land, about 80 rods above the plaintiff's dam, by means of which he diverted about half the water flowing in the stream, for his stock and his natural wants, and for irrigating about one acre of his land, which he had set out in vines and fruit trees. As shaped by the pleadings, the controversy between the parties therefore involved issues of fact as to the respective rights of the parties to the water of the stream. And, as the plaintiff sought to enjoin the defendant from any interference at all with the water flowing in the stream, it became the duty of the court to try and determine the issues raised by the pleadings, and to pass upon the rights claimed by each of the parties, subject, of course, to its power to order any or all of such issues to be tried by a jury. Section 592, Code Civil Proc. But in exercising such power the court should direct proper issues to be framed upon the pleadings and submitted to the jury, (Curtis v. Sutter, 15 Cal. 263,) and the verdict of the jury must respond to all the issues submitted to them. A general verdict is insufficient and should be disregarded, (Brandt v. Wheaton, 52 Cal. 430;) and even a special verdict is only advisory to the court. It may be set aside or disregarded or adopted. In this case the issues were submitted generally to the jury. The verdict returned was as follows: "We, the jury, find that the plaintiff is entitled to forty-five inches, under a four-inch pressure, of the waters of Circo creek, described in the complaint; and we further find that he has been damaged in the sum of one dollar by reason of the unlawful diversion of said waters by the defendant." Upon adopting the verdict, it became the equivalent of a finding by the court; but it did not cover the issues raised by the pleadings. Where the verdict of a jury, in an equity case, does not respond to all the issues, it becomes the duty of the court, if it adopts the verdict as far as it is responsive to the issues, to proceed and find, upon the evidence which has been given and any other which may be offered by the parties, as to the other issues not covered by the verdict, (Bates v. Gage, 49 Cal. 126; Wingate v. Ferris, 50 Cal. 105,) and to make and file its decision in writing, stating the facts found and the conclusions of law drawn therefrom, as required by sections 632, 633, Code Civil Proc. Until such a decision has been made and filed, the case cannot be considered as tried, (Hastings v. Hastings, 31 Cal. 95,) unless the filing of such a decision has been waived. There was no waiver of findings in this case, and, as the court failed to ascertain and determine the rights of each of the parties to the use of the water of the stream in controversy, the judgment and order denying the motion for a new trial must be reversed, and the cause remanded for a new trial. It is so ordered.

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Myrick, Sharpstein, Thornton, Ross and McKinstry, JJ., concurred.

Rehearing denied.

(64 Cal. 57)

Stockman *et al.* v. Riverside Land & Irr. Co. *et al.*[1]

(*Supreme Court of California.* July 30, 1883.)

Appeal—Review—Findings—Estoppel—Costs

1. The verdict of a jury in an equity case is merely advisory to the court, and, where the findings of the court are contrary thereto, and there is a conflict of evidence, the appellate court will not weigh the evidence to determine whether it preponderates in favor of the findings of the court or those of the jury.

2. The fact that a person has constructed a canal at large expense through another's land, and has maintained and used it, together with a strip of land on each side of it, for irrigation, for more than five years, with the knowledge of the land-owner, and that the latter has never objected to nor opposed it, are not sufficient to estop the land-owner to question the other's title to the canal and land in question.

3. In a suit by many plaintiffs to quiet title against one so constructing and maintaining a canal through their land, a finding that "divers of the plaintiffs" assisted him in its construction is too indefinite to be considered on the question of estoppel.

4. While plaintiffs, in whose favor costs have been decreed, are not estopped by receipt of them to question on appeal so much of the decree as is in favor of defendants, on reversal of the decree they will be required to refund such costs before they are allowed a new trial.

Appeal from superior court, San Bernardino county. Affirmed.

Suit by P. J. Stockman and others against the Riverside Land & Irrigating Company to quiet title. There were judgment for defendants, and an order refusing a new trial, from which plaintiffs appealed.

H. M. Willis and *B. B. Harris*, for appellants. *Waters & Gibson*, for respondents.

Ross, J. Action to quiet title. It appears from the record that "by arrangement of both parties, made in open court, six special issues were framed to be presented to a jury then and there impaneled to answer the same by their verdict as advisory to the court." Afterwards the jury returned answers to the issues. The cause was then proceeded with, and, after being argued, and submitted to the court for decision, the court made and filed findings of fact and conclusions of law; and it is insisted on behalf of the appellants that, as the findings of the court upon some of the material issues are contrary to the findings of the jury upon the same issues, this court should, notwithstanding a substantial conflict of evidence upon those issues, proceed to weigh the evidence, and decide whether it preponderates in favor of the findings of the court or of the jury. To this we cannot assent. The findings of fact by the court are as conclusive here as they would be if no jury had been impaneled in the case. The question for us is whether there is sufficient evidence to sustain the findings of the court upon the material issues; and a substantial conflict in the evidence upon such issues is sufficient to sustain a finding either way upon them. It has often been held here that the verdict of a jury in an equity case is but advisory to the court, and in this case it appears to have been the understanding between the parties that it was to be regarded in that light only. The findings of the court below upon the issues are, with one exception, next to be noticed, full, and, in our opinion, sustained by the evidence. We would therefore affirm the judgment and order, but for the fact that the defendant, in its answer, set up ownership in itself of a certain water ditch, referred to in the record as the "upper ditch or canal," together with the right of way therefor through that portion of the land described in the complaint, which is found and adjudged to be the property of the plaintiffs. On the issue made as to this question the court below found that the ditch in question was completed in 1871, (more than five years before the commencement of this action,) at heavy cost; and that it "was constructed, maintained, and used, including a strip fifteen feet wide on each side of the center line thereof, * * * for the purposes of irrigation, * * * with the knowledge of the plaintiffs and their grantors, and without any objection or opposition thereto on their part, and with the active assistance of divers of said plaintiffs." With this finding as its basis, the court below adjudged "that the defendants are the owners of and entitled to the possession of and the right to maintain the upper canal of the Riverside Land and Irrigation Company, and to use a strip of land fifteen feet wide on each side of the center of said canal therefor." The finding did not determine the ultimate fact in issue, and is not sufficient to sustain that part of the decree above quoted.

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[1] This case, filed July 30, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

The learned judge who tried the cause and rendered the decree was of the opinion that the facts found in respect to the ditch constituted an estoppel *in pais*, but in this he was in error. The plaintiffs are many in number, and the finding that the ditch was constructed, maintained, and used "with the active assistance of divers" of them is obviously too indefinite to apply to any particular one or more of the plaintiffs, and it does not purport to include them all. It must therefore be laid out of consideration. The only facts, therefore, left on which the defendants must rely as constituting an estoppel are that the canal cost about $15,000, and that it was constructed, maintained, and used, including a strip of land on each side of it, for the purpose of conducting water for irrigation, with the knowledge of the plaintiffs and their grantors, and without any objection or opposition thereto on their part. We have been cited to no authority, and, know of none, that holds that the bare fact that the ditch was constructed with the knowledge of the plaintiffs and their grantors, and without objection on their part, though at heavy cost, is sufficient to operate an estopppel. "There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title; the effect of the estoppel being to forfeit his property, and transfer its enjoyment to another. Biddle Boggs v. Mining Co., 14 Cal. 368. For the error committed in the particular last mentioned the judgment and order must be reversed.

The point made for the respondents, to the effect that appellants are estopped from questioning the correctness of the judgment because of the voluntary receipt of the costs awarded them by the judgment, is not well taken. The costs are but an incident of the relief given the plaintiffs, the receipt of which does not come within the rule invoked by respondent. As, however, we find it necessary to reverse the judgment by virtue of which they received the costs, it is but right that the amount of costs so received, to-wit, $2,337.32, with legal interest from the date of the receipt, be returned to respondents, to the end that the *status quo* be restored. The power of this court thus to order is expressly given by section 957 of the Code of Civil Procedure. It is therefore here adjudged that the judgment and order of the court below be reversed, and the cause remanded for a new trial; such new trial, however, not to be had, without the consent of the defendants, until the plaintiffs shall have refunded to defendants the costs, with interest, as aforesaid. And it is further here adjudged that, upon the going down of the *remittitur* from this court, the court below enter an order to the effect that the plaintiffs pay defendants the amount of said costs and interest.

THORNTON, SHARPSTEIN, MYRICK, MCKEE, and MCKINSTRY, JJ., concur.

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64 Cal. 345

MORE v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO *et al.*[1]

(*Supreme Court of California.* Nov. 28, 1883.)

PROHIBITION — REMOVAL OF TRUSTEE — JURISDICTION.

A suit by heirs to procure the removal of a trustee holding lands for their benefit is not an action "for the recovery of real estate," such as the constitution of California requires to be brought in the county where the land is situated; and prohibition will not lie to arrest such a suit on the ground that the court is without jurisdiction, because the subject of the trust lies in another county.

In bank.

Petition by A. P. More for a writ of prohibition to the superior court of the city and county of San Francisco and F. W. Lawlor, a judge of such court. The action to restrain which the writ was sought was brought by the heirs of Nicholas A. Den for the removal of trustees holding lands for their benefit under Den's will. Petitioner was a sub-tenant of the lessee of the trustees. Writ denied.

Flournoy, Mhoon & Flournoy, for petitioner. *O. P. Evans*, for respondents.

ROSS, J. The writ of prohibition only goes to arrest the proceedings of a tribunal, corporation, board, or person when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person. Unless, therefore, it can be held that the superior court of the city and county of San Francisco has no jurisdiction of the action entitled Welch v. Huse, it is plain that the writ cannot go; for this writ is not the appropriate one to procure the annulment of proceedings already had. It is contended that the superior court of the city and county of San Francisco has not jurisdiction of the action of Welch **v.** Huse because of that provision of the present constitution declaring that all actions for the recovery of the possession of real estate shall be commenced in the county in which the real estate, or some part thereof, affected by such action or actions, is situated. But in no sense is the action entitled Welch v. Huse one "for the recovery of the possession of real estate." It is an action brought by certain *cestuis que trustent* to procure the removal of the trustees, the appointment of other trustees in their stead, and the appointment of a receiver to take, hold, and protect the property pending the action. Such an action is, and always has been, one of exclusively equitable jurisdiction, of which, by section 5 of article 6 of the constitution, the superior courts are given original jurisdiction. Writ denied, and proceedings dismissed.

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[1] This case, filed November 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

MORRISON, C. J., and SHARPSTEIN, MYRICK, MCKINSTRY, and THORNTON, JJ., concurred.

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64 Cal. 352

FARMERS' & MECHANICS' BANK OF SAVINGS v. COLBY *et al.*[1]

(*Supreme Court of California.* Nov. 28, 1883.)

NEGOTIABLE INSTRUMENTS — MAKERS — CORPORATION.

1. A certain note was signed: "G. A. Colby, Pres't Pac. Peat Coal Co. D. K. Tripp, Sec. *pro tem.*;" and it was indorsed by G. A. Colby and several others. *Held*, that on the face of it it is the note of the coal company.

2. As Colby and Tripp did not charge themselves personally as makers by executing this note, they are not so liable in an action thereon, even if they had not the requisite authority from the corporation for its execution.

In bank. Appeal from superior court, city and county of San Francisco. Affirmed.

Action by the Farmers' & Mechanics' Bank of Savings against G. A. Colby and others on a promissory note. There were judgment for defendants, and an order refusing a new trial, and from the latter plaintiff appeals.

Garber, Thornton & Bishop, for appellant. *Wm. H. H. Hart*, for respondents.

PER CURIAM. This case was heard in department 1, and an opinion filed therein April 30, 1883. Subsequently a hearing by the court in bank was granted; which hearing has been had. We are satisfied with the reasons given and the conclusion reached by the court in department; therefore the order is affirmed.

The following is the opinion of the court in department 1:

ROSS, J. The note in suit is in the words and figures following: "$6,750. San Francisco, April 21, 1875. On the twentieth day of April, 1876, without grace, we promise to pay to the order of H. H. Hubbard, six thousand seven hundred and fifty dollars, with interest at the rate of ten per cent. per annum from date until paid, principal and interest payable only in gold coin of the government of the United States, for value received, payable at the Farmers' and Mechanics' Bank, San Francisco. [Signed] G. A. COLBY, Pres't Pac. Peat Coal Co. D. K. TRIPP, Sec. *pro tem.*" Indorsed: "H. H. HUBBARD. G. A. COLBY. E. B. DEAN. E. TRIPP. J. H. L. TUCK." On this note the plaintiff sued G. A. Colby and D. K. Tripp as makers, and the other defendants as indorsers. The first question, therefore, presented, is: Is the note the individual note of Colby and D. K. Tripp, or is it the note of the Pacific Peat Coal Company? Read as a whole, we think it apparent from its face that it is the note of the company, indorsed by the individuals Hubbard, Colby, Dean, E. Tripp, and Tuck. It is urged for the appellant that the words, "Pres't Pacific Peat Coal Co.," and "Sec. *pro tem.*," are but descriptive of the persons to whose names they are respectively attached; but to this we cannot assent. Promissory notes, like other instruments, must be given that effect which accords with the obvious intent of the parties to them. The individual indorsement of the note by G. A. Colby can be readily understood when the note is viewed as the principal obligation of the Pacific Peat Coal Company, but it would be quite out of the usual order of things for Colby to indorse his own note when he was not the payee thereof. Then, too, to hold the words "Sec. *pro tem.*" but descriptive of the person, would be to give a forced and unnatural meaning to those terms. It is said that the Pacific Peat Coal Company could not be held liable on this note. Of course, that question cannot be determined in this action; but, if the present record correctly presents the facts, it is difficult to see why not, for it there appears that the Pacific Peat Coal Company was at the time of the execution of the note a corporation duly incorporated; that Colby was its president, and D. K. Tripp its secretary *pro tem.*; that Colby, as such president, and D. K. Tripp, as such secretary *pro tem.*, were by resolution of the corporation duly authorized and directed to execute the note to Hubbard, the consideration for the note being the conveyance of certain tule lands by Hubbard to the corporation, and the indorsers, other than the payee, being obtained because of Hubbard's unwillingness to accept the note of the corporation without personal indorsement. While, as already observed, the question of the liability of the Pacific Peat Coal Company is not now for consideration, the matters just alluded to certainly strengthen the view we take of the note itself. Inasmuch, therefore, as by the note in suit Colby and D. K. Tripp did not charge themselves personally, they are not liable in the present action, which is founded strictly upon the note itself, even if they did not have the requisite authority from the corporation for its execution. Hall v. Crandall, 29 Cal. 567. From these views it results, we think, necessarily, that no cause of action is stated against the indorsers of the note, inasmuch as no notice of the failure of the maker to pay appears to have been given them, conceding that demand was not necessary, or, if necessary, that it was made. Order affirmed.

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64 Cal. 363

MURRAY v. GREEN *et al.*[2]

(*Supreme Court of California.* Nov. 28, 1883.)

DEED—CONDITIONS—EJECTMENT—JUDGMENT—COMPETENCY.

1. Where the granting clause of a deed conveys an estate in fee-simple, a subsequent proviso

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that the grantee shall not convey without the consent of the grantor is void, as a restriction upon alienation, general as to time and persons, and therefore repugnant to the estate created.

2. A judgment in ejectment does not affect a title acquired by defendant after the commencement of the action.

3. The operation of a judgment, pending an appeal therefrom, is suspended, and the judgment is inadmissible in evidence in any controversy between the parties.

In bank. Appeal from superior court, city and county of San Francisco. Reversed.

Action by Eugene Murray against Alfred A. Green and others. Plaintiff appeals from a judgment for defendants and an order refusing a new trial.

E. A. Lawrence and *Mat. I. Sullivan*, for appellant. *B. S. Brooks*, for respondents.

SHARPSTEIN, J. When this case was here on a former appeal, the court said: "The nature and effect of the instrument executed by and between Mary Ann Roussel and husband and McLeran has not been discussed by counsel, but they treat it as a deed of conveyance, and no objection is suggested as to the validity of any of the clauses of the instrument. One of those clauses prohibits McLeran from selling, conveying, or otherwise disposing of any of the lands without the written consent of Mary Ann Roussel. The deed of McLeran to Murray, made during the pendency of the action of McLeran v. McNamara et al., having been made without the written consent of Mary Ann Roussel, is absolutely void as a conveyance of any interest acquired by McLeran under the first-mentioned deed, if the above clause is valid. The *habendum* clause recites that the premises are held, the undivided half for McLeran and the other half in trust for said Mary Ann; and another clause provides that, if McLeran shall obtain the seisin or possession of any of the lands, such seisin and possession shall *ipso facto* operate to invest the said Mary Ann with the legal seisin, possession, and estate of and in the undivided half thereof, at her election. It is unnecessary at this time to define the precise effect of each of those clauses, but it is sufficient to say that, if valid, they vested in said Mary Ann, or her assigns, the legal title to the undivided half of the land in controversy, it being the land which McLeran recovered of Murray in the above-mentioned action. Pending that action, Mary Ann Roussel and her husband and McLeran executed a deed purporting to convey this land to Moon, and he conveyed the same to Porter, the defendant's lessor, who held the same at the commencement of this action. From these facts it results that Porter holds the entire title to the tract of land in controversy, or the undivided half thereof,—that is to say, the entire title if the deed of McLeran to Murray is void because of the first-mentioned clauses of the deed, or the title to the undivided half if he can rely only on the last two mentioned clauses of the deed. The finding, therefore, to the effect that the plaintiff, Murray, is the owner in fee of the premises is contrary to the evidence." 4 Pac. Coast Law J. 215.

The foregoing will be better understood if it be stated that the deed of McLeran to Murray antedates that of McLeran and the Roussels to Moon, who conveyed to Porter, the lessor of the defendant. So that the case turns upon the construction of the deed of the Roussels to McLeran. If that vested in him any title to the premises or to any part thereof, his deed to plaintiff doubtless conveyed such title to the latter. But it was determined on the former appeal that the deed of McLeran did not convey any title to more than an undivided one-half of said premises to the plaintiff, leaving it an open question whether it conveyed any title whatever. By the terms of the deed of the Roussels to McLeran they granted, bargained, and sold to said McLeran, his heirs and assigns, all the lands, tenements, and hereditaments of Mary Roussel situated in San Francisco, to have and to hold the undivided moiety thereof to the proper use and behoof of him, the said McLeran, his heirs and assigns, subject, however, to the provisions thereinafter inserted as to the power and control of said McLeran over the said moiety so conveyed to his own use; and to hold the other undivided moiety in trust for the sole and separate use of the said Mary Ann Roussel and her heirs "in manner following, that is to say, in conjunction with the said parties of the first part, or the said Mary Ann Roussel, and not otherwise, to demand, sue for, enter, take, and hold seisin and possession of the same: * * * provided, however, that the said Thomas G. McLeran shall not have any power or authority to sell, convey, or in any wise to dispose of, charge, or incumber any part or portion of said property, land, tenements, or hereditaments hereinbefore mentioned and conveyed to him, whether the same be that moiety conveyed to him for his own use or that moiety conveyed to him in trust for the use and benefit of the said Mary Ann; nor shall he have any authority to make or deliver any lease, leases, or releases, nor any acquittance nor adjustments of or concerning said land, tenements, or hereditaments, without obtaining the proper signature and written consent of the said Mary Ann to each and every instrument or writing whereby any of said matters and things may be done; and provided further, that whenever the said McLeran shall hereafter obtain seisin or possession of any of said property hereinbefore mentioned, such seisin and possession of him, the said McLeran, shall, *ipso facto*, operate to invest the said Mary Ann with the legal seisin and possession of the one undivided half thereof, and to invest her with the legal estate in the one undivided one-half thereof, at her election; and if, for her better security in that behalf, the said Mary Ann shall hereafter make demand of the said McLeran in that behalf, then the said McLeran shall convey to her in fee the one undivided moiety of all or any part of said land, tenements, or hereditaments whereof he may have become actually seised or possessed as aforesaid." This is followed by a covenant of the Roussels that, while said McLeran is faithfully carrying out said trusts, they will not, nor will either of them, without his consent, convey or affect the title held by them, or either of them, to any of said lands, and that any conveyance made by them contrary to this clause shall be null and void; and finally McLeran covenants that he will faithfully perform said trusts at his own proper costs and charges. But for the provision in regard to alienation, the grant of an undivided moiety of the premises to McLeran would be full, absolute, and explicit; and, if the provision in regard to alienation be a condition restraining alienation, and repugnant to the interest created, it is void. Civil Code, § 711.

This is simply declaratory of the common law, (Co. Litt. 223*a*,) and is not controverted. It is also conceded by counsel for respondent that the clause of the deed is one restraining alienation, but is not, he insists, repugnant to the interest created, and therefore not void. Independently of the condition, the interest created by this deed is the largest possible estate which a man can have in land. And one of the incidents inseparably annexed to an estate in fee-simple is the right of alienation, which "passes by the grant as perfectly as if it were given by the express grant. Without such right, the estate granted would be neither a fee-simple nor any other estate known to the law." De Peyster v. Michael, 6 N. Y. 467. "A condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant precedent, neither in anything expressed nor in anything implied which is of its nature incident and is separable from the thing granted." Stukeley v. Butler, Hob. 170. "The reason why such a condition cannot be made good by agreement or consent of parties is that a fee-simple estate and a restraint upon its alienation cannot in their nature co-exist." De Peyster v. Michael, supra. It is difficult to conceive of a condition more clearly repugnant to the interest created by a grant of an estate in fee-simple than the condition that the grantee shall not alien the same without the consent of the grantor. With such a condition, if valid, annexed to the grant, it "would be neither a fee-simple nor any other estate known to the law." The owner of the reversion or possibility of reverter may restrain the alienation by his grantee in fee. This appears in Brooke's Abridgment, title "Condition," 57*a*. "If a man have lands for a term of years on condition that he shall not grant over his estate, this is good by reason of the reversion remaining in the lessor. The contrary of a feoffment on such condition, or that the feoffee shall not waste, for no right or interest remains in the feoffer." In a grant to a corporation, on the dissolution of which there would be a reverter to the grantor, a condition against alienation would be valid; but, in the absence of a possibility of reverter, the imposition of such restraint is not sanctioned by any case so far as we are advised. But it is claimed that, while a general restraint upon alienation is bad, a partial restraint is valid; but is it not obvious that, in case of a grant in fee-simple, where there is no possibility of reverter, any restraint whatever on the power of alienation would be repugnant to the interest created by the grant? In commenting upon the clause in which Littleton says: "But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issue of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., there such condition is good,"—Chancellor Kent says: "But this falls within the general principle, and it may be very questionable whether such a condition would be good at this day." 4 Kent, Comm. 131. In Doe v. Pearson, 6 East, 173, it was held that a condition only to alien to a particular person or persons is good, but this has been distinctly overruled in Attwater v. Attwater, 18 Beav. 330. In the note to Bradley v. Peixoto, Tud. Lead. Cas. Real Prop. 862, it is said: "A condition not to alien within a limited time, it seems, is good;" and cites Churchill v. Marks, 1 Colly. 445, and Large's Case, 2 Leon. 182. An examination of Churchill v. Marks satisfies us that it does not support that proposition; and it has been demonstrated that Large's was a case of contingent remainder, in which this question was not involved. Mandlebaum v. McDonell, 29 Mich. 78. In the case before us the restriction is not limited as to time or persons. In these respects it is general, and, in our opinion, void.

Respondent's counsel relies very much on Sprague v. Edwards, 48 Cal. 239, in which it was held that when a conveyance is made to a trustee, who has no interest in the trust fund, with power to sell and convey the trust land, subject to the approval of the *cestui que trust*, the deed of a trustee to a purchaser will not pass the legal title without the approval of the *cestui que trust*. It is impossible to discover the slightest analogy between that case and this. The doctrine there announced might apply to the conveyance of the undivided moiety in trust from Mrs. Roussel, which, as before shown, is wholly eliminated from this case. The title which the plaintiff acquired from McLeran after the commencement of the action of McLeran v. McNamara et al., in which plaintiff was a defendant, was not in issue in that action, and therefore was not affected by the judgment therein. Having acquired that title after his answer in that action was filed, Murray might do as he has done, —wait until he was ousted, and then bring an action, founded upon a title acquired subsequently to the commencement of that action, to recover possession. "Under the Code a judgment in ejectment is conclusive of but two points,—the right of the possession in the plaintiff at the commencement of the suit, and the occupation of the premises by the defendant at the same date." Freem. Judgm. 301; Yount v. Howell, 14 Cal. 465. While the appeal from the judgment in Porter v. Woodward et al. was pending, the operation of that judgment for all purposes was suspended, and it was not admissible in evidence in any controversy between the parties. Freem. Judgm. 328; Woodbury v.

Bowman, 13 Cal. 634. The conclusion at which we have arrived is that by the deed of McLeran to Murray he acquired the fee of an undivided moiety of the demanded premises, and that the court erred in finding otherwise. Judgment and order reversed.

MORRISON, C. J., and THORNTON, McKEE, and McKINSTRY, JJ., concurred.

(64 Cal. 372)

REYNOLDS v. SUPERIOR COURT OF LOS ANGELES COUNTY.[1]

(*Supreme Court of California.* Nov. 30, 1883.)

CERTIORARI—APPLICATION—TIME OF MAKING.

An application for a *certiorari* to review a judgment, made after the right to appeal from the judgment has been barred by the lapse of the period of one year limited therefor, no excuse being shown for the delay, will be denied. Keys v. Marin Co., 42 Cal. 256, followed.

In bank.

Application by A. W. Reynolds for a writ of *certiorari* to review a judgment and order made by the superior court of Los Angeles county.

Walter D. Stephenson and *Graves & Chapman*, for petitioner. *Bicknell & White*, for respondent.

PER CURIAM. By means of *certiorari* the petitioner seeks to call in question the validity of a judgment and an order made and entered considerably more than one year before the presentation of his petition. In Keys v. Marin Co., 42 Cal. 256, it was held that, unless circumstances of an extraordinary character be shown to have intervened, the remedy through a writ of *certiorari* should be held to be barred by the lapse of the same length of time that bars an appeal from a final judgment. In the present case no excuse is shown for the delay in the application. Writ denied, and proceedings dismissed

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[1] This case, filed November 30, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

92 Cal. 156

ZUMWALT *et al.* v. DICKEY. (No. 14,258.)

(*Supreme Court of California.* Dec. 3, 1891.)

LIMITATION OF ACTIONS—TRESPASS BY ANIMALS—EVIDENCE—HARMLESS ERROR.

1. An action against the owner of sheep for damages for trespass committed by them is not affected by Act Feb. 4, 1874, which gave the owner of the land on which the trespass was committed the right to distrain the animals trespassing, provided proceedings were begun within 60 days; but is governed by the ordinary statute of limitations barring actions for trespass to real property after three years. Code Civil Proc. Cal. § 338.

2. Where defendant, in an action for trespass, is merely a naked trespasser, he cannot object to the admission of patents from the state as *prima facie* evidence of plaintiff's title.

3. Where the ruling of the court below as to the admission of evidence is erroneous, but the record affirmatively shows that defendant was not injured thereby, defendant is not entitled to a reversal.

Commissoners' decision. Department 1. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge. Affirmed.

Action by D. K. Zumwalt and others against W. J. Dickey for trespass. Judgment for plaintiffs. Defendant appeals.

N. O. Bradley and *W. D. Tupper*, for appellant. *Oregon Sanders*, for respondents.

FITZGERALD, C. Action for damages for trespasses alleged to have been committed on the lands described in the complaint, by defendant, who wrongfully and unlawfully, and without plaintiffs' consent, entered thereon with large bands of sheep, and trod down and depastured all of said lands, and all the grass and herbage that grew thereon, during the years 1888 and 1889, and otherwise injured the same, to the great detriment of plaintiffs, and to their damage in the sum of $910. The complaint further alleges plaintiffs' title and possession and right of possession to the lands therein described. The answer specifically denies the material allegations of the complaint, and avers that in the summer season of 1889 defendant's sheep were for a short time "camped on a portion of said lands known as the 'Horse Corral Meadow,' but the feed and grass had all been eaten off by the sheep of other parties, and defendant's sheep did not do any damage whatever to said land in camping thereon." The case was tried by the court without a jury, and judgment rendered in favor of plaintiffs for the sum of $305, from which judgment and the order denying his motion for a new trial this appeal is taken by the defendant. At the trial, plaintiffs severally offered in evidence certain patents from the state of California to themselves; also a deed to them from one Crowley. These patents, and the deed purported to convey to plaintiffs all of the lands described in the complaint, and when offered as stated, were objected to by defendant on the grounds: *First*, that the action was barred by the statute of limitations because it was not commenced within 60 days after the alleged trespasses were committed, as required by the provisions of the statute approved February 4, 1874, entitled "An act to protect agriculture and to prevent the trespassing of animals upon private property in the counties of Fresno, Tulare, Kern, Ventura, Santa Barbara, San Luis Obispo, and Monterey;" *second*, because one of the patents for swamp and overflowed land did not show on its face that the lands described therein were ever listed to the state. The objections were overruled by the court, and the rulings excepted to by the defendant, and assigned as error.

With reference to the first ground of objection, it is sufficient to say that, as this action was not founded on that statute, the cause of action stated in the complaint was not barred by the statute of limitations. Section 338 of the Code of Civil Procedure provides that an action for trespass to real property may be commenced within three years after the cause of action has accrued. Triscony v. Brandenstein, 66 Cal. 515, 6 Pac. Rep. 384.

While the alleged erroneous ruling of the court on the second ground of objection, cannot properly be considered by us on this appeal, for the reason that the patents and the deed are not brought up by the record, yet at the same time we have no hesitancy in saying that we do not entertain the slightest doubt of its correctness. The patents were properly admitted as *prima facie* evidence of title in the plaintiffs, which the defendant was in no position to disprove, because it appears that he was a mere naked trespasser. To disprove the evidence of title furnished by the patents he must bring himself "in some privity with the common source of title." Hebbron v. Graves, 78 Cal. 380, 20 Pac. Rep. 740; Leviston v. Ryan, 75 Cal. 293, 17 Pac. Rep. 239; Doll v. Meador, 16 Cal. 296; Foss v. Hinkell, 78 Cal. 158, 20 Pac. Rep. 393.

It is next insisted that the court erred in permitting one Lillas, a witness for the plaintiffs, to testify, against the defendant's objection, that he saw a couple of thousand sheep "on the Horse Corral Meadow" in August, 1889, and that the man in charge of the sheep, who said his name was Frank Burr, told him that they belonged to the defendant. It appears that only a portion of the Horse Corral Meadow is embraced in the lands described in the complaint; and as plaintiffs failed to show that Burr, who was in charge of the sheep, was connected in any way with the defendant, or that the sheep which the witness saw belonged to the defendant, or that they were on that part of the Horse Corral Meadow owned by the plaintiffs, it follows that the ruling of the court was clearly erroneous; but the record affirmatively shows that the defendant was not injured thereby, for the reason that the damages proved to have resulted from the trespasses admitted are at least equivalent to those awarded by the judgment herein. As the remaining errors complained of are unimportant or untenable, we do not deem it necessary to notice them. We recommend that the judgment and order be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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92 Cal. 100

COWAN v. ABBOTT *et al.* (No. 14,196.)

(*Supreme Court of California.* Nov. 27, 1891.)

JOINDER OF ACTIONS — PLEADING — ADMISSIONS.

1. Under Code Civil Proc. § 427, providing that plaintiff may unite several causes of action in one complaint arising out of contracts, plaintiff may allege (1) that he rendered services reasonably worth a certain sum; and (2) an express contract, whereby defendants agreed to pay him the salary usually paid for such services, reasonably worth a stated amount, and, in addition, a bonus of $1,000 if he accomplished a certain result.

2. Plaintiff alleged in each count that he had received a certain amount, and no more. This defendants did not deny, but they denied having made the contracts alleged, and plaintiff's averments as to what his services were reasonably worth; and alleged that he had been fully paid. *Held*, that it was not thereby admitted that plaintiff had been paid only the amount alleged.

3. Defendants were engaged in operating a mine as tenants in common, rather than as "mining partners." Their clerk testified that he was told by one of them to make an agreement with plaintiff as to the salary to be received by him, and that it was fixed at $4 per day and board. Plaintiff admits, as shown by his receipts, having been paid $854. Each receipt expressly stated that the amount received was in full to date, or to a day specified, and the last one acknowledged "payment in full to date." *Held*, that plaintiff could not repudiate the arrangement made with the clerk on the ground that one of defendants had not authorized him to make it, when defendant had ratified the contract.

4. Plaintiff having testified that he did not receive such sum in full payment, whether he did or not was a question for the jury, as his acceptance of it was not conclusive against him.

5. Plaintiff admitted the receipt of more than four dollars per day. *Held*, that the jury should have been instructed, at the request of defendants, that, if there had been an express agreement fixing his salary at that amount and board, and if he had been fully paid, they should find for defendants.

Commissioners' decision. Department 1. Appeal from superior court, Butte county; P. O. HUNDLEY, Judge. Reversed.

Action by W. A. Cowan against A. Abbott and William Gregory for compensation for services rendered as superintendent of their mine. There was a judgment for plaintiff. From an order denying their motion for a new trial defendants appeal.

H. V. Rearden, for appellants. *John Gall*, for respondent.

TEMPLE, C. Appeal from an order denying defendants' motion for a new trial. Plaintiff sued defendants, as mining partners, to recover for services alleged to have been rendered as superintendent of their mine. The complaint contains two counts. In the first he avers that he performed labor for defendants between certain dates at their request, and that said services are reasonably worth $3,050, of which amount defendants have paid $650 only, leaving $2,400 still unpaid. In the second count he avers an express contract, by which defendants agreed that, if plaintiff would take charge of their mine, pump out the water so that it could be worked, and thereafter manage, work, and mine it, they would pay him the salary usually paid to mining engineers and superintendents, which he avers was reasonably worth $300 per month; and, in case he succeeded in keeping the water out for six months, they would pay him a further sum, as a bonus, of $1,000. The defendants, answering separately, deny specifically each allegation in the complaint, except that they admit that plaintiff performed certain service for them, but not as a mining superintendent; that the service continued from the 1st of March to the 29th of October, 1888. They aver that he was employed to take charge of the machinery and pumps; that he was fully paid long before the commencement of this action.

There was no error in refusing to compel the plaintiff to elect upon which count of his complaint he would rely. The two causes of action arise out of contracts, and can therefore be joined, under section 427 of the Code of Civil Procedure. Theoretically, they are distinct causes of action, and there is no requirement that they shall correspond or be consistent with each other.

As defendants did not rely upon their motion for a nonsuit, the question now is as to the sufficiency of the evidence to sustain the decision. We fail, however, to discover the variance complained of.

Plaintiff testified, in effect, that if he did not get the water out, and keep it out, so the mine could be worked, for six months, he should receive no pay; but if he did so he should be paid a salary, the amount of which was not agreed upon, and $1,000 bonus. His second cause of action states that defendants agreed that, if plaintiff would go to their mine and take charge, and pump out the mine so that it could be worked, and would work and manage the same, etc., he was to be paid a salary and $1,000.

The fact that plaintiff accepted four dollars per day, stating, as he says he did, that it was not in full, though a very strong circumstance against him, was not conclusive. Its effect was for the jury.

Plaintiff, in each count of his complaint, avers that he has been paid for his services the sum of $650, and no more. This amount is not specifically denied in the answer, but the contracts alleged are denied; also the value of the services; and it is averred that plaintiff had been fully paid. We think defendants do not, by this state of the pleadings, admit that no more than $650 had been paid.

On the trial, Thomas James, a witness for the defendants, testified that he was clerk at the mine; that Abbott, one of the defendants, directed him to fix with plaintiff what he was to receive, that he did so, acting for defendants; that plaintiff agreed to take four dollars per day, and was paid at that rate, and receipted in full up to October 30, 1888, when the work ceased. The receipts were placed in evidence, and so far sustain the witness. They each expressly state that the sum received was in full to date, or to a date mentioned. The last, dated October 30th, at which time it is admitted the mine was closed, is for $304.10, "payment in full to date." Plaintiff only claims that he worked 6 months and 25 days. In his evidence he admitted, as his receipts proved, that he had been paid $854. This would be more than four dollars per day for that time.

The facts in contest seem to have been: (1) The value of plaintiff's services; (2) whether defendants made the express contract alleged by plaintiff; (3) whether there was an express agreement, as claimed by defendants, fixing plaintiff's compensation at four dollars per day and board; and (4) whether he had been fully paid. The jury had the right, upon the evidence, to find for the defendants upon the last two issues, and the court erred in refusing to instruct the jury that, if they so found, plaintiff was not entitled to additional compensation.

If, as testified by James, plaintiff agreed to receive four dollars per day and board for his services, and did accept it as full payment, he cannot now repudiate the arrangement on the ground that James was not expressly authorized by both of the defendants. By their conduct in this case, both defendants have ratified the act of their agent; and, although the defendants, as partners, were engaged in working a mine, it was evidently not what was technically known as a mining partnership, which in some respects resembles a tenancy in common. For the error mentioned the order should be reversed, and a new trial had.

We concur: Fitzgerald, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the order is reversed, and a new trial ordered.

(92 Cal. 104)

O'Brien v. Greenebaum *et al.* (No. 13,877.)

(*Supreme Court of California.* Nov. 27, 1891.)

Equity—Cancellation of Compromise—Fraudulent Preferences.

Where plaintiff sought to avoid, in equity, a composition agreement entered into with the other creditors of defendants, on the ground that some of the other creditors received secret advantages at the time unknown to him, and not mentioned in the agreement, the facts that plaintiff, at the time he signed the agreement, did so in consideration of a promise by the agent of defendants to let him have $7,500 at once, and that he gave the agent an order on one of the defendants for that amount, expressing upon its face that it is "payable from the proceeds of the claim" held by plaintiff against defendants, is fatal to the right of plaintiff to equitable relief.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge. Affirmed.

Petition by Frank O'Brien against Greenebaum & Straus. Decree for defendants.

Gordon & Young, (*J. F. Sullivan*, of counsel,) for appellant. *Jarboe, Harrison & Goodfellow*, (*Edward R. Taylor*, of counsel,) for respondents.

De Haven, J. The right of plaintiff to any part of the relief demanded in the complaint depends entirely upon the validity of the composition agreement referred to therein, and which the plaintiff asks to have adjudged fraudulent and void. If that agreement is to stand, then plaintiff, as a party thereto, is bound by its terms, and his claim against defendants Greenebaum & Straus for their alleged conversion of his money and stocks must be satisfied in the manner thereby provided. The plaintiff alleges that this agreement is fraudulent and void as to him, because certain of the creditors who signed it received fraudulent preferences for the purpose of inducing them to do so, and that such facts were concealed from plaintiff, and were a fraud upon his rights, and his signature was by reason of such concealment fraudulently obtained. The court below found as facts that, for the purpose of securing the assent of certain creditors to said agreement, such creditors were, with the knowledge of Greenebaum & Straus, given secret advantages and benefits superior to those held by a majority of the creditors. But the court also found that on or about the 9th of November, 1886, Moses Greenebaum, a brother of one of the defendants, and who seems to have been the one through whom the other creditors received their preferences, requested plaintiff to sign "the said agreement, and the plaintiff at first refused to sign the same; but two days thereafter, to-wit, on the 11th day of December, 1886, he agreed with said Moses Greenebaum that he would sign the same if, in consideration thereof, he, the said Moses Greenebaum, would immediately upon his so doing let him have the sum of $7,500, and simultaneously therewith the plaintiff gave said Moses an order in writing, drawn by the plaintiff upon the defendant Wolfsohn, for the sum of $7,500, expressed upon the face of the order to be payable 'from the proceeds of the claim I hold against Greenebaum & Straus;' and thereupon the plaintiff signed the aforesaid agreement." "By this means the plaintiff himself obtained a secret advantage and benefit greater than and superior to that held by the majority of the creditors of said Greenebaum & Straus, who signed the agreement." The court thereupon rendered judgment in favor of defendants, from which the plaintiff appeals.

The judgment is right upon the findings. There can be no doubt that the law exacts the utmost good faith between the debtor and his creditors in the matter of entering into a composition agreement for the payment of debts. Such agreements rest upon the express or implied understanding that all the creditors are to share in the assets of the debtor upon the terms and in the exact proportion stated in the agreement itself, and, this being so, it is universally held that if some of the creditors have, unknown to the others, obtained as a consideration for their assent to it more favorable terms than are disclosed by the agreement, the agreement is fraudulent and void as to the creditor who was deceived and induced to accept its terms upon the supposition that there were no concealed preferences, and that he was thereby being dealt with as fairly and justly as others. Story, Eq. Jur. § 378; O'Shea v. Oil Co., 42 Mo. 397; Bank v. Hoeber, 88 Mo. 37; Burrill, Assignm. § 181. But, in order to entitle a creditor to relief from such a fraud, practiced upon him by his debtor and others joining with him in the composition agreement, he must himself come into court with clean hands. The application of this familiar principle of equity is fatal to the right of plaintiff to any relief in this action. The findings are to the effect that, in the very transaction of which he complains, the plaintiff himself, as a consideration for his assent to the agreement which he now seeks to avoid, bargained for and obtained a secret preference over other creditors, and which was fraudulent as to them. Under these circumstances he is not in a position where he can be heard to complain because other creditors obtained secret advantages similar to his own. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

(92 Cal. 138)

ALLEN *et al.* v. SAN JOSE LAND & WATER Co. *et al.* (No. 14,098.)

(*Supreme Court of California.* Nov. 29, 1891.)

EASEMENTS—ALTERATION.

1. Where defendant is the owner of an easement to run water in an open ditch over plaintiffs' land, and undertakes to lay pipes in the ditch of no greater carrying capacity than the ditch, the proposed alteration is such as tends to substitute a new and different servitude.

2. Where plaintiffs in such case seek to enjoin the laying of pipe, it is immaterial that the alteration would be less burdensome to the servient estate, and more convenient to defendant.

Department 1. Appeal from superior court, Los Angeles county; W. P. WADE, Judge. Affirmed.

Action by Lyman Allen and others against the San Jose Land & Water Company and Henry Dobbs for injunction. Judgment for plaintiffs. Defendants appeal.

R. Dunnigan and *Anderson, Fitzgerald & Anderson*, for appellants. *Waller J. Hughes* and *Chapman & Hendricks*, for respondents.

GAROUTTE, J. This is an appeal from a judgment upon the pleadings. The only material facts alleged in the complaint, and not denied by the answer, are: (1) The ownership of the land; (2) the defendant has placed pipe upon plaintiffs' land preparatory to laying the same permanently in a ditch across said land. Defendant's answer alleges that "it is the owner of a certain ditch across plaintiffs' land used for the purpose of carrying water to its [defendant's] land for the purpose of irrigation; that the pipes to be laid are of no greater carrying capacity than its said ditch, and when so laid by defendant will render the use of the easement less burdensome to plaintiffs' servient estate, and more convenient to defendant; that no damage has been done to plaintiffs' land, and no damage or trespass threatened or intended." Defendant also sets out the facts showing title to the ditch and water by adverse user. Upon these facts judgment was rendered for plaintiffs for a perpetual injunction restraining the defendant from laying the pipe, and this is an appeal from such judgment.

The principal question in this case is whether an easement to run water over plaintiffs' land in an open ditch is satisfied by carrying the water in a closed pipe, laid on the bottom of such ditch, and then covered to the depth of 13 inches with dirt, provided that such change in the easement would benefit the servient estate and convenience the dominant estate. After a careful examination of many authorities, we are led to conclude that the allegation of the answer "that the alteration in the mode and manner of using the easement will be less burdensome to the servient estate, and more convenient to the defendant," adds no strength to defendant's position, and that such fact is never a material element in a case where it is insisted that the alteration is so substantial as would result in the creation and substitution of a different servitude from that which previously existed. In speaking of this question of easements, in Merritt v. Parker, 1 N. J. Law, 460, the chief justice said: "No one has a right to compel another to have his property improved in a particular manner. It is as illegal to force him to receive a benefit as to submit to an injury. In the light, therefore, in which we view this subject, whether the drawing of the water from the pond by means of a trench, or the causing an additional quantity of water to flow through the lands of the defendant, was productive of benefit or injury, are, in my opinion, questions into which we have no right to examine." In Dickenson v. Canal Co., 15 Beav. 260, it was said: "If the plaintiffs have purchased from the company a right to preserve the waters in the rivers Belbourne and Gade from being diverted in any other manner than * * *, it is no answer to them to say that the diversion proposed will not be injurious to them, or even to prove that it may be beneficial to them. It is for them to judge whether the agreement shall be preserved, so far as they are concerned, in its integrity, or whether they shall permit it to be violated." In Johnston v. Hyde, 32 N. J. Eq. 455, where the owner of the servient estate attempted to substitute a covered way for an open ditch, the court said it could not compel Mr. Hyde to accept the substitution of a covered aqueduct for an open race-way. The same doctrine has been emphatically announced by this court in Gregory v. Nelson, 41 Cal. 278. The action was brought to restrain the defendants from destroying plaintiffs' water-ditch by their mining operations upon a claim across which the ditch ran. Plaintiffs' title to the water-ditch rested upon their right by prescription. The court found in favor of plaintiffs' title, but permitted defendants to proceed with their mining operations, provided they would construct a metal pipe at this point of sufficient capacity to carry the water in lieu of said ditch. In referring to this portion of the judgment the court said "it knew of no principle of law or power in a court of equity to justify or authorize such an invasion of the property rights of one private party to serve the wishes, convenience, or necessities of another private party. It is the duty of courts to protect a party in the enjoyment of his private property, not to license a trespass upon such property or to compel the owner to exchange the same for other property, to answer private purposes or necessities." If the owner of the servient estate is not allowed to materially alter the character of the servitude, although such alteration would not result in damage to the dominant estate, but might be a benefit thereto, we see no reason why the same principle would not apply to the owner of the dominant estate in making material alterations in the character of his easement.

Section 806 of the Civil Code provides: "The extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired;" and it appears to be settled doctrine that both parties have the right to insist that so long as the easement is enjoyed it shall remain substantially the same as it was at the time the right accrued, entirely regardless of the question as to the relative benefit and damage that would ensue to the parties by reason of a change in the mode and manner of its enjoyment. Defendant's title rests upon a right by prescription, an implied grant, a grant which limits and defines defendant's rights as fully and as strictly as though the grant were express; and for the purpose of determining its terms we must look to the nature of the enjoyment by which it was acquired, for, as provided by the section already quoted, the nature of that enjoyment measures the extent of the servitude. It is quite apparent that the nature of defendant's enjoyment in this case was the right of conducting water in an open ditch over and across plaintiffs' land; that right was acquired by actually conducting the water in an open ditch over plaintiffs' land, and the servitude resting upon their realty is exactly of the same character, and no more or less burdensome than though plaintiffs had expressly granted to defendant the right to conduct water in an open ditch across their land. In Ware v. Walker, 70 Cal. 595, 12 Pac. Rep. 475, the court said: "The plaintiff, by the construction of his ditch and the appropriation and user of the water of the stream, acquired, as against the defendant, * * * as complete and perfect a right to maintain his ditch and have the water flow to, in, and through the same as though such right or easement had vested in him by grant."

The only question remaining is whether defendant's easement to conduct water in an open ditch over plaintiffs' land is substantially altered by placing a covered pipe-line in the ground in lieu thereof. Will the terms of a grant for an open ditch of water be satisfied by laying an under-ground pipe-line? We are clearly satisfied to the contrary, and that such a course, if continued, would result in an extinction of the easement, and the creation of a servitude upon plaintiffs' land different in kind from the one previously existing there. In Heath v. Bucknall L. R. 8 Eq. 5, the rule was declared, quoting from Curriers' Co. v. Corbett, 2 Drew. & S. 355: "Where a house having ancient lights is burned or pulled down and rebuilt, and the question arises whether the character of ancient lights which belonged to the windows of the old house attaches to those of the new house, it appears to me that the principle to be applied to the solution of the question is this: To inquire whether the new windows would impose on the servient tenement either an additional servitude to that to which it was subjected when the old house existed, or a different servitude from that which previously existed. * * * To deprive them of that character the change must be material, either in the nature or in the quantity of the servitude imposed." We believe the threatened alteration by defendants in the mode of using the easement is of such a substantial character as to be without the terms of its implied grant, and therefore tends to the creation of a new and different servitude. Let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

(3 Cal. Unrep. 433)

MCCROSKEY v. LADD *et al.* (No. 13,297.)[1]

(*Supreme Court of California.* Dec. 1, 1891.)

DEED BY CORPORATION—VALIDITY—MARKETABLE TITLE—RIGHTS OF VENDEE.

1. A vendor agreed to convey a good and sufficient title or refund any payments made. Defendants refused to accept the deed offered. It appeared that one of the deeds relied on by the vendor in the chain of title was executed by the president and secretary of an incorporated association under their private seals, and recited that they were authorized at an annual meeting of the association to make deeds. *Held* that, since both the recital in the deed from the association and the absence of a corporate seal failed to show any authority from the board of directors to convey, plaintiff did not offer a good paper title, within the meaning of the contract.

2. A purchaser is not bound to accept a title resting on the statute of limitations, or take the risk of determining from facts which he might learn *dehors* the record whether or not the statute of limitations can be successfully pleaded against an adverse claim.

3. Defendants are not called upon to specifically point out defects in a title where the contract does not require it, and especially where the flaw is in a deed from a dissolved corporation.

4. The flaw in the deed from the corporation relates directly to the authority of the officers to act, and is not a defect which can be cured by Civil Code Cal. § 1207, which provides that any instrument affecting real property, recorded prior to January 30, 1873, shall be deemed to impart "notice of its contents to subsequent purchasers and incumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or in the absence of any such certificate."

5. A vendor may be able through litigation to establish a perfect title, and yet be unable to enforce a contract for the sale of his land.

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[1] Rehearing granted.

Department 1. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge. Affirmed.

Action on a promissory note by one McCroskey against one Ladd and another. Judgment for defendants. Plaintiff appeals.

John L. Hudner and *M. T. Dooling*, for appellant. *N. C. Briggs*, for respondents.

PATERSON, J. On August 25, 1887, the plaintiff agreed in writing to sell and convey certain lots to the defendants on the following terms: "$650 at this date, and the balance ($5,850) within sixty days from this date. And said McCroskey, upon receiving said payments, agrees to make a deed of said property to said persons, and convey title to said premises to them; and, if said persons fail to make said payments as herein named, they shall forfeit all right to said property, and all right to all payments made herein. If said title is not sufficient and good, then said moneys shall be refunded." Thereupon the defendants executed and delivered to the plaintiff a promissory note for $650. Although not required to do so by the terms of the contract, the plaintiff furnished to the defendants an abstract of his title, which the latter submitted to their attorney, who, after examination, reported that it did not show title in the plaintiff. Defendants notified plaintiff of the fact, whereupon the latter furnished another abstract, which was submitted by consent to another attorney, agreed upon by the parties, for his opinion, but the plaintiff did not agree to be bound thereby. After examining the abstract, said attorney, Archer, gave an opinion in writing that the title was not good. This opinion was handed to the plaintiff, but it did not point out, nor did the defendants ever state to the plaintiff, wherein the title was defective. The second abstract referred to was furnished after the expiration of the 60 days named in the contract. Soon after the opinion of Archer was given to the plaintiff, the defendants demanded of the latter the possession of the note referred to. After said demand plaintiff tendered to McClay, one of the defendants herein, a deed of grant, bargain, and sale, in the usual form, describing the property, and demanded payment of the sum of $6,500. The demand was refused, whereupon this action was commenced to recover the amount named in the note.

One of the deeds in the chain of title upon which the plaintiff relies was a deed from the San Justo Homestead Association, a corporation created under the laws of this state, to one Sowle. This deed was executed by the president and secretary of said association, and attested by their individual seals. No corporate seal was attached thereto. The deed recites that to facilitate the sale of certain lots "said association did, at their annual meeting held at Gilroy, California, on the 20th day of January, 1869, pass the following, to-wit: 'Resolved, that the president and secretary of the San Justo Homestead Association, at the time of any sale of said lots, be, and are hereby, authorized and empowered in the name and on behalf of said association to make, execute, and acknowledge a good and sufficient deed of conveyance of grant, bargain, and sale to the purchaser or purchasers of any lots sold, on receipt of the purchase price thereof.'" It is not essential to the validity of a deed executed by a corporation that it should contain a recital of the authority under which it is made, unless such recital is made necessary by statute. 1 Devl. Deeds, § 343. But, where such authority is recited, it will be deemed to be the only authority upon which the officers executing the deed acted. The corporate seal is *prima facie* evidence that the officers executing the deed had been authorized by the board of directors to act. "It is settled law in this state that a corporation can only act, can only speak, through the medium prescribed by law, and that is its board of trustees." In re La Solidarite Mut. Ben. Ass'n, 68 Cal. 394, 9 Pac Rep. 453. The recital in the deed to Sowle indicates that the authorization of the president and secretary came from the stockholders at an annual meeting of the association. At least it does not show that the authority came from the board of directors, and the absence of the corporate seal indicates that the board never acted upon the matter. The authority of the officers to execute the deed must affirmatively appear. Kahn v. Supervisors, 79 Cal. 399, 21 Pac. Rep. 849; Koehler v. Iron Co., 2 Black, 715. In cases of this kind, a title, to be good, must be one which is "free from litigation, palpable defects, and grave doubts; should consist of both legal and equitable titles; and should be fairly deducible of record." Turner v. McDonald, 76 Cal. 180, 18 Pac. Rep. 262. The question as to whether or not the vendor has acquired a perfect title by adverse possession is not to be considered. The purchaser is entitled to a good paper title, sufficient in law, "and was not bound to accept title resting upon the statute of limitations, or take the risk of determining from facts which he might learn *dehors* the record whether or not the statute of limitations could be successfully pleaded against the adverse claim." Benson v. Shotwell, 87 Cal. 56, 25 Pac. Rep. 249

It is claimed by appellant that the respondents were estopped from claiming any advantage by reason of these defects, because they were not pointed out at the time the objection was made to the title; that, if they had been, the defects might have been cured. The contract does not fix any time or place any duty upon the respondents with regard to an examination into the title or notice to the appellant of any defects which might be discovered therein. The respondents were entitled to rely on the record as they found it. Assuming, however, that it was the duty of the respondents under this contract to point out any imperfections in the title discovered by them, the record shows that the plaintiff was not injured by their failure to give him notice of the defect referred to. The only object in requiring such notice in any case is to give the vendor an opportunity to correct the defect. The court found that the San Justo Homestead Association was dissolved by a decree of the county court in 1877. It would have been impossible, therefore, for the plaintiff to have removed the imperfection in his title before the time named for the completion of the purchase. Conceding, furthermore, that the only question is whether the plaintiff's title was in fact good, and that the authority of the officers of the corporation to execute the deed might have been shown by the minutes of the board of directors, it is sufficient to say that no such showing was made. Proof of the absence of the corporate seal cast upon the plaintiff the burden of showing that the president and secretary were authorized by the board of directors to execute and deliver the deed. Koehler v. Iron Co., supra.

It is claimed by appellant that the irregularity in the execution and acknowledgment of the deed was cured by the provisions of section 1207 of the Civil Code. That section provides that any instrument affecting real property, recorded in the office of the county recorder prior to January 30, 1873, shall be deemed to impart "notice of its contents to subsequent purchasers and incumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or in the absence of any such certificate." But the imperfection we have been considering is not a mere defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, but is one which relates directly to the authority of the officers to act.

At the conclusion of their brief, counsel for appellant state that respondents' objections "go to the very foundation of appellant's title," and, if approved by the judgment of this court, will obscure the title to property valued at millions of dollars in and about the town of Hollister. The fear thus expressed, however, is groundless. A vendor may be able through litigation to establish a perfect title, and yet be unable to enforce a contract for the sale of his land. We do not determine in this action whether plaintiff's title is or is not good in fact. The stipulation in the contract that, "if said title is not sufficient and good, then said money paid shall be refunded," must be held to mean that, if there should appear to be such uncertainty about the title arising from the record as to affect its marketable value, the plaintiff would return the money or note which he had received from the defendant. The title must be free from "litigation, palpable defects, and grave doubts." If it is not, "a court of equity will not compel its acceptance, and cast upon him the risk of litigation, and the embarrassment of a questionable title." Townshend v. Goodfellow, 40 Minn. 319, 41 N. W. Rep. 1056. Judgment affirmed.

I concur: Garoutte, J.

Harrison, J. I concur in the judgment. The plaintiff had the right to bring an action for the specific performance of the contract of sale against the other parties thereto, and in order to maintain such action it would have been necessary for him to show that he had tendered to the defendants a deed of conveyance of the lands described in said contract, and that such conveyance was sufficient to vest in them the title thereto. Instead of commencing such an action, he has brought the present one against two of the parties to that contract for a portion of the purchase price of the land, without having tendered to either of them any conveyance. At the time this action was commenced the plaintiff had the right to recover the whole of the purchase price of the land if he had the right to recover any of it, but he could maintain such an action only after a tender of a conveyance. He could not, however, sever his contract, and recover from two of the purchasers a portion of that purchase price, without thereby waiving his right to the remainder, or without giving to them any consideration therefor. He was not entitled to retain the land and at the same time recover its value from the defendants.

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92 Cal. 150

Malone v. Beardsley *et al.* (No. 13,793.)

(*Supreme Court of California.* Dec. 1, 1891.)

Appeal—Objections not Raised Below.

An error in granting a nonsuit is an error in law, and will not be reviewed on appeal unless excepted to.

Commissioners' decision. Department 2. Appeal from superior court, Del Norte county; James E. Murphey, Judge. Affirmed.

Action by John Malone against W. H. Beardsley and others. Plaintiff was nonsuited and appeals.

Lucas & Miller, for appellant. *L. F. Cooper* and *L. F. Cobwin*, for respondents.

Belcher, C. This is an appeal from a judgment of nonsuit, and the case is brought here on a bill of exceptions. It appears that the case was tried by the court, without a jury, and, when the plaintiff rested, the defendants moved for a nonsuit, and the court granted the motion on the ground that there was "a failure of proof to warrant a judgment of this court in favor of plaintiff." The appellant contends that, under the evidence introduced by him, he was entitled to a judgment against the respondents, and that the court therefore erred in granting their motion. The respondents object that the points made for a reversal of the judgment cannot be considered, for the reason that no exception was taken to the ruling of the court. This objection seems to be well taken. The law must now be regarded as settled in this state that an error in granting a nonsuit is an error in law, and must be excepted to, or it will not be reviewed on appeal, and that it can not be reviewed on the ground that the evidence is insufficient to sustain the decision. Schroeder v. Schmidt, 74 Cal. 460, 16 Pac. Rep. 243; Flashner v. Waldron, 86 Cal. 211, 24 Pac. Rep. 1063; Warner v. Darrow, (Cal.) 27 Pac. Rep. 737. Here the record does not show that any exception was taken to the order of the court granting the nonsuit, and, in the absence of such showing, it must be presumed that no exception was taken. It follows that the judgment should be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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92 Cal. 143

KRUMDICK v. WHITE. (No. 13,522.)

(*Supreme Court of California.* Dec. 1, 1891.)

TERMINATION OF AGENCY—DEATH OF PRINCIPAL.

A contract of agency, merely authorizing the agent to carry on the principal's business while the latter is disabled, vests in the agent no interest in the subject-matter of the agency, and the agency is terminated by the death of the principal, under Civil Code, § 2356.

Commissioners' decision. Department 1. Appeal from superior court, Lake county; R. J. HUDSON, Judge. Reversed.

Action by Jennette Krumdick against Daniel W. White to recover personal property. Judgment for defendant. Plaintiff appeals.

Yell & Seawell and *Bond & Fishback*, for appellant. *R. W. Crump*, for respondent.

FOOTE, C. This action of claim and delivery, for certain personal property, was brought by the plaintiff as executrix of the last will and testament of her deceased husband, William Krumdick, against the defendant, White, who had purchased the property from one J. F. Edmunds, after Krumdick's death, of which White had notice. Edmunds claimed the same by virtue of a written instrument made by Krumdick in his life-time, while he lay wounded and unable to transact business. The only claim under which Edmunds could have any right to sell the property and transfer the title thereto to White, must be based upon the terms of the written instrument which Krumdick made to Edmunds. If at Krumdick's death the powers of agency given to Edmunds ceased under that instrument, then he could not sell the property, and under the testator's will the executrix would have the right to the possession thereof. The instrument was one which constituted Edmunds the agent of Krumdick, while disabled, to carry on his business as a hauler of freights, and to do all acts in that behalf which Krumdick could. But it did not vest any interest in Edmunds in the subject-matter of the agency confided and intrusted to him, and at Krumdick's death the power of Edmunds to sell ceased as to White, who had notice of Krumdick's death before the former purchased the property. Section 2356, Civil Code.[1] It is plain, therefore, that the jury found contrary to the evidence, under the sixth instruction granted by the court for the plaintiff. In this view of the matter, it becomes unnecessary to discuss any other point made, and we advise that the judgment and order be reversed.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

(92 Cal. 144)

RICE v. COOK *et al.* (No. 13,544.)

(*Supreme Court of California.* Dec. 1, 1891.)

INJUNCTION BOND—BREACH—DAMAGES.

1. In an action on a bond, executed under Code Civil Proc. § 529, on granting an injunction, to the effect that the plaintiff will pay to the party enjoined such damages as he may sustain by reason of an injunction if the court finally decide that plaintiff was not entitled thereto, it appeared that in an action by C., defendant herein, a farmer was restrained from plowing and seeding his land from January 27th until December 27th following, when the injunction was dissolved by a final judgment for plaintiff. *Held*, that by such adjudication the condition of the bond was broken, and plaintiff's action thereon accrued at once.

2. Though title to a portion of the land was decreed in C., the condition of the bond was broken, since, if the injunction was wrongfully issued as to any part of plaintiff's land, and was dissolved to that extent, he would be entitled to such damages as he sustained by reason thereof.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge. Affirmed.

Action on a bond by D. M. Rice against John Cook et al. for damage sustained by reason of the wrongful issuance of an injunction. Plaintiff had judgment, and defendants appeal.

Parker & Sargent, for appellants. *Geil & Morehouse*, for respondent.

FITZGERALD, C. This is an action upon an undertaking for injunction to recover damages alleged to have been sustained by reason of the wrongful issuance thereof. It is substantially alleged that on the 27th day of January, 1887, plaintiff was lawfully possessed of the tract of land described in the complaint, and that, while so possessed, he was engaged in plowing and preparing it for seeding; that on said date the defendant Cook commenced an action against the plaintiff herein in the superior court of Monterey county, in which he procured an injunction to be issued and served on plaintiff, enjoining him from plowing or seeding said land, or using the same for any purpose whatever, or from using the grasses then growing or standing thereon; that, upon the issuing of the injunction, the defendants Hughes and Iverson, as sureties, executed their undertaking to plaintiff to pay to him such damages, not exceeding the sum of $1,000, as he might sustain by reason of the injunction if the superior court of Monterey county should finally decide that the plaintiff (Cook) was not entitled thereto; that the condition of the undertaking was broken by the dissolution of the injunction, to the damage of plaintiff in the sum of $800. The answer specifically denies each and every allegation of the complaint. The case was tried by the court, a trial by jury having been expressly waived, and judgment rendered in favor of plaintiff in the sum of $272.50, from which judgment, and the order denying defendants' motion for a new trial, this appeal is taken.

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[1] Section 2356 provides that, unless the power of the agent is coupled with an interest in the subject of the agency, it is terminated by the death of the principal.

It is claimed by appellants that the condition of the injunction bond was not broken by the judgment dissolving the injunction, for the reason that Cook recovered judgment for a part of the land sued for in the action in which the injunction was issued, from which it necessarily follows that the injunction was not wrongfully issued, and that, therefore, the plaintiff is not entitled to recover damages on the injunction bond. Section 529, Code Civil Proc., provides that "on granting an injunction the court or judge must require * * * a written undertaking on the part of plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of an injunction if the court finally decide that the plaintiff was not entitled thereto." The undertaking herein, the condition of which is in pursuance of the provisions of the foregoing section of the statute, was broken by the total dissolution of the injunction by a final judgment rendered by the superior court of Monterey county on the 27th day of December, 1887. This was, in effect, an adjudication that the plaintiff in that action was not entitled to the injunction, and that thereupon a right of action upon the injunction bond herein at once accrued in favor of plaintiff, and he was entitled to recover such damages, not exceeding the sum of $1,000, as he may have sustained by reason of the injunction. In Fowler v. Frisbie, 37 Cal. 34, which was an action on an injunction bond, it was said: "It does not appear on what ground the injunction was dissolved, and the defendants insist that this order does not establish the fact that the district court finally decided that the plaintiff in that action was not entitled to the injunction when it issued, and consequently that the plaintiffs have failed to show a breach of the undertaking. But, as we construe the order, it is, *prima facie* at least, an adjudication that there was no foundation for the injunction, and that it ought not to have issued." The contention that the condition of the injunction bond was not broken because the plaintiff in that action recovered judgment for a part of the property sought to be recovered therein, is untenable, for the reason that, if the injunction was wrongfully issued as to any part of plaintiff's demand, and it is partially dissolved to that extent, he will be entitled to such damages, within the limit of the penalty of the bond, as he may have sustained by reason of the issuing of the injunction. High, Inj. (3d Ed.) § 1040; White v. Clay's Ex'rs, 7 Leigh, 68.

With reference to the rulings of the court occurring at the trial, and which are claimed to be erroneous, it is sufficient to say that they are either harmless or untenable, for the reason that it is evident, from the averments in the complaint and the theory upon which the case was tried, together with the well-settled rule of damages in such cases, that the words, "use and occupation," as employed by the court in its fifth finding, were not intended to limit the rule of damages to the rental value of the property. The condition of the undertaking which was broken by the judgment dissolving the injunction, and upon which plaintiff's right of action accrued, expressly provides for the payment of such damages as may be sustained by reason of the injunction, if it shall be decided that the plaintiff was not entitled thereto. Note 2, p. 488, Sedg. Dam. (5th Ed.) which is well sustained by authority, reads as follows: "In suits on statutory undertakings and bonds given to secure a defendant against damages and costs resulting from * * * an injunction * * * wrongfully issued, * * * the measure of damages is substantially indicated by the terms of the instrument as authorized by the statute, and is the actual expense and loss occasioned by the writ, * * * excluding remote damages." It appears from the findings, and there is evidence to support them, that defendant was at the time of the issuance and service of the injunction lawfully in the possession, and entitled to the possession, of the 160 acres of land in controversy, saving and excepting therefrom 10 acres; that he was deprived of the use and occupation thereof by reason of the injunction from the 27th day of January, 1887, to the 27th day of December, 1887, and that at the time he was enjoined he was engaged in farming said lands; that the condition of the undertaking was broken by the dissolution of the injunction; and that the plaintiff was damaged and injured in the sum of $272.50, solely by reason of the issuance of the injunction. Mr. High, in the third edition of his work on Injunctions, (§ 1673,) lays down the following, which we regard as the correct rule of damages in cases of this character: "In determining the amount of damages to be allowed upon the dissolution of an injunction restraining one from exercising acts of ownership over his real property, the courts are not governed by arbitrary rules, but proceed upon equitable principles; the defendant being entitled to such damages as are the necessary and proximate result of such deprivation. And the loss of timber, wood, and sand, which have been taken away from the premises pending the injunction, and while the owner was deprived of the right to protect his land from invasion, may be included in the assessment of damages. So the loss of the use and rental of the premises during the time the defendant was enjoined is a proper element of damages to be recovered in an action upon the bond. So, too, damages for the crops which the defendant was prevented by the injunction from harvesting may properly be allowed, as well as waste committed upon the premises while defendants were deprived of their possession by the injunction. And in such cases the rule of damages is not limited to what the land was worth to plaintiff in the injunction suit, but the damages actually sustained by defendants by being kept out of possession will be allowed; and evidence showing that defendants lost their crops for the entire season by reason of being deprived of the land is admissible." In Edwards v. Edwards, 31 Ill. 474, it was held that, "where an injunction restraining a party from taking possession of a farm was issued in the spring and dissolved in September following, the court in the action on the injunction bond held that the measure of the plaintiff's damages was not merely the value of the use of the land during the continuance of the injunction, but the whole damage occasioned by his being kept out of the possession, including the consequent loss of crop." To the same effect is Richardson v. Allen, 74 Ga. 719. Applying the rule furnished by these authorities to the case before us, our conclusion is that the plaintiff herein is entitled to damages for all loss and injury naturally and fairly traceable to the wrongful issuance of the injunction. We therefore recommend that the judgment and order be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

92 Cal. 155

BARNHART v. FULKERTH *et al.* (No. 14,603.)

(*Supreme Court of California.* Dec. 2, 1891.)

DISMISSAL OF APPEAL.

Where the proceedings on appeal are regular, the appeal will not be dismissed because the court below had no jurisdiction of the proceedings for a new trial. Watson v. Sutro, 24 Pac. Rep. 172, and 25 Pac. Rep. 64, 86 Cal. 500, followed.

In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge. Motion to dismiss appeal denied.

P. J. Hazen, for appellant. *Wm. E. Turner* (*Chas. J. Heggerty*, of counsel,) for respondents.

PATERSON, J. Respondents have moved to dismiss the appeal herein on the following grounds: (1) The notice of motion for a new trial was not served or filed within the time allowed by law; (2) said notice was not signed by the attorneys of record; (3) the statement was not served or filed within the time allowed by law.

There is an apparent conflict of authority upon the subject, but we think the better rule is stated in Watson v. Sutro, 86 Cal. 500, 24 Pac. Rep. 172, and 25 Pac. Rep. 64, where it is held that, if the proceedings on appeal are regular, the appeal should not be dismissed upon grounds showing that the court below had no jurisdiction of the proceedings for a new trial; that such matters are proper for consideration on the hearing of the appeal. See, also, Smith v. Westerfield, 88 Cal. 374, 26 Pac. Rep. 206. The motion to dismiss the appeal is denied.

We concur: SHARPSTEIN, J.; HARRISON, J.; MCFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.

In re VAUGHN'S ESTATE. (No. 14,451.)

(*Supreme Court of California.* Dec. 8, 1891.)

DISTRIBUTION OF ESTATES.

All the heirs of an estate except W. conveyed to the latter all their interest in certain property. By W. it was conveyed to B., who petitioned for distribution to her. Notice was served on all parties interested, and the fact of B.'s ownership was before the court. No opposition was made to such petition. *Held*, that the prayer of B.'s petition should have been granted. Chever v. Ching Hong Poy, 22 Pac. Rep. 1081, 82 Cal. 68, distinguished.

Department 2. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge. Reversed.

Petition of Martha A. Bradford for distribution to her as purchaser of certain property of the estate of Thomas H. Vaughn, deceased. From an order denying the petition, petitioner appeals.

Emmett Seavell, for appellant. *James W. Oakes*, for respondent.

MCFARLAND, J. Appeal by Martha A. Bradford from a decree of final distribution. Before the petition for distribution was filed, all the heirs, except William J. Vaughn, had conveyed to the latter all their interests in certain real property here involved; the said William J. Vaughn had conveyed the whole of said property to D. W. Bradford; and the latter had conveyed the same to the appellant, Martha A. Bradford. The prayer of the petition was that the said property be distributed to said Martha A.; notice was given to all parties interested and duly served; all the facts as to her ownership appeared; and "no one appeared or made any opposition upon the hearing of the said petition for distribution, or opposed the granting of the prayer thereof." The court, however, refused to distribute said property to appellant, but distributed it to the legal heirs of the deceased. We are informed by the brief of counsel that the refusal of the court to distribute the property according to the prayer of the petition and the consent of all parties interested was based upon the decision of the court in Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. Rep. 1081. But certainly there was in that case no such question as the one involved in the case at bar. In the Chever Case the appellant, William J. Chever, had, pending the administration of the estate of his deceased father, conveyed to his mother all his interest in the real property of said estate. Upon final distribution, the claim of the mother, as grantee of William J., for some reason was not set up and was not before the court; and the court very properly, upon the facts before it, distributed the interest in question to the heir William J., who was still apparently the owner of it. He afterwards claimed that the decree of distribution conclusively estopped the mother from setting up title under the prior conveyance; but this court held that such was not the law, and that was the only point decided in the case. In stating the question we used this language: "Upon this state of facts the contention of appellant is that, notwithstanding his said deed to his mother of May 10, 1860, by which he conveyed to her all his right and title to the property, the subsequent decree of distribution entirely destroyed the effect of that deed, and conclusively established the title in appellant as of the date of the decree. The contention of respondent is that the title vested in appellant on the death of his father, by operation of law, and passed by the deed to his mother. And we think that the view of the question taken by respondent, and adopted by the court below, is the correct one." If, in the opinion rendered in that case, there was some unnecessary language used, there was none, at least, that should have created any confusion in the case at bar; for if there was an uncalled for query as to the power of the probate court, on distribution, to determine "a contested issue between an heir and alleged grantee, when the former denied the right of the latter," it was expressly said that section 1678 applied to "admitted claims." Moreover, in that case the grantee was not before the court, and he said that "it is clear that, on rendering ordinary decrees of distribution, probate courts deal only with issues and parties legitimately before them." The decree appealed from is reversed, and the court below is directed to render a decree distributing the land described in the petition for distribution to the appellant, Martha A. Bradford.

We concur: De Haven, J.; Sharpstein, J.

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92 Cal. 176

CRANE v. McCORMICK *et al.* (No. 14,059.)

(*Supreme Court of California.* Dec. 3, 1891.)

Action on Contract — Mistake — Real-Estate Agent—Commission—Evidence.

1. Where defendants in an action on a contract allege that they entered into the contract under a mistake, and there is no evidence that plaintiff knew that defendants had made such mistake, there is no such mutual mistake as to defeat a recovery under the contract.

2. Where defendants authorized plaintiff to sell certain real estate for them at any time within a year, and agreed for a valuable consideration to pay a commission if the sale should be effected in any way during that time, and the land was sold by defendants within the year, plaintiff, to recover the commission, need not show that he had produced or could produce a purchaser.

3. In such case, testimony as to conversations between defendants as to their intentions in regard to erasing that part of the contract referring to commissions being paid if the land was sold in any way, is incompetent as hearsay, it not being shown that plaintiff was present at the time of the conversations.

In bank. Appeal from superior court, Stanislaus county; William O. Minor, Judge. Reversed.

Action by one Crane against McCormick and Kemp to recover commission on the sale of land. Judgment for defendants. Plaintiff appeals.

Stonesifer & Minor and *Richard Boyne*, for appellant. *Hatton & Fulkerth* and *W. E. Turner*, for respondents.

Paterson, J. On September 30, 1866, the defendants authorized De Jarnatt & Crane to sell certain real estate at any time within a year, and agreed to pay them 5 per cent. on $35,000, the limited price, and one-half of any excess of that amount which might be realized from the sale. The written authorization contained the following provision: "And in consideration of your expenses and efforts in attracting settlers to the county it is agreed that, in event of the withdrawal of said property from sale, or in event of sale through any means during the continuance of this power, (one year,) the same commission will thus be paid as though sale had been made by you." On September 2, 1887, the defendants, without any notice to their agents, sold and conveyed the land to R. F. Osborne and Isaac Upham, it is alleged, for the sum of $40,000. Defendants refused to pay De Jarnatt & Crane anything on account of commissions, and the latter assigned their claim to plaintiff, who, as their assignee, demanded judgment for the sum of $4,250. These are the only material facts stated in the complaint, which covers 25 printed pages of the transcript. It is not alleged, except inferentially, that De Jarnatt & Crane ever incurred any expenses, or made any efforts to sell the land or attract settlers to the county; but there was no demurrer to the complaint, and the defendants cured the defect and perfected the issue by an affirmative allegation that De Jarnatt & Crane, to induce the defendants to enter into the contract, promised to publish and distribute a pamphlet advertising the land, but that no such pamphlet was ever published; nor was any effort ever made to advertise or sell the land. The answer covers 72 pages of the transcript, and is a hotchpot of denials, allegations of affirmative matter, probative facts, and superfluous circumstances. From this mass of redundant matters and tiresome reiteration, jumbled together in utter disregard of the provisions of sections 437 and 441 of the Code of Civil Procedure, we have been able to extract sufficient to show that the defendants rely upon the following defenses: That the provision of the contract above quoted was left therein by mutual mistake of the parties, and defendants always supposed until the commencement of this action that it had been eliminated from the printed form before execution; that it was understood and agreed no commissions should be paid unless the sale was effected by or through the agents; that said agents never procured a purchaser, and never did anything to advertise the land or attract settlers to the county, although they induced defendants to enter into the contract by representations that they would do so; that defendants did not sell the ground for cash, but exchanged the same for other lands in part payment and the balance in cash, and that the value of the entire consideration received did not exceed $30,000; that there was no consideration for the execution of the agreement, and, if there was, the same has failed; that plaintiff is not the real party in interest, no assignment having been made to him by De Jarnatt & Crane. There is a demurrer to the answer, covering 16 pages of the record; and a motion to strike out portions of the answer, covering 32 pages. Both were overruled. The jury found that the power of sale was signed by defendants under a mistake, and that De Jarnatt & Crane knew or suspected that it was signed under such mistake. What the mistake was is not found, but there was a general verdict for the defendants.

Under the pleadings, the court should have disposed first of the issue as to whether the clause of the contract quoted was left therein by mutual mistake. If that matter had been determined in favor of the defendants on sufficient evidence, there would have been no necessity for a jury, or for any further inquiry, because plaintiff nowhere claims that the agents found or could have found a purchaser. Plaintiff's right of action is based solely upon the provision of the contract that, if the defendants withdrew the property from sale, or effected a sale in any manner during the year, the same commissions would be paid as if the sale had been made by De Jarnatt & Crane. There is no evidence in the record to support a finding that the provision referred to was left in the contract by mutual mistake. De Jarnatt testified that the first intimation they ever had that any mistake had been made was when the answer was filed in this action. All the evidence shows that such was the fact. It is argued by counsel that because it is shown that McCormick struck out of the power of sale for his individual land a clause precisely like the one quoted above, it clearly appears that he would have modified the contract under consideration in the same way if he had not forgotten to do so. No such deduction can fairly be drawn; on the contrary, it would seem to be a natural conclusion that he intended to leave the clause in the contract which he had stricken from his own. But, however this may be, there is no evidence that De Jarnatt or Crane ever knew, or had reason to know, that defendants had made such a mistake; and, unless they did, it cannot be said that there was a mutual mistake entitling defendants to a reformation of the contract, or sufficient to defeat a recovery in this action. There was no relation of trust or confidence, and the means of knowledge as to the terms and conditions of the contract were equally open to all parties. The mere intent of the defendants, not communicated to De Jarnatt & Crane, cannot control the plain provision of the contract. Hawkins v. Hawkins, 50 Cal. 558; Stewart v. Whitlock, 58 Cal. 2; Association v. Esche, 75 Cal. 517, 17 Pac. Rep. 675.

There is no merit in the contention of respondents that De Jarnatt & Crane cannot recover on the contract without showing that they had produced, or could have produced, a purchaser within the time fixed in the contract, and the cases cited are not in point. Defendants agreed for a valuable consideration to pay the commissions if a sale should be effected in any way during the year. Their agents, acting upon the agreement, at their own expense caused a large number of pamphlets and circulars to be printed and sent to various parts of the world, advertising and offering for sale certain tracts of land, including the land described in the contract. A real-estate agent's right of recovery depends entirely upon his contract with the owner of the land. In this case the sale or exchange of the land by defendants themselves put it beyond the power of De Jarnatt & Crane to thereafter make a sale; and, according to the express terms of the contract, this entitled them, upon proof of performance on their part, to the same commissions they would have earned if they had sold the land for the amount realized by the owners. Civil Code, § 1512; Wolf v. Marsh, 54 Cal. 232; Gilbert v. Sleeper, 71 Cal. 293, 12 Pac. Rep. 172; 26 Amer. Law Reg. (N. S.) 554-567.

It is not necessary to review all of the alleged errors. What we have said will be sufficient to guide the court on another trial. It is sufficient to say that a party's undisclosed intentions are unavailing as against his acts and declarations. The testimony as to conversations between respondents with respect to their intentions to erase the clause referred to from the contract was clearly incompetent and hearsay, neither De Jarnatt nor Crane being present at the time the conversation was held. Woods v. Whitney, 42 Cal. 362. It is not claimed by respondents in their brief that plaintiff is not the real party in interest. The judgment and order are reversed, and the cause is remanded for a new trial.

We concur: BEATTY, C. J.; DE HAVEN, J.; GAROUTTE, J.; HARRISON, J.; MCFARLAND, J.

92 Cal. 188

Ex parte CURTIS. (No. 20,898.)

(*Supreme Court of California.* Dec. 8, 1891.)

RIGHT TO BAIL—HABEAS CORPUS—NEW EVIDENCE.

1. Accused was held on a charge of murder, and the evidence on the preliminary examination showed that he was arrested by a regular police officer, and, while being conducted to the police station, he resisted the arrest, and in the struggle drew a pistol and shot the officer in the head, killing him instantly, and immediately attempted to escape. *Held*, that accused was not entitled to bail, under Pen. Code, § 1270, which provides: "A defendant charged with an offense punishable with death cannot be admitted to bail when the proof of his guilt is evident, or the presumption thereof great," etc.

2. Where the petitioner in *habeas corpus* for the purpose of giving bail seeks, in addition to the report of the evidence taken on the examination, to introduce witnesses under Pen. Code Cal. § 1484, the petition should be addressed to the superior court or judge of the proper county, and set out the discovery of such new evidence among the grounds for the petition.

Application on *habeas corpus* for bail of M. B. Curtis, *alias* Strelinger. Denied, and prisoner remanded.

Knight & Heggerty and *W. W. Foote*, for petitioner. *Wm. S. Barnes*, Dist. Atty., for respondent.

BEATTY, C. J. On the 12th day of October, 1891, the petitioner was by the police court of the city and county of San Francisco held to answer without bail upon a charge of murder, alleged to have been committed in said city and county, on the 11th day of September, 1891. His petition for the writ of *habeas corpus* is based upon sections 1490, 1491, of the Penal Code, which provides that when a person is imprisoned or detained in custody on any criminal charge for want of bail, such person is entitled to a writ of *habeas corpus* for the purpose of giving bail, etc., and the sole question for decision is whether on the evidence relating to the offense charged the prisoner ought to be released on bail. A prisoner charged with any offense not punishable with death is entitled, before conviction, to be admitted to bail as a matter of right; but a defendant charged with an offense punishable with death cannot be admitted to bail when the proof of his guilt is evident, or the presumption thereof great. Pen. Code, §§ 1270, 1271; Const. art. 1, § 6. Murder of the first degree only is punishable with death, and the question therefore reduces itself to this: Is there, upon the evidence in the case, evident proof or a strong presumption that the petitioner is guilty of murder in the first degree? In determining this question it is necessary to ascertain the proper construction of the expressions, "proof is evident," "presumption is great." An examination of the decided cases discloses a wide variance of opinion upon this point, some courts and judges holding that the prisoner is entitled to bail unless the evidence against him is such as ought to satisfy a trial jury of his guilt beyond any reasonable doubt; others that bail should be denied when the evidence is sufficient to warrant a grand jury in bringing in an indictment, or, what practically amounts to the same thing, when the evidence is sufficient in law to sustain a capital conviction. Such is the rule that has been adopted in this court. In re Troia, 64 Cal. 152. In that case the evidence was extremely conflicting, and tended very strongly to discredit the only witness who claimed to have been present at the homicide. (The prisoner was, in fact, afterwards acquitted.) But this court, in denying the application for bail, said: "We cannot say, upon the evidence before us, that the superior court ought to set aside the verdict as not justified by the evidence, should the jury find the petitioner guilty of the higher degree of the crime charged. We ought not to anticipate the action of the jury by discharging the prisoner from actual custody, with or without bail, upon evidence which we are not prepared to say is so insufficient as that a verdict requiring a capital sentence, based upon it, should not be permitted to stand." I do not doubt the soundness of this rule, but, even if I did, it is, as a decision of the court, binding upon its individual members. I proceed, therefore, to inquire whether there is any substantial evidence in this case to sustain a verdict of murder in the first degree. And here a question of practice arises as to what evidence may be considered.

The petitioner asks that, in addition to the report of the evidence taken in the police court, he may be allowed to introduce the testimony of a number of witnesses not heretofore examined, by whom he proposes to impeach some of the witnesses for the people, and to prove facts otherwise tending to his exculpation. To this offer the people object, and I think the objection must be sutained. Section 1484 of the Penal Code, upon which the petitioner relies, is merely a legislative declaration of the rule commonly prevailing in the United States that the petitioner in *habeas corpus* may put in evidence to contradict the return, and may, of course, in a proper case examine witnesses. It does not at all help to a solution of the question as to what is proper evidence in a particular case. There are decisions, however, of some of the state and federal courts which do sustain the contention of this petitioner, but they are opposed by decisions of equal weight in other jurisdictions, and, on the whole, I think it safe to say that ordinarily, in such proceedings as this, only the depositions and other evidence returned by the committing magistrate should be considered. There may be cases in which new facts have been developed, or new evidence discovered, after the conclusion of the preliminary examination, in which it would be proper to hear additional testimony on the application for bail. But in such cases I think the petition should set out the discovery of such new facts of evidence among the grounds of the application, and that the application itself should be addressed to the superior court or judge of the proper county. The regular business of this court demands the entire time of all its members, and they cannot, in justice to its suitors, take upon themselves the hearing of oral examinations of witnesses in proceedings properly appertaining to the local courts.

Confining myself, then, to the report of the evidence taken in the police court, I find that the petitioner offered no testimony whatever, but submitted the case on the evidence adduced by the people, which I am convinced satisfactorily establishes these facts: A few minutes after 12 o'clock on the nights of September 10, 11, 1891, Alexander Grant, a regular police officer of San Francisco, on his proper beat, and wearing his star, but not his uniform, arrested the petitioner at some point on Sixth street, north of Folsom street. Why the arrest was made is left a mystery, the officer being dead, and the prisoner having thus far made no statement regarding it. From the point where the arrest was made, the officer conducted the petitioner along Sixth street to Folsom, down Folsom and across it to a point on its south side between Fourth and Fifth streets, near the southern police station. At this point a struggle ensued between the officer and the prisoner, in which the latter seems to have been resisting the efforts of the former to conduct him to the station. In the course of this struggle the prisoner drew a pistol, and shot the officer in the head, killing him instantly, and immediately attempted to escape by running away, but was pursued and captured by officers from the station, who were attracted to the scene by the noise of the pistol shots. Nothing whatever appears in the testimony tending to show justification or provocation for the killing, and the presumption is that it was malicious, and, therefore, murder. But is there anything upon which a jury would be justified in finding deliberation or premeditation, such as is necessary to constitute murder in the first degree? Upon this point all that it is necessary and all that it is proper for me to say is that, if a jury, upon the facts thus far disclosed, should find the existence of deliberate malice their verdict could not be set aside upon the ground that there was no evidence to support it. In re Troia, supra. The application for bail is denied, and prisoner remanded.

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92 Cal. 194

DORN v. BAKER *et al.* (No. 14,727.)

(*Supreme Court of California.* Dec. 8, 1891.)

DISMISSAL OF APPEAL.

Where a motion is made to dismiss an appeal, and subsequently another motion to dismiss the same appeal upon the same ground is denied, the original motion will be denied.

In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge. Denied.

Action by N. A. Dorn against J. C. Baker and others. Judgment for plaintiff. Defendants appeal. Motion to dismiss appeal.

Graves & Graves and *Venable & Goodchild*, for appellants. *F. A. Dorn*, for respondent.

PER CURIAM. Motion to dismiss appeal, upon the ground that the transcript was not filed in time. The motion was submitted October 23, 1891, upon the certificate of the clerk of the court below, and affidavits made by attorneys of the respective parties. Subsequently another motion was made to dismiss the same appeal upon the same ground. The last motion was orally argued before the court, and denied. This motion must therefore be denied, and it is so ordered.

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92 Cal. 202

KENEZLEBER v. WAHL. (No. 13,893.)

(*Supreme Court of California.* Dec. 9, 1891.)

NEW TRIAL—SURPRISE—PAYMENT OF NOTE—EVIDENCE.

In an action on a note, defendant set up a counter-claim for goods sold to plaintiff. On the trial defendant testified that he had paid the note in full by the sale to plaintiff of a saloon, together with wines, liquors, and cigars, and by money. On a motion by plaintiff for a new trial on the grounds of surprise and newly-discovered evidence, plaintiff alleged that defendant had employed him as manager of the saloon; that defendant's name was painted over the door as proprietor; that, a year after the alleged sale to plaintiff, defendant offered the saloon for sale, and that subsequently, when the saloon was closed, he stated to others, in the presence of plaintiff, and without denial, that the saloon and its contents were his; that defendant was the lessee of the building occupied, and paid the rent, and that licenses hung on the walls in defendant's name; that the first knowledge plaintiff had of defendant's claim was obtained from his testimony on the trial, and that plaintiff did not discover witnesses to the facts alleged until after the trial. *Held*, that a new trial was properly granted.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge. Affirmed.

Action by Gotlieb Kenezleber against Christ Wahl on a promissory note. Judgment for defendant. New trial granted. Defendant appeals from the order.

W. A. Gett and *C. Y. Brown*, for appellant. *G. W. Bowie*, for respondent.

FITZGERALD, C. This is an appeal by the defendant from an order granting plaintiff's motion for a new trial on the ground of newly-discovered evidence and of surprise at the trial. The action was brought by plaintiff on a promissory note executed to him by the defendant for $1,080. The answer contains a general denial of the allegations of the complaint, and sets up, by way of counter-claim, plaintiff's indebtedness to defendant in the sum of $1,557.88 "for goods, wares, and merchandise sold and delivered to the plaintiff, and for cash loaned, paid out, and advanced to plaintiff between the 19th day of May, 1886, and the 8th day of October, 1888, upon open, current, running, and mutual account by and between the parties hereto." The trial of the issues thus joined resulted in a verdict and judgment for the defendant, which the plaintiff moved to set aside and vacate, and to grant a new trial, on the following, among other, statutory grounds: "Accident and surprise which ordinary prudence could not have guarded against; newly-discovered evidence material for the plaintiff which he could not with reasonable diligence have discovered." The defendant, by way of defense, and in support of his counter-claim, gave evidence tending to show the payment in full of the note sued on by the sale to plaintiff of a saloon theretofore owned and conducted by defendant in the town of Galt, and by the further sale and delivery to him, at his instance and request, of wines, liquors, and cigars, and the advancement of money at different times extending over a period of more than 28 months; wherefore, and by reason of which, plaintiff became and is indebted to him in excess of the amount stated on the face of the note in the sum of $377. The newly-discovered evidence set forth in the moving affidavits, identified by the judge as having been used at the hearing of the motion, and not answered by counter-affidavits, is to the effect that, during the whole of the time the plaintiff resided in Galt, he was in the employ of the defendant as the manager of his saloon in that place; that over the door thereof was a sign with the name of the defendant painted thereon as proprietor, and that he was never at any time engaged in any kind of business in that place for himself; that about two months before the saloon was closed and the business discontinued, and something like twelve months subsequent to the alleged sale of the saloon to plaintiff, the defendant offered it for sale as his property; that when the place was closed he was in the possession of it, and at that time he stated to others, in the presence of the plaintiff, who did not dispute it, that the saloon, and the wines, liquors, cigars, and other property therein contained, belonged to him, all of which he, as the owner thereof, afterwards sold and disposed of to persons other than the plaintiff, or removed or caused to be removed from the premises; that during all of this time the defendant was the lessee in possession of the premises used as a saloon as aforesaid, and the rent therefor was paid by him, and the licenses which hung upon the wall were issued to him. Upon this showing in support of the motion, the court, on the grounds stated, ordered that the verdict and the judgment entered thereon be set aside and vacated, and a new trial granted, from which order this appeal is taken by the defendant.

It is insisted by appellant that if plaintiff had used due diligence he could not reasonably have been surprised by the testimony given by the defendant on the trial of the case; and, further, that the new trial was not granted on the ground of surprise. We cannot adopt the views of appellant in relation to this question, as it is evident from the language of the order that the ground of surprise was considered by the court in passing on the motion, and properly so, too, for the reasons given by the respondent that "the answer and so-called cross-complaint do not disclose the nature of defendant's case; that there is no intimation in either of them that he had sold or turned over to plaintiff the saloon at Galt, or that he had sold or furnished him any liquors, beer, and cigars on his account. Plaintiff therefore could not anticipate the character of the defense." The question of a new trial on the ground of surprise is largely one of discretion, and the judge who tried the case is generally in a much better position for the proper exercise of such discretion than an appellate court. It is further claimed by appellant that the alleged newly-discovered evidence was incompetent, impeaching, and cumulative, and that, if it had been heard at the trial, it would not have changed the result. It affirmatively appears that the evidence which is claimed to be newly discovered was perfectly competent, because by it plaintiff proposed to prove that the declarations and acts of the defendant were in direct conflict with the testimony given at the trial. It was therefore material to the issue, because it was original, and goes directly to the merits of the case, and was not offered merely for the purpose of impeachment. It would have been competent even if the defendant had not been a witness in his own behalf. Nor was it cumulative, for the reason that it is not "additional evidence of the same character to the same point." Section 1838, Code Civil Proc. Nor was there any evidence whatever given upon the trial of the case of the declarations and acts of the defendant, as set forth in the affidavits. It therefore follows that such evidence was entirely new, distinct, and material to the issue; and it is perfectly fair to presume that, if it had been produced before the jury at the trial of the case, the verdict would have been different. Stoakes v. Monroe, 36 Cal. 388. We would state in this connection that, where the question as to whether the evidence is cumulative is involved in doubt, it then becomes a matter of discretion, and, unless there has been a manifest abuse of it by the trial court, this court will not interfere.

It is lastly contended that the newly-discovered evidence which is claimed to be material for the plaintiff could have been, with the exercise of reasonable diligence, discovered, and produced at the trial. It appears that the case was tried at Martinez, in Contra Costa county, and that the individuals whose proposed testimony is contained in the affidavits resided at the time of the trial in Galt, Sacramento county, a distance of about 100 miles from Martinez; that the first knowledge that plaintiff had of defendant's case was obtained from the testimony of the defendant while he was testifying as a witness in his own behalf on the trial of the case; that he did not ask for a continuance, because at no time before or during the trial did he have any knowledge of any witnesses by whom he could establish the evidence set forth in the affidavits; and for the further reason that the facts disclosed thereby did not come to his knowledge until after the trial. It is therefore evident that the plaintiff possessed no means by which he could discover the evidence which is alleged to be newly discovered, and that he had no knowledge of the evidence or of the witnesses by whom it could be established until after the trial. As we are clearly of the opinion that the ends of justice will be best answered by a new trial, we recommend that the order appealed from be affirmed.

We concur: Vanclief, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the order appealed from is affirmed.

92 Cal. 199

Palmer & Rey v. Barclay *et al.* (No. 13,616.)

(*Supreme Court of California.* Dec. 9, 1891.)

Change of Venue — Affidavit — Amendment.

1. Code Civil Proc. § 396, provides that if a defendant wishes to remove an action to the county where he resides he must, "at the time he appears and answers or demurs," file an affidavit of merits, and a demand for such removal. Sections 4 and 473 provide that the court, in its discretion, may allow an amendment to any pleading or proceeding. *Held*, that where such affidavit was filed at the time of appearance and demurrer, but was insufficient, in that it alleged only that the facts constituting the "defense" had been stated to their attorney, the court properly allowed an amendment, and the filing of the amended affidavit related back to the time of filing the original.

2. Where defendants were both asking for the removal of the cause, it was immaterial that the amended affidavit was not made by the defendant who made the original.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge. Affirmed.

Action by Palmer & Rey, a corporation, against H. A. Barclay and others for damages caused by the negligence of defendants as attorneys. On a motion to change the place of trial, defendants' affidavit being insufficient, they were allowed to amend, and from the order allowing the amendment plaintiff appeals.

Gordon & Young, for appellant. *Houghton, Silent & Campbell*, for respondents.

Belcher, C. This action was commenced in the superior court of the city and county of San Francisco to recover damages alleged to have been sustained by plaintiff by reason of the negligence of defendants, as attorneys at law, while retained and employed by the plaintiff; and the appeal is from an order granting the motion of defendants to change the place of trial to the county of Los Angeles. On the 4th day of June, 1889, the defendants filed a general demurrer to the complaint, and a notice of motion to change the place of trial, with a demand in writing that the trial be had in the county of Los Angeles, upon the ground that all of the defendants then and at the time of the commencement of the action resided in that county. They also at the same time filed an affidavit, made by the defendant Barclay, in which it was stated "that he has fully and fairly stated all the facts in the above-entitled case constituting the defense of the defendant in the above-entitled action to Alex. Campbell, Esq., an attorney at law duly admitted to practice in the supreme court of the state of California, and one of the attorneys for defendants in this action, and is by his said attorney advised that he and his co-defendants have a full and complete defense to said action upon the merits." The motion came on regularly to be heard on the 23d day of August, 1889, and thereupon counsel for plaintiff asked the court to deny the motion upon the ground that no sufficient affidavit of merits had been filed. This the court refused to do, "but granted leave to the said defendants to amend their affidavits of merits, and to file upon said motion to change the place of trial an amended affidavit of merits." A new affidavit was then filed and the motion granted.

In cases like this the Code provides that the action must be tried in the county in which the defendants, or some of them, reside at the time of its commencement. Section 395, Code Civil Proc. But it also provides that "if the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands in writing that the trial be had in the proper county." Section 396, Code Civil Proc. The appellant contends that the court erred in granting the motion, for the reason that the first affidavit was insufficient, and the second could not be considered, because, as said in Nicholl v. Nicholl, 66 Cal. 37, 4 Pac. Rep. 882, "to be of any avail, such affidavit and demand must be filed when the defendant appears and answers or demurs." The affidavit filed June 4th was to the effect only that the affiant had fully and fairly stated to the attorney all the facts constituting the defense of the defendants, etc. This was clearly insufficient, as was held in Nickerson v. Raisin Co., 61 Cal. 268, and in People v. Larue, 66 Cal. 235, 5 Pac. Rep. 157.

The only question, then, is, had the court a right to consider and act upon the so-called "amended affidavit?" The Code provides that the court may, in its discretion, and upon such terms as may be just, allow an amendment to any pleading or proceeding, (section 473, Code Civil Proc.;) and that the provisions of the Code and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice, (section 4, Id.) These provisions seem to us to be broad enough to cover a proceeding like this, and to justify the action of the court below. In Burnham v. Hays, 3 Cal. 115, it was held that under a similar provision of the old practice act the trial court had power, in the exercise of its discretion, to allow a bill of costs, and the affidavit accompanying it, to be amended after the time for filing had expired, and that the filing of the amendments related back to the time of filing the originals, of which they merely formed a part.

It is further objected that the second affidavit was not sworn to by the same defendant as the first, and hence that it should be treated as an original, and not as an amended, affidavit. We see no force in this objection. The affiants were jointly sued, and were both asking for a change of the place of trial; and an affidavit of merits could properly be made by one of two or more co-defendants for the benefit of all. Rowland v. Coyne, 55 Cal. 1. The affidavit in question was accepted by the court below as an amended affidavit, and in this we see no error. It follows, we think, that the order appealed from should be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(92 Cal. 183)

In re WILLIAMS' ESTATE. (No. 14,214.)[1]

(*Supreme Court of California.* Dec. 7, 1891.)

TESTAMENTARY POWERS — SALES OF LAND — CONFIRMATION.

Code Civil Proc. § 1561, providing that in sales of property by an executor under authority given in the will no title shall pass unless the sale is confirmed by the court, does not apply to sales under a will directing that "all the property of which I die the owner * * * vests absolutely in my executor, * * * said executor to hold said property * * * in trust for the uses and purposes in this will mentioned," and giving the executor power to sell any portion of the estate that may seem proper to him.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge. Reversed.

Proceedings by George E. Williams, executor and trustee under the will of Thomas H. Williams, for confirmation of a sale of land. Motion by the executor to dismiss the proceedings was denied, and an order entered making and confirming a sale of the land to another person. From this order the grantee of the executor appeals.

Page & Eels and *A. L. Rhodes*, for appellant. *W. S. Goodfellow*, for respondent.

SHARPSTEIN, J. By the terms of the last will of Thomas H. Williams all his property was devised to his executor, George E. Williams, in trust for the payment of debts of the estate, and to distribute the remainder among various devisees. In item 9 of the will the testator declares: "That no confusion may arise in reference to title to any property of my estate, I hereby desire that all the property of which I die the owner * * * vest absolutely in my executor herein appointed; * * * said executor to hold said property, and every part thereof, in trust for the uses and purposes in this will mentioned, and for the use and benefit of my children, as herein provided. Item 10: To my executor herein appointed I give and grant the following powers and authority: (1) To carry on all business in which I was engaged at the time of my death; (2) to borrow money for use of such business, or the benefit of my estate; (3) to bargain, sell, and convey any portion or part of the property of my estate, without any order of court or any other proceeding, and to execute all mortgages or conveyances necessary or deemed proper by him; (4) to sell and convey any part or parcel of property set aside for any one of my children, after distribution," etc. "Item 2: That my executor shall pay all just claims against my estate out of the income thereof, or sales if necessary, or money borrowed." This will was admitted to probate in San Francisco on April 6, 1886, and letters testamentary on the same day were issued to George E. Williams. The administration is still pending. On July 31, 1890, George E. Williams, as trustee and executor under the will, entered into a contract to sell to Gustave Niebaum (the appellant here) certain lands in San Francisco, belonging to the estate, for the sum of $10,000, whereof $1,000 was paid by the purchaser at that date. The agreement acknowledged receipt of $1,000 in part payment, and provided that the purchase should be completed within 15 days thereafter, and contained no reference to any return to or confirmation by any court. On August 25, 1890, without the knowledge or consent of the purchaser, the executor filed a return of sale in the probate court in the usual form, requesting confirmation by the court; and an order was entered setting the petition for hearing by the court on September 5, 1890. On September 5th the hearing was postponed by consent to September 12th. On September 10th, two days before the hearing, Niebaum paid to the executor the remaining $9,000 of purchase money, and received his deed of the land, which recited the terms of the will, and purported to convey the lands pursuant thereto. This deed was recorded on September 11th. On September 12, 1890, when the hearing of the return of sale came on, one J. L. Moody filed in the probate court a written bid, offering to pay the executor $11,000 for the land. The executor moved the court to dismiss the return of sale, and to proceed no further in the matter, upon the grounds that Niebaum required no confirmation, but had paid in full for the land, and had received his deed; that the court had no jurisdiction of the sale to the purchaser, and had no power either to confirm or reject it. Moody was present in court, and opposed the motion to dismiss. The motion was denied by the court, and an order entered accepting Moody's bid, and making and confirming a sale of the land to him for $11,000, and directing the executor to execute a deed to him accordingly. At the time this order was granted, and after the motion to dismiss was denied, Niebaum appeared, and entered his exception to the order of confirmation upon the same grounds as those of the executor's motion to dismiss.

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[1] Opinion modified on rehearing, 28 Pac. Rep. 679.

This appeal is brought from the order confirming sale, and presents the question whether an executor to whom lands have been devised in trust for sale to pay debts of the estate can legally sell and convey them to a purchaser without confirmation by the probate court. In Re Delaney's Estate, 49 Cal. 76, the court said: "The only question remaining is whether the provision of section one hundred and seventy-eight, requiring confirmation of sale, is applicable to the sales made by the executor, when the fee of lands is devised to him in trust." That question was answered by the court in the negative. Section 178 of the statute then in force, to which reference is made by the court in the case above cited, reads as follows: "When such provision has been made, or any property directed by the will to be sold, whether for payment of debts or expenses or for any other purpose, the executor or administrator with the will annexed may proceed to sell without the order of the probate court; but he shall be bound, as an administrator, to give notice of the sale, and to return accounts thereof to the court, and to proceed in making the sale in all respects as if it were made under the order of the court, unless there are special directions given in the will, in which case he shall be governed by such directions. But in all cases no sale shall be valid unless confirmed by the court, under the rules prescribed in cases of sale of real estate by an administrator; and before granting such confirmation the court may require security, as in cases of sales of land by an administrator." The provision of the Code relating to the same subject reads as follows: "When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales, as in other cases; and, if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale be confirmed by the court." Section 1561, Code Civil Proc. It is perfectly obvious, we think, that the former provision of the statute did not apply to sales made under wills like Delaney's; that the latter provision of the Code does not apply to sales made under wills like the one now before us; and, if not, it is quite clear that the court had no jurisdiction over the subject-matter of the sale, and all its orders and proceedings therein are void. Order appealed from reversed, and cause remanded with directions to the court below to dismiss the return of sale.

We concur: DE HAVEN, J.; MCFARLAND, J.

(3 Cal. Unrep. 438)

ROSE v. FOORD. (No. 14,060.)[1]

(*Supreme Court of California.* Dec. 3, 1891.)

LIMITATIONS — RUNNING OF STATUTE — ACKNOWLEDGMENT.

1. Where a seller of stocks fails to deliver them, limitations against his implied promise to refund the purchase money begin to run from the date of his notice to the purchaser of inability to deliver.

2. After such notice, verbal promises to deliver the stocks when he could will not take the case out of the statute of limitations, by reason of Code Civil Proc. Cal. § 360, which provides that no promise is sufficient for such purpose, unless in writing, signed by the party to be charged thereby.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge. Reversed.

Action by L. J. Rose against James Foord, administrator, to recover money had and received. Judgment for plaintiff. Defendant appeals.

Lee & Scott, for appellant. *Chapman & Hendrick*, for respondent.

FOOTE, C. This action was brought to recover $4,000 and interest, against the administrator of the estate of N. R. Vail, deceased, by L. J. Rose. A judgment was obtained, payable in due course of administration, from which, and an order denying a new trial, this appeal is taken. The cause of action, as stated in the complaint, grew out of an agreement on the part of the deceased, in his life-time, to sell and deliver to the plaintiff, within a reasonable time, certain shares of stock, and the certificates thereof, in a mining corporation. Before the mining corporation was incorporated, or any shares of stock or certificates were issued, the plaintiff paid the sum of $4,000 as the purchase price for one-half of the decedent's (N. R. Vail's) share of the stock which he was to have, after the same should be issued. It became impossible for Vail to deliver the shares or certificates therefor, which he had promised to the plaintiff, by reason of the issuance and service of an injunction granted by a court of competent jurisdiction in the state of New York. The plaintiff made a demand in writing some time after he had paid his money, and about the 30th of July, 1883, for the shares of stock and certificates thereof, which he had purchased, and which he had become entitled to receive from Vail. On the 6th of August of that same year, Vail by letter admitted to the plaintiff the former's inability to comply with his contract and deliver the stock or certificates, and make good the proposed sale to the plaintiff. It is evident that, had the plaintiff elected so to do, he might, at the last-mentioned date, have rescinded the contract, a reasonable time having been given for its completion, and the consideration therefor having clearly failed. But, so far from promptly proceeding to stand on such legal right, the plaintiff seems rather to have preferred for several years after that date, and until the death of Vail in 1888, to rely on the contract as made originally, and to insist on its performance, encouraging Vail to suppose that such was the plaintiff's wish; and Vail in turn appearing, from time to time, up to within a few months of his death, verbally promising to get hold of the stock and certificates, and make his sale good. The right of action accrued to the plaintiff on the 6th of August, 1883, when the defendant by letter confessed his inability, and declined thereby to deliver the stock and certificates thereof. Such being the state of affairs, the plaintiff's cause of action, as stated in the complaint, arose from the failure on the part of Vail to comply with his implied promise to pay the purchase price for the stock back to the plaintiff, on the failure of the consideration of the contract of sale and delivery The statute of limitations of two years on such a verbal promise to pay money had and received would commence to run on the 6th of August, 1883, when the consideration failed.

We perceive no force in the suggestion advanced by the appellant that the complaint states a cause of action based upon any other than a cause of action resting upon the breach of this implied promise just adverted to. When the evidence and findings are examined, even at a glance it is seen that the cause of action declared on was never understood by any of the parties at the trial to be other than what we have here stated. The date when the cause of action became barred was several years before the presentation of the claim to the administrator of Vail, who refused to pay it, and also before the institution of this suit, and before the death of Vail. There are several other points made and argued extensively and exhaustively, but, in the view that must be taken of this matter, we cannot see how they can be of any avail either to discuss or determine. The verbal promises to deliver stock when it could be done, do not appear to be sufficient to take the case out of the statute of limitations of two years. Section 360, Code Civil Proc.[1] For these reasons, after a very thorough and painstaking examination of the record and authorities cited, we are satisfied that the judgment and order refusing a new trial should be reversed, and we so advise.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

(92 Cal. 195)

In re VANCE *et al.* (No. 14,329.)

(*Supreme Court of California.* Dec. 9, 1891.)

PARENT AND CHILD—ABANDONMENT — RESIDENCE OF CHILD.

1. Where a father leaves his children for years to be supported by their grandmother, and

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[1] Rehearing granted.

[1] This section provides that "no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this title, unless the same is contained in some writing signed by the party to be charged thereby."

at various times declares his intention never to reclaim them, it is sufficient evidence of their abandonment by him.

2. Where children under 14 years of age, abandoned by their father, live with and are supported by their grandmother for several years, the residence of the grandmother is that of the children.

3. Where the father subsequently removes such children to another county, against the will of their grandmother, the residence of the children is not changed.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county; John G. Pressley, Judge. Affirmed.

Action by Mary L. P. Mountjoy against John B. Vance to be appointed guardian of the persons of Robbin and Stewart Vance. Judgment for plaintiff. Defendant appeals.

W. H. Barrows and *Barham & Bolton*, for appellant. *J. R. Leppo*, for respondent.

Belcher, C. On the 14th of October, 1890, Mrs. Mary L. P. Mountjoy filed in the superior court of Sonoma county her petition, praying that she be appointed guardian of the persons of Robbin and Stewart Vance. She stated in the petition that Robbin was a little girl about eight years old, and Stewart a little boy about five years old; that they were the children of John B. Vance and Louise F. Vance, but that the mother was dead; that she was the grandmother of the children, and that they had been living with her at Santa Rosa, Sonoma county, and in her care and custody, for several years; and that the father was not a fit or proper person to have the care and custody of them. The father filed an answer to the petition, and denied that he was not a fit and proper person to have the care and custody of the children; denied that it was necessary that a guardian of the persons of the children should be appointed, inasmuch as he was their legal guardian; and alleged that the children were then, and had been since prior to the filing of the petition, inhabitants and residents of the city and county of San Francisco. After a hearing, the court found, among other things, that the children had been residents of Sonoma county for more than four years last past, living with their grandmother, the petitioner, who had sole care and custody of them during that time; that on the 12th day of October, 1890, the father, without the knowledge or consent, and against the wishes, of the petitioner, carried them away to San Francisco, where he resided; that the father deserted and abandoned the children more than three years previous to the time of his taking them from the custody of their grandmother; that he had not provided for their support for more than four years; and that his reputation was bad; and that the petitioner was a fit and proper person to have the custody of them. An order was accordingly entered that letters of guardianship be issued to the grandmother as prayed for, and from this order the father appeals.

The principal contention of appellant is that the court had no jurisdiction of the case, because, at the time the petition was filed, the children were not inhabitants or residents of Sonoma county; and hence that the order was void, and should be reversed. The evidence on which the order was based was as follows: The petitioner introduced evidence showing that the mother of the children was her daughter, and had been dead about four years; "that several years prior to the death of their mother, the mother and the children lived with petitioner, and were wholly supported by the petitioner; that after the death of their mother the children continued to reside with the petitioner, and to be supported by her; that the father, Vance, has not provided for the support of the children since the death of the mother; that, at various times since the death of the mother, Vance, the father, has expressed and declared to the petitioner that he was willing that she might have the care and custody of the children; that, at various times since the death of the mother, Vance had expressed and declared his intention of never reclaiming or taking the custody of the children from the petitioner; * * * that the reputation of J. B. Vance for sobriety, industry, and morality was and is bad, and has been for more than four years last past, and that he spent his earnings and money for liquors, on women, and general dissipation; that up to about one year ago Vance, the father, resided in Santa Rosa, Sonoma county; that about one year ago he went to San Francisco, and since that time has resided in San Francisco; that after going to San Francisco to reside he married, and for some time previous to the trial has lived with his wife in San Francisco; that on the 12th day of October, 1890, Vance came to Santa Rosa, and went to the home of the petitioner, where the children were, and represented to the petitioner that he desired to take the children down town to get some candy, whereupon petitioner consented, and he took the children and went away with them, as the grandmother understood, to take them down town and get them candy; that Vance then took them to San Francisco without the knowledge and consent of the grandmother; that they were in San Francisco at the time these proceedings were commenced and up to the trial thereof; that petitioner is able to maintain and care for the children." The father then offered testimony showing that his residence had been in San Francisco for the year last past, and was at the time he took the children there, and "that his present wife, Mrs. J. B. Vance, had means with which to support and care for the children, and was desirous of caring for and supporting them." In view of this evidence, we cannot say that the finding that the father had abandoned the children was not justified. He had left them for years to be supported and cared for by their grandmother, and had at various times declared his intention never to reclaim them. And that he recognized the grandmother's right to their custody will be presumed from the fact that he resorted to fraudulent means to get them away from her. If he had considered that he had a right at any time to take them away, presumably he would have asserted his right boldly, and no misrepresentations or deceit would have been used to accomplish his purpose. The general rule is that "the residence of the father during his life * * * is the residence of the unmarried minor child." Pol. Code, § 52, subd. 4. But this rule does not apply when the child is under the age of 14 years and has been abandoned by the father. In such case he forfeits his guardianship of the child, and can no longer claim its custody. St. 1873-74, p. 297. If, then, these children had been abandoned by their father, as the court below found, their residence was in Sonoma county, and it was not changed by their surreptitious removal to San Francisco. The questions involved in the case were all questions of fact, which the court below was called upon and had a right to determine, (In re Danneker, 67 Cal. 643, 8 Pac. Rep. 514,) and we see no good ground for disturbing its conclusions. We advise that the order be affirmed.

I concur: FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

64 Cal. 150

FITCH v. CORBETT *et al.*[1]

(*Supreme Court of California.* Sept. 8, 1883.)

FRAUDULENT CONVEYANCES — RIGHTS OF CREDITORS.

1. A creditor's right to avoid a conveyance which is fraudulent as to him is not affected by his knowledge of the fraud at the time the conveyance was executed.

2. Nor is such right affected by a settlement between him and the debtor of the amount of the debt, theretofore undetermined, made after the conveyance.

Department 2. Appeal from district court, twenty-third judicial district.

Action by George K. Fitch against John J. Corbett and others to set aside a deed made by Corbett to his wife as in fraud of his creditors, one of whom, E. M. Heistand, was plaintiff's assignor. The indebtedness to Heistand existed before the conveyance was made, but its amount was not determined until after it, by a settlement between Heistand and Corbett. The court found actual fraud in the conveyance and rendered judgment setting it aside, and refusing a new trial. Defendants appeal. Judgment and order affirmed.

Henry E. Highton, for appellants. *Texas Angel*, *H. D. Tuttle*, and *J. C. Bates*, for respondent.

PER CURIAM. This action was instituted to set aside a conveyance alleged to have been executed to hinder, delay, and defraud creditors, and especially one E. M. Heistand, the plaintiff's assignor, of her rights as creditor. Actual fraud is averred and found as a fact, and the finding is sustained by the evidence. It is argued that, because Mrs. Heistand knew of the fraudulent conveyance, neither she nor her assignor can avoid it. We cannot see that there is any reason in this position, for if she was aware of the conveyance, and knew its fraudulent character, it was still void, and she has done nothing by which her right to proceed to annul it for fraud has been waived or given up. If she knew the character of the conveyance she knew that it was fraudulent, and, by consequence, void. Carter v. Castleberry, 5 Ala. 279. Nor did she waive any right by settling with Corbett for $7,500. How the settlement of the 3d of July, 1878, purged the fraud we cannot conceive. The counsel for appellants is mistaken in viewing this case as a mere voluntary conveyance to the wife without actual fraud, and as only constructively fraudulent against existing creditors. It is, as we have said above, a case of actual fraud alleged, established, and found. We have examined the errors of law assigned, and find none of them maintainable. Judgment and order affirmed.

Hearing in bank denied.

64 Cal. 152

In re TROIA.[2]

(*Supreme Court of California.* Sept. 17, 1883.)

HABEAS CORPUS—MURDER—BAIL—EVIDENCE.

1. The supreme court is not justified in discharging on *habeas corpus*, with or without bail, one who is committed to answer a charge of murder, where the testimony of the state's material witnesses before the committing magistrate is not clearly shown to be false.

2. A person committed to answer the charge of murder should not be discharged on *habeas corpus*, with or without bail, unless the evidence against him before the committing magistrate was so insufficient that a verdict based thereon requiring a capital sentence ought to be set aside.

In bank.

Application by Salvador Troia for a writ of *habeas corpus*. Writ denied.

Holl & Buckley, for petitioner.

PER CURIAM. The petitioner was committed by a magistrate to answer to a charge of murder. His application is that he be permitted to give bail. A witness—one William Rafferty—testified at the examination before the magistrate he saw petitioner kill his wife, under circumstances such as would constitute murder in the first degree. It is claimed that petitioner should be admitted to bail because the testimony before the magistrate, taken as a whole, shows that Rafferty swore falsely in respect to material matters, and that his testimony should be rejected. But while there was testimony with respect to facts and circumstances which, if true, tended strongly to cast discredit upon Rafferty's statements, much of such testimony was in turn attacked and disputed. If, on *habeas corpus*, we are ever authorized to determine the credibility to be accorded to the testimony of witnesses whose material statements conflict, it is only when the testimony of the material witnesses for the people is clearly shown to be false that we can be justified in discharging the prisoner, with or without bail. It was said by the court of common pleas of Philadelphia county: "It is a safe rule, where malicious homicide is charged, to refuse bail in all cases where a judge would sustain a capital conviction if pronounced by a jury on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail." Com. v. Keeper of Prison, 2 Ashm. 227. We cannot say, upon the evidence before us, that the superior court ought to set aside the verdict, as not justified by the evidence, should the jury find the petitioner guilty of the higher degree of the crime charged. We ought not to anticipate the action of the jury by discharging the prisoner from actual custody, with or without bail, upon evidence which we are not prepared to say is so insufficient as that a verdict requiring a capital sentence, based upon it, should not be permitted to stand. Petition denied, and petitioner remanded.

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[1] This case, filed September 8, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[2] This case, filed September 17, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

THORNTON, J., not having heard the argument, expressed no opinion.

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64 Cal. 153

PEOPLE v. BOYLE.[1]

(*Supreme Court of California.* Sept. 17, 1883.)

ROBBERY—INFORMATION—DUPLICITY—FORMER OFFENSE.

1. An information for robbery, which alleges that defendant had been convicted of petit larceny before the robbery was committed, does not charge two offenses.

2. An allegation in an information for robbery that defendant had been formerly convicted of petit larceny is mere surplusage, and should be disregarded.

In bank. Appeal from superior court, Yolo county. Reversed.

Information against Peter Boyle for assault with intent to rob. The information was as follows: "Peter Boyle is accused, by the district attorney of Yolo county, by this informaton, of the crime of felony, committed as follows: The said Peter Boyle, on the 21st day of May, A. D. 1883, at the county of Yolo, in the state of California, did feloniously, unlawfully, and willfully assault one Albert Lemay, with intent then and there to rob the said Albert Lemay; that the defendant, Peter Boyle, before the commission of the offense charged in this information, was in justice's court of Cache Creek township, county of Yolo, state of California, convicted of the crime of petit larceny, contrary to the form, force, and effect of the statute," etc. The court made an order sustaining a demurrer to the information, and rendered judgment discharging the defendant. The people appeal.

Atty. Gen. Marshall, J. Craig, Dist. Atty., and *J. C. Ball*, for the People. *F. S. Sprague* and *Byron Ball*, for respondent.

MCKINSTRY, J. Defendant moved to set aside the information on the ground that he had not been legally held to aswer, in that the commitment showed upon its face that defendant had previously been convicted of the offense for which he was held to answer. As the commitment is not in the transcript, we cannot say what is shown upon its face. Defendant demurred to the information that it does not substantially conform to the requirements of sections 950–952 of the Penal Code, and that more than one offense is charged therein. The information contains all the averments required by the sections of the Penal Code. It also contains an averment that, before the commission of the offense therein charged, defendant was convicted of petit larceny in a justice's court. If, by reason of the repeal of section 969 of the Penal Code, which took effect April 9, 1880, it is no longer proper to allege a former conviction in an information or indictment, the averment with respect to the previous conviction is surplusage, which should be stricken out or disregarded. The statement that defendant had previously been convicted of a larceny is not a distinct charge of larceny to be tried under the information. Two offenses are not, therefore, charged in the information. If, by reason of the language employed in section 1158 of the Penal Code, an averment of a former conviction is proper, the information is unobjectionable. The demurrer should therefore have been overruled. Judgment and order reversed, and cause remanded, with direction to the court below to overrule and disallow defendant's demurrer to the information.

THORNTON, ROSS, MYRICK, and MCKEE, JJ., concurred.

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64 Cal. 164

SMITH v. DUNN, State Comptroller.[2]

(*Supreme Court of California.* Sept. 21, 1883.)

OFFICIAL REPORTER—SALARY—CONSTITUTIONAL LAW.

In January, 1880, the supreme court reporter entered upon his office under Const. Cal. art. 6, § 21, by which he was to receive a salary "not exceeding" a certain sum per annum; but the act fixing his salary, and making an appropriation therefor, did not take effect until July 1, 1880, leaving the salary for a period of six months unprovided for. An act was passed on March 13, 1883, making an appropriation to cover this period. *Held* that, since the salary for this period had not been previously fixed or provided for, the act was not in conflict with the provisions of the constitution prohibiting the legislature from granting "extra" compensation to public officers, or from affecting their salaries by special legislation.

In bank.

Application by George H. Smith for a writ of *mandamus* to John P. Dunn, state comptroller, to compel him to issue a warrant to plaintiff for his salary as reporter of the decisions of the supreme court.

Glassell, Smith & Patton, for plaintiff. *The Attorney General*, for defendant.

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[1] This case, filed September 17, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[2] This case, filed September 21, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

McKEE, J. By an act of the legislature entitled "An act to pay the salary of the reporter of decisions of the supreme court for the period elapsing from January 7 to July 1 of the year 1880," the sum of $1,208.33 was appropriated out of any moneys in the state treasury, not otherwise appropriated, to pay to the petitioner the salary due him for services as such reporter during the time specified. The act took effect on the 13th of March, 1883. Appropriation of the sum allowed by the law has, in fact, been made, and the money is now in the state treasury for the purpose of the law; but the comptroller of state refuses to draw his warrant for it in favor of the petitioner, because, as it is contended, the law conflicts with section 32, art. 4, of the constitution, which prohibits the legislature from granting any extra compensation or allowance to a public officer, and also subdivision 29, § 25, art. 4, which prohibits special legislation affecting the salary of any officer. But there is nothing in the title or the body of the act which expresses an intention to increase or diminish the salary of the officer, nor to appropriate money to him as extra compensation for official services. The entire scope of the act, as expressed in the title and in the act itself, is to fix and provide for the payment of the salary of the officer for the time specified in the act. Legislation for that purpose is not prohibited by the constitution, unless the salary itself which constituted the subject of legislation had been already fixed, provided for, or paid. If it had been, then the allowance of any additional sum for the same purpose would be in the nature of extra compensation, and the act allowing it would be unconstitutional and void. But the salary of the plaintiff for the time specified in the act had not been fixed, provided for, or paid. The facts are: On the 7th of January, 1880, the petitioner was appointed reporter of the decisions of the supreme court. As such he qualified and entered upon the duties of his office. By the constitution of the state, under which the appointment was made and accepted, he was to receive a salary "not to exceed $2,500 per annum, payable monthly." Article 6, § 21. In dealing with that provision the legislature passed an act fixing the salary at $2,500 per annum, the constitutional limit, and that sum was appropriated for the payment of the annual salary; but the act did not take effect until July 1, 1880. There was therefore an interim during which the salary had not been provided for by law. But the plaintiff was entitled to his salary during that time, because when he entered into office he consented to the terms proposed by the state as to his compensation, *i. e.*, that he would receive a salary not exceeding $2,500 annually, payable monthly; and there arose such a legal relation between him and the state as gave him a public right to have his compensation fixed, within the constitutional limit, by legislative enactment. And when the legislature did, by the act of 1880, fix the annual salary of the office, and provide for its payment, except as to the time of nearly six months, which had intervened between the date of the appointment to the office and the taking effect of the law, there still remained a portion of the salary, due for that time, for which the plaintiff had a valid and subsisting claim against the state, and for the payment of that claim the legislature was authorized, by section 29, art. 4, of the constitution, to make an appropriation. The act of 1883 was passed for that purpose, and we find in it nothing which conflicts with any of the provisions of the constitution. Smith v. Kenfield, 57 Cal. 138, is not opposed to the views expressed or the conclusion reached in this case, in that the facts were not the same or similar. The case is therefore inapplicable. Let the writ issue.

MYRICK, SHARPSTEIN, and THORNTON, JJ., concurred. ROSS, J., concurred in the judgment.

McKINSTRY, J., (*specially concurring.*) I concur in the judgment. When the legislature fixed the salary of the reporter he became entitled to demand and receive compensation at that rate from the commencement of his term so soon as the legislature should appropriate moneys for that purpose. By the act of March 13, 1883, moneys were appropriated for the payment of his salary from the commencement of his term to the date when the act fixing his salary took effect.

(64 Cal. 253)

PEOPLE v. FONG AH SING.[1]

(*Supreme Court of California.* Oct. 26, 1883.)

MURDER—ALIBI—INSTRUCTIONS—DYING DECLARATIONS.

1. In a trial for murder it is error to charge that, if the jury find the defendant to have been at another place—as, for instance, in the society's rooms—at the time of this alleged shooting, and if his being there then creates a reasonable doubt of his having been present at the place of the alleged crime at the time of its alleged commission, he should have the benefit of that reasonable doubt and be acquitted, as it compelled the jury to find as a fact that he was at another place at the time of the shooting, and did not extend the question of reasonable doubt to his presence at the club-rooms.

2. On a trial for murder dying declarations are competent evidence as to the act of the killing and the circumstances forming the *res gestæ*, but are inadmissible as to a former transaction, stated by the deceased as furnishing a possible motive for the crime.

In bank. Appeal from superior court, city and county of San Francisco. Reversed.

Information for murder against Fong Ah Sing. Verdict of guilty, judgment thereon, and order refusing a new trial. Defendant appeals.

L. Quint, for appellant. *The Attorney General*, for the People.

ROSS, J. The defendant was charged with the crime of murder. His defense was that of *alibi*, he claiming that at the time the deceased was killed he (defendant) was at certain rooms about three blocks distant from where the murder was committed. Upon that question the evidence was conflicting, and upon that state of facts the defendant, through his counsel, requested the court to charge the jury as follows: "Whilst the prosecution must establish beyond a reasonable doubt the guilt of the defendant, it is not incumbent on the defendant to prove an *alibi* beyond a reasonable doubt. Though the evidence offered to establish an *alibi* falls short of the weight of moral certainty as to the existence of the *alibi*, yet if it leave in the minds of the jury such a doubt or uncertainty that, taken by itself, they could not find for or against the *alibi*, they are bound to carry such doubt into the case of the prosecution, and to array it there as an element of the reasonable doubt, beyond which the prosecution must establish guilt. The defendant is entitled as much to the benefit of such doubt as to any other doubt raised by the evidence; and if its weight, alone, or added to that of any other, be sufficient to reduce belief in their minds as to the defendant's guilt to a reasonable doubt, they must acquit." This instruction the court below refused to give, but instead gave the jury, as the law upon the subject of *alibi*, the following: "If the jury find the defendant to have been at another place,—as, for instance, in the society's rooms, which have been spoken of in the evidence at the time of this alleged shooting,—and if his being there then creates a reasonable doubt of his having been present at the place of the alleged crime at the time of its alleged commission, he should have the benefit of that reasonable doubt, and be acquitted." The instruction requested was substantially correct, and should have been given. The charge given was incorrect, and should not have been given. The commission of a criminal offense implies, of course, the presence of the defendant at the necessary time and place. Proof of an *alibi* is, therefore, as much of a traverse of the crime charged as any other defense; and proof tending to establish it, though not clear, may nevertheless, with the other facts of the case, raise doubt enough to produce an acquittal. A reasonable doubt of the defendant's presence at the time and place necessary for the commission of the crime would seem necessarily to raise a reasonable doubt of his commission of it. But, according to the charge of the court below, the defendant was not to have the benefit of any doubt in regard to the alleged *alibi*, unless the jury should find as a fact that he was at another place than the place of shooting when the shooting occurred. It is obvious that the finding of that fact would itself have established the *alibi*, and that would have ended the case of the prosecution. But proof tending to establish an *alibi*, though insufficient of itself to establish that fact, is not to be excluded from the case. Whatever doubt, if any, such testimony may raise in the minds of the jurors, is for their consideration; and if its weight, alone, or added to that of other evidence in the case, be sufficient to reduce belief in their minds as to the defendant's guilt to a reasonable doubt, they should acquit; for in every criminal case, when all the proof is in, the final question for the jury is, are all the essential averments of the indictment proved beyond a reasonable doubt?

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[1] This case, filed October 26, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

The dying declaration of the deceased was properly admitted in evidence, but the declaration included some matter foreign to an instrument of that nature, and which should have been excluded by the court below from the consideration of the jury. We allude to the following statement of the declarant: "I don't know any reason that Fong Ah Sing had for shooting me, unless it was that a few days before the shooting I was bathing my feet up stairs over a room in which Fong Ah Sing was sitting, and I spilled a little water on the floor, and some of it leaked through the floor and fell upon Fong Ah Sing. Fong Ah Sing was very angry thereat, and told the proprietor of the house that I must apologize, and make him some present, to prevent bad luck coming upon the house. The proprietor did make some little present to Fong Ah Sing, and I supposed the matter was settled." Dying declarations are restricted to the act of killing, and to the circumstances immediately attending it and forming a part of the *res gestæ*. When they relate to former and distinct transactions they do not come within the principle of necessity on which such declarations are received. Whart. Crim. Ev. § 278; 1 Greenl. Ev. § 156; State v. Draper, 65 Mo. 335; Leiber v. Com., 9 Bush, 11; Moses v. State, 11 Humph. 232; State v. Shelton, 2 Jones, (N. C.) 360; Nelson v. State, 7 Humph. 542; Hackett v. People, 54 Barb. 370. Judgment and order reversed, and cause remanded for a new trial.

McKINSTRY, SHARPSTEIN, McKEE, MYRICK, and THORNTON, JJ., concurred.

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64 Cal. 266

CASSIDY v. SULLIVAN.[1]

(Supreme Court of California. Oct. 30, 1883.)

RIGHT TO JURY TRIAL—DIVORCE SUITS.

Const. Cal. art. 1, § 7, provides that "the right of trial by jury shall be secured to all, and remain inviolate." *Held* not applicable to a suit for divorce, as the right of trial by jury did not exist in such cases at common law.

Department 2.

Application by Mary Cassidy for a writ of mandate to J. F. Sullivan, judge of the superior court of the city and county of San Francisco.

Tyler & Tyler, for petitioner. *Cope & Boyd*, for respondent.

PER CURIAM. This is an application for a writ to compel the respondent, judge of the superior court, to have the issues of fact in a divorce case pending in said court tried by a jury. The clause of the constitution mainly relied on reads as follows: "The right of trial by jury shall be secured to all and remain inviolate." Const. art. 1, § 7. This implies the existence of the right. To "secure" is not to create or acquire, but "to make safe; to relieve from apprehensions of or exposure to danger; to guard; to protect." Webst. Dict. Under the provisions of other constitutions and statutes quite as broad as the clause above cited, it has uniformly been held that the right to trial by jury was not intended to be extended to cases in which the right did not exist at common law. And the counsel for petitioner concedes that this has become too well established as to equity cases to admit of a change of the rule in that respect by the courts. But the counsel insists that an action of divorce is not a case in equity, and cites the clause of the constitution which confers jurisdiction on superior courts to show that actions of divorce are mentioned separately, as if they were different and distinct from cases in equity. Admitting all that he claims in this respect, it by no means follows that the right of trial by jury is given in divorce cases. The right is denied in equity cases, not because they are equity case, but because no such right ever existed in equity cases; and, by parity of reasoning, it should be denied in divorce cases, because no such right ever existed in divorce cases. In Koppikus v. Commissioners, 16 Cal. 248, the court, FIELD, C. J., delivering the opinion, said: "The provision of the constitution that 'the right of trial by jury shall be secured to all, and remain inviolate forever,' applies only to civil and criminal cases in which an issue of fact is joined. The language was used with reference to the right as it exists at common law. * * * It is in this common-law sense that the language has always been regarded by the courts of this state. It is a right 'secured to all,' and inviolate forever, in cases in which it is exercised in the administration of justice according to the course of the common law, as that law is understood in the several states of the Union. It is a right, therefore, which can only be claimed in actions at law or in criminal actions where an issue of fact is made by the pleadings." It is therefore quite immaterial whether an action of divorce be a case in equity or not, so long as it is a case in which the right of trial by jury did not exist at common law or otherwise. The clause of the constitution relied on does not apply to it.

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[1] This case, filed October 30, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Application denied.

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64 Cal. 272

HIRSHBERG v. STRAUSS *et al.*[1]

(*Supreme Court of California.* Nov. 1, 1883.)

WRONGFUL ATTACHMENT—EXEMPLARY DAMAGES—INSTRUCTIONS.

An instruction in an action for wrongful attachment, that the plaintiff was entitled to exemplary damags if it was found that the property was taken wantonly or maliciously, is erroneous when there is no evidence to sustain it.

Department 2. Appeal from superior court, Alameda county. Reversed.

Action by Rieke Hirshberg, administratrix of the estate of Samuel Hirshberg, deceased, against Levi Strauss and others for wrongful attachment. There was judgment for plaintiff, from which, and from an order refusing a new trial, defendants appeal.

Napthaly, Friedenrich & Ackerman, for appellants. *Jas. C. Martin* and *Wm. H. & J. R. Glascock*, for respondent.

PER CURIAM. In this case, which was an action against the sheriff and attaching creditors of David S. Hirshberg to recover damages for maliciously levying an attachment on certain goods, the property of plaintiff's intestate, Samuel Hirshberg, the court charged the jury, among other matters, as follows: "In addition to the actual value, you have a right to give exemplary damages, if the proof satisfies you that the goods were wantonly or maliciously taken from the plaintiff; and on this subject I charge you that if you find that the plaintiff, before any action taken by the defendants, purchased the property from David S. Hirshberg and others in good faith and for a valuable consideration, and immediately took possession of the same in his own right, and held such possession down to the time of said taking by defendant, such possession being immediate and continuous, then the presumption is that the plaintiff was the owner of said property, and the taking by defendant against his will was wrongful, and the plaintiff would be entitled to recover damages for the value of the goods at the time when they were taken, and interest from that date to this time; and, if you believe the act of taking was wanton or malicious, you may also add exemplary damages, as before stated." There was no evidence of any character to jusify the court in submitting to the jury any question relating to exemplary damages. On this point the charge was entirely abstract, and was calculated to mislead the jury. It may be urged that the jury was not misled, or at all influenced, by this direction, and that the error was without injury. But this is not apparent. On the contrary, the jury might well upon the evidence have found a verdict much smaller in amount, and therefore we cannot say that the verdict was not enhanced in amount by the direction in regard to exemplary damages. For this error the judgment and order are reversed, and the cause remanded for a new trial.

Hearing in bank denied.

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[1] This case, filed November 1, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

(92 Cal. 359)

PEOPLE v. FREEMAN. (No. 20,779.)

(*Supreme Court of California.* Dec. 14, 1891.)

MURDER—EVIDENCE—CHALLENGE TO JURY—NEW TRIAL.

1. Where the record of a trial for murder leaves grave doubts as to the truth of the story told by the principal witness for the state, but it cannot be said as matter of law that the jury were not warranted in returning a verdict of guilty, such verdict cannot be set aside.

2. Where defendant in a murder trial testified that shortly before the time at which the crime was alleged to have been committed he and a witness for the state had a quarrel, and on a certain bridge he had knocked said witness down, it was proper to admit in rebuttal evidence that said bridge was muddy at that time, and that the clothes of said witness were free from mud when he reached the place where the alleged crime was committed.

3. Where the court in a murder trial sustained an objection to a question asked a talesman during his examination on his *voire dire* as to his qualifications as a juror, and said talesman was peremptorily challenged by defendant, and the court subsequently permitted another peremptory challenge in addition to the number allowed by law, such ruling, if error, was harmless.

4. A new trial will not be granted on the ground of newly-discovered evidence when such evidence must have been known to defendant during the first trial, and is also in conflict with the evidence there given.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Charles Freeman was convicted of murder, and appeals. Affirmed.

C. N. Post, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

BEATTY, C. J. The defendant, who was convicted in the superior court of murder in the first degree and sentenced to death, appeals from the judgment, and from an order denying his motion for a new trial. Of the numerous assignments of error contained in the record, only four have been insisted upon by counsel in their oral and printed arguments, and to these we shall confine our attention.

A brief outline of the facts of the case will conduce to a clearer understanding of the questions to be decided: The defendant, Freeman, the deceased, Mark Feeny, and two other men, Terrill and Wilks, were employed on a ranch by one De Kay; Feeny as cook, the others as laborers. These men occupied a small house on a ranch four miles distant from the "home ranch" of their employer. A day or two prior to March 6, 1890, Terrill went to the home ranch, leaving only Freeman and Wilks at the other place. The weather at this time was too rainy to admit of plowing, (the work in which Terrill, Freeman, and Wilks had been engaged;) and, having no work to do on the afternoon of March 6th, Freeman and Wilks took their shotguns, and went hunting, leaving Feeny alone on the ranch. The testimony shows that Feeny was a small man, only about five feet high, and weighing less than a hundred pounds; that he was sick, consumptive, weak, and emaciated. There had been some complaint on the part of the hands as to his inefficiency as a cook, but it does not appear that there had been any quarrel or disagreement between him and Freeman during the five or six weeks he had been on the ranch. About 10 o'clock at night, on the 6th of March, Freeman and Wilks returned to the ranch after their hunt. They had stopped on their way at Antelope, and at a wayside saloon had taken several drinks, but, according to the testimony of each, both were sober enough to know and to remember all the details of what ensued. As to what then occurred, this is the story told by Wilks on the witness stand: He says that he entered the house first, put aside his unloaded gun, and heard Feeny call out from his bed, to which he had retired, saying, in substance, "You will find your suppers set out on the table;" that he proceeded to the kitchen, and while he was feeling for the lamp and a match he heard Freeman, who had in the mean time entered the common sleeping-room where Feeny was lying in his bunk, calling him to come in there. He went to the bedroom in response to Freeman's call, who announced that he intended to kill the cook, and that he (Wilks) must help him. Wilks told Freeman that he must be joking, that he did not mean it; but Freeman insisted that he did mean it, and that unless Wilks helped him he would kill him too. Thereupon Wilks says he attempted to leave the room, but was knocked down by a blow from Freeman's gun; that while he was down Freeman cocked both barrels of the gun, and placed it against his breast; that he caught the gun, and pushed it aside, when Freeman again knocked him down across Feeny's bed with a blow of his fist, and, leaning over, bit through his ear. During this struggle Feeny was entreating Freeman not to kill "Archie," (Archie Wilks;) but Freeman continued his violence until, in answer to his demands, Wilks finally said he supposed he would have to help him kill Feeny; whereupon he was released by Freeman, and allowed to get up. Freeman then ordered Feeny to get up, adding that "his time had come." Feeny sat up in bed, and Freeman, still holding his loaded gun in his left hand, so as to threaten Wilks, passed his right arm around the body of Feeny, under his arms, and lifted him from his bed. Then carrying his gun in his hand and Feeny under his right arm, and commanding Wilks to follow, he passed out of the bedroom and from the house, proceeded to a water-barrel containing the water used for domestic purposes, and, bending Feeny across his right leg with his right arm, stuck his head down into the water-barrel and held him there until he was drowned; Wilks in the mean time standing by too terrified to interfere or to expostulate. When Feeny, after being held in the water for three or four minutes, was quite dead, Freeman left him with his feet resting on the ground and his head in the water, and ordered Wilks to get on a horse, go to the home ranch, and inform Mr. De Kay that on their return from Antelope they had found the cook drowned in the water-barrel. Wilkes went as directed, but, instead of telling the story put in his mouth by Freeman, told De Kay the truth as to the murder.

Freeman, testifying on his own behalf, told an entirely different story. He says that when he and Wilks were on the road from Antelope, coming back to the ranch, they got into a quarrel over his proposition to ford a creek instead of going round to a bridge. That the quarrel continued as they walked along, and at the bridge culminated in a fight, in which Wilks first struck him with his gun, whereupon he knocked Wilks down on the bridge with his gun, and kicked him several times, until he promised to behave himself. They then proceeded to their house, Wilks entering in advance and going into the bedroom. They called Feeny, but got no answer, and after awhile started to the stable to feed and care for their horses. On their way Wilks went to the water-barrel to get a drink, and from there called out to Freeman, saying, "Here is 'Shorty,'" (the nick-name of the cook.) Freeman went to the water-barrel, and there saw Feeny's dead body in exactly the position and condition in which it remained until removed by the coroner the next day; that is to say, (and as to this all the testimony agrees,) the feet rested on the ground, he had his shoes as well as his pants on, his head was immersed in the water, which stood about eight or ten inches below the top of the barrel, and the lower part of his abdomen rested on the edge of the barrel. When Wilks went to De Kay's to tell his story, Freeman walked over to their nearest neighbor and told his story. When he told how they had found the cook drowned in the water-barrel, he asked for a drink of whisky, saying he felt nervous, and got his neighbor to go home with him to keep him company. He proposed to bring the body into the house and lay it out, but, being informed that it would be wrong to move it before the arrival of the coroner, took a blanket and covered it where it was.

Each of these conflicting stories is to some extent corroborated, and to some extent contradicted, by circumstances. The story of Wilks is opposed to the fact that there is a total absence of any apparent motive on the part of Freeman for wishing to injure Feeny; to the apparent difficulty that even a strong man would have experienced in drowning another, however small and weak, in the manner described,—the murderer having the use of only one arm, the other being occupied with the gun with which he was constantly threatening Wilks, and the victim's arms and hands being entirely free to grasp the edge of the barrel into which his head must have been thrust for a foot or more in order to immerse it; to the improbability that Feeny, who is represented as earnestly beseeching Freeman not to kill Archie, would have allowed himself to be carried to the water-barrel and drowned, not only without a struggle, but even without a word of entreaty. Then there is the extremely significant fact that Feeny undoubtedly had his shoes on when he was drowned, and, consequently, if Wilks' story is true, must have gone to bed with his shoes on. Wilks testifies that Feeny habitually slept in his pants, but neither he nor Terrill say that he ever went to bed with his shoes on. It is claimed, as a corroboration of Wilks' story, that fresh blood was found in the bedroom, where, he says, the fight occurred; but, on the other hand, it seems to be claimed that this blood is accounted for by the supposition that Wilks, though wounded at the bridge, might have continued to bleed after his arrival at home. Freeman's story is opposed to the fact testified to by several witnesses, that the bridge upon which he says he knocked Wilks down was covered with mud, and that no mud was observed on Wilks' clothes when he arrived at the home ranch. As against the conclusiveness of this circumstance there was some testimony that the bridge was not ordinarily very muddy, except near the ends, and that there had been heavy rains, by which it was washed comparatively clean. It is also argued that any mud that may have been on Wilks' clothes would have been washed off by the rain while he was going from the bridge to the house, and from there to the home ranch. In corroboration of Freeman's story, and of the theory of the defense, (viz., that Feeny, going for a bucket of water, and leaning over the barrel to lift it out, had fallen in a fit, and drowned while unconscious,) it was proved that a short time before he went to De Kay's ranch, and, while working at another place, he had fallen in a fit and remained unconscious for some minutes. And it was proved that when his body was lifted from the barrel the water bucket was found under him, in the water. There was, of course, a great deal of testimony as to minor details and collateral circumstances, but the foregoing statement exhibits the salient features of the case for the prosecution and the defense, and is sufficient to illustrate the points to be decided.

1. As to the contention that the verdict is not supported by the evidence, we can only say that, while the case as presented upon the record before us leaves room for grave doubts as to the truth of the story told by Wilks, it cannot be held as matter of law that the jury, who not only heard all the minute details of the evidence, but had the great advantage of observing the demeanor of the witnesses on the stand, was not warranted in concluding that the guilt of the defendant was established beyond a reasonable doubt. If Wilks told the truth, there can be no question that a cruel and deliberate murder was committed, and it was for the jury, in view of all the evidence in the case, to decide the question of his credibility. With their conclusion on this point we cannot interfere.

2. It is contended that the superior court erred in admitting, by way of rebuttal of Freeman's testimony, evidence of the mud on the bridge, and of the absence of mud from Wilks' clothes when he arrived at the home ranch. The claim of counsel is that this was part of the prosecution's case, or, if not, that it was made so by a question asked Wilks by the district attorney on his examination in chief, as to whether he and Freeman had any difficulty on their way home from Antelope on March 6th. We think this evidence was clearly proper evidence in rebuttal, and we do not think that the general question asked Wilks on his direct examination precluded the proof of any specific fact inconsistent with the defendant's testimony as afterwards given. Still less was the state precluded from introducing such proof by the fact that Terrill had testified in chief that Wilks was very bloody when he arrived at the home ranch.

3. It is contended that the superior court erred in sustaining the objection of the district attorney to a question asked of a talesman named Baker, during his examination on *voire dire*, touching his qualifications to act as a juror. It is unnecessary, however, to decide the question presented by this assignment of error, for the reason that Baker was challenged peremptorily by the defendant, and did not sit on the jury; and the peremptory challenge so used was not lost to the defendant, because the court subsequently allowed him, upon the suggestion of the district attorney, to make another peremptory challenge, in addition to the number allowed by law. The final result, in other words, was the same as if the court had not only allowed the questions asked of the talesman, but had sustained a challenge for cause. Consequently, if there was any error, there was no injury in these rulings.

4. One of the grounds of defendant's motion for a new trial was newly-discovered evidence. The motion upon this ground was supported by a number of affidavits of himself, his mother, his sister, and others, tending to show that his grandfather and other members of his family had been affected with insanity, and that he himself, since the age of 19 years, had been subject to fits, rush of blood to the head, severe pains in the head; that when so troubled he becomes unable to control his actions, or to remember anything he does; that when under the influence of liquor he becomes a dangerous man, crazy, and irresponsible, etc. The learned judge of the superior court, in denying the motion for a new trial, delivered an opinion from which we extract the following statement of his reasons for disallowing the claim based upon newly-discovered evidence: "Admitting the materiality of this evidence, if produced at the defendant's trial, the first question that arises is whether there appears from the affidavits such a showing as would enable this court to

say that a case has been made out which should entitle the defendant to a new trial herein. A motion for a new trial upon the ground of newly-discovered evidence has always been regarded by the courts with a great deal of suspicion and disfavor. It has been said that 'the temptations are so strong to make a favorable showing after a defeat in an angry and bitter controversy, and the circumstance that the testimony had just been discovered when it is too late to introduce it is so suspicious, that courts require the very strictest showing of diligence.' In one case it was said by Justice SANDERSON that 'applications for new trials upon the ground of newly-discovered evidence must be looked upon with suspicion and disfavor, because the temptation to make a favorable showing after having sustained a defeat is great. A party who relies upon that ground must make a strong case, both in respect to diligence on his part in preparing for the trial, and as to the truth and materiality of the newly-discovered evidence, and that, too, by the best evidence that can be obtained. If he fails in either respect, his motion must be denied.' The law requires at the hands of the defendant that he make careful and diligent preparation for his trial; and it is to be presumed, more especially in a case of the importance of this, involving the life and liberty of the defendant, that in preparing for a trial he should go over very carefully and diligently with his attorney every fact and circumstance which might in any way bear upon his defense. Looking at the character of the showing made by these affidavits, it is inconceivable to my mind that these facts, which are now relied upon as newly-discovered evidence, should not have been known to the defendant, and called to the attention of the attorney in making preparation for the defense. It is true that the defendant states that many of the facts set forth in his affidavit were unknown to him until after his trial, but this statement becomes absolutely unworthy of credence, in view of the fact that in large part the contents of his affidavit are facts which must have been within his personal knowledge. It is not to be believed that the defendant could have suffered, as stated in his affidavit, at various times during his life, from fits and trouble and pains in his head, and the loss of memory as to material things occurring during his life, and not have a personal knowledge of the fact. Neither is it to be credited that a party who has been addicted to the use of strong drink can be entirely unaware as to the effect upon his physical and mental being in the use of intoxicating liquor. The defendant shows, by his own statements, and it appeared in evidence at the trial of this case, that he had been drinking considerably on the day on which deceased met his death. The calling of that fact to the attention of his counsel, to my mind, should necessarily have led to an investigation by the attorney, which would have resulted in eliciting all the facts which are now relied upon by the defendant as newly-discovered evidence. Furthermore, it appears by the affidavits of the mother and the sister of the defendant that all the material facts which are now relied upon by the defendant as newly-discovered evidence were known to them before the occurrence of the facts out of which this case arose. And it appears from the counter-affidavits filed by the district attorney that this sister and the mother of the defendant were in daily communication with the defendant from the time of his arrest up to the time of his trial, and that throughout the entire nine days' trial, which resulted in defendant's conviction, they sat beside him in the court-room, and consulted and advised, not only with the defendant, but with his attorney. The sister states in her affidavit that she saw the defendant on the afternoon of the day in question about 2 o'clock, and that he was then under the influence of liquor, and knowing, as she did, the tendency of his mind and disposition when in liquor, it is almost incredible to believe that she should have neglected to inform his counsel of that fact while preparation was being made for his defense. And I am bound to assume, taking all the circumstances into consideration, that the attorney of the defendant, by an exercise of reasonable care, and inquiry of the defendant and those so intimately connected with him, could have ascertained all the facts in time to employ them in the defendant's behalf at the trial. Nor can the defendant be excused or relieved in any way from the fact that he may have been ignorant of the law or of the rules of evidence which would make these facts material. A party is bound to know the materiality of his evidence, and ignorance of the law does not excuse. Whether or not he was sufficiently acquainted with the law to know of their materiality, it was his duty to have communicated them to his counsel. After a careful consideration of the showing made by these affidavits, when viewed in connection with the facts and circumstances appearing at the trial, I am entirely unable to come to the conclusion either that the evidence set forth was newly discovered, or that it could not by reasonable diligence have been produced at the trial. But there is another reason why the application of the defendant for a new trial upon these grounds would have to be denied. The showing made by the affidavits presented here is wholly and entirely in conflict with the defense made at the trial and the defendant's own evidence. While the defendant may make as many and different defenses to a charge as he may see fit, although they may be inconsistent, nevertheless, if he proceeds to trial upon a certain line of defense without making due inquiry and preparation as to any other defense that he may have to the charge, he cannot be permitted, when the issue has gone against him, to thereafter come in, and, upon a motion for a new trial, suggest for the first time that there is other evidence material to his defense upon a new and different theory. He cannot divide up his defense piecemeal. If he were to be permitted to pursue one line of defense without inquiring as to any other until the issue had gone against him upon that, and then for the first time inquire as to any other, and be granted a new trial upon the ground that it was newly discovered, there would be no end of litigation. A new trial will not be granted upon evidence in conflict with that given at the trial. People v. McCauley, 45 Cal. 146–148; People v. O'Neal, 67 Cal. 378, 7 Pac. Rep. 790." These reasons, we think, are conclusive against the contention of appellant. The record discloses no error, and the judgment and order of the superior court are therefore affirmed.

We concur: McFarland, J.; Garoutte, J.; Sharpstein, J.; Paterson, J.; Harrison, J.; De Haven, J.

(95 Cal. 343)

Diefendorff v. Hopkins. (No. 13,017.)[1]

(*Supreme Court of California.* Dec. 10, 1891.)

Conversion—Verdict—Pleading—Objections Waived—Wife's Separate Property.

1. Where the verdict in an action for the conversion of goods is for defendant, there need be no finding as to value or damage.

2. An objection to a plea on the ground of insufficiency will not be considered on appeal, when not raised in the court below.

3. Where a married woman, with her own funds, establishes a boarding-house, and with the proceeds thereof mingles a monthly allowance from her husband, and it is not apparent whether the furniture, etc., of the house is purchased with her own money or with that furnished by her husband, but her husband has nothing to do with the business, and by their actions and declarations both show that they considered the business hers alone, and no question is raised as to the rights of the husband's creditors, the furniture of such house must be deemed to be her separate property.

Department 1. Appeal from superior court, city and county of San Francisco; James G. Maguire, Judge.

Action by Cornelius J. Diefendorff against Peter Hopkins for the conversion of goods. Judgment for defendant. Plaintiff appeals. Affirmed.

Thornton & Merzback and *Geo. A. Blanchard*, for appellant. *Freeman, Bates & Rankin*, for respondent.

Beatty, C. J. The defendant, as sheriff of the city and county of San Francisco, levied a writ of attachment, issued in an action commenced by certain creditors of Mrs. M. A. Rix against her and her husband, upon the furniture of a boarding and lodging house known as the "Colonnade." The plaintiff, claiming to be the owner of the property attached, as vendee of the husband, demanded it of the defendant, and, his demand being refused, commenced this action to recover damages for its conversion. The findings and judgment of the superior court were in favor of the defendant, and the plaintiff appeals from the judgment and from an order denying his motion for a new trial. In support of his appeal from the judgment, the plaintiff makes two assignments of error: *First.* "The judgment is erroneous on the face of the record, because there is no finding on the material issue of value and damage to the plaintiff." *Second.* "The justification as pleaded is insufficient upon the face of the answer, in this: that it is not alleged that either an affidavit or undertaking on attachment was filed in support of the writ under which the defendant justifies."

In considering these assignments it is necessary to state the substance of the complaint and answer. It is alleged in the complaint that the defendant is sheriff; that on June 20, 1886, plaintiff was the owner and entitled to the possession of the furniture in the Colonnade; that on said day the defendant took said furniture and converted it to his own use; that the plaintiff thereafter, and while still the owner and entitled to the possession of said furniture, demanded of the defendant its redelivery and surrender to him; that said demand was refused; that said furniture is of the value of $20,000, and that plaintiff has been damaged in that amount by said wrongful taking and conversion. The answer denies that plaintiff was ever the owner or entitled to the possession of all or any part of the furniture described in the complaint; denies that the defendant ever converted it, or any of it, to his own use; denies that surrender or redelivery has been demanded; denies that the furniture is worth any more than $3,000; and denies that plaintiff has been damaged in any sum whatever. Following these denials, in what is designated in the findings of the superior court as subdivision 2 of the answer are the following allegations: "Defendant, further answering, as a further defense to said action avers: That on the 1st day of June, 1886, one Margaret A. Rix was, and for a long time prior thereto had been and still is, the sole owner of all the property described in plaintiff's complaint. That on said 1st day of June, 1886, an action was duly commenced by one P. D. Barnhard against the said Margaret A. Rix and her husband, Alfred Rix, in the superior court of the city and county of San Francisco, state of California, to recover the sum of $5,451.90, alleged to be due and owing from defendant Margaret A. Rix to P. D. Barnhard, the plaintiff in said action, upon certain promissory notes executed by said Margaret A. Rix to one John Horstman and others, and assigned to said plaintiff; also for merchandise sold and delivered by John Horstman & Co. to said Margaret A. Rix upon open accounts, which said accounts were assigned to plaintiff. That on said 1st day of June, 1886, a summons in due form was issued in said last-named action, and was thereafter, on the —— day of June, 1886, served upon the defendant Alfred Rix, the husband of the defendant Margaret A. Rix, and thereafter, on the —— day of June, 1886, served upon the defendant Margaret A. Rix, and said defendants have appeared to said action in said court. That on the 1st day of June, 1886, a writ of attachment in due form was issued in said last-named action after the issuance of summons therein, and was placed in the hands of the defendant as sheriff as aforesaid. That on or about date, and in pursuance of the commands of said writ, this defendant, as sheriff, levied said writ of attachment upon the property described in the plaintiff's complaint, and placed a keeper in charge of said property, and still holds the same under and by virtue of said writ of attachment, and in no other manner. That at the date of the levy of said writ of attachment this defendant was the duly elected, qualified, and acting sheriff of the city and county of San Francisco, and the property levied on, as this defendant is informed and believes, was and is the property of the defendant Margaret A. Rix, and subject to seizure by virtue of said attachment. That this defendant has never removed any portion of the property described in plaintiff's complaint from the Colonnade House, but has placed a keeper in charge of said property in said house, and allowed the said Margaret A. Rix to use said property, subject to the control of said keeper. That this defendant now holds said property as sheriff, to satisfy any judgment which may be recovered in said action of Barnhard against Rix."

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[1] Rehearing granted.

The following are the findings of the superior court: "(1) That the plaintiff was not on the 20th day of June, 1886, nor at any time prior to the commencement of this action, the owner or entitled to the possession of all or any of the household furniture described in this complaint. The defendant on or about said 20th day of June, 1886, took said furniture in the manner hereinafter sated; and the plaintiff thereafter made a demand upon the defendant for the surrender and delivery of said furniture; and the defendant then and at all times refused to surrender and deliver the same to plaintiff. (2) That all the allegations of subdivision two of the defendant's answer are true. That the defendant seized and holds the property described in plaintiff's complaint, under the circumstances and for the purposes stated in said subdivision two. As conclusions of law, I find the defendant entitled to judgment for his costs of suit, and to be dismissed hence without delay. Signed December 29, 1887. James G. Maguire, Judge."

1. The judgment is not erroneous for want of an express finding on the issue of value and damage. There could be no finding of damage, because the effect of the findings made is that there was no damage, and the value of the goods is of no consequence. Whether it was three thousand or twenty thousand dollars could make no possible difference in the result. Under the facts found, no additional finding as to value could have prevented a judgment for the defendant for costs; and it has been frequently held in this court that the failure to pass upon an issue which has thus become immaterial is not error, or, at least, that it is not a prejudicial error. McCourtney v. Fortune, 57 Cal. 619; Dyer v. Brogan, 70 Cal. 139, 11 Pac. Rep. 589; Malone v. County of Del Norte, 77 Cal. 217, 19 Pac. Rep. 422; Robinson v. Railroad Co., 65 Cal. 263;[1] Brison v. Brison, 90 Cal. —, 27 Pac. Rep. 186. Many other decisions to the same effect might be cited. Notwithstanding these decisions, it is contended by appellant, or seems to be, that an omission to find upon all the issues in the case is prejudicial error, because it deprives him of the advantages which it was the purpose of the statute (Code Civil Proc. §§ 632, 633) to secure, viz., a final adjudication upon each separate issue, ever a basis for a final judgment by this court on the appeal. But we do not see how this court could ever in any case render a final judgment for the appellant, however full and specific the findings might be, if a finding on one or more of the issues compelled a judgment for the respondent regardless of the others. As to the claim that the parties have a right to a finding upon every specific issue in a case, in order that they may plead it as *res adjudicata*, in some possible future controversy where it may become material, although it is not so with regard to the matter being litigated, we do not think it was any part of the purpose of the statute to secure such a dubious advantage.

2. No question was raised in the superior court either by demurrer to the answer or by objection to evidence, as to the sufficiency in form and substance of the defendant's plea of justification under the attachment; and conceding, without deciding, that if such an objection had been made it would have been necessary for the defendant to amend his answer, we are bound to hold, in accordance with our settled rule, that where, as in this case, the trial has been conducted in the superior court upon the assumption of all parties that a plea is sufficient, it cannot be objected to for the first time when the case is here on appeal. The judgment, therefore, must be affirmed.

The principal question in the case, however, arises upon the appeal from the order denying the plaintiff's motion for a new trial. He contends, in support of this branch of the appeal, that the first finding of the court is contrary to the evidence. In other words, he contends that from all the evidence in the case it clearly appears that the furniture in controversy belonged to Alfred Rix, the husband of Mrs. Margaret A. Rix, in June, 1884, at which date it was transferred to the plaintiff by a bill of sale executed by Mrs. Rix, in the name of her husband as his attorney in fact, and that it has ever since remained the property of the plaintiff. In addition to the findings of the superior court, above quoted, there is contained in the record an opinion of the judge in which the grounds of his decision are set forth more specifically and more at large, and in which he discusses several matters not involved in the findings, as, for instance, the effect of the conduct of Alfred Rix as an estoppel, the effect of an existing lease of the furniture upon plaintiff's right of possession at the date of the seizure, and of the commencement of the action, etc. A great deal of space is devoted in the briefs of counsel to a discussion of these questions, and of points of practice and pleading to which they give rise. We think, however, that they are wholly immaterial. The question, and the only question, to be decided is this: Does the evidence support the findings that the plaintiff was never the owner of the furniture, and that Mrs. Margaret A.

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[1] 3 Pac. Rep. 878.

Rix, at the date of the levy of the attachment in the suit of her creditors, was the sole owner? If it does, the order must be affirmed; and if it does not, the order must be reversed, irrespective of the reasons contained in the opinion of the judge.

The evidence shows that Alfred and Margaret A. Rix were married in 1858, and took up their residence in a house belonging to the husband on Pine street, near Powell. At the date of the marriage the wife had no property, but shortly thereafter her husband gave her some lots at the Mission, which she subsequently sold. With the proceeds she purchased a vacant lot adjoining the family residence, upon which her husband erected a large house, containing about 30 rooms, which she used as a boarding and lodging house. Subsequently she rented and disposed of several other boarding or lodging houses in succession before taking the Colonnade. She always, however, kept up the Pine-Street house, leaving it in the personal charge of her niece when she was compelled to be at the other places. How she managed to furnish these various houses, whether by the aid of her husband or upon her own credit, does not distinctly appear; but it is very clearly shown that her husband had nothing to do with the business, either actually or ostensibly. It was always spoken of as her business, and both by his words and his whole course of conduct Mr. Rix distinctly repudiated any concern in it, or any responsibility for its debts. In 1870 he was called to New York on business, and during the ensuing four years was there a large portion of the time. From 1874 to 1883 he was there all the time, with the exception of a few flying visits to California. During all of this time Mrs. Rix was carrying on her business in San Francisco, a business with which her husband would have nothing to do, and which he was constantly advising her to give up. He made her an allowance of $400 a month, apparently for the support of herself and children, but seems never to have directed any particular application of it. She apparently mingled the receipts of her business and her husband's allowance, and expended both in supporting herself and children and in keeping up the business. The circumstances and the acts and declarations of both parties indicate that this was known by and at least tacitly consented to by her husband. The result was that in 1883, her husband still being in New York, she had the Colonnade, a large house of 100 rooms, fully furnished, where she was keeping a boarding and lodging house, and the Pine-Street house, where her niece was in charge. But she had incurred debts, and, being pressed for money, tried to obtain it from the plaintiff. She offered to sell him the furniture of the Colonnade, presumably upon some such terms as were subsequently made in the name of her husband, but the plaintiff would not purchase from her. Acting under advice of counsel, he required a bill of sale from her husband. She accordingly obtained from her husband some sort of an authorization to sell, the terms of which, the writing having been lost, are not very clearly proven. Whatever they were, however, the power of attorney was executed by Mr. Rix, as a matter of form, as he expressed it; or rather, as the evidence indicates, for the mere purpose of satisfying the plaintiff. It is perfectly evident that, in spite of the power of attorney and the form of the transaction, Mrs. Rix all the time claimed the furniture and the right to dispose of it, and that Mr. Rix never did claim it or any part of its proceeds. After obtaining written authority from her husband, Mrs. Rix executed and delivered a bill of sale of the Colonnade furniture in her husband's name to the plaintiff, receiving therefor the sum of $3,000. At the same time the plaintiff gave her a lease of the furniture for two years, which was subsequently renewed for another term of two years, at a rent of $40 per month, stipulating that she might purchase the furniture at any time within the term for $4,000. There was no delivery or change of possession of the furniture. The plaintiff lodged in the Colonnade for a few months, as others did, but it is not seriously claimed that this circumstance was sufficient to work a change of possession. There was not the slightest outward or visible change in the condition of the property, nor did any occur up to the date of the levy of the attachment. Such being the facts disclosed by the evidence, we think they sustain the finding of the court that the furniture of the Colonnade was the separate property of Mrs. Margaret A. Rix.

To begin with, she owned the Pine-Street house and lot, where she carried on a business which was hers exclusively, and in which her husband refused to have any part. The proceeds of such business were, therefore, her separate estate, as being the profits of her separate property. Civil Code, § 162. It is true that they may have been, to some extent, the profits of her labor and personal attention, but so must, in some degree, be the rents, issues, and profits of any separate estate of either spouse, and the wife must have the same right to manage her separate estate, so as to turn it to profit, that the husband has to manage his separate estate. The proceeds of the business, therefore, belonged to her. What these amounted to and how they were expended does not appear, and neither is it shown how the Pine-Street house was furnished. But the whole course of conduct of both husband and wife, for years, and all their declarations, go to show that she managed the boarding-houses, bought and sold and exchanged furniture just as she pleased, and in her own name, with her husband's full knowledge, and without any objection on his part, except his objection to her engaging in a business at all, which he considered unprofitable and injurious to her health.

As to the furniture in question, these circumstances, we think, are more than sufficient to overcome the presumption which ordinarily obtains that any property purchased by either spouse after marriage is community property. Even if it appeared that some of the furniture originally put in the Pine-Street house was bought and paid for by Mr. Rix, the subsequent conduct and declarations of the parties would warrant the inference that it was a gift to his wife. And if, with his knowledge and express or tacit consent, she used some portion of her monthly allowance to pay bills incurred in her business, that also would, as between themselves at least, be regarded and treated as a gift. To what extent creditors of the husband could call in question such transfers to the wife, or how far they could resort to the proceeds of a business, carried on as this was, in disregard of the provisions of the statute relating to sole traders, is a question which does not arise in this case; the only question here being as to how property acquired after marriage may, as between husband and wife, become the separate property of the latter. There is no doubt that it may become so by gift, and we think that, so far as any property originally belonging to this community was mingled with the profits of Mrs. Rix's separate estate, the evidence fully warrants the conclusion that it was so mingled with the husband's knowledge and consent, and with the intention that it should be hers to use, control, and alienate at her pleasure. Indeed, neither the husband nor wife makes any claim to the contrary in any part of their evidence. All this the plaintiff knew, or might easily have ascertained, (and there were abundant facts within his knowledge to put him upon injury,) before purchasing the property; but he neglected to avail himself of the knowledge which he had or might have had. The result is that he has no title to the furniture by the transfer from Alfred Rix. As against Mrs. Rix, his title would probably be good by estoppel; but as against her attaching creditors it is wholly invalid for want of delivery and change of possession. The judgment and order of the superior court are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(91 Cal. 621)

ORENA v. CITY OF SANTA BARBARA. (No. 14,118.)

(*Supreme Court of California.* Nov. 7, 1891.)

BOUNDARIES — SURVEYS — STREETS — LOCATION— EVIDENCE—PUBLIC USE—INITIAL POINTS—ORDINANCES—ESTOPPEL—ADVERSE POSSESSION.

1. A surveyor, hired by a city to make a survey and division into blocks and streets of its lands, the streets to be 60 feet wide, and the blocks 150 yards square, and the corners of the squares to be marked by stakes, made the survey according to contract, and actually located the blocks and streets, marking each block by a stake, many of which remained for several years. His return of survey was merely that the survey was made, as directed in the contract, but contained no field-notes, and made no mention of any initial point or base line. Thereafter the city had made, and adopted as official, maps which purported to show said survey. And certain streets as so surveyed and mapped were declared open. The city then deeded a certain number of square feet, describing them as in a certain corner of one of said blocks, and bounded by two of said streets. *Held*, that the lot was bounded by the streets as actually located by the surveyor, and that, the stakes showing the location of the block and street lines having been lost, and there being no evidence of the precise point where they had been placed, evidence of the boundaries of the street as actually opened and used was material.

2. The fact that the grantee of the land inclosed his full quantity of land within the block, taking as the street line the boundary as actually opened, and that he acquiesced in this line for many years before putting out his fence into the street as actually used, is evidence of the correctness of the boundary as opened.

3. In ascertaining the actual location of streets and blocks, the initial point and base line of the survey are not necessarily more controlling, or even as much so, as other ascertained points in the survey.

4. An ordinance declaring certain stakes to be the initial points of a survey already made, and attempting to locate lines therein, is void.

5. Such ordinance does not estop the city from claiming a line, inconsistent with the provisions of the ordinance, as the boundary between a street and a block which it had previously conveyed and described as bounded by the street.

6. In an action to quiet title to land claimed by defendant to be part of a street and by plaintiff to be part of his lot, plaintiff cannot make out a *prima facie* case by evidence of adverse possession, for title to a street cannot be thus acquired as against the public.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; B. T. WILLIAMS, Judge.

Action by Gaspar Orena against the city of Santa Barbara to quiet title to a strip of land. Judgment for plaintiff, and defendant appeals. Reversed.

Thos. McNulta, for appellant. *W. C. Stratton*, for respondent.

TEMPLE, C. This is an action to quiet title to a strip of land about 16 feet wide, claimed by plaintiff to be a part of block 268 in the city of Santa Barbara, and by the defendant to constitute a portion of Gutierrez street. In 1851 the city of Santa Barbara, being the proprietor of the ungranted lands within its limits, contracted with Haley for a map of the city and for a survey and division into blocks and streets of a certain portion of the lands. Haley agreed to divide the city into squares of 150 yards by streets 60 feet wide, and "to mark each angle of said squares with substantial redwood stakes 18 inches long, not less than two inches in diameter, and to sink said stakes into the ground 16 inches; to make an accurate map of said streets and squares," etc. March 1, 1851, Haley reported "that the city was now surveyed in the manner pointed out in the contract." The report did not contain field-notes, or state the initial point or base line, or that any had been established. In November, 1852, the city employed Wackenreuder to make certain surveys and maps, which were reported April 22, 1853, with two maps, marked "1" and "2." These maps were, by ordinance passed August 8, 1855, declared official maps of the city of Santa Barbara. They were maps showing or purporting to show the Haley survey. April 29, 1853, an ordinance was approved, declaring certain streets, as surveyed by Haley and mapped by Wackenreuder, open. Gutierrez street was one of these streets. Haley made his survey according to contract, and actually located all the streets and blocks, marking each block by a stake driven at each corner. These stakes remained for several years, or at least many of them did, and were known and recognized as Haley's stakes. Lots were sold by the city and conveyed according to the survey, or at least such is our inference from the evidence, although the fact is not made very clear. The plaintiff claims under a deed from the town of Santa Barbara, dated July 9, 1867, which describes his property as "one hundred varas lot situated in the south-west corner of block two hundred and sixty-eight, in the town of Santa Barbara, containing 278 and one-tenth square feet, bounded on State and Gutierrez streets, and at right angles to said streets 278 1-10 feet." It does not appear that there was, at the date of grant, any official map of the town of Santa Barbara, except the Haley, sometimes called the "Brady," map, and the Wackenreuder maps. It is plain, therefore, that plaintiff's lot is bounded by Gutierrez street, as actually located by Haley, and the question in the case is as to this location.

The court apparently failed to find evidence of the existence of any of Haley's stakes upon block 268, or of the precise point where they had actually been placed. Haley was a witness at the trial, and testified substantially that the intersection of Carrillo and State streets was the initial point of his survey; that the streets, as he surveyed them, were exactly 60 feet wide, with the exception of Carrillo and State streets, which were 80 feet each; and that the blocks were 450 feet square, as required by his contract with the city. The plaintiff had been in possession of his lot for 25 years, and had, through tenants, fenced it. Up to about 1876 his fence along Gutierrez street corresponded very nearly with the line of Gutierrez street, as claimed by the defendant. At that time a survey was made from the intersection of Carrillo and State streets, which, allowing 60 feet for the street and 450 feet for blocks, according to the projected plan of the city and Haley's report of his survey, located his line as he now claims it. Thereupon he moved his fence out, as he testified, some 14 feet; as defendant claims, the whole 16 feet in dispute. If the survey of Haley had been exact, the plaintiff would be justified in his conclusion, whether the point measured from were the initial point, or any other ascertained point in the Haley survey, for all would correspond; but so soon as it was determined that Haley's survey was inaccurate, as admittedly it was, the value of such measurements from the initial point, or any other, as evidence, was materially impaired. For instance, a point in Haley's survey was pretty well established at the corner of State and Montecito streets, distant the width of one block and one street easterly from the disputed boundary; and another at the corner of Haley and State streets, the width of one block and two streets westerly. Between these two points, assuming them to have been established, there is an excess of over 16 feet. According to the testimony of a former city surveyor, who ran the line of Gutierrez street by the line of improvements and reputed monuments in the Haley survey, as he determined them, 14 feet of this excess is between Haley and Gutierrez streets. This is in the block immediately opposite plaintiff's premises on Gutierrez street, and is between plaintiff's premises and the assumed initial point. On plaintiff's theory he would get this entire excess. In other words, he gets the benefit of the mistakes in the survey, which, in order to make out his case, he assumes to have been mathematically correct. But the initial point and base line, if they had been marked on the map, and returned in the notes of the survey, instead of existing only in the memory of the surveyor, as they did in this case, would not be necessarily more controlling than other ascertained points in the survey in ascertaining the actual location of streets and blocks. Whether the initial point be of greater or less importance than other ascertained points, would depend on circumstances,—their proximity and relation to the point to be located.

In determining the line of the street, measurements on that street would naturally be of more value than elsewhere; and if they, or the places where they were, cannot be located, it would be important to ascertain the boundaries of the street as actually opened and used; and, if such location has been generally acquiesced in by the public, by lot-owners, and the municipality, in the absence of more certain evidence, it will be conclusive. In this case, the very fact that the plaintiff has inclosed his full quantity of land within the block, as claimed by the defendant, and that, after acquiescing in this line for a number of years, he put out his fence, intruding upon the street then actually used by the public, is a strong circumstance against him. That the fences were built by his tenants makes no difference. He let and relet the premises as inclosed, and still occupies and claims to the fences. He cannot deny his inclosure. If the entire survey could be revised, and made to conform to the plan of the city as projected, and the plaintiff could be awarded his lot under the revised survey, he would gain nothing. There is no reason in his contention except upon the idea that he will retain the full quantity which he now holds, and so much more. But there is no more reason for adjusting the lines of Gutierrez street to the supposed base and initial point than the other streets and blocks, where no monuments of Haley's survey are found. This is obviously impracticable, for it affects the oldest and best improved portion of Santa Barbara, and the evidence shows what should have been expected after the lapse of nearly 40 years,—that it is difficult to locate such monuments.

The learned judge who tried the case adopted the theory of the plaintiff, and he was probably induced to do this by certain ordinances of the city of Santa Barbara, which were admitted against the objections of the defendant, and which rulings are assigned as error in the statement on motion for a new trial and on this appeal. One was ordinance No. 28, passed November 3, 1870. It was here ordained that the iron stakes at the intersection of State and Carrillo streets and at the easterly corner of block 142 "be from now henceforth the initial points of the town survey and of all locations of lots and streets. Satisfactory evidence shows that the aforesaid corners of blocks have been the initial points of the Salisbury Haley surveys; * * * therefore * * * all surveys made thereafter that in any manner deviate from the said initial points, and vary with the courses and distances as set forth in said S. Haley's maps, are hereby declared null and void," etc. This ordinance is void, and should not have been received in evidence. The city council could not change the location of streets and highways in this manner, nor could it affect the rights of lotholders under grants previously made. Much less could it lay down rules of evidence by which the courts should determine the location of points, nor determine the fact as to the initial point. Even if it had been made in advance, it would have been utterly impracticable, and would not have controlled the actual surveys, although they were shown to be incorrect. No absolutely accurate survey ever was or ever will be made. In order to build cities and towns there must be some finality as to the location of blocks and streets. Under such an ordinance, if valid, there could be none. All lines would be forever subject to be revised and corrected or changed by new surveys not really more accurate, but only for the time deemed so. The ruling admitting ordinance 39 may be disposed of in the same way. The respondent claims that these ordinances, under the circumstances, constitute an estoppel against the city; but, independently of the fact that, so far as locating these lines are concerned, they are absolutely void, we see no element of estoppel in them, and the plaintiff has not expended money or done anything to his injury in reliance upon them. All these ordinances, to which objection was made, were enacted after the grant to plaintiff, and after the street had been opened. In no event could they affect the location of plaintiff's lot. We cannot say that they did not affect the judgment of the court below in its determination of the cause.

In his complaint the plaintiff avers that for more than 16 years before the commencement of the action he had been in the actual, open, notorious, quiet, peaceable, and exclusive possession of the premises in controversy, holding and claiming the same adversely to the whole world, and that the defendant was not seised or possessed of the land, or any part thereof, for 5 years before the commencement of this action. The second finding of the court is in nearly the same language. It is also found that the plaintiff is the owner. This may have been a conclusion from the fact of the adverse possession found. The fourth finding is to the effect that the premises in dispute do not constitute a portion of Gutierrez street. This also may have been a conclusion from the same finding of adverse possession. The fifth finding is to the effect that the plaintiff did not declare that the premises in dispute were a part of Gutierrez street, or consent to its use, and the same has never been dedicated to public use. This is all that is found as to the title of plaintiff, and all that may have been inferred from the supposed adverse possession of plaintiff. But the question of adverse possession is a false quantity in the problem to be solved. The burden was upon the plaintiff to show title in himself. He can do that only by proof that the premises are within his grant. Proof of his supposed adverse possession does not make a *prima facie* case. This claim assumes the very question in controversy, for if the premises are a part of the public street there could be no adverse possession. Individuals may intrude upon or obstruct a public thoroughfare, but the public cannot be disseised of such lands, and such intruder acquires no rights. We think the judgment and order should be reversed, and a new trial ordered.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

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92 Cal. 228

ANTONELLE *et al.* v. BOARD OF NEW CITY HALL COMMISSIONERS *et al.* (No. 13,815.)

(*Supreme Court of California.* Dec. 11, 1891.)

Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

W. W. Bishop and *G. H. Perry*, for appellants. *Langhorne & Miller*, for respondents.

MCFARLAND, J. This is an appeal from a judgment of the superior court in a proceeding in *mandamus*, commanding the board of new city hall commissioners to allow a certain demand of respondents, payable out of the new city hall fund. The transcript consists merely of the pleadings, the judgment, and a notice of appeal therefrom. The case was tried without a jury, and findings were waived. The complaint (or petition) states facts sufficient to constitute a cause of action, and to authorize the issuance of the writ prayed for, and was attacked only by a general demurrer. All the issues made by the pleadings are presumed to have been found in favor of the petitioners. We are unable, therefore, to see any opening for an attack on the judgment. Judgment affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

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92 Cal. 277

PEOPLE v. WONG WANG. (No. 20,821.)

(*Supreme Court of California.* Dec. 12, 1891.)

POLICE COURTS—JUDICIAL NOTICE—SUFFICIENCY OF INFORMATION.

1. Act March 18, 1885, establishing police courts in cities having 30,000, and less than 100,000, inhabitants, and giving such courts exclusive jurisdiction of all misdemeanors punishable by

fine or imprisonment, or both, applies to Los Angeles; the court taking judicial notice of the results of the census of the United States for 1890, which shows that said city contains the population required by said act.

2. In a trial in the superior court of Los Angeles county for a misdemeanor punishable by imprisonment, the information charging that the offense was committed in the county, and not showing whether within or without the city, of Los Angeles, is insufficient, under Act March 18, 1885, above, as it fails to show that the offense was committed within the jurisdiction of the superior court.

In bank. Appeal from superior court, Los Angeles county; B. N. SMITH, Judge.

Wong Wang was convicted of running a gambling game, and appeals. Reversed.

Willis & Appel, for appellant. *James McLachlan*, for the People.

SHARPSTEIN, J. Appellant was tried and convicted in the superior court of Los Angeles county upon an information charging him with having, on the 18th day of October, 1890, at the county of Los Angeles, willfully and unlawfully opened, carried on, and conducted a certain gambling game commonly known as "Chinese Pool;" said gambling game being then and there a percentage game, played for money by means of and with certain devices, to-wit, a billiard table, a board, a billiard ball, and cue. After appellant's motion for a new trial had been overruled, he made a motion in arrest of judgment, one of the grounds of which was that the court had no jurisdiction of the offense charged in the information. The information alleges that the offense was committed in the county of Los Angeles. That county embraces, with other territory, the city of Los Angeles. The offense charged is a misdemeanor punishable by imprisonment, and therefore the police court, if any there was, of the city of Los Angeles, if the offense was committed in said city, had jurisdiction of the offense. Was there a police court in said city on the 18th day of October, 1890, the alleged date of the commission of the offense? The act of March 18, 1885, entitled "An act to provide for police courts in cities having thirty thousand, and under one hundred thousand, inhabitants, and to provide for officers thereof," provides that "the judicial power of every city having thirty thousand, and under one hundred thousand, inhabitants shall be vested in a police court to be held therein by the city justices, or one of them, to be designated by the mayor;" and it is made the duty of said city justices to hold said police court. And exclusive jurisdiction of all misdemeanors punishable by fine or imprisonment, or both, is conferred by said act upon said police court.

Does this act apply to the city of Los Angeles? Did it have 30,000, and under 100,000, inhabitants? The act of congress entitled "An act to provide for taking the eleventh and subsequent censuses," approved March 1, 1889, provides "that the enumeration required by this act shall commence on the first Monday of June, 1890, and be taken as of that date." And it is further provided that each enumerator shall compute the enumeration of his district, and prepare the returns required to be made, on or before the first day of July, 1890. We know that the enumeration so made established that the city of Los Angeles had a population of more than 30,000, and less than 100,000, inhabitants on the first Monday of June, 1890. Courts take judicial notice of "public and private official acts of the legislative, executive, and judicial departments of this state and of the United States." Section 1875, Code Civil Proc. In Bank v. Cheney, 94 Ill. 430, the court said: "We must take judicial notice that by the census of 1870 Greene county contains a population exceeding twenty thousand inhabitants, and not exceeding seventy thousand, and therefore, according to the classification adopted, belonged to the second class." In People v. Williams, 64 Cal. 87, 27 Pac. Rep. 939, it was contended, among other things, that the court erred in admitting in evidence a certificate of the superintendent of the census to prove the population of the county of Santa Barbara. The court held there was no error in admitting said certificate, and said: "But, if this is not so, the court below and this court can take judicial notice of the results of such census." Citing section 1875, Code Civil Proc.

The exclusive jurisdiction of the police court over certain public offenses committed in a city having 30,000, and under 100,000, inhabitants, depends upon the fact of its having the specified number of inhabitants, and not upon any report or proclamation of the fact. The attorney general states that the "census returns" for California were filed with the secretary of state of California, January 13, 1891. That was 18 days before the court overruled the motion in arrest of judgment; and, if the court took judicial notice of the filing of those returns at the date of their filing, it must be held to have had judicial notice that on the first Monday of June, 1890, the city of Los Angeles had 30,000, and under 100,000, inhabitants; and that the police court of said city, from and after that date, had exclusive jurisdiction of the offense with which appellant was charged. It is not alleged in the information that the offense was committed within the corporate limits of the city of Los Angeles, nor is it alleged that it was committed outside of these limits. To give the superior court jurisdiction, the information should show that the offense was committed within the jurisdiction of that court. The information in this case does not show that fact. The offense may have been committed within the county of Los Angeles, and yet without the jurisdiction of the superior court. It is a familiar and well-settled principle of law that the indictment must allege that the offense was committed within the jurisdiction of the court. 1 Chit. Crim. Law, 131; McBride v. State, 10 Humph. 615. Bishop says: "If the jurisdiction of the court extends over less space than the county, a mere allegation that the offense was committed within the county is insufficient; because, in spite of what is thus disclosed, the tribunal may be without jurisdiction, for the doctrine is general that the place of the offense must be so set out as to show jurisdiction in the court." 1 Bish. Crim. Proc. 375. The allegation of the information that the offense was committed in the county of Los Angeles is consistent with the fact that it was committed in the city of Los Angeles. The rule is that, where the language is ambiguous, a pleading is to be taken most strongly against the pleader. The court erred in overruling appellant's motion in arrest of judgment, and for that reason the judgment is reversed, and the court below directed to dismiss the action, and discharge appellant.

We concur: Beatty, C. J.; Garoutte, J.; Harrison, J.; McFarland, J.

Paterson, J. I concur in the judgment. I do not think the census is complete, so far as the classification of cities is concerned, until the complete returns are filed in the office of the superintendent at Washington. Ex parte Halsted, 89 Cal. 471, 26 Pac. Rep. 961.

De Haven, J. I concur in the judgment.

(92 Cal. xix)

People v. Ah Ung. (No. 20,822.)

(*Supreme Court of California.* Dec. 12, 1891.)

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Willis & Appel, for appellant. *James McLachlan*, for the People.

Per Curiam. This case being in all material respects the same as People v. Wong Wang, 28 Pac. Rep. 270, (this day decided,) and for the reasons given in the opinion in that case, the judgment and order are reversed, and the court below is directed to dismiss the action, and discharge appellant.

(92 Cal. 296)

In re Bonds of Madera Irrigation Dist. (No. 14,157.)[1]

(*Supreme Court of California.* Dec. 12, 1891.)

Constitutional Laws—Legislative Powers—Irrigation Districts — Establishment — Validity.

1. St. 1887, p. 29, which provides for the organization and government of irrigation districts, is within the legislative power to provide laws for the welfare of the state. Irrigation Dist. v. Williams, 18 Pac. Rep. 379, 76 Cal. 360, and Irrigation Dist. v. De Lappe, 21 Pac. Rep. 825, 79 Cal. 351, affirmed.

2. The board of supervisors petitioned to organize an irrigation district is sole judge of the sufficiency of the bond accompanying such petition.

3. The provisions that the petition shall particularly set forth and describe the boundaries of the district sought to be organized does not require that they shall be described with more particularity than would be necessary in an act of the legislature creating a particular district or a municipal corporation.

4. Act March 16, 1889, (St. 1889, p. 212,) § 5, provides for a hearing in court to examine and determine the legality and validity of the proceedings had for the organization of irrigation districts, and the legality of the bonds to be issued, and the sale thereof. Section 2 provides that the "petition shall state facts showing the proceedings had for the issue and sale of said bonds, and shall state generally that the irrigation district was duly organized," etc. Section 4 provides: "The provisions of Code Civil Proc. respecting the answer to a verified complaint shall be applicable to the answer of said petition," etc. A petition under said statute alleged that the petitioner was duly organized, etc., and the answer thereto denied that any of the steps required for the organization were taken. *Held* that, as it was the duty of the court to determine the legality of the organization, the record of the board of supervisors that there was evidence, to the satisfaction of the board, on the question whether there were the required number of *bona fide* freeholders within the boundaries of the proposed district who had signed the petition, was incompetent evidence to show the legality of the proceedings.

5. The proceedings for the organization were not defective, though the order for the issuing the bonds did not conform strictly to the statute, since the statute may be followed by the board of directors when issuance by them becomes necessary.

6. The conclusion of the decree, confirming the legality of the organization, which purports to forever bar all persons interested in the organization of the district, save the contestants herein, from denying any fact relating to the organization, or "providing for and authorizing the issue and sale of the bonds of said district, which might by them have been denied, questioned, or disputed in this proceeding," was not authorized by the statute.

In bank. Appeal from superior court, Fresno county; J. B. Campbell, Judge.

Special proceedings by petition of the board of directors of the Madera irrigation district for the confirmation of their organization, and proceedings for the issue and sale of certain bonds of the district. The proceedings were contested by persons owning land within the district. On the hearing a decree was entered in accordance with the petition, and the contestants appeal. Reversed.

R. E. Houghton, Octave G. Du Py, Messick, Maxwell & Phelan, Page & Eells, Pillsbury & Blanding, E. W. Magraw, and *E. W. McKinstry*, for appellants. *Hinds & Merriam, Craig & Merredith*, and *C. C. Wright*, for respondent.

Harrison, J. The board of directors of the Madera irrigation district, on the 25th of May, 1889, filed in the superior court of the county of Fresno, in pursuance of the act of March 16, 1889, (St. 1889, p. 212,) a petition for the confirmation by that court of their proceedings for the issue and sale of certain bonds of said district, amounting to $850,000. In their petition they alleged that "said Madera irrigation district was duly organized under the laws of the state of California, and especially under the provisions of the act approved March 7, 1887," (St. 1887, p. 29;) and set forth the various steps taken by them in reference to the issue and sale of the bonds, and prayed "that the proceedings aforesaid for the issue and sale of the bonds of said district may be examined, approved, and confirmed by said court, and for all and any legal and equitable relief which may be provided by law, and which the court shall deem meet." Notice was thereupon given by order of the court that the hearing of said petition would be had July 5, 1889; and prior to that day the appellants herein filed answers thereto, showing that they were owners of lands within the district to be affected by said bonds, and specifically denying the allegations in said petition. At the hearing upon the issues presented by the answers of the appellants the court rendered its judgment in favor of the petitioners, and approved and confirmed "the legality and the validity of each and all of the proceedings for the organization of said Madera irrigation district," and further adjudged and decreed that "each and all of the proceedings taken to secure and provide for and authorizing the issue and sale of bonds of said district in the sum of $850,000, and affecting the legality and validity of said bonds, up to and including the resolutions and orders of the board of directors of said district, made March 13, 1889, authorizing the issuance and sale of said bonds, be, and the same are hereby, approved and confirmed." From this judgment an appeal has been taken directly upon the judgment roll, bringing here the proceedings at the trial of the issues by a bill of exceptions.

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[1] Rehearing denied, see 28 Pac. Rep. 675.

In presenting their appeal, the appellants have contended that the act of March 7, 1887, under which the proceedings for the organization of the district were had, is unconstitutional, for the reason that it is in its nature beyond the power of the legislature to enact, and also by reason of the provisions therein contained for the organization of the district, and the mode provided for assessments upon the lands in said district, with which to meet the bonds authorized by the act. It is also contended by them that, at the hearing of the proceedings in the court below, the petitioners did not establish by competent evidence that there had been such compliance with the requirements of the act as would constitute a district, or give any authority to provide for the issuance of the bonds in question, and that the evidence upon which the court made its findings was improperly admitted and considered by it. The constitutionality of the act in question was passed upon this court and affirmed in the case of Irrigation Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379, and also in the case of Irrigation Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825; but, inasmuch as counsel have made elaborate arguments herein in review of the conclusion reached in those cases, we have again examined the question in the light of these arguments, and in affirming those decisions we present the reasons upon which we again hold the act to be constitutional more at length than was presented in the former opinions.

1. That the legislature is vested with the whole of the legislative power of the state, and that it has authority to deal with any subject within the scope of civil government, except in so far as it is restrained by the provisions of the constitution, and that it is the sole tribunal to determine as well the expediency as the details of all legislation within its power, are principles so familiar as hardly to need mention. The declaration in article 4, § 1, of the constitution, "The legislative power of this state shall be vested in a senate and assembly, which shall be designated the 'Legislature of the State of California,'" comprehends the exercise of all the sovereign authority of the state in matters which are properly the subject of legislation; and it is incumbent upon any one who will challenge an act of the legislature as being invalid to show either that such act is without the province of legislation, or that the particular subject-matter of that act has been by the constitution, either by express provision or by necessary implication, withdrawn by the people from the consideration of the legislature. The presumption which attends every act of the legislature is that it is within its power, and he who would except it from the power must point out the particular provision of the constitution by which the exception is made, or demonstrate that it is palpably excluded from any consideration whatever by that body.

In providing for the welfare of the state and its several parts, the legislature may pass laws affecting the people of the entire state, or, when not restrained by constitutional provisions, affecting only limited portions of the state. It may make special laws relating only to special districts, or it may legislate directly upon local districts, or it may intrust such legislation to subordinate bodies of a public character. It may create municipal organizations or agencies within the several counties, or it may avail itself of the county or other municipal organizations for the purposes of such legislation, or it may create new districts embracing more than one county, or parts of several counties, and may delegate to such organizations a part of its legislative power to be exercised within the boundaries of said organized districts, and may vest them with certain powers of local legislation, in respect to which the parties interested may be supposed more competent to judge of their needs than the central authority. "The members of the two houses are the constitutional agents of the public will in every district or locality of the state, and they may therefore so arrange the powers to be given and executed therein as convenience, the efficiency of administration, and the public good may seem to require, by committing some functions to local jurisdictions already established, or by establishing local jurisdictions for that express purpose." People v. Salomon, 51 Ill. 50. "If from exceptional causes the public good requires that legislation, either permanent or temporary, be directed towards any particular locality, whether consisting of one county or several counties, it is within the discretion of the legislature to apply such legislation as in its judgment the exigency of the case may require, and it is the sole judge of the existence of such causes. The representatives of the whole people, convened in the two branches of the legislature, are, subject to the exceptions which have been mentioned, the organs of the public will in every district or locality of the state. It follows that it falls to the legislature to arrange and distribute the administrative functions, committing such portions as it may deem suitable to local jurisdictions, and retaining other portions to be exercised by officers appointed by the central power, and changing the arrangement from time to time, as convenience, the efficacy of administration, and the public good may seem to require." People v. Draper, 15 N. Y. 544.

In providing for the public welfare, or in enacting laws which in the judgment of the legislature may be expedient or necessary, that body must determine whether or not the measure proposed is for some public purpose. We do not mean by this that the declaration of the legislature that an act proposed by it will be for the public good will of necessity preclude an investigation therein, or that such declaration will be conclusive when the act itself is palpably otherwise. Consolidated C. Co. v. Central Pac. R. Co., 51 Cal. 269. Acts may be passed by that body which will, by their very terms, or the nature of their provisions, show that their purpose is private, rather than public. Such are the acts that were involved in the cases of Association v. Topeka, 20 Wall. 664; Allen v. Inhabitants, 60 Me. 124; Lowell v. City of Boston, 111 Mass. 454; State v. Osawkee, 14 Kan. 419; People v. Parks, 58 Cal. 624. But if the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court. Railroad Co. v. City of Stockton, 41 Cal. 147. It may be more difficult to define in advance the line of separation between a purpose which is private and one which is public than to determine whether in the individual case the act is for a public or a private purpose, and, as was said by Mr. Justice Miller in Davidson v. New Orleans, 96 U. S. 104, it is wiser to proceed "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require." Whenever it is apparent from the scope of the act that its object is for the benefit of the public, and that the means by which the benefit is to be attained are of a public character, the act will be upheld, even though incidental advantages may accrue to individuals beyond those enjoyed by the general public. We have recently held that an appropriation by the legislature of $300,000 for the World's Fair Columbian Exposition at Chicago (Daggett v. Colgan, Cal. 28 Pac. Rep. 51) is to be sustained as a legitimate appropriation of the public moneys of the state, upon the ground that it is one of the objects of government to promote the public welfare of the state, and to provide for the material prosperity of its people, and that it is for the legislature to determine the manner and the extent to which it will exercise this function of government, and that its determination upon that point is limited by its own discretion, and beyond the interference of courts. The same rules of construction must be applied to the exercise of legislative authority in authorizing an expenditure for a local improvement. Such authorization is a legislative declaration that the expenditure is for a public purpose, and for the welfare of the public, and its action is not to be disregarded by the courts upon an assumption by them that such legislation is unwise, or that it may be injurious to some of the individuals who are affected by it. In determining whether any particular measure is for the public advantage it is not necessary to show that the entire body of the state is directly affected thereby, but it is sufficient that that portion of the state within the district provided for by the act shall be benefited thereby. The state is made up of its parts, and those parts have such a reciprocal influence upon each other that any advantage which accrues to one of them is felt more or less by all of the others. A legislature that should refrain from all legislation that did not equally affect all parts of the state would signally fail in providing for the welfare of the public. In a state as diversified in character as is California, it is impossible that the same legislation should be applicable to each of its parts. Different provisions are as essential for those portions whose physical characteristics are different as are needed in the provisions which are made for the government of town and country. Those portions of the state which are subject to overflow, and those which require drainage, as well as those which for the purpose of development require irrigation, fall equally within the purview of the legislature, and its authority to legislate for the benefit of the entire state, or for the individual district. The power of the legislature to adapt its laws to the peculiar wants of each of these districts rests upon the same principle, viz., that it is acting for the public good in its capacity as the representative of the entire state. Under this principle levee districts have been organized directly by the legislature itself, and their organization has been authorized by the legislature through the board of supervisors of the county in which the district is situated. St. 1867-68, p. 316. Such legislation was upheld in Dean v. Davis, 51 Cal. 406. Under the same principle, reclamation districts have been organized and their creation upheld as a legitimate exercise of legislative power. In passing upon this question in Hagar v. Board, 47 Cal. 233, the supreme court said: "The power of the legislature to compel local improvements which in its judgment will promote the health of the people and advance the public good is unquestionable. In the exercise of this power it may abate nuisances, construct and repair highways, open canals for irrigating arid districts, and perform many other similar acts for the public good, and all at the expense of those who are to be chiefly and more immediately benefited by the improvement;" and, in answer to the suggestion that such was merely a local improvement, the court said: "But we need not rest our decision upon the narrow ground that this is strictly a local improvement. On the contrary, the reclamation of the vast bodies of swamp and overflowed land in this state may justly be regarded as a public improvement of great magnitude and of the utmost importance to the community. If left wholly to individual enterprise, it probably would never be accomplished, and in inaugurating so great a work the legislature has pursued substantially the same system adopted in other states for the reclamation of similar lands, to-wit, by dividing the territory to be reclaimed into districts, and assessing the cost of the improvement on the lands to be benefited;" and refer in support of the opinion to the acts of different states in which similar improvements had been authorized.

The reasons given in that case are fully as potent in support of the authority exercised in the matter of an irrigation district; and, notwithstanding it is urged by counsel for appellants that the authority for reclaiming overflowed lands is to be upheld only as a sanitary measure, it will be seen that that is not the only ground upon which the court based its decision. Nor do we think that it rests upon that ground alone. In our opinion, a more liberal construction should be given to the authority under which such a district is established. Certainly these grounds are not the basis of the authority for the creation of a levee district; that rests, not upon any sanitary ground, but upon the ground of protection to the parties who would be affected by the overflow. Williams v. Cammack, 27 Miss. 222; Wallace v. Shelton, 14 La. Ann. 498. Upon this subject Mr. Cooley says: "But where any considerable tract of land owned by different persons is in a condition precluding cultivation by reason of excessive moisture which drains would relieve, it may well be said that the public have such an interest in the improvement and the consequent advancement of the general interest of the locality as will justify the levy of assessments upon the owners for drainage purposes. Such a case would seem to stand upon the same solid ground with assessments for levee purposes, which have for their object to protect lands from falling into a like condition of uselessness." Cooley, Tax'n, p. 617.

We have not been cited to the statute of any other state which provides for irrigating arid lands, or to any authority in which the power of the legislature over the subject is discussed, but we have no hesitation in saying that the principles upon which the decisions to which we have referred were made are applicable to sustain the legislative authority in making provision for such irrigation. Whether the reclamation of the land be from excessive moisture to a condition suitable for cultivation, or from excessive aridity to the same condition, the right of the legislature to authorize such reclamation must be upheld upon the same principle, viz., the welfare of the public, and particularly of that portion of the public within the district affected by the means adopted for such reclamation. Whatever tends to an increased prosperity of one portion of the state, or to promote its material development, is for the advantage of the entire state; and the right of the legislature to make provision for developing the productive capacity of the state, or for increasing facilities for the cultivation of its soil according to the requirements of the different portions thereof, is upheld by its power to act for the benefit of the people in affording them the right of "acquiring, possessing, and protecting the property" which is guarantied to them by the constitution. The local improvement contemplated by such legislation is for the benefit and general welfare of all persons interested in the lands within the district, and is a local public improvement. This principle is not contravened by the fact that it may even operate injuriously upon some of the individuals or proprietors of land within the district, or by the fact that there may be some who for personal motives may wish to resist the improvement. Such result is only a sacrifice which the individual makes to the general good in compensation for the advantages enjoyed by virtue of the social compact. All laws of this character are upheld upon the same principle as is the creation of a district for the purpose of any other local improvement, such as the opening of a highway, or of a street, or of a public park. The legislature, to which has been confided the matter, has determined that it will be for the public good that such street or park be opened, and it has imposed the burden of such opening upon the property within a limited district. In each of such instances the land taxed for the improvement may not be the only land that will be benefited. Although land adjacent to the district may be incidentally benefited, that is no reason for taxing such land, nor is it any objection to the proceeding that some of the property within the district will not receive any benefit, or that the improvement will more specifically benefit those who have procured its creation. "It has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the meaning of these words as used in the constitution. Such an interpretation would greatly narrow and cripple the authority of the legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the state. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the declaration of rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community." Talbot v. Hudson, 16 Gray, 425.

The means by which the legislature may exercise this power are left to its own discretion, except as it may be limited by the constitution. If, in the exercise of its care for the public welfare, it finds that a specific district of the state needs legislation that is inapplicable to other parts of the state, it may, in the absence of constitutional restrictions, legislate directly for that district, or, if it be the case that similar legislation be required for other portions of the state, it may provide for adapting such legislation to those portions at the will of the people in such districts, as was done in the reclamation and levee laws already referred to. It may, too, by general laws authorize the inhabitants of any district, under such restrictions, and with such preliminary steps as it may deem proper, to organize themselves into a public corporation for the purpose of exercising those governmental duties, upon the same principle as it authorizes the incorporation of any municipal corporation under general laws. The constitution of California has been framed with the principle of investing separate subdivisions of the state with local government, and especially authorizes the legislature to confer the power of local legislation upon such subdivisions within the state as may be organized under its authority. The legislature is itself forbidden to interfere in any manner, except by general laws, with the power of local legislation intrusted to such organizations, nor can it delegate to any but public corporations the power to perform any municipal functions whatever, or vest in any but the corporate authority of a municipal corporation the power to assess and collect taxes for any municipal purpose. But, although the legislature is prevented from passing any special or local law which shall be applicable to only a particular portion or district of the state, its power of legislation for the public good in that portion of the state has not been destroyed. It still retains the full power of legislation conferred upon it in the constitution, but is required to exercise such power in the mode prescribed in that instrument. It may pass general laws which from their nature will be capable of enforcement in only particular portions of the state; or it may by other general laws authorize the organization of municipal corporations, which, from the nature of the functions intrusted to them, can find occasion for organization only in certain portions of the state, and it may by such general laws provide for the organization of such and as many species of municipal corporations as in its judgment are demanded by the welfare of the state, and the "protection, security, and benefit of the people," for which government is instituted, and which has been by the people confided to it. Const. art. 1, § 2. The provision in article 11, § 6, of the constitution, "Corporations for municipal purposes shall not be created by special laws," does not imply that the legislature must by any general law provide a plan in which shall be prescribed the mode under which all municipal corporations must be organized, and the powers that they can exercise. The provision in article 12, § 1, that private corporations "may be formed under general laws, but shall not be created by special act," although more explicit, and, under the declaration of the constitution itself, (article 1, § 22,) "mandatory" rather than permissive, requiring that they must be formed under general laws, has never been construed as requiring that all private corporations must be formed under the same general law, or limited to the exercise of the same powers. On the contrary, the form of organization, as well as the powers to be exercised, have been by legislation adapted to the character of the corporation to be organized. All corporations of the same class are required to be organized in the same manner, but the nature of the organization does not permit, nor does the constitution require, that corporations of different classes shall be organized in the same manner, or provided with the same powers. Hence the provisions that have been made by the legislature for the organization and powers of railroad, insurance, religious, mining, and other business corporations have been adapted to their respective character and needs. With greater propriety has it been left to the legislature to provide the mode of organization and the powers to be exercised by different species of municipal corporations. Such corporations are but the agents or representatives of the state in the particular locality in which they exist. They are organized for the purpose of carrying out the purposes of the legislature in its desire to provide for the general welfare of the state, and in the accomplishment of which legislative convenience or constitutional requirements have made them essential. Although in this state the legislature is required to provide such agencies under general laws, it is authorized, under its general power of legislation, to invest such corporations, when created, with the same powers which without such restriction it could itself have exercised; and in providing for such organizations it need confer upon them only such powers as in its judgment are proper to be exercised by them in the discharge of the particular functions of government which may be conferred upon them. Being the representatives of the legislature in the various localities of the state, the requirements for organization, as well as the powers to be exercised, vary with the character of the purpose for which they may be created. Hence the general laws which the legislature may enact for the organization of public corporations may be as numerous as the objects for which such corporations may be created. For each of these objects the law is the same, but there would be a manifest impropriety in requiring that the organization of a levee district or an irrigation district should be conducted in the same manner as the organization of a corporation for the management of a public park, or the control of the school department. Whether the districts to which such general laws are applicable, or in which the people thereof may avail themselves of the privilege conferred, be many or few, is immaterial. Even if there be but a single district to which the law is applicable at the time of its enactment, the legislature would be justified under its legislative power to pass general laws, in making such provision for that district. Whenever a special district of the state requires special legislation therefor, it is competent for the legislature by general law to authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it. It is not necessary that such public corporation should be vested with all governmental powers, but the legislature may clothe it with such as in its judgment are proper to be exercised within and for the benefit of such district. Being created for the purpose of discharging only one public purpose, it is not requisite that it have power not necessary therefor, or which would be appropriate to a corporation organized for some other purpose. Neither is it requisite that such corporation should have legislative or judicial powers conferred upon it. It may be organized for the mere purpose of exercising executive and administrative functions, with the added power of making such prudential rules and regulations as may be necessary for the exercise of the particular functions intrusted to its charge. The powers committed to a public corporation organized for the administration of a public park, or for the government of a levee district, or for the control of the police department, need be only such as are peculiarly appropriate to such organizations.

It is contended that the act is unconstitutional for the reason that it is a delegation of the legislative power to create a corporation. If by this is meant that only the legislature can create such corporation, the answer is that the constitution prohibits such action. If it is meant that because the corporation is not "created" until the voters of the district have accepted the terms of the act, the answer is that such proceeding is in direct accord with the principles of the constitution. Having the power to create municipal corporations, but being prohibited from creating them by special laws, the only mode in which such corporations could be created under a general law would be by some act on the part of the district or community seeking incorporation, indicative of its determination to accept its terms. As the constitution has not limited or prescribed the character of such general law, its character and details are within the discretionary power of the legislature. We know of no more appropriate mode of such indication than the affirmative vote of those who are to be affected by the acceptance of the terms of the act. The municipal corporations which may be thus created are not limited to cities and towns. The constitution makes provision in various places for municipal corporations other than cities and towns. Article 11, §§ 9, 10, 12, 16. In each of these sections provision is made with reference to the government or officers of "county, city, town, or other public or municipal corporation;" thus clearly indicating that there may be municipal corporations other than those of a town or city, and, consequently, that the provisions with reference to the incorporation of cities and towns found in section 6 of the same article are not controlling in the organization of other municipal corporations, and that, while the constitution carefully provides for the "incorporation, organization and classification" of cities and towns, it makes no similar provision for other municipal corporations, but very properly leaves such action to the discretion of the legislature. Inasmuch as there is no restriction upon the power of the legislature to authorize the formation of such corporations for any public purpose whatever, and as when organized they are but mere agencies of the state in local government, without any powers except such as the legislature may confer upon them, and are at all times subject to a revocation of such power, it was evidently the purpose of the framers of the constitution to leave in the hands of the legislature full discretion in reference to their organization.

In the present case the legislature has chosen to authorize the creation of a public corporation, in the manner and with the forms specified in the act under discussion. For this purpose it has provided that a petition of 50 freeholders, or a majority of the freeholders owning lands within a proposed district susceptible of one mode of irrigation, shall be presented to the board of supervisors of the county within which such lands are situate; and that the board of supervisors shall, upon the hearing of such petition, after notice thereof, determine whether or not it will take steps to organize an irrigation district; and that upon such determination an election shall be ordered, at which, if two-thirds of the electors within the district shall vote in favor of such organization, the district shall thereupon be organized, and its management confided to a board of directors chosen by the electors of that district. It is objected to this that it is placing in the hands of those not interested the power of imposing a burden upon the owners of the land, who may be a small minority of the electors within that district, or who may even be nonresidents of the district. This, however, is a matter which was addressed purely to the discretion of the legislature. Whether such a petition should be made by the owners of a fixed proportion of the land, as was required in the reclamation law, or whether there should be any qualification to the petitioners, or whether there should be any limit to the expenses which they were authorized to incur for the purposes of the improvement, are questions which were solely for the consideration of the legislature. It is not for this department of the government to question the policy or the prudence of a co-ordinate branch. If those who are affected by its proceedings feel that it has not given them sufficient protection, or placed sufficient safeguards around the institution of the corporation, they must seek redress from that body. We can only act upon the law as it has been enacted. It must be observed, however, that this petition has no binding operation, but is merely the initiatory step which gives to the board of supervisors a jurisdiction to act upon the expediency or policy of authorizing the creation of the district. That body is the representative of the county, and has been chosen by its electors for the express purpose of legislation upon local subjects, and may naturally be supposed to have the interests of the entire county, as well as of each of its parts, in charge, and to be acquainted with its needs and requirements. The legislature has not, however, intrusted that body with the final determination of the question, but has authorized it to submit the question to a vote of the electors of the district, and it is only when these electors have determined by a vote of two-thirds of their number in favor thereof that the district can be created as a political body. The objection that this vote may be carried by a majority of those who have no interest in the lands affected thereby is but an incident, and not of the essence of the matter. It is no more than exists in every popular vote which involves the creation of a municipal debt or the adoption of a municipal organization. The fact that the owners of the lands are non-residents within the district, and not allowed a voice in the proceedings, is of the same character. Property qualification for voting, either in amount or character, is expressly forbidden by article 1, § 24, of the constitution, which declares: "No property qualification shall ever be required for any person to vote or hold office;" and, however much non-residents may be affected by the acts and vote of the community, only those who are inhabitants of the district can, by the constitution, be permitted to vote at any election. Article 2, § 1.

That an irrigation district, organized under the act in question, bcomes a public corporation, is evident from an examination of the mode of its organization, the purpose for which it is organized, and the powers conferred upon it. It can be organized only at the instance of the board of supervisors of the county,—the legislative body of one of the constitutional subdivisions of the state; its organization can be affected only upon the vote of the qualified electors within its boundaries; its officers are chosen under the sanction and with the formalities required at all public elections in the state,—the officers of such election being required to act under the sanction of an oath, and being authorized to administer oaths when required for the purpose of conducting the election; and the officers when elected being required to execute official bonds to the state of California, approved by a judge of the superior court. The district officers thus become public officers of the state. When organized, the district can acquire, either by purchase or condemnation, all property necessary for the construction of its works, and may construct thereon canals, and other irrigation improvements; and all the property so acquired is to be held by the district in trust, and is dedicated for the use and purposes set forth in the act, and is declared to be a public use, subject to the regulation and control of the state. For the purpose of meeting the cost of acquiring this property, the district is authorized, upon the vote of a majority of its electors, to issue its bonds; and these bonds, and the interest thereon, are to be paid by revenues derived under the power of taxation, and for which all the real property in the district is to be assessed. Under this power of taxation, one of the highest attributes of sovereignty, the title of the delinquent owner to the real estate assessed, may be divested by sale, and power is conferred upon the board of directors to establish equitable by-laws, rules, and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purpose of the act. Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is in trust for the public, and subject to the control of the state. Its officers are public officers chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public. "Where a corporation is composed exclusively of officers of the government, having no personal interest in it, or with its concerns, and only acting as organs of the state in effecting a great public improvement, it is a public corporation." Ang. & A. Corp. § 32. "A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality of its people. The primary idea is an agency to regulate and administer the interior concerns of the locality in matters peculiar to the place incorporated, and not common to the state or people at large." 15 Amer. & Eng. Enc. Law, p. 954. "Public corporations are such as are created for the discharge of public duties in the administration of civil government." Lawson, Rights, Rem. & Pr. 332.

The constitutionality of the act in question is further assailed upon the ground that it makes no provision for a hearing from the owners of the land prior to the organization of the district. But the steps provided for the organization of the district are only for the creation of a public corporation, to be invested with certain political duties which it is to exercise in behalf of the state. Dean v. Davis, 51 Cal. 406. It has never been held that the inhabitants of a district are entitled to notice and hearing upon a proposition to submit such question to a popular vote. In the absence of constitutional restriction, it would be competent for the legislature to create such public corporation, even against the will of the inhabitants. It has as much power to create the district in accordance with the will of a majority of such inhabitants. It must be observed that such proceeding does not affect the property of any one within the district, and that he is not by virtue thereof deprived of any property. Such result does not arise until after delinquency on his part in the payment of an assessment that may be levied upon his property, and before that time he has opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the basis of his assessment. He does not, it is true, have any opportunity to be heard, otherwise than by his vote, in determining the amount of bonds to be issued, or the rate of assessment with which they are to be paid; but in this particular he is in the same condition as is the inhabitant of any municipal organization which incurs a bonded indebtedness or levies a tax for its payment. His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of the assessment thereon becomes final. People v. Smith, 21 N. Y. 595; Gilmore v. Hentig, 33 Kan. 170, 5 Pac. Rep. 781; Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. Rep. 663; Davies v. City of Los Angeles, 86 Cal. 46, 24 Pac. Rep. 771.

It is also objected that the mode provided for the payment of the bonds is unconstitutional, in that it provides for an assessment upon the real property within the district according to its value, and not according to the benefit which each particular parcel of land may derive from the improvement. The power of the legislature in matters of taxation is unlimited, except as restricted by constitutional provisions. This is one of the attributes of sovereignty which the people have placed in its hands; and they have intrusted its exercise to its discretion, either in the manner or to the extent to which it is to be applied. All taxation has its source in the necessities of organized society, and is limited by such necessity, and can be exercised only by some demand for the public use or welfare. And, whether the tax be by direct imposition for revenue or by assessment for a local improvement, it is based upon the theory that it is in return for the benefit received by the person who pays the tax, or by the property which is assessed. For the purpose of apportioning this benefit, the legislature may determine in advance what property will be benefited, by designating the district within which it is to be collected, as well as the property upon which it is to be imposed, or it may appoint a commission or delegate to a subordinate agency the power to ascertain the extent of this benefit. It may itself declare that the entire state is benefited, and authorize the burden to be borne by a public tax, or it may declare that all or a portion of the property within a limited region is benefited, either according to its value or in proportion to its actual benefit, to be specifically ascertained by actual determination of officers appointed therefor. Upon the power of the legislature over the subject of taxation, as well as the modes in which and the objects upon which it may be exercised, we know of nothing that has been written in any opinion since that of Judge RUGGLES in People v. Brooklyn, 4 N. Y. 419, which is not either an amplification of the views therein expressed, or an adaptation of them to the particular subject under discussion. In the exhaustive opinion of Mr. Justice SAWYER in Emery v. Gas Co., 28 Cal. 345, the principles declared in that opinion were applied to the case then before the court, wherein this power of taxation was shown to be the foundation for upholding the right of assessment in a manner different from the *ad valorem* principle. The controversy upon this subject has almost invariably been against the "front-foot" rule, and in favor of the *ad valorem* principle; and in nearly every state, unless it be New Jersey, the principle has been maintained that it is within the power of the legislature to adopt whichever rule it may select. In Burnett v. Sacramento, 12 Cal. 76, the charter of Sacramento provided that the expense of a local improvement should be assessed upon the adjacent property according to its value, and upon this point the supreme court, speaking through Judge FIELD, said: "The law in question avoids the injustice of general taxation for local purposes, and lays the burden upon the recipients of the benefit. It apportions the tax according to the assessed cash value of the adjacent property, which is as near an approximation to an equitable rule as can well be established. No rule could be adopted which would work absolute equality. An approximation to it is all that can be attained. The power of apportionment, like the power of taxation, is exclusively in the legislature. The constitution contains no inhibition to the tax, and prescribes no rule of apportionment. Security against the abuse of the power rests in the wisdom and justice of the members of the legislature, and they are responsible to their constituents." Assessments for local improvements according to the value of the property assessed have been upheld in Downer v. Boston, 7 Cush. 277; Snow v. Fitchburg, 136 Mass. 183; Gilmore v. Hentig, 33 Kan. 174, 5 Pac. Rep. 781; Strowbridge v. Portland, 8 Or. 82; Creighton v. Scott, 14 Ohio St. 438; Lockwood v. St. Louis, 24 Mo. 20.

It is, however, for the legislature to determine how the apportionment shall be made, and, while it is held that an apportionment of the expenses for a local improvement is to be made according to the benefits received by the property assessed, yet the power to make such apportionment rests upon the general power of taxation, and the apportionment itself does not depend upon the fact of local benefit in any other sense than that all taxes are supposed to be based upon the benefit received by the tax-payer. As was said by Mr. Justice TEMPLE, in Lent v. Tillson, 72 Cal. 428, 14 Pac. Rep. 71: "The main practical difference between assessment for a local improvement and general taxation seems to be that in general taxation it is difficult and generally impossible for the court to say that the purpose of the tax is not a public purpose, or that no benefit will result to the tax-payer, while in local assessments it is more often easy to see that the improvement will not be a special benefit. Still, the benefit is not the source of the power. That is inherent in the government, and is only limited by express or implied limitations found in the constitution, or by its own nature and purposes, and within these limits the legislature is the sole judge of when and to what extent the power shall be used;" and again: "The power being in the legislature, the limitations upon it must be found in the constitution, either in express provisions or by implication, and there exists the same presumption that the law is within legislative power that applies to any other statute; that is, the law will not be declared unconstitutional unless it plainly appears to be so." Page 430, 72 Cal., and page 81, 14 Pac. Rep. Mr. Cooley says, in his treatise on Taxation, (page 622:) "The power to determine when a special assessment shall be made, and on what basis it shall be apportioned, is wisely confided to the legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere." And, in Hagar v. Board, supra, the court said: "It is equally clear that those clauses which provide that taxation shall be equal and uniform throughout the state, and which prescribe the mode of assessment, and the persons by whom it shall be made, and that all property shall be taxed, have no application to assessments levied for local improvements." In accordance with this principle, various modes of apportionment for the expenses of local improvements have been upheld. We have already seen that they have been upheld when made in accordance with the value of the property, as well as when made in proportion to the frontage of the lots. The legislature has also itself designated the district which will be benefited by the improvement, as was done in the Dupont-Street Improvement, (St. 1875–76, p. 433,) and as has been provided in the general act for street improvements, where the entire frontage of the block is the district upon which the assessment is to be made. Diggins v. Brown, 76 Cal. 318, 18 Pac. Rep. 373. Assessments have also been upheld when made by commissioners appointed to make specific assessments upon the several parcels of land, (Bridge Co. v. Kirkham, 64 Cal. 519, 2 Pac. Rep. 409,) or when made according to the area of the land affected by the improvement, (Keese v. City of Denver, 10 Colo. 123, 15 Pac. Rep. 825.) The legislature has itself levied a specific tax upon each acre of land within a district created by itself, (Levee Co. v. Hardin, 27 Mo. 495; Williams v. Cammack, 27 Miss. 209, Alcorn v. Hamer, 38 Miss. 652,) and has authorized such tax to be levied by the district, (Wallace v. Shelton, 14 La. Ann. 498;) and has authorized a fixed uniform rate for each sewer upon the estimated cost of all the sewers within the district, (Leominster v Conant, 139 Mass. 384, 2 N. E. Rep. 690.)

It is not necessary to show that property within the district may be actually benefited by the local improvement, and, even if it positively appear that no benefit is received, such property is not thereby exempted from bearing its portion of the assessment, nor is the act unconstitutional because it provides that such property shall be assessed. Property that is exempt from taxation has always been held subject to the burdens of assessment for local improvements, and property within a district that is not susceptible of receiving any immediate benefit from the improvement is nevertheless so indirectly benefited thereby that it must bear a portion of the burden. If within the limits of a levee district a parcel of land should be so situated as not to require the protection of the levee, that would be no reason for excluding it from its share of the expense, or, if within the limits of a drainage district there should chance to be found a cliff, that would be no reason for exempting it from assessment. The objection that the legislature has no authority to confer upon the supervisors of a county the right to create a corporation whose district shall embrace a portion of the territory of another county does not arise in the present case. It is not contended that any portion of the Madera irrigation district lies outside of the county of Fresno.

2. One of the objections to the sufficiency of the proceedings taken by the supervisors in authorizing a vote by the electors for the purpose of determining whether the district should be organized is that the bond which accompanied the petition was so defective as to deprive the board of jurisdiction to authorize such election.

If it be conceded that the presentation to the board of a bond with the petition is a jurisdictional prerequisite to their consideration of the petition, we do not think that such element of jurisdiction was wanting in the present case. The bond which was presented, although informal, was not invalid, and was of binding obligation upon those who had signed it. In such a case the determination of its sufficiency by the board of supervisors was as conclusive as their determination respecting the pecuniary responsibility of its signers, or the amount for which the bond should be given.

3. Other objections to the constitutionality of the act, and the sufficiency of the proceedings in the organization of the district, have been presented by the appellants, but we think that they are covered by the views presented in the foregoing opinion. We do not think that the boundaries of the district, or of the election precincts, are so imperfectly described as to prevent the supervisors from acquiring jurisdiction for authorizing the organization of the district. The provision in the statute that the petition shall particularly set forth and describe the boundaries does not mean that they shall be set forth and described with more particularity than would be necessary in an act of the legislature creating a political district or a municipal corporation. If the course of a boundary is given, it is not necessary that such course shall have been actually surveyed upon the ground before the boundary can be said to be particularly described; and a reference to an official map, or to a land-mark designated upon such map, is as definite as would be a reference to the land-mark itself. We cannot, from their description, say that the boundaries given in the petition are so indefinite that the district cannot be definitely located, or that they fail to embrace a distinct and definite territory. As illustrations of similar descriptions in acts of the legislature, we refer to the act incorporating the city of Sacramento, (St. 1850, p. 70,) and the act incorporating the city and county of San Francisco, (St. 1856, p. 146;) also the act setting forth the boundaries of the county of San Benito, (St. 1873–74, p. 95.) The case of Crosby v. Dowd, 61 Cal. 557, referred to by appellants, was expressly overruled in De Sepulveda v. Baugh, 74 Cal. 468, 16 Pac. Rep.

223. The boundaries of a municipal corporation are not construed with any more strictness than is required in the case of a private grant. This subject was fully considered in Irrigation Dist. v. De Lappe, supra.

4. By the act of March 16, 1889, (St. 1889, p. 212,) under which these proceedings were instituted, it is provided in section 5 that, "upon the hearing of such special proceedings, the court shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm each and all of, the proceedings for the organization of said district, under the provisions of said act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale and the sale thereof." It is also provided in section 2 that "the petition shall state the facts showing the proceedings had for the issue and sale of said bonds, and shall state generally that the irrigation district was duly organized, and that the first board of directors was duly elected, but the petition need not state the facts showing such organization, or the election of said first board of directors." Section 4 of the act provides: "The provisions of the Code of Civil Procedure respecting the answer to a verified complaint shall be applicable to an answer to said petition. * * * The rules of pleading and practice provided by the Code of Civil Procedure, which are not inconsistent with the provisions of this act, are applicable to the special proceeding herein provided for." The petition in the present case states "that said Madera irrigation district was duly organized under the laws of the state of California, and especially under the provisions" of the act of March 7, 1887. The answers deny this allegation, and deny specifically that any of the steps required by the statute for the organization of the district were taken in reference thereto. In order that the court might determine the legality and validity of the proceedings, it was required by the act in question to "examine" them. The act provides that it "shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organization of said district;" and, unless it shall "examine" the proceedings, it would not have the power to "determine" their legality and validity. One step in the proceedings, and that which was the foundation of all others, and without which the whole superstructure of the corporation and its acts, culminating in the bonds sought to be validated, would have fallen, was that a petition should have been presented to the board of supervisors, signed by 50 or a majority of freeholders owning lands within the boundaries of the proposed district. It was necessary, therefore, for the petitioners herein to make proof to the court that such a petition had been presented to the board of supervisors. Instead, however, of making such proof, they introduced in evidence the record of the proceedings of the board of supervisors, which contained recitals that a petition had been presented to said board, and that, before hearing said petition, evidence to the satisfaction of the board was adduced by petitioners upon the question whether or not there were 50 petitioners whose genuine signatures appeared affixed to said petition, who were *bona fide* freeholders of lands within the proposed boundaries of said proposed irrigation district; whereupon the board, having announced that they are satisfied that there were 50 such freeholders, whose signatures appeared affixed to said petition, proceeded to hear said petition. The defendants objected to the introduction of this evidence upon the ground that no foundation had been laid therefor, and that it was irrelevant, immaterial, and incompetent to establish any issue before the court. The objections were overruled, and an exception taken by the defendants. The petitioners then offered in evidence a document purporting to be a petition, with the signatures of upwards of 50 names attached thereto. To the introduction of this document the defendants objected, upon the ground that its execution had not been shown, and that there was no evidence that the parties whose names appeared attached thereto were freeholders owning lands within the district. The court overruled the objection, to which the defendants excepted. In these rulings the court erred. There was no proof that the petition had been signed by either of the persons whose names were attached thereto, or that either of said persons was a freeholder, owning lands within the boundaries designated in the petition. Whether a petition had been presented to the board of supervisors of such a character as to give to that board jurisdiction to act in accordance with the provisions of the law in question was an issue before the court, to be determined by competent evidence. A declaration by the board of supervisors that such a petition had been presented, even though such declaration was spread upon their records, was not competent evidence in this proceeding, as it was only hearsay. No board or tribunal can obtain jurisdiction by its own recital that it has jurisdiction. It may be held that, when the question of such jurisdiction arises in some collateral proceeding, the act of the board in recognition of the sufficiency of the petition would be presumptive of such sufficiency, yet, when the very issue to be determined by the court is whether the petition was sufficient to give jurisdiction, such issue must be established by evidence as competent as that which is required to establish an issue in any other proceeding. In the absence of any statutory declaration respecting the character of the proof by which any fact may be established in a court of justice, it must be established in accordance with the common-law rules of evidence. It is sometimes provided by statute that in proceedings of this nature the act of the board of supervisors shall be *prima facie* evidence of the regularity of all proceedings prior to the making of the order, as was the case in Damp v. Town of Dane, 29

Wis. 426; and also in Re Kiernan, 62 N. Y. 459. The effect of such provision is to throw the burden of proof upon those who would challenge the sufficiency of the petition. In all cases it is essential that there be proof of a sufficient petition, inasmuch as without it the board could acquire no jurisdiction to act, and its proceedings would be absolutely void. In the absence of such statutory provision, however, the burden of proving any affirmative allegation is upon him who makes it, (Code Civil Proc. § 1869,) and it must be established under the ordinary rules of evidence. The statute in the present case is silent with reference to the effect as evidence of the action of the board of supervisors upon the petition. We are not aware of any statute which gives to their action any effect as evidence, or which makes their records evidence of any fact other than the corporate act therein recorded. Their records can be competent evidence of only such matters as they are by statute authorized to make matters of record. The statute herein does not authorize the board of supervisors to enter upon their records the facts which give them jurisdiction to hear the petition, or any evidence of such facts; and the entry in their record of such facts, or of such evidence, does not give thereto any official sanction or right of recognition more than any other memorandum that may have been made by their clerk. In People v. Hagar, 49 Cal. 232, when the question arose in a collateral proceeding, and it was contended that the certificate by the commissioners of a compliance by them with the requirements of the statute was evidence thereof, the court held otherwise, saying: "Whatever may have been the rule, if the statute had required the commissioners to state in their certificate to the assessment roll that they had jointly viewed and assessed the land, it is clear that the certificate can have no such conclusive effect, unless it was incumbent on the commissioners to certify that they acted jointly in viewing and assessing the land. But, as the statute does not require them to state that fact in the certificate, their having voluntarily done so was a superfluous act, and, instead of being conclusive of the fact that they acted jointly, was not even *prima facie* evidence of it."

It was held in Dean v. Davis, 51 Cal. 406, that in a collateral proceeding the regularity of the proceedings under which the district had been organized could not be questioned, under the rule that, being a *de facto* corporation, only the state could take advantage of any irregularity in its organization. In Lent v. Tillson, 72 Cal. 422, 14 Pac. Rep. 71, the court, however, questioned the power of the county court in that case to pass upon the questions upon which its jurisdiction depended, so as to conclude an inquiry, even upon a collateral attack; and in Kahn v. Supervisors, 79 Cal. 400, 21 Pac. Rep. 849, the court said: "Nor should this jurisdiction be held to attach, whatever court may have ruled that the petition was signed by a majority, when in fact it was signed only by a minority, of the owners designated by the statute." The cases cited on behalf of the respondent in support of the action of the court below are all cases in which the question was presented in a collateral proceeding. In Humboldt Co. v. Dinsmore, 75 Cal. 604, 17 Pac. Rep. 710, it was admitted that the persons who signed the petition were freeholders. After jurisdiction had once been obtained, other proceedings subsequent thereto are movements within the jurisdiction, and can be questioned only by direct attack; but the fact of jurisdiction must be affirmatively shown whenever that is the issue to be determined. It is unnecessary, however, in the present case, to determine what would be the rule if the question should arise in a proceeding where the jurisdiction would be collaterally attacked. The question does not arise collaterally here. The corporation has itself come into court and challenged an examination into the regularity of its organization, and asks the court to examine "each and all of the proceedings for the organization of said district." Upon such a proceeding it becomes as necessary for it to establish such regularity, and to give evidence of each step therein, as fully as if its acts were under investigation upon a writ of review, or as if the state were by *quo warranto* questioning its right to exercise the franchise of a corporation. In such a case it is incumbent upon it to make proof of every step required by statute for assuming corporate powers. High, Extr. Rem. 712, 716; Larke v. Crawford, 28 Mich. 88. Upon *certiorari*, though the inferior tribunal is required to certify only matters of record, yet, if the jurisdictional facts do not appear of record, it must certify "not only what is technically denominated the record, but such facts, or the evidence of them, as may be necessary to determine whatever question, as to the jurisdiction of the tribunal, may be involved." Blair v. Hamilton, 32 Cal. 52; Whitney v. Board, 14 Cal. 479; Lowe v. Alexander, 15 Cal. 300. The object of the act in question, as was said in Board v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237, is for the purpose of affording to investors in the bonds the security of a judicial determination of their validity, and, in order that this may have the effect intended by the legislature, it is not sufficient for the court to perform the mere perfunctory office of recording the determination of the board of supervisors that its proceedings in the organization of the district were regular. The court is not a *lit de justice* for the mere purpose of entering of record the rescripts of the board of supervisors, and giving to them the dignity of its own judgment. When the defendants controverted the allegations of the petition that the irrigation district was duly organized, it became necessary for the petitioners to establish at the trial the facts showing that it had been duly organized.

Section 456, Code Civil Proc., provides: "In pleading a judgment or other determination of a court, officer, or board it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction." The provision in the act in question that the rules of pleading and practice provided by the Code of Civil Procedure should be applicable to this proceeding made it incumbent upon the petitioner to establish the due organization of the district by evidence competent therefor. We are not aware of any decision in this state in which it has been held that the decision of an inferior board upon the question of its own jurisdiction was conclusive on a collateral attack, or even *prima facie* evidence of the fact in a direct proceeding. In Litchfield v. Vernon, 41 N. Y. 123, the legislature had authorized a local improvement to be made "upon application of a majority of the owners of land in the district proposed to be assessed, and the sufficiency of an assessment therefor was afterwards contested in the courts. Upon the hearing in the court of appeals, that court used the following language: "This brings us to the only remaining question in the case, and that is whether there was any competent evidence authorizing a finding that a majority of the owners of land within the territory made subject to assessment made application to the common council, requesting them to make application to the supreme court for the appointment of three commissioners, as provided by the first section of the act of 1859. The act itself is wholly silent as to how this essential fact shall be proved. The right of the common council to apply for the appointment of the commissioners lies at the foundation of the whole proceeding. Unless this right existed, all the proceedings in appointing the commissioners, and subsequent thereto, are void. This right depends upon the question whether a majority of the land-owners petitioned the common council to proceed under the act. In the absence of such petition the common council had no authority in the premises, and nothing could be done under the act. The act does not provide for the determination of this fact by the common council, nor by the special term upon the presentation of the petition for the appointment of the commissioners. The act being silent as to what should be deemed proof of the fact that a majority of the land-owners petitioned the common council, the plaintiff was bound to prove such fact by competent, common-law evidence. This could be done by proof showing who were the owners of the land at the time of the passage of the act, and that a majority of such persons petitioned the common council, as required by the first section of the act. Neither the application of the council to the court, nor the affidavit of the mayor accompanying such application, was evidence of this fact against the defendant. Sharp v. Speir, 4 Hill, 76. There was no competent evidence of this fact given upon the trial, and the exception to the finding of this fact by the judge was well taken." In Thorn v. Commissioners, 130 Ill. 594, 22 N. E. Rep. 520, the same question was presented. The statutes of Illinois provided that the board of park commissioners might take jurisdiction over certain streets, upon first obtaining the consent, in writing, of the owners of a majority of the frontage of the lots and lands abutting thereon; and also provided for a confirmation of any assessment made therefor by the circuit court, upon the application of the commissioners, after notice therefor to the lot-owners. At the hearing of the application for confirmation of the assessment roll, returned by the commissioners in the above case, the commissioners offered a paper, purporting to be the petition and consent of the abutting lot-owners, and showed that such paper came from the files kept by the board of commissioners, and was the written consent acted upon by the board in adding the streets for the purpose contemplated. The court below, upon the objection to the competency of this evidence, held that this document made a *prima facie* case for the commissioners, and cast the burden upon the objectors to show that it was not the written consent of the property owners, as it purported to be. Upon appeal, however, the supreme court reversed the action of the court below, saying: "We cannot concur in the holding of the trial court. As we have seen, the burden was on the park commissioners to show affirmatively the jurisdictional fact of consent by the owners of the required amount of frontage. The evidence in respect thereto was, we think, wholly insufficient. Waiving the matter of proving ownership by the persons purporting to sign the paper admitted in evidence, it is not shown that a sufficient number of such persons signed the consent to constitute consent by the owners of a majority of the abutting property. The only person introduced who testified generally to the execution of the writing testifies that he procured the signatures of most of the signers, but not all, and he does not testify, except in a few instances, either as to those he did or did not procure. The writing here offered is not signed by the objectors, and we are aware of no rule by which it was admissible in evidence against them, without proof of its execution, nor is the consent at all aided by the fact that the park commissioners acted upon the paper introduced in evidence. While the park commissioners must, in the first instance, pass upon the fact of consent by the owners of abutting property, and determine for themselves whether those owning a majority of the frontage of the property had consented to their appropriation of the street for the purposes contemplated by the act, such determination can have no effect, when their jurisdiction is challenged, in endeavoring to carry out the powers conferred by the statute. The power conferred upon the park board affects and impairs the right of the citizen, and may incumber his property without his consent, and may arbitrarily impose onerous burdens for which there is no relief or redress. The legislature has interposed the safeguard of requiring the consent of the owners of more than one-half of the property to be affected, upon the presumption, no doubt, that what will be of benefit to the greater portion will not unduly prejudice the lesser part; and, when the commissioners sought confirmation of their assessment upon appellant's property, under the power conferred by the statute, it was incumbent upon them to show compliance with the law by which alone they obtained jurisdiction to impose the burden. This they have not done." See, also, Pittsburg v. Walter, 69 Pa. St. 365.

5. The order for the issuance of the bonds is that $850,000 be issued, and that the said bonds shall be payable in installments, as follows: "At the expiration of eleven years, not less than five per cent. of said bonds; at the expiration of twelve years, not less than six per cent. of said bonds," etc. Section 15 of the statute provides: "Said bonds shall be payable in gold coin of the United States, in installments, as follows, to-wit: At the expiration of eleven years, not less than five per cent. of said bonds; at the expiration of twelve years, not less than six per cent.," etc. In Irrigation Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825, the form of the bond in connection with this provision of the statute was discussed. It was there held that the bonds to be issued should be in such form that each bond would be payable in installments of such percentage in each year as is designated in the statute, and that an order making that percentage of the entire issue of the bonds payable in the designated years would not be a compliance with the statute. In the present case, if 5 per cent. of the $850,000 should be payable at the expiration of 11 years, and the board of directors should not sell or dispose of more than that percentage of the entire issue of bonds, it would make the entire amount of outstanding bonds payable at the expiration of 11 years; whereas, the board of directors, under section 22 of the act in question, are authorized, at the expiration of 10 years after the issuing of said bonds, to levy an assessment for only 5 per cent. of the principal of the whole amount of bonds then outstanding. This provision in the order does not, however, affect the substance of the order for the issuance of the bonds, but merely the form in which the bonds are to be issued, and does not itself invalidate the proceedings had by the district for the issuance of the bonds. The district voted for the issuance of bonds to the amount of $850,000, to be issued in accordance with the provisions of the statute. The manner in which those bonds were to be issued is prescribed by the statute, and can be followed by the board whenever their issuance becomes necessary. The court, however, instead of approving and confirming this order, should have limited its order of confirmation to that portion thereof which designated the amount of the bonds to be issued, leaving to the board itself the duty of preparing the bonds in the form required by the statute.

6. In its decree the court, after determining the legality and validity of the proceedings, added thereto the following: "And it is further ordered, adjudged, and decreed that all persons, and each and every person interested in the organization of said irrigation district, save and except the appellants herein, be forever debarred and precluded from disputing, denying, or disclaiming any fact or facts relating to the organization of the said district, or providing for and authorizing the issue and sale of the bonds of said district, which might by them have been denied, questioned, or disputed in this proceeding." This portion of its judgment was unauthorized. The statute does not confer upon the court any power or jurisdiction to do more than "examine and determine the legality and validity of, and approve and confirm," the proceedings had under said act. What the effect of its determination and judgment may be is to be determined by the court in which it shall at any time hereafter be offered in evidence. The statute makes no provision for including therein an injunction against those who may not have seen fit to question its action in this proceeding, and against whom there has been no service, except by the publication of the notice directed by the court. If by virtue of such inaction on their part they should be hereafter precluded or estopped from questioning the sufficiency of the action of the court in this proceeding, that question must be determined by the court in which any attempt may be made to avoid the effect of the judgment herein. For the error committed by the court in admitting evidence as hereinbefore stated the judgment is reversed.

We concur: McFarland, J.; Garoutte, J.; Sharpstein, J.; Paterson, J.; De Haven, J.

Beatty, C. J. Until the filing of the supplemental briefs in this case I had supposed that the constitutionality of the statute commonly known as the "Wright Act" had been definitely settled by the decision of this court in the case of Irrigation Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379, in which I was one of the counsel employed to defend the validity of the act. I therefore sat at the hearing of this case with the expectation of participating in its decision, but on becoming aware of the fact that the constitutionality of the law was again seriously drawn in question upon all the grounds formerly taken, and upon several others, I concluded that, although I might not be disqualified in a strict sense in this particular case, I could not with perfect propriety take part in deciding it, and for that reason express no opinion.

In re Bonds of Madera Irrigation Dist. (No. 14,234.)

(*Supreme Court of California.* Dec. 12, 1891.)

In bank. Appeal from superior court, Fresno county; J. B. Campbell, Judge.

R. E. Houghton, Octave G. Du Py, Mesick, Maxwell & Phelan, Page & Eells, Pillsbury & Blanding, E. W. Magraw, and *E. W. McKinstry,* for appellants. *Hinds & Merriam, Craig & Merredith,* and *C. C. Wright,* for respondent.

Per Curiam. This is an appeal from an order denying a new trial. The facts in the record are identical with those in the appeal from the judgment in the same case, 28 Pac. Rep. 272, (No. 14,157;) and for the reasons given in the opinion in that case the order of the court below is reversed, and a new trial granted.

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92 Cal. 235

BAIRD v. PEALL. (No. 13,773.)

(*Supreme Court of California.* Dec. 12, 1891.)

MECHANICS' LIENS—CONTRACT PAYABLE IN LAND—BILL OF EXCEPTIONS.

1. Under Code Civil Proc. § 1184, declaring void all contracts for labor and materials expended on buildings, except that of the contractor, unless the whole contract price is payable in money, a painter who contracts to paint an hotel is an original contractor, and the contract is not void because part of the price is to be paid in land.

2. Under Code Civil Proc. § 648, providing that when an exception is made to the findings of the court below on the ground of the insufficiency of the evidence "the objection must be stated with so much of the evidence or other matter as is necessary to explain it, and no more," no statement of the evidence or deduction therefrom by way of argument is proper.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; JOHN REYNOLDS, Judge.

Action by J. H. Baird against W. J. Peall to enforce a mechanic's lien. Judgment for plaintiff. Defendant appeals. Affirmed.

W. C. Kennedy, for appellant. *W. B. Hardy*, for respondent.

VANCLIEF, C. Action to foreclose a mechanic's lien for the sum of $150, alleged to be the balance due on a contract for painting. The following is a copy of the written contract as admitted by the pleadings: "San José, Dec. 19, 1888. Contract and agreement made this day between W. J. Peall and J. H. Baird, whereby J. H. Baird, a painter and contractor, agrees to paint a certain frame hotel, known as the 'Continental Hotel,' of forty (40) rooms, located in the town of Bethlehem, Santa Clara county, Cal.; the same to be two-coat work of lead and oil or rubber preparation, to suit the owner, W. J. Peall. The shingles above cornice to be painted in different color from main part of building, for the consideration of three hundred and ninety ($390.00) dollars, but in case of party-colors an additional twenty ($20.00) dollars will be allowed to said J. H. Baird. This contract does not include the tin roof. Said J. H. Baird does hereby agree to accept as a part payment a certain contract of certain lots of land situated in the city of San José or the town of Bethlehem, to the amount of one hundred and fifty dollars; the balance of the contract price to be paid in the following manner, to-wit: One hundred dollars upon the completion of priming said hotel outside, fifty dollars more when outside is second-coated; and the balance when the building is completed, inside and out. The work to be completed as speedily as possible. We and each of us agree to this contract and agreement. W. J. PEALL. J. H. BAIRD. Interior of said building to have two coats of paint and oil, cresting over cornice not included. PEALL." The judgment was in favor of plaintiff, enforcing the alleged lien for the balance claimed. The defendant appeals from the judgment and from an order denying his motion for a new trial.

Appellant contends that the contract is void, because the whole price is not payable in money; and in support of this point cites the following provisions in section 1184 of the Code of Civil Procedure: "As to all liens except that of the contractor, the whole price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, offset, or counter-claims in favor of the owner and against the contractor. * * * All such contract and alterations thereof as do not conform substantially to the provisions of this section shall be wholly void, and no recovery shall be had thereof by either party thereto." I think the plaintiff was an original contractor, within the meaning of sections 1184, 1187, and 1194 of the Code of Civil Procedure, and therefore within the exception expressed in the above quotation from section 1184. La Grille v. Mallard, (Cal.) 27 Pac. Rep. 294. His contract was to paint the hotel, and, of course, to furnish the necessary materials for that purpose. The cases of Sparks v. Mining Co., 55 Cal. 389, and Schwartz v. Knight, 74 Cal. 432, 16 Pac. Rep. 235, cited by appellant, are not in point, as in those cases liens were claimed simply for materials furnished. Had the plaintiff contracted to do the work in consideration that defendant should convey to him certain land or personal property, without fixing the money price or value of the work, perhaps he would not have been entitled to a lien; but the money price of the whole work is fixed by the contract, though a specified portion of that price ($150) is to be paid in land. Upon a breach of the argeement to pay $150 in land, the damages would be liquidated and certain, and precisely the same as they would be in case of the breach of an agreement to pay so much money. The exception in favor of the contractor, in the provision of the Code above quoted, indicates, if it does not imply, that he may contract and have a lien for the value of his work payable otherwise than in money; and this is in perfect accord with section 1183, which provides that he shall have a lien for the value of the labor done and materials furnished. In other states, under statutes not substantially different from our Code in this respect, mechanics' liens for the contract price of labor and materials, payable in property, have been enforced, and I have found no case to the contrary. Phil. Mech. Liens, § 129, and authorities there cited.

Other points are made by appellant, but in view of the pleadings and findings by the court none of them requires special consideration. The contract and the performance thereof on the part of the plaintiff are admitted by the pleadings. The findings of fact in favor of the plaintiff on all the issues support the judgment, and no particular in which any one of them is not justified by the evidence is specified in the bill of exceptions upon which the motion for new trial was made.

The following are the only attempted specifications of insufficiency of the evidence: "(1) The evidence shows that the contract in writing is void, and the plaintiff waived his right to a lien, because the sum was not payable wholly in money, and finding 3 is contrary to the evidence. (2) That the evidence shows that the 15th of May, 1889, at the time of commencement of this suit, plaintiff had no claim against defendant, but that D. Rinaldo was the owner thereof, and therefore finding 3 is against the evidence. (3) That by assigning said claim to Rinaldo plaintiff lost any claim of lien he might have had, and waived it, and therefore finding 4 is against the evidence." There is no finding numbered 4, and that part of the findings numbered 3 contains at least three distinct propositions of fact, as follows: "(3) That the total contract price of said labor and materials was the sum of $410, of which amount $260 has been paid, leaving a balance of $150 still due and owing. No part of said balance of $150 still owing plaintiff by defendant is to be paid otherwise than in money, and the allegations in the answer of defendant that plaintiff is to receive as part payment for said work and materials a conveyance of any lot, tract, or parcel of land is untrue." There is no specification in the bill of exceptions that any one of these propositions is not justified by the evidence, as required by section 648 of the Code of Civil Procedure. Each distinct proposition excepted to on the ground that it is not justified by the evidence should be separately specified; and no statement of the evidence, nor deduction therefrom by way of argument, is proper in connection with the specification. What "the evidence shows" should not be argued or considered until the hearing of the motion. I think the judgment and order should be affirmed.

We concur: Belcher, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

92 Cal. 282

People v. Ah Len *et al.* (No. 20,815.)

(*Supreme Court of California.* Dec. 12, 1891.)

Criminal Law—Arguments of Counsel.

Where counsel for the people, by remarks during a trial for murder, and by statements to the jury not founded on the evidence, imputes to defendants a character for violence, even though the court instruct the jury to disregard any statement of fact not warranted by the evidence, a verdict of guilty will be reversed.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Ah Len, Ah Jung, and others were convicted of murder, and appeal. Reversed.

C. C. Stephens and *J. A. Donnell*, for appellants. *Atty. Gen. Hart*, for the People.

De Haven, J. The appellants were charged by information with the crime of murder, alleged to have been committed on one Fong Ah Lung in the county of Los Angeles, and were convicted of murder in the second degree. This appeal is from the judgment and an order denying their motion for a new trial. During the progress of the trial Mr. Ling, one of the attorneys conducting the case in behalf of the people, stated to the court, in the presence of the jury: "I would like to have the court direct the defendants to forbid them making threats against Charley Ah Him, as he sits here assisting the prosecution of this case. Now, this is the second time that it has been done, and I would like to have the court put a stop to it. * * * Two or three of the defendants have said here just this instant: 'Now, you look out what you are doing; you look, or we will fix you.'" The court immediately directed the jury to "pay no attention whatever to remarks made by counsel," and the trial proceeded. Upon the close of the evidence the same attorney made the opening address to the jury, and during the course of his argument "he remarked to the jury that the violence of these defendants in killing Fong Ah Lung was exemplified here in this court-room; that during the trial of the case they couldn't keep their mouths shut, but threatened him or his assistant, Charley Ah Him, by making threats in the court-room." To this appellants objected, on the ground that it was not warranted or justified by any evidence in the case, and the following proceedings were had: "The Court: The court will instruct the counsel for the prosecution to abstain from making any remarks upon any matter not shown by the evidence, and will instruct the jury to pay no attention whatever to any statement of fact which is not warranted by the evidence; that the only matter before them for their consideration is the evidence; and they are not to take into consideration any statement of counsel with reference to any matter of fact which is not shown by the evidence. Proceed with the argument. Mr. Ling. It is just what I expected. Mr. Stephens. Just a moment. Mr. Ling. I expected when the facts came out the galled jade would wince."

The learned judge of the court below did everything in his power to dislodge from the minds of the jurors any impression which the statements referred to may have made, but we do not think the error committed against appellants was thereby removed from the case. There was no withdrawal of the facts so stated, but, on the contrary, after the court had directed the jury to disregard them, the counsel who made the statement, in effect, again reiterated its truth by the assertion, "I expected when the facts came out the galled jade would wince." A person accused of crime is entitled, under the constitution, to a trial by jury, conducted according to the established principles of law, not the least important of which is that the verdict shall be founded only upon relevant and competent facts produced before the jury under the rules prescribed for the admission of evidence; and it was held by the supreme court of New Hampshire, in the leading and well-considered case of Tucker v. Henniker, 41 N. H. 317, that this right is violated "if counsel are permitted to state facts and comment upon them in argument against the adverse party which are not before the jury by proofs regularly submitted." It is true that the attorney for the prosecution in this case was not permitted by the court to comment at any length upon the facts which he himself imported into the case; but, while this was to the credit of the court, it does not change the fact that a matter not in evidence, and of a nature clearly prejudicial to the appellants, was laid before the jury for the purpose of affecting their verdict, and it is no answer to this to say that the jury may have disregarded it. As was said in the case just cited: "When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is denied. It may be said, in answer to these views, that the statements of counsel are not evidence; that the court is bound to so instruct the jury; and that they are sworn to render their verdict only according to evidence. All this is true; yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and, if they in the slightest degree influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them, and the advocate has no right to make them. It is unreasonable to believe the jury will entirely disregard them. They may struggle to disregard them; they may think they have done so, and still be led involuntarily to shape their verdict under their influence." It follows that the only safe and just rule to apply in such cases is to make it impossible for a party to derive any advantage from such misconduct of counsel by promptly granting a new trial to the adverse party, unless it is clear that the verdict was not affected thereby. It may be added that, if the fact stated by counsel had been introduced in evidence against the objection of appellants, it would have been sufficient to reverse the judgment, as the fact is itself an irrelevant one. It had no legitimate tendency to prove any issue in the case, but it was one which, as urged by counsel for the prosecution, was well calculated to illustrate "the violence" of appellants, and this was doubtless the object of bringing it to the attention of the jury; but the character of a defendant on trial for murder is not subject to this kind of attack. Judgment and order reversed.

We concur: McFarland, J.; Paterson, J.; Sharpstein, J.; Garoutte, J.; Harrison, J.

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92 Cal. 293

In re Galland's Estate. (No. 14,379.)

(*Supreme Court of California.* Dec. 14, 1891.)

Claims against Decedent's Estate—Rights of Pledgee—Funeral Expenses.

1. Where a policy of insurance was assigned to satisfy a debt, and the assignee was authorized to collect the money from the company, which he did on the death of the insured, and retained the amount of the debt, and paid over the balance to the insured's executor, it was error for the court to refuse to allow the claim in the executor's account on the ground that it was not presented against the estate, as a pledgee is not obliged to present his claim to the executor of the pledgor unless he seeks recourse against other property of the estate.

2. Such debt would be allowed under Code Civil Proc. § 1632, providing that it is the duty of the court to allow sums paid by the executor in good faith in discharge of debts justly due.

3. Where a will directed that the testator's funeral expenses should not exceed $100, and the will was not received by the executor until after the funeral, it was error for the court not to allow reasonable and proper charges in excess of $100.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge. Modified.

I. B. L. Brandt, for appellant. *J. H. Henderson*, for respondent.

McFarland, J. This is an appeal by the executor from an order settling his first annual account.

1. The decedent, during his life-time, being indebted to one Badt in the sum of $290 for money loaned, duly executed, acknowledged, and delivered to said Badt a bill of sale and assignment of a certain life insurance policy for $3,000, issued to decedent by the Germania Life Insurance Co. By this assignment Badt was authorized to recover and collect the money from the company; and, in compliance with the requirements of said company, Badt immediately presented to and left with said company the said assignment. Afterwards, upon the death of the decedent, Badt collected the full amount of the said policy from said insurance company, and paid it over to the executor with the exception of said sum of $290, which he retained. (He also retained the amount of an attorney's fee, which is not now under consideration.) The court below refused to allow it, upon the ground that Badt had not presented the same as a claim against the estate. In thus ruling the court below erred. A pledgee is not obliged to present his claim to the executor of the pledgor unless he seeks recourse against other property of the estate. Kibbe's Estate, 57 Cal. 407. Moreover, as it amply appears beyond all question that Badt's debt was "justly due," it ought to have been allowed the executor under section 1632, Code Civil Proc.

2. The executor paid out various sums for funeral expenses, amounting in all to $202.75. The items of this amount were duly presented by the several persons claiming them, and were approved and allowed by the executor and probate judge. There is no finding, and no ground for contending, that the items of this account were not reasonable and proper charges, or that the executor did not pay them in good faith; but the court refused to allow $102.75 of the amount, and allowed the executor only $100 thereof, upon the ground that the will of the decedent provided that the funeral expenses should not exceed $100. It is found "that said last will and testament was not received by the said executor until some time after the funeral of said deceased;" and it is also found "that during the life-time of said deceased he gave to said executor the

sum of $100, to be used by him to defray the funeral expenses of said deceased." Under these circumstances, we think that the executor should have been credited with the full amount of these payments. The claims thus paid, having been duly approved and allowed, were *prima facie* valid debts against the estate, and although they could be afterwards contested by the heirs, the burden was upon the latter to show their invalidity. The expenses were necessarily incurred immediately after the death of the decedent, and, as it appears, before the executor knew the provision of the will on the subject. It does not appear that when the decedent gave the executor the $100 he then limited the funeral expenses to that amount. Moreover, it is the duty of an executor to give a decedent decent burial, and he cannot be absolutely limited in the performance of such duty by the provisions of a will. Bell v. Briggs, 63 N. H. 592, 4 Atl. Rep. 702. If the items of the funeral expenses here involved had been rejected on the ground that they were extravagant or exorbitant, a different question would be presented. But they were rejected solely on the ground of a violation of the will. We see no other errors. It is ordered that the order appealed from be modified so as to allow the executor the additional amount of $290 retained by said Badt, and also the additional sum of $102.75 for payment of funeral expenses; and that in all other respects the said order stand affirmed. The superior court is directed to modify said order as herein stated.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

(92 Cal. 285)

NOYES *v.* SOUTHERN PAC. R. CO. (No. 13,840.)

(*Supreme Court of California.* Dec. 12, 1891.)

RAILROADS — INJURIES TO PERSONS ON TRACK—QUESTION FOR JURY.

In an action against a railroad company for the wrongful death of an employe of one of its contractors, it appeared that deceased, with the knowledge and consent of the company, was walking to his work on the right of way, in a narrow place between a bluff and the sea, traversed by two parallel tracks, with knowledge that two locomotives, one on each track, would shortly follow him in the same direction; that he received warning by the bell of one, and then perceived that they were approaching at such relative rates of speed as would probably bring them together at the moment of passing him; that he attempted to cross the track towards the bluff, and was struck and killed while so doing. *Held*, that a nonsuit was improperly directed, as the questions of defendant's negligence and deceased's contributory negligence were for the jury. HARRISON and MCFARLAND, JJ., dissenting.

In bank. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

Action by one Noyes, administrator, against the Southern Pacific Railroad Company. From the judgment of the court below directing a nonsuit plaintiff appeals. Reversed. For former hearing, see 24 Pac. Rep. 927.

Henry C. McPike and *D. M. Delmas*, for appellant. *L. D. McKisick* and *Fred B. Lake*, (*H. S. Brown*, of counsel,) for respondent.

BEATTY, C. J. This is an action brought by the administrator of one De Mattos to recover damages for causing his death. The plaintiff was nonsuited by the superior court, and his appeal from the judgment presents two questions: *First*, did the evidence introduced by the plaintiff in the superior court make out a *prima facie* case of negligence on the part of the defendant? and, if so, *second*, did such evidence show that De Mattos was himself guilty of contributory negligence? The following brief statement of the facts which the evidence on the part of the plaintiff proved, or strongly tended to prove, is extracted from the brief of his counsel, and is in every particular sustained by the record: "On the 26th day of July, 1886, the deceased, Manuel F. De Mattos, was run over and killed by an engine on defendant's road near Port Costa. At and for many years before that time the defendant owned and operated a railroad running from Port Costa along the margin of the Straits of Carquinez, in a southerly direction. At some distance southerly from Port Costa, on the line of the road, were located certain extensive grain warehouses, called the "Nevada Docks." There was a double track running from Port Costa to these docks,—one the main, and the other the switch, track. Going from Port Costa to the docks, the main track is on the right, and the switch on the left, hand. The width of the roadway is not more than sufficient to accommodate the two tracks, being only twenty-four feet. On the right, and but four feet from the end of the ties of the main track, rises an abrupt steep bluff, at the foot of which was dug a drainage ditch, while on the left the ties projected to the water's edge. Mr. Edgar De Pue had been for more than two years engaged by the defendant as a contractor, to load and unload their cars at these docks, employing at times in this business as many as one hundred men. To facilitate the operation of loading and unloading the cars, the defendant had been in the habit of sending daily two locomotive engines from Port Costa to the docks. On their way to the docks these engines were accustomed to carry some of the hands engaged in loading and unloading, but by far the larger part of the force daily found its way from Port Costa to the docks, and back again, after their day's labor, by walking along the space between the tracks. There was no road, and no means, except by the railroad track, to reach the docks from Port Costa. The deceased, De Mattos, was one of the men thus employed by Mr. De Pue. In the early morning of the 26th day of July, 1886, a crew of men, under the supervision of Mr. De Pue, started from Port Costa for their work at the docks. Two locomotive engines were, as usual, to accompany them from Port Costa. Some of the men, and Mr. De Pue himself, clambered upon the engines for a ride, but the larger number—some nineteen or twenty, including their foreman, Mr. Angle—started on foot upon the track in advance of the engine. They had gone but a short distance when the engine on the switch track started behind them, following them at a very moderate rate of speed. The engine on the main track with Mr. De Pue aboard was the last to leave Port Costa, and, whether to make up for lost time, or for some other less pardonable cause, proceeded on its course at full speed. De Mattos was among the men who had started afoot, ahead of the engines, and who were traveling towards the docks along the accustomed path between the tracks. While they were thus traveling on a narrow part of the road, where the switch track came up to the water's edge, and the main track was but a few feet from the abrupt bluff on the other, they were warned, by the sound of its bell, of the approach of the engine on the switch track. Turning, they beheld it approaching at a distance of about forty yards; but at the same time they saw the engine on the main track, almost upon them, approaching without warning and at full speed. As the main engine was coming at full speed, a glance sufficed to show that it would, in a moment, be abreast of the switch-engine, and thus the whole space of the road-way between the bluff and the water would be covered by them. The danger of their position flashed at once upon the mind of every man. On one side was the water; on the other side the high bluff. To use the expressive language of the foreman, 'The men did not have much time to think, and, in a moment of desperation, they took the best course they thought possible' to escape impending death. One of the men 'jumped on top of the rocks in the water,' and was fortunate enough to escape without more than some injuries to his legs. Another tried the dangerous experiment of remaining standing between the tracks, and allowing the engines, which were running abreast, to pass him. He was struck by one of the engines as it passed, but not so as to cause him any great injury. Others sought to escape by running to the space at the foot of the high bluff. Of these was De Mattos, and, as he was running for his life across the main track, the engine struck him, ran over him, and killed him." Such being the case, it should have been left to the jury to decide from the evidence whether, as matter of fact, there was negligence on the part of the defendant, or contributory negligence on the part of De Mattos. It cannot be held as a legal conclusion, upon such a statement of facts, that De Mattos was, or that the defendant was not, guilty of negligence. The judgment and order are reversed, and cause remanded.

We concur: DE HAVEN, J.; GAROUTTE, J.

We dissent: HARRISON, J.; MCFARLAND, J.

PATERSON, J. I concur in the judgment. In the former decision it was said: "The same facts which show that the deceased was negligent show also that the employes of respondent were not guilty of negligence." Upon further consideration of all the evidence, I am not prepared to say as matter of law that the engineer in charge of the engine on the main track, with his knowledge of all the circumstances, was not negligent in running at a rate of speed which would bring the locomotives together at the narrow part of the road where the men were traveling. The question is not, "How would I act were I juror?" but whether there is any evidence at all from which inferences may be drawn in support of or against the charge of negligence. Speaking of nonsuit, the court, in Wilson v. Railroad Co., said: "But where negligence, as the essential element in the case, is disputed, and the evidence of it is conflicting, or consists of circumstances from which the inferences may be drawn for or against it, it is the province of the jury to determine, under instructions by the court, whether the evidence establishes it as the proximate cause of the injury complained of." 62 Cal. 172. Whether the engineer was guilty of negligence, and whether the deceased was guilty of contributory negligence, under the rule stated and under the evidence, cannot be determined as matter of law, but should be submitted to the jury, with proper instructions from the court.

(92 Cal. 229)

MILLER v. HICKEN *et al.*, (WITTENBROCK, Intervener. No. 14,153.)

(*Supreme Court of California.* Dec. 11, 1891.)

RELEASE OF MORTGAGE — CONSTRUCTIVE NOTICE— ASSIGNMENT.

1. A discharge of a mortgage which gives the date of the mortgage, the parties thereto, the book, page, and office where and the time it was recorded, is operative, though the mortgaged premises are not correctly described therein.

2. A purchaser of the land is entitled to the benefit of the record of the release, though he relied on a statement that the land was unincumbered, and did not examine the record, and the release was made by mistake.

3. Where a conclusion of law necessarily follows a state of facts found, a finding of the court is not faulty, though the conclusion of law is not stated in terms.

4. Where the question before the court was whether a certain instrument operated as a discharge of a mortgage, and the court found that it did, it was immaterial that the court failed to find the exact amount yet unpaid on such mortgage.

5. By an assignment of a mortgage, the title to the note, as well as the mortgage, vests in the assignee, though at the time the note is in the hands of a third person, as security for a loan to the mortgagee, subject only to the lien of such third person.

Department 2. Appeal from superior court, Placer county; B. F. MYRES, Judge.

Suit in equity to foreclose a mortgage, by A. Miller against John B. Hicken and others, defendants, and R. Wittenbrock, intervener. Defendants and intervener had judgment, and plaintiff appeals. Affirmed.

J. M. Fulweiler and *F. P. Tuttle*, for appellant. *Wallace & Prewett* and *Wallace & Wallace*, for respondents. *Taylor & Holl*, for intervener.

MCFARLAND, J. This action was brought by plaintiff to foreclose a mortgage executed to him by defendant Hicken, July 1, 1881, to secure a note for $12,000 and interest, upon the S. E. ¼ and the W. ½ of section 2, township 11 N., range 5 E., Mt. Diablo base and meridian. Johnson and wife were made defendants as claiming some interest in the land; and they answered, averring that on January 11, 1888, plaintiff had released and discharged said mortgage; that afterwards they purchased the land from Hicken; and that they are owners and in possession of the land unincumbered by the alleged mortgage of plaintiff. Wittenbrock intervened, also averring the release and discharge of said mortgage, and alleging, further, that when Johnson purchased from Hicken he gave to the latter, to secure part of the purchase money, a mortgage on the land for the sum of $6,200, and that afterwards intervener loaned money to Hicken, and took said mortgage from Johnson as security. He prayed that his mortgage be decreed to be superior to that of plaintiff, and that it be foreclosed. Hicken made default. Plaintiff alleged, in an amended complaint, that the release was made by mistake, and asked to have it reformed. The court found in favor of the intervener, and Johnson and wife, finding, however, that the release was made through mistake, and decreed that the mortgage held by intervener be foreclosed; that the surplus, if any, after sale, be paid to Johnson; and that plaintiff take nothing by his action. Plaintiff appeals from the judgment and from an order denying a new trial. There are a number of points made by appellant; but the first and main question in the case is whether or not a certain written instrument, duly executed and acknowledged by plaintiff on January 11, 1884, and duly filed and recorded the next day, was a full and operative release and discharge of said mortgage from Hicken, which is the basis of this action. The said mortgage embraced not only the said S. E. ¼ and W. ½ of said section 2, in township 11, but also several other parcels of land; and the said instrument is as follows: "Know all men by these presents, that I, Alexander Miller, of El Dorado county, state of California, do hereby certify and declare that a certain mortgage bearing date the first day of July, 1881, made and executed by John B. Hicken, of Placer county, state of California, the party of the first part therein, to Alexander Miller, the party of the second part therein, conveying the north half (½) of the south-west ¼, and fractional north-west ¼, of section 1, and the south-east ¼ of section 2, and fractional east ½ of section 3, and the fractional north ½ of section 2, all in township 10 north, range 5 east, Mt. Diablo base and meridian, and situate in Placer county, California, as security for the payment to said Alexander Miller of a certain sum of money specified in said mortgage, and recorded in the office of the county recorder of the county of Placer, in Book M of Mortgages, on page 635, on the second day of July, 1881, together with the debt thereby secured, is fully paid, satisfied, and discharged. In witness whereof I have hereunto set my hand and seal the eleventh day of January, one thousand eight hundred and eighty-four. [Seal.] Alexander Miller."

It is contended that the land in contest was not discharged from the lien of the mortgage, because it was not mentioned in said instrument. But the language used in the instrument clearly operated as a full satisfaction of the entire mortgage referred to, and there can be no doubt as to the mortgage intended to be discharged. The description in the instrument leaves no question as to the identity of the particular mortgage described. It gives the date of the mortgage, the parties to it, the time and office where and when it was recorded, and the book and page on which it was so recorded. We think, therefore, that the instrument in question was a discharge of the mortgage thus identified, and a release of its lien upon all the land embraced in it. We see nothing in the point that Johnson, at the time of his purchase, did not himself examine the record, but chose to rely on the representation of another person that the land was not incumbered. A party dealing with land is bound by the record, and is entitled to any rights which may accrue to him under it; and his position with reference to it is the same whether or not he examines it himself. Neither do we see any point in the objection made to the method of the assignment and transfer to the intervener of the mortgage from Johnson to Hicken, and to the finding of the court on that subject. The intervener (Wittenbrock) made the loan through his agent, L. S. Taylor. He first (through Taylor) loaned Hicken $1,500, in April, 1886, and at that time Hicken deposited the mortgage with Taylor as security. It had then attached to it what Taylor supposed to be the original note described in the mortgage. On January 31, 1887, Wittenbrock (through Taylor) advanced to Hicken a further sum of money, which, added to the $1,500, made $3,000; on which day Hicken, by a separate instrument duly executed and acknowledged, (and recorded February 2, 1887,) sold, assigned, and transferred to Wittenbrock the said mortgage, together with the promissory note described therein, authorizing him to collect and enforce it by action, etc. Afterwards, some time in the spring of 1887, Taylor discovered that the note attached to the mortgage which he had kept in his possession was only a copy, and that the original note was in the possession of one Oppenheim, to whom it had been hypothecated by Hicken to secure the sum of about $1,200 loaned by the former to the latter; whereupon Taylor entered into negotiations with Oppenheim, and procured from him the said original note. Therefore, from at least the date of the written assignment, (January 31, 1887,) which was before the filing of the amended complaint, and probably from the first deposit of the mortgage and supposed note with Taylor in April, 1886, the title to the note and mortgage vested in Wittenbrock, subject only to the lien of Oppenheim, and complete as against all other persons. We do not think, therefore, that any question arises under the doctrine of *lis pendens*. Johnson having actually paid to Hicken a large part of the purchase money, and given his promissory note and mortgage for the balance, was clearly a purchaser "for a valuable consideration;" and the court finds that neither Johnson nor Wittenbrock had notice of the mistake in the said discharge of said mortgage, and believed that no incumbrance existed upon the land except the said mortgage given by Johnson. The evidence was sufficient to support the findings, and we see no want of a finding of a necessary or material fact. It is objected that the court did not find in terms that the defendants and intervener had not "constructive" notice of plaintiff's mortgage; but that followed from the facts found, and it is immaterial that the court did not make an express "conclusion of law" to that effect. It is also contended that the court should have found the exact amount unpaid upon plaintiff's mortgage, instead of saying that it was "about $10,000;" but, as between appellants and respondents, that was an immaterial matter. And it is contended that the finding that plaintiff "did not intend to release" the mortgage is not specific enough as a finding that the release was made by mistake; but the judgment went upon the theory that there was such mistake, and the result would have been the same, no matter how clearly the mistake had been stated in the finding. The findings covered all the material issues. The exceptions to rulings of the court regarding the admissibility of certain testimony need not be discussed, because it mattered not whether the proposed testimony was admitted or rejected. It was of no consequence in the case whether or not Hicken told Johnson that the title was clear, or whether or not Johnson was at any time in Auburn, and might have examined the records. It was immaterial that plaintiff afterwards made another partial release of the mortgage; and, moreover, Johnson had purchased before that occurred. Whether or not the court below should have given plaintiff a personal judgment against Hicken for the amount of the note is a question that does not arise on this appeal. We see no other points which need special notice. It is no doubt a hardship for plaintiff to lose part of his money, but we see no legal relief. Judgment and order affirmed.

We concur: De Haven, J.; Sharpstein, J.

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92 Cal. 239

Bruner v. Superior Court of the City and County of San Francisco *et al.* (No. 14,812.)

(*Supreme Court of California.* Dec. 12, 1891.)

Grand Juries — Selection — Elisors—Writ of Prohibition.

1. Under Code Civil Proc. § 226, providing that whenever a sufficient number of jurors fail to appear the court may order a sufficient number to be drawn and summoned, or it may direct the sheriff or an elisor chosen by the court to summon as many men of the county to serve as jurors as may be required, the court should not appoint an elisor to select and summons talesmen for the completion of a grand jury without a showing that the sheriff is disqualified.

2. A grand jury, completed by talesmen so drawn, is without authority, and an indictment found by it is void. Beatty, C. J., and De Haven and Sharpstein, JJ., dissenting.

3. Under Code Civil Proc. §§ 1102, 1103, declaring that prohibition lies where there have been proceedings "without or in excess" of jurisdiction, and there "is not a plain, speedy, and adequate remedy in the ordinary course of law," the court will be prohibited from proceeding with a trial under an indictment found by such a grand jury. Beatty, C. J., and De Haven and Sharpstein, JJ., dissenting.

In bank.

Petition of Elwood Bruner for writ of prohibition to the superior court of the city and county of San Francisco and Hon. William T. Wallace, judge thereof, to restrain further proceedings on indictments against petitioner.

J. C. Campbell, for petitioner. *A. L. Rhodes*, Dist. Atty., and *Wm. S. Barnes*, for respondents.

McFarland, J. This is an application for a writ of prohibition to prohibit the superior court of San Francisco, department No. 6, and the judge thereof, from proceeding further against petitioner upon two certain paper writings purporting to be indictments. The main ground of the petition is that the body of men who presented said writings had no legal existence as a grand jury; and that, therefore, the respondents have no jurisdiction or authority to arraign or try petitioner upon the same. Upon the record presented two principal questions arise: (1) Was said body a legal grand jury? and (2) if it was not, then is prohibition a proper remedy?

The material facts in the case are undisputed, and are as follows: The respondent, the presiding judge, made an order that 25 names be drawn in the usual way from the "grand-jury box" (which contained the names of 144 persons selected by the 12 judges of the superior court) for the purpose of procuring a grand jury. After service by the sheriff on all of said persons who could be found, 18 of them appeared. Eight of them were excused by the court for good cause, and the others were accepted. No further drawing from the grand-jury box (in which there remained more than 100 names) was made; but thereupon the court made the following order: "And it now appearing to the court that of the entire number of persons drawn to serve as grand jurors there are only the number of ten proper and competent to so serve and not excused, it is now here ordered that a sufficient number, to-wit, the number of nine good and lawful men, be forthwith summoned by an elisor appointed by the court here for that purpose to be and appear before the court hereon Thursday, August 20, 1891, at 12 o'clock meridian, to complete the said grand jury, and that Henry H. Scott be and is hereby appointed such elisor; and all further proceedings in impaneling a grand jury are continued until the 20th day of August, 1891, at 12 o'clock meridian." Another order was also made, formally appointing said Scott elisor, who, after being sworn as such, returned nine other persons as grand jurors. The whole of said nine persons were accepted, and thus the requisite number of 19 grand jurors were procured and sworn. No reason was given why the jury was not completed by an additional drawing from the grand-jury box; nor was there any cause why, when the other method of getting jurors was adopted, the sheriff was not ordered to summon them instead of an elisor. No charge of partiality, interest, or disqualification of any kind was made against the sheriff by affidavit, or in any other manner; and the record shows that the sheriff was discarded and the elisor appointed simply because the court chose to do so. And the contention of respondents' counsel is that the power of a judge to appoint a private person to select a jury is unlimited and unqualified by any provisions of law, or any considerations whatever,—his will being supreme in the premises. No question, therefore, arises here as to the jurisdiction of a court to pass upon the issue of disqualification of a sheriff in such a case, because here there is no such issue.

The provisions of statutory law upon the questions here involved may be somewhat briefly stated. The formation of grand and trial juries is provided for in the Code of Civil Procedure, commencing with section 204; and the general provisions on the subject are these: In January of each year the superior court of the county must make an order designating the estimated number of grand jurors, and also the number of trial jurors, that will be required for the business of the ensuing year, and thereupon the board of supervisors must select from the qualified citizens of the county—taking them as nearly as may be from the different wards and townships in proportion to population—the number designated by the court. A certified list of these names is given to the county clerk, who must write the names of the grand jurors on separate pieces of paper of uniform appearance, and, having folded them so as to conceal the names, must deposit them in a box called the "grand-jury box;" and whenever during the year a court orders a grand jury, it is provided that the jurors shall be drawn by the clerk, in the presence of the court. He must shake the box so as to mix the slips containing the names before drawing, and must observe other statutory directions providing against the unfair drawing of particular names for particular purposes. Sections 219, 241. In cities and counties of more than 100,000 inhabitants, which includes San Francisco, the jurors are selected in January by the judges of the superior court, instead of by the supervisors. Section 204. In all other respects the law is the same. Such is the general method provided by statute for the formation of juries, and it is as wise a method as could well be devised to procure fair and impartial jurors, and to prevent public officers from bringing together certain persons on a jury in order to secure a certain result,—to annoy the innocent or protect the guilty.

There is, however, another provision of the Code—intended, evidently, for cases of neglect of duty or inadvertence, and to prevent, in some instances, great delay or expense—on which the right of the court to procure a jury as it was procured in the case at bar is based. The thought of the legislature in enacting the provision would seem to have been directed more particularly to trial than to grand jurors; but, if its language be wide enough to grant the power here contended for, then the power exists. But, if the language does not grant such power, then it does not exist, for it is granted nowhere else. The said provision is contained in section 226, and is as follows: "Whenever jurors are not drawn or summoned to attend any court of record or session thereof, or a sufficient number of jurors fail to appear, such court may order a sufficient number to be forthwith drawn and summoned to attend the court, or it may, by an order entered on its minutes, direct the sheriff or an elisor chosen by the court forthwith to summon so many good and lawful men of the county, or city and county, to serve as jurors, as may be required; and in either case such jurors must be summoned in the manner provided in the preceding section." It is apparent that the claim of power under the said section 226 to do the thing complained of in the case at bar should be closely scrutinized, and denied unless the power be found to be clearly given; for, if it exist, it is a most arbitrary and dangerous power,—one that can easily be used to unjustly destroy character, liberty, or life. And in determining whether or not there be such legal power we must discard all consideration of the worthiness or unworthiness of the purpose sought to be attained in any particular case. There must be attributed to the learned judge of the court below good motives and purposes; but, if he have the power claimed, then such power must be conceded to every other person who may at any time occupy a similar judicial position. Under such power a court could easily procure the indictment, and perhaps the conviction, of any person whom it deemed to be an offender, by simply appointing a person favorable to its designs to select jurors with a similar bias. In times of great public excitement—political or otherwise—a citizen who has incurred censure in certain quarters would have scarcely a remnant left of that protection which is afforded by a fair trial before an impartial jury; and to say that such unlimited power can be safely lodged with all the men who may happen to be judges would be to ignore human history and the principles of human nature. It must be remembered that unauthorized power may be used for bad as well as for good purposes. A spectator might, for the moment, look in safety and with complaisance upon the barbaric tumult of a mob if he happened to be in sympathy with its present design; but let the fury of another mob be directed against him, or those whom he knows or believes to be innocent, and he will appreciate at once the value of legal protection. So, also, he may look lightly upon the spectacle of a jury packed for the purpose of prosecuting one whom he believes to be guilty; but, if such a course were pursued towards him or his friend, he would have clear views of personal security, and the sacredness of a jury trial. Under the best system that human wisdom can devise, an innocent man will, at long intervals, be punished, and a guilty one go free; but that a government of law is better than a government of unlimited personal power is a principle that has been fought out in English and American history, and established as a monument of liberty.

The asserted power of the court in the case at bar comes, if it comes at all, from these words in the section last quoted, "or an elisor." It has no other source. The whole force and stress of the question involved rest on the word "elisor." The language is not that the court shall direct the sheriff "or some other person," or "any qualified citizen," or "any other person over the age of eighteen," (as in case of service of summons in civil cases,) to summon the jury. There is no ordinary, general language used which would have denoted a legislative intent to give the court unlimited discretion under any and all circumstances, without any showing, to choose whomever it pleases to pick out a jury. Common language is discarded, and the exclusively legal word "elisor"—a word used nowhere else than in law language—is employed. What is the meaning of that word? And what was the legislative intent in using it? A rule of construction that has always obtained is aptly expressed in section 16 of the Code of Civil Procedure as follows: "Words and phrases are construed according to the context and the approved use of language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition." Now, the word "elisor" has a "peculiar and appropriate meaning in law," as much as any word that can be suggested. It is not used at all in common language. No one in private or business circles would think of calling an agent or trustee an "elisor." It can be found rarely, if ever, in general literature. It is doubtful if the majority of men of good intelligence have any notion as to its meaning. Practically it is known and used alone in law literature, and in the law its meaning is clear and unquestioned. It has always meant, and means now, a person appointed to perform certain duties pertaining to certain officers, when the latter are disqualified. He was originally confined to the duty of returning a jury in the event of such disqualification; but in some states his duties are extended to the service of other process, but only in the event of the disqualification of some other officer. The provision for such appointment, as stated in Blackstone, is as follows: "If the sheriff be not an indifferent person,—as, if he be a party to the suit, or be related, either by blood or affinity, to either of the parties,—he is not then trusted to return the jury, but the *venire* shall be directed to the coroners, who, in this, as in many other instances, are the substitutes of the sheriff to execute process, when he is deemed an improper person. If any exception lies to the coroners, the *venire* shall be directed to two clerks of the court, or two persons of the county, named by the court and sworn. And these two, who are called 'elisors' or 'electors,' shall indifferently name the jury," etc. 3 Bl. Comm. 355. In Bouvier's Law Dictionary "elisors" are defined as "persons appointed by the court to return a jury when the sheriff and coroner have been challenged as incompetent." Such is the definition given in all the dictionaries, and such the sense in which the word is used in all the law-books to which our attention has been called; and we do not understand that counsel for respondent claims differently. Therefore, considering the universal meaning given in the law generally to the word "elisor," and without considering any other legislative provision upon the subject in this state, it would seem clear that, when section 226 gives power to direct the sheriff or an elisor to summon a jury, it uses the word as designating a person to be appointed in the event that the sheriff has been "challenged as incompetent." Such construction is not only compelled by the only known meaning of the word, but brings the section into harmony with all the other sections relating to the selection of juries, the object of which is clearly to have jurors, as far as possible, fair and impartial. The sheriff is an officer elected by the people, and usually long before he is called upon to select a jury. If he should be secretly partial in any future case, it would be an accidental evil. He could not, at least, be appointed for such express purpose. And the fact that "coroner" was omitted (inadvertently or otherwise) from section 226 does not change the meaning of "elisor," who is essentially one who is a substitute for some disqualified officer.

But our statutory law gives the same meaning to "elisor" that is given to it in the general authorities. It is provided that, "with relation to each other, the provisions of our four Codes must be construed [except as in the next two sections provided] as though all such Codes had been passed at the same moment of time, and were parts of the same statute." Pol. Code, § 4480. (The next two sections refer to cases of conflict, and have no application here.) When, therefore, "elisor" is used in one Code, it must be deemed to have been used with reference to its definition given in another Code. The Political Code, from sections 4175 to 4193, deals with the duties of sheriff, and with process and notices and their service. It refers to both civil and criminal procedure. Section 4176 provides generally that the sheriff must "serve all process and notices in the manner prescribed by law." Section 4175 provides that "'process,' as used in this article, includes all writs, warrants, summons, and orders of courts of justice or judicial officers. 'Notice' includes all papers and orders (except process) required to be served in any proceeding before any court, board, or officer, or when required by law to be served independently of such proceeding." It is impossible to imagine any sort of a thing ordered by any court, or judge thereof, which has to be executed by an officer, that is not embraced in the above definitions; and the general statutory provision is that it must be executed by the sheriff. Section 4191 provides, however, that, if the sheriff be "a party to an action or proceeding," the process and order therein must be executed by the coroner. And then, in section 4192, the office and functions of an elisor are provided for and described as follows: "Process and orders in an action or proceeding may be executed by a person residing in the county, designated by the court, the judge thereof, or a county judge, and denominated an 'elisor,' in the following cases: (1) When the sheriff and coroner are both parties; (2) when either of these officers is a party, and the process is against the other; and (3) when either of these officers is a party, and there is a vacancy in the office of the other, or when it appears by affidavit to the satisfaction of the court in which the proceeding is pending, or to the judge thereof, that both of these officers are disqualified, or by reason of any bias, prejudice, or other cause would not act promptly or impartially." The only attempt to break the force of this provision is by way of suggesting that the word "proceeding," as used therein, must be limited to that peculiar kind of civil remedy which is called in section 23 and in section 1063 et seq. (Code Civil Proc.) a "special proceeding." But there is no room for such construction. The provision in question does not say "special" proceeding, and the preceding sections and the whole article in which it occurs refer to both civil and criminal matters, and use the word "proceeding" in its general and well-known sense, which includes all steps taken and all things done, wherein judicial procedure is instituted or judicial action invoked. Even in a strictly civil action, when reciting what had occurred in the case, we say, such "proceedings were had," etc. This is the common meaning of the word "proceeding," when applied to things done in court or before judicial officers. Indeed, counsel for respondents in his brief refers very naturally to the formation of a grand jury as a "proceeding." And so we have a statutory definition and description of "elisor" in full accord with the meaning that has always been given it in the general law.

It is contended that, no matter how a body of men may have been gathered together, its acts cannot be attacked if it be recognized by the court as a "grand jury," upon the principle sometimes applied to the act of *de facto* public officers. One of respondents' counsel goes so far as to assert that the legal existence of a jury can be inquired into only by the proceeding of *quo warranto;* and, while other counsel do not assume that very novel position, yet their views logically drift them there. But *quo warranto* does not lie against a mere temporary employment like that of a jury; it lies only against the holder of a public office having a "fixed and permanent tenure." 7 Lawson, Rights, Rem. & Pr. § 4040, and notes. It would, indeed, be startling if a man could be put to the partial ignominy and hazard of a trial at the will of any set of men whom a court might choose to style a "grand jury." But the correct doctrine on that subject was clearly stated by this court in Levy v. Wilson, 69 Cal. 105, 10 Pac. Rep. 272, where the court, through McKee, J., say: "One of the grounds stated in the petition is that the indictment was found by a body of men styled a 'grand jury,' that was not in law and fact 'a valid and constitutional grand jury.' If that be so, the accusatory paper returned to the court below as an indictment is worthless and void, (People v. Thurston, 5 Cal. 69,) and the court has no jurisdiction to try the petitioner upon it; for no person can be held to answer for crime unless on information, after examination and commitment by a magistrate, or an indictment by a grand jury." In People v. Thurston, Id., the same rule was stated, where Murray, C. J., delivering the opinion of the court, said: "I regard the indictment thus found by an illegally constituted body as worthless, and all proceedings based upon it void." See, also, People v. Coffman, 24 Cal. 234. And such is the tenor of the general authorities. In State v. McNamara, 3 Nev. 75, the court say: "An indictment found by a jury not legally constituted cannot be valid." In Brown v. State, 9 Neb. 163, 2 N. W. Rep. 378, the court say: "The grand jury must be selected in the manner prescribed by law. There is no security to the citizen but in a rigid adherence to the legislative will, as expressed in the statutes for our general guidance." In Stokes v. State, 24 Miss. 623, it was held that (we quote from the syllabus, which correctly states the decision) "a grand jury consists of the requisite number of competent individuals selected, summoned, impaneled legally, and sworn according to the forms of law; and, if the law be not followed, the grand jury is incompetent to perform legal acts. * * * The strict observance of the statute in regard to the formation of a jury cannot be dispensed with." In Rainey v. State, 19 Tex. App. 481, the court say that "a valid indictment is an indispensable prerequisite to a legal prosecution for felony." In Finley v. State, 61 Ala. 201, the court, after referring to an unauthorized order made by the lower court on procuring a grand jury, say: "The exercise of such a power by the court would be a violation of the spirit of all our legislation, and would convert the grand jury from a distinct, independent body, drawn and summoned by officers specially charged with that duty, into a mere dependency of the court, chosen by its absolute will. The practical results of such a power are too apparent to require discussion or statement. There is no reason for imputing to the court in this instance more than mere error; but the power exercised in the hands of a capricious or an unscrupulous judge would destroy the purity and independence of the grand jury, and pervert it from all the purposes of its institution." There are numberless other authorities to the same point, but it is useless to indulge in further citations. And these authorities are determinative of the other form in which one of the respondents' counsel states his position, to-wit, that the court, having obtained jurisdiction of the matter of forming a grand jury by first making a valid order that certain jurors be drawn from the box, retained, or thus acquired, power to make the subsequent invalid order that other jurors be selected by Scott. But that was the exact state of facts in many of the cases above cited. In Finley v. State, for instance, the court had first made a legal order that certain grand jurors be properly drawn, and had afterwards made an illegal order for the procurement of other jurors. The fact is that the jurisdiction of the respondent to legally impanel a grand jury did not come from any order which it made in the premises. That jurisdiction came from the law, and was vested in the court before any order was made by it. But that power was limited. There was room for the play and exercise of discretion within the inclosure, but the court could not get beyond that without overleaping or breaking down the barriers. The appointment of Scott was an act entirely independent of and distinct from the order for the drawing of jurors from the box; and, if there was any power to make it, such power must be found in the law, and not in any previous action of the court. As said in High, Extr Rem. § 774, (2d Ed.) a court "will not be permitted to make a jurisdiction for itself, by coupling matters beyond its control with those upon which it may rightfully adjudicate."

Our conclusion is that the court below had no authority in law to appoint said Scott to select grand jurors, because there was no case to which the power of appointing an elisor applied.

2. Is prohibition the proper remedy? Prohibition lies in all cases where there have been proceedings "without or in excess" of jurisdiction, and there "is not a plain, speedy, and adequate remedy in the ordinary course of law." Code Civil Proc. §§ 1102, 1103. If the views hereinbefore expressed are correct, it is clear that the appointment of the (so-called) elisor was "without jurisdiction." Jurisdiction is usually defined as "the power to hear and determine;" but of course it is difficult to express, in abstract terms, a statement of the distinction between error in exercising jurisdiction and jurisdiction itself, that can be readily applied to all cases as they may arise. The law endeavors to fix definitely everything that can in its nature be so fixed, so as to leave as little as possible to the judgment or caprice of those who administer it. But, as many future events cannot, in the nature of things, be foreseen and provided for, it follows necessarily that much must be left to the discretion of courts and other tribunals. And the main test of jurisdiction in any particular matter is whether or not discretion is given the court as to such matter. In the matter before us, for instance, if the law intended to give the power to appoint an elisor in the event of disqualification of the sheriff, it is apparent that the law could not determine beforehand the disqualification of any particular person who might happen to be sheriff at any future time. It could not say that any such sheriff would be actuated by "bias or prejudice." Consequently the determination of the issue, when properly made, of such disqualification, is necessarily left to the discretion of the court, and it has jurisdiction to hear and determine that issue. But when there is no such disqualification, then there is no discretion given to determine whether an elisor should or should not be appointed. Consequently, when there is such an issue made, and the court finds against the disqualification; or when, as in the case at bar, it is admitted that there was no such disqualification, then no jurisdiction exists to make the "appointment." And the jury, not being a legal body, and the so-called indictment being void, then, as before quoted from Levy v. Wilson, "the court has no jurisdiction to try the petitioner upon it." The conclusion follows that the proposed action of the court would be without and in excess of its jurisdiction.

The only other question is: Would petitioner have a plain, speedy, and adequate remedy in the ordinary course of law? If there be such remedy, it must be by appeal. But it would be a difficult proposition to maintain that a defendant in a criminal case, forced through all the stages of a trial for felony without any indictment against him, or, which is the same thing in effect, upon a void indictment, would have a plain, speedy, and adequate remedy, because, after conviction and judgment, and perhaps after suffering the ignominy of imprisonment in the state-prison, he could have the illegal proceeding reversed on appeal. But it is not necessary to discuss that question, because it has been held several times by this court that the point here made by petitioner cannot be reached on appeal. It was so held by our predecessors in People v. Southwell, 46 Cal. 141. In that case the lower court had made an order reciting that there were objections to the sheriff, and that the court intended to submit certain charges against him to the grand jury, and for that reason appointing the coroner to summon the grand jurors. The defendant attacked, in the court below, the legality of the grand jury upon the ground of such appointment of the coroner, by moving to set aside the indictment. On appeal this court first held that the appointment of the coroner was illegal, that the question could be reviewed on appeal, and that the judgment should be reversed; saying, among other things, that "a due regard to the rights of all persons accused or to be accused by the grand jury requires that that body should be summoned by the officer intrusted by law with the performance of that duty." But a rehearing was granted, and, after further consideration, the court—WALLACE, C. J., dissenting, and adhering to the former opinion—held that "in its legal effect the motion was a challenge to the panel," and that, as the objection to the summoning of a jury by the coroner was not a statutory ground of challenge to the panel, the defendant had no remedy on appeal. In People v. Welch, 49 Cal. 174, the court below had allowed the district attorney to examine the sheriff as to his qualifications to summon a jury, and, upon his testifying that he was biased against the defendant, had appointed the coroner to summon the jury. The defendant objected to the *venire* for that reason; but this court, on appeal, while holding that the action of the court below was wrong, held also that the question could not be reached, saying that People v. Southwell "is authority for the proposition that the mistake of the judge in this case was not ground for challenge to the panel of trial jurors, or of objection to the *venire.*" (It will be noticed that in both of the above cases there was an attempt in some form to attack the qualification of the sheriff.) The same rule was announced in People v. Colby, 54 Cal. 37, and People v. Hunter, Id. 65; and in each of said cases People v. Southwell is mentioned and expressly approved. And unless all of these cases—and some later ones—are to be overruled, there is no way in which the question raised in the case at bar can be reached, except by the writ of prohibition. And such, we think, was the decision of this court in Levy v. Wilson, 69 Cal. 105, 10 Pac. Rep. 272. In that case the petition was for a writ of prohibition. The petitioner set forth that he had been indicted by a body of men styled a "grand jury," but "that the body that found said indictment is not a grand jury, or a valid, legal, or constitutional body of grand jurors;" that the respondent Wilson, judge of the court in which said indictment was pending, was about to proceed to try petitioner upon said indictment, and that he would so proceed unless prohibited by the order of this court. Whereupon he prayed that a "writ of prohibition" be issued "restraining said Hon. T. K. Wilson, as a judge of said superior court, from taking any further action or proceeding in said matter." (See petition in said case.) Now, the first question presented to the court, and which it must have decided affirmatively before looking further into the case, was this: Assuming that the body of men by whom petitioner was indicted was not a legal and valid grand jury, is prohibition the proper remedy, and has the court jurisdiction, under that proceeding, to grant the relief prayed for? If the decision had been adverse to the proposition that prohibition would lie in such a case, there would have been no occasion for the court proceeding further and examining into the grounds upon which petitioner, in that particular instance, rested his charges of the invalidity of the jury. The case would have stopped at the threshold. And the question was fully presented and elaborately argued by opposing counsel. Louderback, for petitioner, argued strenuously that prohibition was the proper remedy, and cited numerous authorities to sustain his position; while the first point made by counsel for respondent, J. N. E. Wilson, was that prohibition would not lie; authority also being cited to the point. And so, if the court had agreed with the position of respondent, it would have dimisssed the proceeding upon that ground. But no such course was pursued. It entertained the writ of prohibition, and discussed the cases where it will and will not lie, and clearly held that it would lie when there was an indictment by a body not a valid and constitutional grand jury. Such is the necessary result of the action of the court, and such is the conclusion that must follow the language which it used. In that case the petitioner, among other things, had alleged numerous irregularities as grounds of the illegality of the grand jury, and the court, in speaking of those, used this language: "Most of the grounds stated for the purpose are irregularities and errors accruing before and after the finding and return of the indictment. But, as these are matters which are reversible and remandable on appeal in the action, they are not grounds for a writ of prohibition. Prohibition lies to arrest the proceedings of a judicial tribunal when they are without or in excess of its jurisdiction, and the writ is issuable only in cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." But, having disposed of these minor matters, the court proceeds: "One of the grounds stated in the petition is that the indictment was found by a body of men styled a 'grand jury,' that was not in law and in fact a valid and constitutional grand jury. If that be so, the accusatory paper returned by them to the court below as an indictment is worthless and void, (People v. Thurston, 5 Cal. 69,) and the court has no jurisdiction to try the petitioner upon it." And so the express language of the court is a clear statement that if in that case the indictment had been found by a body of men who were not a legal grand jury, the peremptory writ of prohibition would have been granted. From every standpoint, therefore, the case must be taken as a full authority to the point that prohibition lies in the case at bar. But when the court proceeded and looked into the merits of that case, it found against the petitioner. The fact relied on was that the court below, after having ordered some of the grand jurors drawn from the jury-box, had then ordered the sheriff to select the rest from the body of the county. The point insisted on by petitioner was that under the constitution grand jurors must be "drawn," and that "drawn" meant taken from the jury-box by lot, and that the statutory provision allowing the court to direct the sheriff to select jurors was unconstitutional. On that point the decision of the court was against the petitioner. While it says that "we are of opinion that the court below in exercising its discretion ought to have ordered the panel to be filled by requiring the clerk, in open court, and in the presence of the judge, to draw the requisite number of names from the grand-jury box, instead of requiring the sheriff to summon jurors from the body of the city and county," yet it holds that "the course adopted by the court was one authorized by the Code." But if the court had held with the petitioner in his contention about the sheriff's power, it is clear that the writ would have issued. As to the case of Ex parte Haymond, it is sufficient to say that the distinction between a mere witness and a party indicted for a felony is too clear to need discussion. We are of opinion, therefore, that there is no jurisdiction in the respondent to proceed with the trial of petitioner; that the latter has no "plain, speedy, and adequate remedy in the ordinary course of law;" and that prohibition is the proper remedy.

Petitioner makes the point that at the time of the order complained of there was a rule of the superior court of San Francisco, made by the 12 judges thereof, and never repealed or abrogated, as follows: "Rule 4. It shall be the duty of the presiding judge to preside over the drawing and impanelment of all grand juries required by law or by the public interests to be drawn. Grand jurors must in all cases be drawn from the list of grand jurors selected by the judges of this court, unless the grand-jury box containing the names of jurors so selected shall be exhausted without securing a grand jury." Also, that the constitution requires a grand jury to be drawn; and that "drawn" means taken by lot from a jury-box. Also, that one of the alleged indictments against petitioner shows upon its face that, if the crime charged was committed at all, it was committed in the county of Sacramento, and without the jurisdiction of respondents. Also, that the trial jurors before whom he would be tried have likewise been procured by another similar order appointing another elisor. Also, that petitioner was compelled to appear before said grand jury, and testify as to the very charges upon which he was indicted. But, as our views heretofore expressed are determinative of the case, and as some of said questions are reviewable upon appeal, we deem it unnecessary to here discuss them. Let the writ issue restraining the respondents, as prayed for in the petition.

We concur: HARRISON, J.; PATERSON, J.

GAROUTTE, J., (*concurring*.) This proceeding is an application for a writ of prohibition, requiring the judge of department No. 6 of the superior court of the city and county of San Francisco to refrain from proceeding further in the trial of one Elwood Bruner, upon the ground that such course would be in excess of the jurisdiction of the court; the alleged indictment upon which the trial is predicated having no validity whatever, because found and presented by a body of men not a grand jury. The questions presented upon this hearing are quite important, and in some respects may be considered very novel, when precedent is sought in the authorities of this state. But neither the novelty nor the importance of the matter under investigation demands that its final determination should be reached otherwise than by a most careful consideration of principle and authority. In this case it is so apparent that the court acted without its authority in the appointment of an elisor that the matter demands no extended consideration. Section 4192 of the Political Code reads: "Process and orders in an action or proceeding may be executed by a person residing in the county, designated by the court or judge thereof, or a county judge, and denominated an 'elisor,' in the following cases: * * * (3) When it appears by affidavit to the satisfaction of the court in which the proceeding is pending, or to the judge thereof, that both of those officers [sheriff and coroner] are disqualified, or by reason of any bias, prejudice, or other cause would not act properly or impartially." The impanelment of a grand jury is a proceeding within the provisions of the foregoing section, and it is conceded that the sheriff labored under no disqualification; consequently the contingency for the appointment of an elisor in this case never arose. Section 226 of the Code of Civil Procedure reads: "Whenever jurors are not drawn or summoned to attend any court of record or session thereof, or a sufficient number of jurors fail to appear, such court may order a sufficient number to be forthwith drawn and summoned to attend the court, or it may, by an order entered in its minutes, direct the sheriff, or an elisor chosen by the court, forthwith to summon so many good and lawful men of the county, to serve as jurors, as may be required, and in either case such jurors must be summoned in the manner provided in the preceding section." Section 242 of the same Code provides: "When, of the persons summoned as grand jurors and not excused, nineteen are present, they shall constitute the grand jury. * * * If less than nineteen of such persons are present, the panel may be filled as provided in section 226 of this Code." Conceding that the provisions of the Political Code quoted have no application to the matter of the impanelment of a grand jury, and that section 226 of the Code of Civil Procedure is alone controlling, still I have no hesitation in saying that under that section the court has no power to appoint an elisor, unless the sheriff is disqualified. From any point of view taken, it is the necessary conclusion that the proper construction of section 226 is that the court may appoint an elisor only when the contingency has arisen, whereby the officer elected by the people to perform such service, and which service is a duty enjoined upon him by statute, has become disqualified to act in the matter. The word "elisor" is a technical legal word, with a technical legal meaning; a meaning definitely and uniformly settled by all the authorities; and, under elementary rules of construction, such meaning must attach to it in this section of the Code. An elisor is "an elector chosen by a court to return a panel of jurors, where the sheriff and the coroner are disqualified." And. Law Dict. It is not necessary to amplify upon the necessity in the interest of good government for a strict construction of the law pertaining to the selection of jurors. It is the spirit of the entire law pertaining to the subject that the names of jurors, both grand and petit, should always be drawn from the box, rather than that the great responsibility should be cast upon any officer of going out upon the highways and byways, and of his own choice and will selecting jurors. Our present law, in many essential features, is the outgrowth of an act of the legislature found in the statutes of 1857, p. 168, which provided, among other things, that all grand jurors and all trial jurors, in criminal cases, without exception, should be drawn from the box. This act of 1857 was the direct result of the gross failure of justice, under a corrupt use of the power previously vested by law in the officers of the court to select jurors from the body of the county, and which abuse of power resulted in the organization of the vigilance committee of 1856, a matter which is inseparably connected with the history of this city and state.

The principles which are applicable and controlling upon matters of *mandamus* are equally applicable and controlling upon proceedings in prohibition; and in Rex v. Barker, 3 Burrows, 1268, Lord MANSFIELD, in speaking of the object and scope of the writ of mandate, said: "It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. Within the last century it has been liberally interposed for the benefit of the subject and admeasurement of justice. The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied." The case of Quimbo Appo v. People, 20 N. Y. 542, received an exhaustive consideration from the court of that state, and, after referring to many authorities upon the question as to when the writ of prohibition should issue, it said: "These cases prove that the writ lies to prevent the exercise of any unauthorized power in a cause or proceeding of which the subordinate tribunal has jurisdictian, no less than when the entire cause is without the jurisdiction." And again: "This shows that the writ was never governed by any narrow technical rules, but was resorted to as a convenient mode of exercising a wholesome control over inferior tribunals. The scope of this remedy ought not, I think, to be abridged, as it is far better to prevent the exercise of unauthorized power than to be driven to the necessity of correcting the error after it is committed." It would seem from the principles laid down in the foregoing authorities, that in this case prohibition is pre-eminently the proper remedy; for, if prohibition is not the remedy, then the defendant is barred from all remedy, for, as we will hereafter indicate, this court has repeatedly and uniformly held that the defendant has no appeal in such a case. It is confidently submitted that our judicial institutions are not so constituted but that the power to relieve an innocent man from an unjust and illegal prosecution and conviction must be found somewhere and in some manner in our judicial tribunals. Such is not only a principle of natural justice recognized by the intelligence and conscience of all civilized nations, but, as a matter of abstract right under our constitution, a defendant is entitled to a remedy.

It is unnecessary to quote further authorities from other states or countries. The question as to whether or not the writ of prohibition is the proper remedy has been squarely met and decided in the affirmative by this court in the case of Levy v. Wilson, 69 Cal. 105, 10 Pac. Rep. 272, and, unless that case shall be overruled at this time, it stands all-controlling upon the case at bar. Like this, as shown by the verified petition filed, that was an application for a writ of prohibition to restrain the Hon. T. K. Wilson, as judge of the superior court of the city and county of San Francisco, from proceeding with the trial of one Henry Levy, charged by indictment with the crime of burglary, and, among the various grounds relied upon by petitioner for the issuance of the writ, he alleged "that said body or alleged grand jury was not a grand jury or a legal or constitutional grand jury." This court, after first remarking that "most of the grounds stated for the purpose were irregularities and errors in law occurring before and after the finding and return of the indictment," said: "One of the grounds stated in the petition is that the indictment was found by a body of men styled a 'grand jury,' that was not in law and fact a valid and constitutional grand jury." If that be so, the accusatory paper returned by them to the court below as an indictment is worthless and void, (People v. Thurston, 5 Cal. 69,) and the court has no jurisdiction to try the petitioner upon it; for no person can be held to answer for crime unless on information, after examination and commitment by a magistrate, or an indictment of a grand jury. And the court then proceeds to quote the definition of the words "grand jury," as declared by the law of this state in section 192 of the Code of Civil Procedure. The foregoing authority decides clearly and emphatically that an accusatory paper returned as an indictment by a body of men not a valid and constitutional grand jury is worthless and void, and a court has no jurisdiction to try a defendant upon such a paper. From the mere statement of the proposition it would seem no lawyer would dispute it. Certainly no court would challenge it. These quotations are not *obiter dicta* of the court; they are the heart and life of the decision. At the threshold of the case respondent insisted that petitioner had no remedy by prohibition, (exactly what is being done here.) This objection raised a question of law, and it was absolutely necessary for the court to meet it and dispose of it before entering upon an examination of the facts. The question was argued with learning and ability by counsel for petitioner and respondent, and it was in answer to that argument that these principles of law were declared by the court. If it can be said that there is language to be found in the case of People v. Southwell, 46 Cal. 150, opposed in any way to these views, such language would seem to be *dicta*, or, if it ever had weight as authority, it must be held to have been overruled by Levy v. Wilson, supra.

The court had jurisdiction to impanel a grand jury, to the same extent and in the same manner that it had jurisdiction of the crime of murder. It had no jurisdiction to impanel a grand jury in a manner without the law, and as its caprice might dictate. Neither had it jurisdiction to take a man *vi et armis*, charged with murder, and proceed to hear and determine his guilt or innocence. Conceding the court had jurisdiction of the offense of murder, and by reason of a valid indictment had jurisdiction of the defendant, it would have no jurisdiction to proceed to try the defendant without a jury; or, upon a verdict of guilty by a jury, it would have no jurisdiction to render a judgment that the defendant be crucified. In the case of Windsor v. McVeigh, 93 U. S. 282, in the opinion of the court, this matter of jurisdiction was clearly and succinctly discussed by that eminent jurist, Mr. Justice Field, wherein he said: "Though a court may possess jurisdiction of a subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases. * * * And the reason is that the courts are not authorized to exert their power in that way. The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it."

Were the acts of the court in the formation of this grand jury in excess of its jurisdiction? Under the constitution the court has jurisdiction to form a grand jury, but by reason thereof it would not follow that it had jurisdiction to form such grand jury in any way it saw fit. Section 192 of the Code of Civil Procedure says: "A grand jury is a body of men, nineteen in number, returned in pursuance of law." A grand jury is not a body of 20 men, returned in pursuance of law, neither is it a body of 19 men, returned to the court in pursuance of no law. The court has jurisdiction to impanel a grand jury, but it has jurisdiction to impanel it only in accordance with the provisions of law; and when it impanels it without the law it is acting in excess of its jurisdiction, and such a body is not a grand jury, for it does not fill the test demanded by the section of the Code just quoted. If, by reason of its general jurisdiction granted by the constitution to impanel a grand jury, it has the power to form one of 19 men not in pursuance of law, it would have the same power to form one consisting of 40 men, or, possibly, 40 women. It is no more requisite, viewed by the statute, that the grand jury should consist of 19 men, than it is that it should be returned according to law. Indeed, from a standpoint of honest, conscientious results, the number of the grand jury is insignificant, as compared to the manner of its selection. When the law declares that a grand jury shall consist of 19 men, and the court impanels a grand jury consisting of 10 men or 12 men, it acts without its jurisdiction, and such a body is without authority, and has no vitality whatever. There is no case to the contrary in this country, and very many directly to that effect. Such a body is not a grand jury, and in congregating it the court was not acting within its powers, for its authority was limited to the formation of a grand jury. In State v. Symonds, 36 Me. 132, the court, referring to three citizens who were placed upon the grand jury, said: "These persons were summoned and charged as grand jurors, and added to the panel, and acted in finding this bill; but, as their selection for the purpose was not in conformity to the laws of this state, they constitute no part of a legal grand jury, * * * and the indictment should be revoked and forever held at naught." In Doyle v. State, 17 Ohio, 224, the law there requiring a grand jury to consist of 15 persons, the court said: "A less number is not a grand jury. Fourteen are not a grand jury. * * * Hence, in this case, the indictment was not found by a grand jury. * * * Hence, that which purports to be an indictment was no indictment, and the party charged could not be put upon trial to answer. It should have been quashed, or set aside as a nullity." In Finley v. State, 61 Ala. 206, the court said: "Without the agency of the sheriff, but in exclusion of it, the court orders a sufficient number of names to complete the grand jury from the bystanders in the court-room, to be placed upon strips and drawn. The statute imposes upon the sheriff the duty and responsibility of summoning the persons from whom a sufficient number to complete the grand jury are to be drawn, and the court could not exclude him from the performance of the duty, or transfer it to another, or assume to perform it. * * * The exercise of such a power by the court would be in violation of the spirit of all our legislation, and would convert the grand jury from a distinct, independent body, drawn and summoned by officers specially charged with that duty, into a mere dependency of the court, chosen by its absolute will. The record affirmatively discloses that this accusation is not an indictment; that it proceeds from and is the act of a body of men organized as a grand jury in violation of law. It follows that the judgment must be reversed." In McQuillen v. State, 8 Smedes & M. 597, the court said: "A grand jury does not, by our law, consist of thirteen or more men, congregated by the mere order of the court or by accident in a jury-box, but it consists of the requisite number of competent individuals, selected, summoned, and sworn according to the forms of law; and, if the law be not followed, it is an incompetent grand jury." In Lott v. State, 18 Tex. App. 630, in speaking of the acts of a grand jury composed of 13 men when the law required 12, the court said "Such a body of men is unknown to the law, and its acts, being wholly without authority of law, are absolutely null, and a pretended indictment preferred by such a body can have no legal standing or effect whatever. It cannot confer any jurisdiction of the case upon the court. Our conclusion is that the matter presented by the motion in arrest of judgment is fundamental, and reaches the very foundation of this prosecution." In People v. Thurston, 5 Cal. 69, which case was approved in Levy v. Wilson, supra, this court said, speaking through Chief Justice MURRAY: "I regard the indictment thus found by an illegally constituted body as worthless, and all proceedings based upon it void." The principle declared by the foregoing cases, to-wit, that a body of men sworn as a grand jury, if not composed of the number required by law, or if not impaneled in pursuance of law, is not a grand jury, and that an accusatory paper presented to the court by such body is not an indictment, and that consequently the court has no jurisdiction to try a defendant upon such paper, has been upheld and affirmed directly in many other cases. See Rainey v. State, 19 Tex. App. 479; State v. Williams, 5 Port. (Ala.) 130; Stokes v. State, 24 Miss. 621; Burley v. State, 1 Neb. 385; State v. Lawrence, 12 Or. 297, 7 Pac. Rep. 116.

Respondent insists that, the court having jurisdiction to form a grand jury, and its first order to draw the names of 25 persons from the box being strictly within the requirements of the law, the court thereby obtained jurisdiction, and all matters and orders done and made by the court towards the formation of a grand jury, subsequent to that time, were not jurisdictional, but simply erroneous. This position has no sound support. The first order made by the court in the process of impanelment of the grand jury was no more jurisdictional than the second order made by the court. The court, by exercising its jurisdiction in making a valid order, could not thereby create in itself jurisdiction to make a void order. In this case the grand jury was formed under two separate and independent orders of the court, and under two separate and distinct provisions of the statute. If one was jurisdictional, the other was equally so. The court had the power to make the first order, and exercised it by ordering that the names of 25 persons be drawn from the box. The result of this order was the securing of 10 grand jurors. It had no power to make the second order, and necessarily such order had no legal results. The nine men selected by the elisor were intruders, and necessarily no grand jury was impaneled. The action of the court in appointing an elisor cannot be mere error, any more than a judgment of imprisonment for life upon a conviction for petit larceny would be mere error. In both cases the fatality is caused by an absence of power to make the order. If it is simply an error of the court to appoint an elisor and order him to summon nine men as grand jurors, without any authority in law, it would only be an error of the court to have selected the men itself from the by-standers, or from its personal friends; it would have been simply an error of the court to have impaneled a grand jury consisting of 10 men. If an order appointing an elisor to summon nine men as grand jurors, made in direct contravention of law, is mere error, then an order for the elisor to summon 19 men to compose a grand jury would be mere error, and a grand jury could be impaneled so wholly and entirely irregular as to outrage and shock the law at all points; and still it would be mere error. This is the necessary result of such doctrine, and it would be a grave impropriety to hold it to be the law.

We have now determined that the court acted in excess of its jurisdiction in the impanelment of this grand jury. Has the defendant a plain, speedy, and adequate remedy other than by prohibition? In the cases of People v. Southwell, 46 Cal. 141; People v. Welch, 49 Cal. 174; People v. Colby, 54 Cal. 37; People v. Hunter, Id. 65; People v. Goldenson, 76 Cal. 328, 19 Pac. Rep. 161,—and others not necessary to note, it was held that a defendant had no appeal to this court from such action of the trial court in impaneling a grand jury as is disclosed by the record in this case. As early in the history of the legal jurisprudence of this state as the case of People v. Hunter, supra, this court said: "Such must be considered the settled doctrine in this state." Conceding that these cases do not establish the true rule, and that the defendant can appeal to this court to right such wrongs, yet such remedy is not plain and speedy; neither is it adequate. It cannot be said to be plain and speedy when at every milestone marking his path to this court there may be found an obstruction completely blocking his way in the form of a supreme court decision, placed there by the very court towards which he is traveling for relief. His remedy by appeal is not adequate. To say that an innocent man can be charged and convicted of a crime involving the greatest moral turpitude, and lie in a felon's cell until he can be set at liberty when his appeal has dragged its slow length along to this court, and that such remedy is adequate for his wrongs, is a travesty upon the use and meaning of words. In the case of Havemeyer v. Superior Court, 84 Cal. 399, 24 Pac. Rep. 121, this court decided that the remedy by appeal was not adequate where the appellant might suffer irreparable damage by a destruction of his property pending the appeal. It would follow that it is a very conservative view to say that in this case the remedy by appeal is not adequate; for loss of liberty, and irreparable damage to character and good name, would result to this defendant pending his appeal. The remedy is not adequate to him, for, pending his appeal, wounds would be inflicted no surgeon's art could heal. For the foregoing reasons I think the writ should issue as prayed for.

Beatty, C. J., (*dissenting*.) I concur in so much of the opinion of the court as holds that the appointment of an elisor to select and summon talesmen for the completion of the grand jury was, in the absence of any finding of disqualification of the sheriff, a violation of the statutory provisions regulating the formation of grand juries. But I do not think it can be held that the superior court is exceeding its jurisdiction in proceeding with the trial of the petitioner upon the indictments which have been presented against him, and, if not, its action cannot be arrested by prohibition. Precisely the same vice which infects the proceedings in this case was disclosed in the Southwell Case, and several later cases in which it has been followed, (People v. Southwell, 46 Cal. 141; People v. Colby, 54 Cal. 37; People v. Hunter, Id. 65;) in all of which it was expressly held that for such a violation of the statutory provisions on this subject there was no remedy by appeal. This would of course be, as the court intimates, only an additional reason for holding that prohibition is the proper remedy, if, as contended, the superior court has no jurisdiction to try an indictment found and presented by a body so irregularly organized. But I think that, while the only point expressly decided in the Southwell Case was that there was no remedy by appeal, the decision necessarily implies that in such cases the superior court has jurisdiction to proceed to trial and judgment; for surely it ought not to be supposed, in the absence of anything necessarily involving such conclusion, that this court meant to decide that the legislature, by any sort of amendment to the Penal Code, could oust it of its constitutional appellate jurisdiction in criminal cases; that it could, by merely omitting to provide for grounds of challenge to the panel of a grand jury, or of motion to quash or set aside an indictment, enable the superior court to try and convict a citizen upon an accusation presented by a body of men lacking in the essential constitutional qualifications of a grand jury, without having its action reviewed on appeal to this court, where, by the constitution itself, the power of review in such cases is lodged. Such a decision, I say, is not to be imputed to the court when it has not been expressly made, unless it is necessarily to be implied from the conclusion reached, or the reasoning upon which such conclusion is founded; and I see nothing in the opinion of the court in the Southwell Case from which it can be implied that the action of the superior court in pretending to try an indictment presented by a body of men claiming to be a grand jury, but which is not a valid, constitutional grand jury, could not be reviewed on appeal. On the contrary, I find the distinction stated with quite sufficient clearness between a *de facto* grand jury, whose indictments, so far from being void and subject to collateral attack, are legally sufficient to justify the court in proceeding to try them, and a body claiming to be a grand jury, but having no semblance or color of authority. With respect to such a body, it is distinctly intimated that it would be the duty of the superior court to strike from its files any pretended indictment that it might present, and (as I think must be understood) that, if the superior court neglected its duty in that respect, its action would be reversed on appeal. But whether or not this is what the court meant to say, it certainly said nothing to the contrary effect. What was said in the subsequent case of Levy v. Wilson, 69 Cal. 108, 10 Pac. Rep. 272, is also perfectly consistent with this view. An accusatory paper returned as an indictment by a body of men not constituting "a valid, constitutional grand jury" is worthless and void, and no court has jurisdiction to bring the person accused to trial upon it.

But what is a valid, constitutional grand jury? It is, I think, a body of men possessing the constitutional requisites of a grand jury, as distinguished from merely statutory requisites. As to the former, the legislature cannot dispense with them, nor can it, by altering or refusing to enact rules of procedure, deprive this court of the constitutional power to enforce their observance through the medium of an appeal or writ of error, or by prohibition, when that may be necessary. But as to mere statutory regulations in regard to the selection and summoning of talesmen to complete the panel of a grand jury, which exist only by the grace and favor of the legislature, it is entirely competent for the same power which has prescribed them to determine what, if any, advantage may be taken of their violation. This principle I find very clearly and forcibly stated by Judge ANDREWS, delivering the opinion of the court of appeals of New York in the case of People v. Petrea, 92 N. Y. 144: "If the defect in the constitution of the tribunal deprived it of the character of a grand jury in a constitutional sense, there can be no doubt that the court would have been bound to have taken notice of it, although no statute authorized it, or even if the statute assumed to preclude the raising of the objection. But when the defect is not of that character, and the defendant may be held to answer the indictment without invading any constitutional right, then the question is one of procedure merely, and the right of the defendant to avail himself of the objection is subject to the regulation and control of the legislature." This, it seems to me, is unquestionably a sound view, and it is conclusive of this case. Here the grand jury was not selected as the law prescribes, but it is not lacking in any constitutional requisite. It is composed of 19 members,— the number prescribed by the statute for the time being,—a number within the common-law limits of not less than 12 nor more than 23. It has been impaneled, sworn, and charged with the duties of a grand jury by and is acting under the direction of a court vested with the power to impanel it, and it was drawn and summoned in the sense of the constitution, (article 1 of section 8.) As to this point, I do not think that the constitution means anything more than that a panel must be drawn in the first instance. It does not require, in case, after a regular drawing and summoning of the panel, there are not a sufficient number to form a grand jury, that talesmen for its completion should be drawn. In other words, I hold, as it has invariably been held heretofore, that this provision of the constitution was not intended to change the law existing at the date of its adoption. These indictments are, therefore, not void, and the legality of the grand jury cannot be attacked otherwise than by motion or challenge of a person indicted upon some ground allowed by the statute.

As to the objection that the indictment for bribery in this case shows on its face that no part of the offense was committed in San Francisco, no answer is made, and I do not see how any answer can be made to it. But, although it seems pretty clear that the superior court of San Francisco has no jurisdiction of the offense charged, I do not think this court should interfere by prohibition until the particular defect referred to has been called to the attention of the superior court by demurrer, and even then appeal would be the usual and sufficient remedy.

The other objections to the indictment do not, in my opinion, involve any question of jurisdiction. Upon these grounds, while fully concurring with the court in its construction of the statute relating to the appointment of an elisor to select and summon talesmen, I am constrained to dissent from the conclusion that the error of the superior court can be corrected by prohibition.

De Haven, J. I dissent. The indictments pending against petitioner in department No. 6 of the superior court of the city and county of San Franciso were returned by a body of men impaneled by that court as a grand jury, and charged by it with the duties pertaining to such a body. In my opinion, the learned judge of that court committed an error in making the order which directed the summoning of some of its members by an elisor, in the absence of a showing that the sheriff was disqualified to perform that duty. Section 226 of the Code of Civil Procedure provides: "Whenever jurors are not drawn or summoned to attend any court of record or session thereof, or a sufficient number of jurors fail to appear, such court may order a sufficient number to be forthwith drawn and summoned to attend the court, or it may, by an order entered in its minutes, direct the sheriff or an elisor chosen by the court forthwith to summon so many good and lawful men of the county, or city and county, to serve as jurors as may be required; and in either case such jurors must be summoned in the manner provided in the preceding section." This section does not, when properly construed, give to the judge an absolute discretion to select any person to summon jurors to complete the panel, without reference to the sheriff or his disqualifications. If such were the intention of the law, it would have been more clearly expressed by omitting the word "sheriff" altogether, and simply providing that the jurors should be selected by some person named for that purpose in the order, and then the court would have been left with complete discretion to select the sheriff or any other person to execute its order; but such is not its language, and, giving due effect to the meaning of the word "elisor" in the connection in which it is here used, the true meaning of this section is that the court shall direct the sheriff to summon such jurors, or, in case of his disqualification, some person to act in his place. But this error of the court did not convert the persons impaneled by it as a grand jury into a body of usurpers, without any semblance of authority, and whose accusations are mere nullities, which the court is without jurisdiction to entertain. The court had undoubted authority to impanel a grand jury. Its order made for the drawing was regular, and when, in due course of the proceeding, certain of those drawn were excused from serving, and there did not remain a sufficient number of competent jurors to form the panel, the court was called upon in the exercise of its jurisdiction to obtain additional jurors, and how this should be done was a matter for the court to determine by its order, and involved the exercise of discretion as to whether they should be drawn or summoned; and, in the event that the latter mode was adopted, required the exercise of judgment,—a decision whether under the law the execution of its order should be directed to the sheriff or some other person. That the judge of that court was thus called upon to determine what the law required in the premises is evident, and that this was the exercise of a judicial function in a matter over which he had perfect jurisdiction is to my mind so clear that the mere statement of the proposition ends all argument upon the point. The right to act in the matter at all, and to decide for the time being what was the law applicable to the proceeding before the court, constituted jurisdiction in every sense of that term, and no mere error in the decision of the question thus regularly before it could deprive the court of jurisdiction over that proceeding, or make its orders therein subject to a collateral attack, as absolutely null and void.

The court having this jurisdiction over the general proceeding, it follows necessarily that the jury impaneled by it is a *de facto* body, having the right to exercise the functions of a grand jury, and whose indictments can only be questioned in the court to which they were returned, with the right of appeal from any judgment therein. Every possible objection which, under the law or constitution, can be taken to the formation of such grand jury, must be presented by the accused in that court, and not by an independent and collateral action in another court. That the objection here urged against this particular grand jury is a mere irregularity, and does not at all affect the jurisdiction of the superior court over the indictments returned against petitioner, was, in my opinion, clearly and distinctly held in the case of People v. Southwell, 46 Cal. 141. In that case, as in this, the jurors had been selected and summoned by an unauthorized person, and this court, on appeal, said this was only an irregularity, and one for which the statute did not even provide a remedy. In thus deciding and affirming a judgment of conviction the court necessarily held that such an irregularity was not fatal to the jurisdiction of the court to try the defendant upon an indictment returned by a grand jury, many of whose members had been irregularly and improperly summoned. It was there said: "It is claimed on behalf of the defendant that, if the grand jury was not selected and summoned as required by law, it was an illegal body, which usurped the functions of a grand jury, and its acts are wholly void." In the course of its opinion, and in reply to this position of the appellant in that case, the court, in pointing out the difference between a grand jury which had such technical defects in its organization and a body wholly without authority and whose indictments would not properly be considered by the court, further said: "It may be that, if a paper be presented to the court in the form of an indictment, but which was found by a body of men having no semblance of authority to act as a grand jury, it would be the duty of the court to strike it from the files as a mere nullity, and as wholly worthless for any purpose. It would have no proper place among the files of the court, and ought, therefore, to be removed from them. * * * But it is not every slight irregularity which may occur in the formation of a grand jury, which would justify the court in striking the indictment from the files as a nullity; otherwise there would be no need of a challenge to the panel, as all objections to the grand jury could be taken on a motion to strike the indictment from the files. The true distinction lies between the acts of a body having no semblance of authority to act at all, and of a body which, though not strictly regular in its organization, is nevertheless acting under a color of authority. In the former case the acts of the wholly illegal body are nullities, having no proper place among the files of the court; but in the latter case section one hundred and eighty-two of the statute prescribes the only method by which mere irregularities in the formation of the grand jury can be inquired into. The case at bar comes within the latter category. On the facts disclosed by the record it cannot be affirmed that the grand jury had no semblance of authority, and were acting without color of lawful right. It was regularly drawn from a grand-jury list, duly certified, and, some of them having been excused, the deficiency was supplied by a *venire* properly issued by the order of the court. We think the court erred in directing the *venire* to be summoned by the coroner instead of the sheriff. But this was only one of the irregularities for which the statute has failed to provide a remedy. A grand jury, summoned in pursuance of a *venire* duly issued, cannot be said to be a wholly illegal body, having no semblance of authority, merely because the court erroneously directed the *venire* to be served by the coroner instead of the sheriff. It was error of which the defendant perhaps might justly complain, but the statute has provided no remedy for it." This decision has never been overruled, but, on the contrary, has been repeatedly referred to as authority in later cases in this court, and seems to be conclusive of every question presented by this record. Indeed, my attention has not been called to the decision of any court, either in this state or elsewhere, in which it has been held that an irregularity in the formation of a grand jury of the character here complained of can be corrected in a collateral action. In Wharton's Criminal Law and Practice, § 350, it is said: "If the body by whom the indictment was founded was neither *de jure* nor *de facto* entitled to act as such, then the proceedings are a nullity, and the defendant, at any period when he is advised of such nullity, is entitled to attack them by motion to quash or by plea in abatement, or, when the objection is of record, by motion in arrest of judgment. He is, in most jurisdictions, sheltered by constitutional provisions from prosecution, except upon indictment found by a grand jury; and when the body finding the indictment is not a grand jury, either *de jure* or *de facto*, then its prosecution must fail when the question is duly raised. But a *de facto* grand jury cannot be deemed a nullity under this provision of the constitution." This seems to me to be the true rule, and in the case of Ex parte Haymond, (Cal.) 27 Pac. Rep. 859, we held upon the same state of facts disclosed in this record that this same grand jury was a *de facto* jury. This being so, in my opinion the superior court has jurisdiction to proceed upon the indictments, and any judgment which it might make would not be void, and therefore the writ should be denied. In the foregoing I have assumed that the offenses charged against petitioner are alleged to have been committed in whole or in part within the city and county of San Francisco. If, however, the indictments are defective in this respect, and it is not shown that the attention of the superior court has been called thereto, petitioner is not entitled, as a matter of right at this time, to the writ demanded.

SHARPSTEIN, J. I dissent. It seems to me that the only serious question in this case is whether the court, in the absence of an affidavit showing that the sheriff and coroner were "disqualified, or by reason of any bias, prejudice, or other cause would not act promptly or impartially," has the power to direct "an elisor chosen by the court forthwith to summon so many good and lawful men of the county, or city and county, to serve as jurors, as may be required," which was fully and carefully considered in People v. Southwell, 46 Cal. 141, and determined against the contention of the petitioner. Under the law then in force the coroner was authorized to execute process only when the sheriff was a party to an action or special proceeding. It nowhere appears, nor is it suggested in People v. Southwell, supra, that the sheriff was disqualified to serve the *venire*. Therefore the power of the court to direct it to the coroner in that case rested upon no better foundation than the power of the court in this case to direct it to an elisor. The court in People v. Southwell, supra, very pertinently remarked that "a grand jury summoned in pursuance of a *venire* duly issued cannot be said to be a wholly illegal body, having no semblance of authority, merely because the cout erroneously directed the *venire* to be served by the coroner instead of the sheriff." In that case the court said: "We think the court erred in directing the *venire* to be summoned by the coroner instead of the sheriff." That shows that it was not a case in which the court was authorized by law to direct the *venire*, to the coroner. Had it been, the court could not have said that it was error to so direct it. I think the opinion of the court in People v. Southwell, supra, is amply supported by reason and authority, and that it would be much safer to follow than to overrule it. I therefore think the application for a writ of prohibition in this case should be denied.

92 Cal. 419

TAYLOR v. FORD. (No. 12,982.)

(*Supreme Court of California.* Dec. 18, 1891.)

RIGHT TO JURY TRIAL.

Where defendant, in an action under Code Civil Proc. § 1050, to have determined a claim asserted by defendant against plaintiff on a note, files a pleading which in form and substance is a complaint on the note asking judgment for the amount claimed thereon, and plaintiff, answering, sets up want of consideration and other defenses, it is error for the court to refuse a demand by plaintiff for a jury trial.

In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by H. W. Taylor against C. D. Ford to have a claim determined. Judgment for defendant. Plaintiff appeals. Reversed.

Charles F. Hanlon, for appellant. *Page & Eells*, for respondent.

McFarland, J. This action was brought under section 1050 of the Code of Civil Procedure to have determined an adverse claim which defendant asserted against plaintiff upon a certain promissory note for $8,509.85. Defendant filed a pleading styled "an answer and cross-complaint," which was in form and substance a complaint upon said promissory note, with a prayer for judgment against plaintiff for the amount due thereon. Plaintiff answered, setting up want of consideration and other defenses. At the proper time plaintiff demanded a jury. The court denied this demand, and proceeded to try the case without a jury, and subsequently rendered judgment against plaintiff for the amount which the court found to be due upon the note. Plaintiff appeals. In refusing the demand for a jury the court erred. The issues raised by the cross-complaint, and the answer thereto were triable in the ordinary course of law, and by a jury unless waived. It was a common-law action upon a promissory note, with a defense of want of consideration; and the case comes clearly within the principles stated in Donahue v. Meister, 88 Cal. 121, 25 Pac. Rep. 1096. The judgment and order are reversed, and the cause is remanded for a new trial.

We concur: Beatty, C. J.; De Haven, J.; Garoutte, J.; Sharpstein, J.; Harrison, J.

(92 Cal. 408)

SMULLEN v. PHILLIPS. (No. 14,408.)

(*Supreme Court of California.* Dec. 18, 1891.)

Limitation of Actions—Running of Statute—Amendment of Complaint.

Where a complaint is amended to obviate a variance, and the cause of action is the same as that set out in the original complaint, the amended complaint relates to the commencement of the action.

Commissioners' decision. Department 1. Appeal from superior court, Butte county; John C. Gray, Judge.

Action for slander by Smullen against Phillips. Judgment for defendant. Order for new trial. Defendant appeals. Affirmed.

John Gale and *Mr. McBarney*, for appellant. *H. V. Rearden* and *M. G. Murphy*, for respondents.

Fitzgerald, C. This is an appeal from an order granting plaintiff's motion for a new trial. The action is slander, and the words charged in the original complaint, as having been spoken by the defendant of and concerning the plaintiff, are, "He is a thief." These words impute to the plaintiff a crime punishable by law, and are therefore actionable *per se.* At the trial the witnesses for plaintiff testified that the words used by the defendant, at the time and place alleged, were as follows: "That thieving son of a ——, he stole $2,500 from me, and I can prove it." This testimony was on motion stricken out on the ground of variance, and the plaintiff, after excepting to the ruling of the court, moved for and obtained leave to amend his complaint by inserting the words of the witness in lieu of those originally declared on The defendant in his answer specifically denies the material allegations of the amended complaint, and, among other matters of defense, avers that the alleged cause of action set out therein is barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure. The trial was then proceeded with by the plaintiff recalling his witness and propounding to him the following question: "State the language used by the defendant Philips at his store on November 6, 1888, in the presence of yourself and others, of and concerning the plaintiff Smullen." Counsel for the defendant here objected "to the introduction of any evidence in support of the cause of action set out in the amended complaint herein, upon the ground that the cause of action set out in said amended complaint is barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure." The objection was sustained, and plaintiff, after excepting to the ruling of the court, rested his case. The court, upon motion, then instructed the jury to find a verdict for the defendant, which they accordingly did, and judgment was entered thereon in favor of the defendant. Plaintiff, in his notice of intention to move the court to vacate and set aside the verdict and judgment herein, and to grant a new trial, stated that it would be "made upon a statement of the case to be hereafter served, and upon the following grounds, viz.: 'Errors in law occurring at the trial, and duly excepted to by said plaintiff.'" The following are the specifications of errors contained in the statement on motion for a new trial: "(*a*) The court erred in striking out the testimony of the witness J. J. Rich, relative to the words used by the defendant given in support of the original complaint. (*b*) The court erred in sustaining defendant's objection to the testimony of the witness J. J. Rich, offered in support of the cause of action set out in the amended complaint." The order shows that the new trial was granted on the ground last assigned, the first having been waived by the filing of the amended complaint. The scandalous words laid in the original complaint are not qualified or altered in their sense or meaning by those proved to have been used by the defendant. The former are clearly embraced in the latter, and both substantially charge that the plaintiff is a thief. As the cause of action is the same, it is evident that the object and effect of the amended complaint was simply to obviate a variance by conforming the allegations thereof to the proof. The action was commenced within the meaning of the statute, when the original complaint was filed, and it follows that the amended complaint relates to the commencement of the action; and, as the original complaint shows on its face that the cause of action therein stated was not barred by the statute of limitations at the time it was brought, it follows that the new trial was properly granted by the court below on the ground stated in the order. The order appealed from should be affirmed, and we so advise.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(92 Cal. 393)

BUELL v. BUELL. (No. 13,698.)

(*Supreme Court of California.* Dec. 17, 1891.)

EXECUTION—ISSUANCE—MOTION TO RECALL—SUBSTITUTION OF ATTORNEYS.

1. Under Code Civil Proc. § 681, allowing five years from the entry of a judgment to issue execution thereon, the running of a statute is not suspended pending an injunction staying execution.

2. A motion to recall an execution is an original proceeding, and may be made by attorneys, other than those who appeared in the original action, without substitution.

3. A notice of motion to recall the execution, specifying the grounds of the motion to be "for the reason that the said execution was wrongfully and unlawfully and improperly issued," is sufficient to raise the question of the authority of the court to issue the execution.

4. Where the court has improperly made an order directing execution to issue, it may, on motion, recall the execution, though the order is appealable. Dorland v. Hanson, 22 Pac. Rep. 552, 81 Cal. 202, followed.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Motion to recall a writ of execution issued by H. P. Buell against R. T. Buell. Writ ordered recalled. Plaintiff appeals. Order affirmed.

Wm. H. Webb, for appellant. *Geil & Morehouse*, for respondent.

BELCHER, C. This is an appeal from an order made by the superior court of Monterey county on the 11th of November, 1889, recalling a writ of execution issued by its order, on a money judgment rendered by the district court in and for that county on the 28th of February, 1877. Notice of the motion was served on appellant's attorney in proper time, and it stated that respondent would move the court, at a time named, to recall the writ, "for the reason that the said execution was wrongfully and unlawfully and improperly issued;" and it further stated that the motion would be made on the record and papers on file, etc. When the motion came on to be heard, appellant objected to the hearing upon the grounds (1) that no legal notice of the motion had ever been filed or served upon him or his attorney; and (2) that the notice failed to specify in what respect the execution was either wrongfully or unlawfully or improperly issued. The objections were overruled, and an exception reserved. It was then shown that execution on the judgment was stayed by various orders of the court, made at the request of respondent, until January, 1878; that on the 17th of January, 1878, respondent commenced an action against appellant in the district court in and for Santa Clara county, to obtain an injunction restraining appellant from taking out an execution on, or enforcing the collection of, his said judgment; that an injunction was issued as prayed for and served on appellant, and that it remained in full force and effect until the 10th of September, 1885, when it was dissolved by the judgment and decree of the superior court of the county; that on the 30th of September, 1885, the appellant applied to the superior court of Monterey county for an order directing its clerk to issue an execution on his judgment, and that the order asked for was made, and in pursuance thereof an execution was issued and placed in the hands of the proper officer for levy and service, but subsequently returned wholly unsatisfied; that again on the 16th of September, 1889, the appellant made application to the same court for an order directing the clerk thereof to issue an execution on his judgment, and "the said superior court, after a full hearing and consideration of the facts and matters appertaining thereto, duly gave, made, and caused to be filed and entered in said cause its order in writing, directing and commanding the clerk of said court to issue a writ of execution," etc.; and that, in pursuance of this order, an execution was issued and placed in the hands of the sheriff of Santa Barbara county, with instructions from appellant's attorney to levy the same upon the property of respondent. This last writ was recalled by the order of the court, and the appeal is from the order recalling it.

1. The appellant contends that the notice of the motion to recall was not legal, or such as he was entitled to, because it was signed by attorneys other than those who appeared for respondent in the original action, and no substitution was shown. We see nothing in this point. The motion was a new and original proceeding, as much so as would have been an action to review the order of the court directing the issue of the writ, and the respondent had full power to employ such attorneys as he might choose to conduct it. McDonald v. McConkey, 54 Cal. 143.

2. Appellant further contends that the motion was insufficient because it failed to specify the grounds of the notice with particularity. The respondent, on the other hand, claims that the order for the issuance of the writ was made by the court without authority, and in excess of its jurisdiction; that the writ was therefore void; that it could and should be recalled, even on an oral motion, upon its illegal issuance being shown. Assuming respondent's theory to be correct, we think the notice was sufficient. The question then is, did the court have jurisdiction and authority to make the order for the issuance of the writ? Section 681 of the Code of Civil Procedure provides: "The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement." And it has been held that, when the judgment is for the recovery of money, execution can only be issued thereon within five years after its entry. It is claimed by appellant that the time during which execution was stayed should be excluded from the computation of the five years. But this claim cannot be sustained, the contrary rule having been expressly declared by this court. Solomon v. Maguire, 29 Cal. 237; Cortez v. Superior Court, 86 Cal. 278, 24

Pac. Rep. 1011. In the last-named case the court said: "The judgment, being 'for the recovery of money,' * * * could not be enforced by execution after the lapse of five years from the entry thereof. * * * The order staying proceedings did not operate to suspend the running of the statute. Solomon v. Maguire. 29 Cal. 237; Dorland v. Hanson, 81 Cal. 202, 22 Pac. Rep. 552. The order under review was in excess of the jurisdiction of the court. The court had no power to enforce the same after the lapse of five years." It is true that in that case the order was only a stay order, but we see no difference, in legal effect, between such an order and a writ of injunction commanding the same thing. In view of the authorities, we think it must be held in this case that the court below had no authority or power to make the order for the issuance of the writ, and that the writ was therefore void, and subject to be recalled by any proper proceeding instituted for that purpose.

3. The last point made for a reversal is that the order granting the writ was an appealable order, and could only be attacked by appeal therefrom or writ of review. But this is no longer an open question. The same point was made in Dorland v. Hanson, 81 Cal. 202, 22 Pac. Rep. 552, and expressly overruled. The order appealed from should be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

92 Cal. 412

FOGEL v. SCHMALZ *et al.* (No. 13,617.)

(*Supreme Court of California.* Dec. 18, 1891.)

TORTIOUS ACTS OF AGENT—LIABILITY OF PRINCIPAL—APPEAL.

1. Code Civil Proc. § 939, subd. 1, which provides that "an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within 60 days after the rendition of the judgment," does not limit the time within which an appeal from a judgment of nonsuit may be taken. Warner v. Darrow, (Cal.) 27 Pac. Rep. 737, followed.

2. In an action for conversion against a husband and wife for property purchased, he being manager and agent for his wife in conducting a pawn-shop, the wife cannot be held, in the absence of testimony to show that the husband was acting within the scope of his agency in purchasing the property, or that she subsequently ratified his acts.

Department 1. Appeal from superior court, city and county of San Francisco; J. H. REARDEN, Judge.

Action by Robert R. Fogel aaginst William Schmalz and Miriam Schmalz for conversion. Judgment for plaintiff. Defendants appeal. Affirmed as against William Schmalz and reversed as against Miriam Schmalz.

Henry H. Davis, for appellants. *H. H. Lowenthal*, for respondent.

GAROUTTE, J. The complaint in this action consists of two counts, one of conspiracy, wherein it is charged that the two defendants Schmalz, in company with one Livingstone and one Cohen, co-defendants, conspired with one Parado to cheat and defraud Greensweig & Co. out of large quantities of jewelry, and that such conspiracy was successful, etc.; and the second count alleges a conversion of the said property by these defendants, and praying damages. Judgment went for the plaintiff, and this appeal is prosecuted by the defendants Schmalz from the judgment and order denying a new trial, the action having been dismissed as to the other defendants by the trial court. In this record we find what purports to be a statement on appeal, made after a motion for a new trial upon the minutes of the court, and in that statement it appears that a motion for a nonsuit was made and denied, and an exception to the ruling of the court entered. This ruling is relied upon as error, and, under the authority of Warner v. Darrow, (Cal.) 27 Pac. Rep. 737, it cannot be questioned but that an error of the trial court committed in granting or denying a motion for a nonsuit is an error of law, and as such can be reviewed upon appeal from the judgment, even though such appeal is not taken within 60 days from the rendition thereof.[1] There is no evidence whatever tending to show any conspiracy between these defendants, as set forth in the complaint, and upon that count plaintiff's case signally failed. As to the count of the complaint charging a conversion, we think the motion for a nonsuit should have been granted as to the defendant Miriam Schmalz, as there is no evidence in the record in any manner indicating that she was a party to the conversion of this property. All the testimony in the case in any way relating to the defendants Schmalz is the evidence of one Parado that he sold the property to the defendant William Schmalz at the store, corner of Dupont and Sutter streets; and the evidence of the defendant Miriam Schmalz that she was the wife of her co-defendant Schmalz, and the owner of the pawnbroking business at said place. She further testified: "William Schmalz is the manager of my business. My name appears on the sign over the door. I do not know anything about this case. I know none of the parties. Never saw Parado and never authorized my husband, who is my agent in the business, to purchase any goods from Parado. I do not know that he purchased any goods from Parado." It appears from the foregoing statement of facts that the defendant Miriam Schmalz was an utter stranger to the transaction, and there is nothing to indicate that she accepted the fruits of the sale or in any manner ratified the acts of her co-defendant. Such being the case, and no evidence having been introduced to show that he was acting within the scope or authority of his agency as manager of the business in buying these articles, we see nothing to support an allegation of conversion as far as Miriam Schmalz is concerned, and her motion for a nonsuit should have been granted. Let the judgment and order be reversed as to the defendant Miriam Schmalz, and the cause remanded; and as to the defendant William Schmalz let the judgment and order be affirmed.

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[1] Code Civil Proc. § 939, subd. 1, prescribing the time within which an appeal shall be taken, provides that "an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment."

We concur: HARRISON, J.; PATERSON, J.

1 Cal. 65

WHITING v. PLUMAS COUNTY.[1]

(*Supreme Court of California.* July 31, 1883.)

COUNTY CLERK—COMPENSATION—ESTOPPEL.

The fees due plaintiff, both as county clerk and auditor, were paid into the county treasury, the payment of the former being made under a law afterwards held invalid; and during the whole time he received from the treasury a sum greater than that he was entitled to as clerk, but less than that due him as both clerk and auditor. *Held*, that his receipt of this amount does not estop him to claim and recover the difference between it and the amount paid into the treasury on both accounts.

Department 2. Appeal from superior court, Plumas county.

Action by E. B. Whiting against Plumas county. There was final judgment sustaining defendant's demurrer to the complaint, from which plaintiff appeals. Judgment reversed.

D. W. Jenks and *J. D. Goodwin*, for appellant. *R. H. F. Variel*, for respondent.

SHARPSTEIN, J. The plaintiff was clerk and *ex officio* auditor of Plumas county, and, as such, entitled to certain fees as clerk and to certain fees and percentages as auditor, which fees and percentages the tax collector, during a certain specific period, paid over to the county. The plaintiff during the same period paid the fees received by him as county clerk into the county treasury. During the same period he drew from the treasury $125 per month, which was more than the fees received and paid in by him as clerk, but less than the aggregate of the fees and percentages to which he was entitled as clerk and auditor. His fees and percentages as auditor, as above stated, were paid into the county treasury by the tax collector. During the period above referred to it was supposed that the act of March 26, 1878, entitled "An act in relation to certain officers of Plumas county, and to fix the compensation thereof," was a valid act. In Whiting v. Haggard, 60 Cal. 513, this court determined that it was not. The payment by the clerk of the fees received by him as clerk into the county treasury, and drawing therefrom $125 per month, was wholly unauthorized by the law then in force. But no particular harm could result therefrom, because the amount which he drew during the time the act above referred to was supposed to be valid was less than the fees paid in by him and the fees and percentages to which he was entitled, paid in by the tax collector. Crediting the county with the amount drawn out during the aforesaid period, and debiting it with the sums paid in, to which the plaintiff was entitled, there is a balance in his favor of $1,193.69, for the recovery of which this action is brought. The claim is not an inequitable one, and the allowance of it will simply place the parties where they would be if the law had been strictly complied with. One of the grounds upon which the claim is resisted is that the payment by the plaintiff of his fees into the treasury was voluntary. But he only paid in the fees he had received as clerk, and he has drawn an amount considerably in excess of the sum so paid. In other words, the county has voluntarily paid him more than he paid the county, and he very properly credits the county with the excess in his account against the county for fees and percentages to which he was entitled as auditor, and which were turned over to the county by the tax collector. That is, he in effect says to the county: "I am entitled for fees and percentages as auditor from the first Monday of March, 1880, to the 31st day of March, 1882, to the sum of $2,228.53, of which I have received $1,034.84, leaving a balance due me of $1,193.69." Unless the receipt of a part of what was due him constitutes a waiver of his right to recover the balance, we cannot conceive upon what ground such right can be defeated; and nothing is better settled than that the receipt or acceptance of a part of a debt is not a satisfaction of the whole, nor a waiver of the right to recover the balance. The case as presented by the record before us is not one to which the doctrine of estoppel will apply. Judgment reversed, and cause remanded, with directions to the court below to overrule the demurrer to the complaint, with leave to the defendant to answer within 10 days after receiving notice thereof.

THORNTON and MYRICK, JJ., concurred.

Hearing in bank denied.

64 Cal. 67

PEOPLE *ex rel.* ORR v. WHITING.[2]

(*Supreme Court of California.* July 31, 1883.)

STATUTES — TAKING EFFECT — COUNTY OFFICERS.

Act March 26, 1878, relating to certain officers of Plumas county, contained provisions as to the election of a recorder, which were to take effect immediately, but the taking effect of the rest of the act was postponed until March, 1880. In the mean time the present constitution was adopted, which provides in article 22, § 1, that all laws in force at its adoption, and not inconsistent with it, shall remain in full force and effect until altered or repealed by the legislature. *Held*, that this provision continues in force so much of the act of 1878 as relates to the recorder, while the rest of the act is rendered forever incapable of taking effect.

Department 2. Appeal from superior court, Plumas county.

Suit by the people on the relation of James A. Orr against Fenton B. Whiting to oust defendant from the office of recorder of Plumas county, which he claims by election under Act Cal. March 26, 1878, and to put the relator in possession thereof, as county clerk and *ex officio* recorder, under Pol. Code Cal. § 4105. There was judgment on demurrer in favor of the relator, from which defendant appeals. Judgment reversed.

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[1] This case, filed July 31, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[2] This case, filed July 31, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

J. D. Goodwin, *D. W. Jenks*, and *F. B. Whiting*, for appellant. *E. C. Marshall*, Atty. Gen., and *R. H. F. Variel*, for respondent.

SHARPSTEIN, J. By its terms, so much of the act of the legislature entitled "An act in relation to certain officers in Plumas county, and to fix the compensation thereof," approved March 26, 1878, as provides for the election of a county recorder, took effect immediately and prior to the adoption of the present constitution. Other parts of the act were, by its terms, not to take effect until the first Monday of March, 1880, and consequently were not in force at the adoption of said constitution, which provides "that all laws in force at the adoption of this constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the legislature." Article 22, § 1. The portions of the act which could not take effect until after the adoption of the constitution were obviously not in force at the adoption of it. But other portions of the same act were in force at that date. Such portions of this act as were not in force at the adoption of the constitution never have and never will take effect. Peachey v. Supervisors, 59 Cal. 548; Speegle v. Joy, 60 Cal. 278; Whiting v. Haggard, 60 Cal. 513. The portions which were in force at the adoption of the constitution are as distinct and separable from those which were not as it is possible for different parts of the same act to be. That such was the understanding and intention of the legislature is evidenced by the enactment that one part should take effect immediately, and the other two years thereafter. This proves that in the opinion of the legislature one part might stand and be executed independently of the other. If it could be for two years, we are unable to discover why it could not be for all time. "If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." Principles of Const. Law, 152. We are therefore of the opinion that on the facts disclosed by the record the appellant is entitled to the office from which it is sought by this action to oust him. This renders it unnecessary to consider the other point discussed by counsel. Judgment reversed, and cause remanded, with directions to the court below to sustain the demurrer to the complaint, with leave to the plaintiff to amend within 10 days after receiving notice thereof.

THORNTON, J., and MYRICK, J., concurred.

Hearing in bank denied.

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64 Cal. 75

GREEN v. ROBERTSON.[1]

(*Supreme Court of California.* Aug. 9, 1883.)

RIGHT OF ACTION — REAL-ESTATE BROKER—COMMISSIONS—ACTING FOR BOTH PARTIES.

1. Where a person contracts to pay his agent a certain commission "when the balance of purchase money is paid" on the principal's ranch by the buyer procured by the agent, the right of action for such commission accrues at the instant the balance of the purchase money is paid.

2. Where a person merely brings the buyer and seller together to make their own contract, which they do, the fact that he received a commission from the buyer is no defense to his action for the commission which the seller, after completing the contract, promised to pay him when the purchase money was all paid.

Department 2. Appeal from superior court, Amador county.

Action by W. O. Green against James Robertson for services rendered by plaintiff about the sale of defendant's ranch. The defenses were that the action was prematurely brought, and that, while plaintiff was acting as defendant's agent for the sale of the ranch, he also acted as the purchaser's agent, and received compensation from him. There were judgment for plaintiff, and an order refusing a new trial, from which defendant appeals. Judgment and order affirmed.

Charles R. Gray, for appellant. *A. C. Brown*, for respondent.

MYRICK, J. This action was brought to recover judgment for $400 and interest on the following instrument: "Jackson, Cal., March 17th, 1882. I hereby agree and promise to pay unto William O. Green the sum of four hundred dollars for and in consideration of services to me rendered by him in finding a purchaser and selling my ranch to John Tucker, when the said Tucker or his assigns pays to me the balance of the purchase price, to-wit, the sum of twenty-six hundred dollars; and when such payment is made by said Tucker then I agree to pay the said $400 to said William O. Green. JAMES ROBERTSON." In addition to the averments of execution of the instrument, plaintiff averred that the balance of the purchase price—$2,600—had been paid by Tucker to the defendant. The defendant admitted the employment and services, the execution of the instrument, and that the balance of the purchase price had been paid. The plaintiff was entitled to judgment on the pleadings. Neither of the defenses was sufficient to prevent recovery. *First.* As soon as the money was paid by Tucker the defendant owed the $400 to plaintiff, and plaintiff could maintain his action without waiting for the day to expire. The instrument does not say "on the day Tucker pays me I will pay the plaintiff;" but it says, in effect, "when he pays me I will pay." *Second.* The matters set up in the answer as to the employment of plaintiff by Tucker do not constitute a defense. The plaintiff made no bargain for the sale of the property. He was not authorized to make a bargain. He undertook to bring the buyer and seller together, and he did so. They made their own bargain; and, after plaintiff had rendered his service and brought them together, and after they had made their bargain, the defendant executed the instrument in suit. There is no pretense that the defendant is not satisfied with the price he received; no pretense that Tucker is not satisfied with the price he paid. Judgment and order affirmed.

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[1] This case, filed August 9, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

SHARPSTEIN and THORNTON, JJ., concurred.

(64 Cal. 123)

SPRING VALLEY WATER-WORKS v. SAN MATEO WATER-WORKS *et al.*[1]

(*Supreme Court of California.* Aug. 30, 1883.)

EMINENT DOMAIN—NECESSITY—WATER COMPANIES.

1. No such "necessity," as contemplated by Code Civil Proc. § 1241, exists for the condemnation of land by a water company to secure an additional source of supply, where it is shown by its own evidence that it already owns sources which would, if utilized, increase its supply to a practically unlimited extent.

2. It is no ground for a right to take the land in question that its resources could be utilized at much less expense than could those of the lands which the company already owns.

In bank. Appeal from district court, San Mateo county.

This is a condemnation proceeding, brought by the Spring Valley Water-Works against the San Mateo Water-Works and others. There was judgment for defendants, and an order refusing a new trial, from which plaintiff appeals. Judgment and order affirmed.

Fox & Kellogg, *F. G. Newlands*, and *McAllister & Bergin*, for appellant. *Garber, Thornton & Bishop*, for respondents.

MCKEE, J. This case arises out of a proceeding commenced under part 3, tit. 7, Code Civil Proc., relative to the subject of eminent domain. As shaped by the pleadings, the proceeding indirectly involves a controversy between two water corporations, each incorporated under the laws of the state, and claiming to be in charge of a public use, for which it asserts the right to appropriate private property. In the exercise of that right the plaintiff seeks, by the proceeding in hand, to condemn 28 acres of land in San Mateo county, which, it alleges, form part of the canadas, valleys, and canons which, uniting near a place in the said county known as "Crystal Springs," constitute, with their creeks, streams, rivulets, lagoons, springs, and catchments, the only adequate source from which the plaintiff can derive its necessary supply of water for its corporate purpose within any distance from which water can be conducted to San Francisco, and without an expenditure of many millions of dollars more than would be required to appropriate and utilize the land in controversy, or without an expenditure greatly disproportionate to the benefit to be derived therefrom. Admittedly, the title to the land sought to be condemned is in the defendant, which claims to have already appropriated the land to the use of the public for its corporate purpose of appropriating and storing water for distribution and sale to the inhabitants of San Mateo county. This the plaintiff denies, but also affirms that, if such appropriation has been made by the defendant, the public use to which it proposes to appropriate the land—*i. e.*, for the corporate purpose of appropriating and storing water for distribution and sale to the inhabitants of the city and county of San Francisco—is a greater public use than that represented by the defendant. Whether the public use represented by the plaintiff is greater than that represented by the defendant is a question subordinate to the main question involved in the proceeding itself as to the necessity for appropriating the land for the public use; and, as that is a judicial question, and lies at the foundation of the right asserted by the plaintiff, it became the imperative and controlling issue in the case. New York Cent. & H. R. R. Co. v. Metropolitan Gas-Light Co., 63 N. Y. 326; Kohl v. U. S., 91 U. S. 367. Upon that issue the court found as follows: "*Tenth.* That the use of the said land is not a necessity to the Spring Valley Water-Works, but would be a great convenience, and enhance the value of its property, and secure a fuller water supply to the inhabitants of San Francisco. *Eleventh.* That the present water supply of the said Spring Valley Water-Works is fully equal to the wants of the people of San Francisco, and will so remain for many years,—at least four years,—and that a larger catchment could be secured by said Spring Valley Water-Works with small expense. *Twelfth.* That said Spring Valley Water-Works has other sources of supply, which water can be utilized by it as a good money-making investment, long before the inhabitants of San Francisco will need the same." From these facts the court found as a conclusion of law that the plaintiff was not entitled to judgment of condemnation. But it is contended that the decision is against the law and the evidence, and that is the principal question involved in the case, for the specifications of error are that the decision is not sustained by the findings, and that the findings are not sustained by the evidence. In this court it is incumbent upon the appellant on such a contention to show that in the evidence upon which the findings are based there was no substantial conflict, and that the facts and the inferences deducible from them as found by the court were contrary to the evidence. We think the evidence upon which the plaintiff rested its case justified the finding. The evidence consisted of the testimony of the chief engineer and superintendent of the plaintiff, and it related to the sources of supply of water possessed by the plaintiff during the time over which the testimony of the witnesses extended, the increase of the population of San Francisco, the requirements of the city for water, and the constant increase from year to year of those requirements. As to those points the evidence seems to have been uncontradicted; and it tended to prove that the plaintiff had obtained its supply of water for the use of San Francisco for 14 years from certain creeks known as "Pilarcitos," "San Andreas," "Lobos," "Islais," and "San Mateo." The Pilarcitos was the first source of supply, and the second was the Islais. Finding that running streams of water without storage reservoirs would be insufficient and unreliable as a source of supply, the plaintiff, in 1863, built what is known as the "Upper Pilarcitos Dam," and in 1866-67 what is known as the "Lower Pilarcitos Dam;" and in 1867 it commenced to build on the San Andreas a reservoir which was completed in 1869; and afterwards, in 1874, an addition was made to it. From these sources the plaintiff had for 14 years furnished water to the city of San Francisco and its inhabitants. But in 1874 the engineer of the plaintiff began to discover that the catchment and storage capacity of the sources of supply of which the plaintiff was then in possession must be increased. It could not safely rely on the Pilarcitos and San Andreas combined, with all their water-rights and waste water caught, to produce more than 9,000,000 gallons daily. Meanwhile the population of San Francisco was constantly increasing, and the requirements for water kept pace with the increase of population. The daily consumption of water and the increase of population were shown by the following table:

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[1] This case, filed August 30, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Year.	Population.	Daily Consumption of Water.
1864	115,000	2,500,000 gallons
1867	150,000	4,500,000 gallons
1870	180,000	5,500,000 gallons
1874	240,000	8,700,000 gallons
1875	250,000	10,500,000 gallons
1876	290,000	12,500,000 gallons
1879 (time of trial)	310,000	12,000,000 gallons

The sources of supply were also subject to be affected by the variability of the rain-fall in California. That variability from 1850 to 1876-77 was shown to have been as follows:

Season.	No. of Inches.
1850-51	7.40
1861-62	49.27
1862-63	13.62
1863-64	10.08
1870-71	14.10
1871-72	34.71
1874-75	18.40
1876-77	9.87

Under those circumstances, the capacity of the plaintiff to supply San Francisco and its inhabitants with water began to be publicly questioned. The newspaper press took up the question, and its discussion agitated the public mind, and caused dissatisfaction with the plaintiff, so that, as the engineer expressed it, "the people that had been ordinarily using a reasonable amount of water in their households, and even with a fair allowance for waste, all of a sudden commenced to waste water so fearfully that at that rate we would not be able to keep up the supply much longer. In fact the daily demand from 1874 until 1875 increased to two million gallons daily, while in former years—in ten years—the increase had been only six million gallons during the ten years, or an average of six hundred thousand gallons yearly." The plaintiff therefore found itself confronted with the question "whether it would adopt stringent measures to repress the waste, or incur additional expenditure in order to provide an additional supply for the people to waste." Conference and consultation upon that question resulted in the determination upon the part of the engineer, the president, and the board of directors "to strike a medium road, by partly checking the waste, and increasing the sources of supply." Waste was to be stopped by meters, and the supply increased by the acquisition of the Crystal Springs property, and the construction of reservoirs thereon. The meter experiment caused public irritation, and, proving unsatisfactory, it was soon abandoned. But the Crystal Springs scheme was projected and surveyed. That scheme involved the appropriation of a valley, containing about 160 acres of land, lying back of the towns of Milbrae, San Mateo, and Belmont; bounded on the west by the coast range of mountains, and on the north and south by hills and mountains. According to the evidence, the valley was originally a natural lake, full of water, which forced an outlet through the hills of San Mateo at the place where the San Mateo creek makes its way through the hills to San Francisco bay. By constructing a dam at the junction of the three arms of the creek, where the passage-way was made, the entire valley could be turned into an artificial lake. But instead of one lake the plaintiff designed to make three artificial lakes in the valley for the storage of water,—one where the San Andreas reservoir is now constructed, another at the location of the present Crystal Springs reservoir, and the third at the junction of the three arms of the San Mateo creek, where it forces its way through the hills. By this project the plaintiff considered it could increase its supply of water about 18,000,000 gallons daily, and be enabled to introduce the water into San Francisco, so as reach the various levels of the city with proper pressure, and upon the gravitation plan. In the scheme Pilarcitos was designed for the highest levels, San Andreas for the levels below, and Crystal Springs for the lowest levels; the final dam to be constructed on the latter levels to be at the three arms of the San Mateo creek, and that was intended to meet the demand of the lowest levels of San Francisco.

In carrying out the project the plaintiff, during the summer and fall of 1874, and afterwards, purchased and acquired the title to 153 acres of the land bordering on the natural lake or lagoon, which is now embraced in the present Crystal Springs reservoir, and also land in the valley below and to the north of it. Of the 28 acres of the land sought to be condemned for this scheme 7 acres are covered by the waters of the lagoon, and the whole is part of a larger tract of land, which belonged to one who, in 1874, acted as the agent of the plaintiff in making for it purchases of the lands bordering on the lagoon; but the owner was not informed that the plaintiff wanted to buy his land, nor were any steps taken to acquire the same until after it had been transferred to the San Mateo Water Company. Inferentially, therefore, the plaintiff did not consider it necessary to acquire the land in connection with the Crystal Springs scheme until after it had been transferred to another water company. Before that transfer the plaintiff had experienced no great difficulty in meeting all demands, however extravagant, for water; and at the commencement of the present proceedings it had secured other streams, watersheds, water-rights, and land with which to meet any reasonable demands which might be made upon it in the future. Those were, in addition to Pilarcitos and San Andreas, the water, water-rights, and properties which it had purchased and acquired in Lake Merced, San Francisco, Calaveras, San Gregorio, Pescadero, Clear Lake, and Lake Tahoe. Of its various sources of supply the plaintiff had utilized only Pilarcitos, San Andreas, and Lobos. Pilarcitos furnished 3,000,000 gallons daily, San Andreas 5,500,000 gallons, and Lobos 2,000,000; and there were over 2,000,000 gallons pumped out of artesian wells. San Francisco could have got along comfortably with 9,500,000 gallons of water daily; and, if regulated by meters, 5,000,000 gallons would have been sufficient to supply the demand. One-third of the water furnished was wasted, yet the supply could have been readily increased, because Merced, at that time, had been purchased; and, according to the evidence of the engineer of the plaintiff, "it would probably furnish, on an average, from five million to six million gallons a day," although by some engineers it was placed at seven or eight millions; and there was testimony given by some persons who were not experts that it would furnish ten million gallons daily. Then there was also Calaveras, consisting of about 4,200 acres of land in Alameda and Santa Clara counties, with the water and water-rights connected therewith, for which, it was in evidence, the plaintiff had paid $1,000,000, the water from which, by means of an aqueduct, could be emptied into the San Andreas reservoir sufficient to furnish a supply, "deducting for evaporation and everything," of from 60,000,000 to 75,000,000 gallons daily. Next to the Crystal Springs project, Calaveras was the best, but the most distant and expensive. Crystal Springs was more convenient and cheaper; at the same time Calaveras alone would furnish a supply of water four times greater than Crystal Springs.

Upon the case as it was presented by the plaintiff we cannot say that the findings of fact were not sustained by the evidence. But, assuming that they were justified by the evidence, it is contended that the finding that the land in controversy would be a great convenience, and would enhance the value of the corporation and secure a fuller water supply to the inhabitants of San Francisco, satisfies the degree of necessity required by the Code, (section 1241, Code Civil Proc.,) and is, in itself, a finding that the property is necessary to the use represented. Such things alone, however, do not constitute the elements of legal necessity. Private property, contiguously situated to the works of a corporation, may be very convenient for its corporate purpose, and the acquisition of the same might add to the wealth of the corporation by enhancing the value of the property which it has in hand, and yet not be reasonably necessary to the corporation in the discharge of its duty to the public. "For public uses the government has the right to exercise its power of eminent domain and take private property, giving just compensation; but for public convenience it has not. A public convenience is not such a necessity as authorizes the exercise of the right of eminent domain. The taking of private property for public uses is in derogation of private right, and in hostility to the ordinary control of the citizen over his estate, and statutes authorizing its condemnation are not to be extended by inference or implication." Prather v. Railroad Co., 52 Ind. 36. So in Illinois, where a railroad company undertook to condemn a portion of the ground used and occupied by the state, under a law which authorized it "to enter upon, take possession of, and use all and singular any lands, streams, and materials of every kind, * * * necessary for the construction, completion," etc., "of its road," the supreme court of Illinois used this language: "The word 'necessary' has great flexibility of meaning. It is used to express mere convenience, or that which is indispensable to the accomplishment of a purpose. If we were compelled to say that the general assembly intended to embrace this property in the grant, we should hold that, as a condition to its appropriation to the uses of the company, it would have to appear that this property was indispensably necessary,—not merely convenient or profitable to the road,—but to its completion and operation; that without it the objects and purposes of the creation of the company would be defeated, and the company cease to exist. There can be but little doubt that this strip of ground would be of great convenience to the company, and we entertain as little doubt that all of the grounds and buildings thereon would also be of greater convenience, to say nothing of the saving of expenditure in the purchase of land for the use of the company. But we cannot believe that it is anything more than a matter of convenience and profit that the company should apply this ground to the purposes sought." Therefore the right to condemn was denied. And in a proceeding to condemn land for a public highway, where there was proof that a public road already existed between the proposed termini which answered all the purposes of the public, although it had been allowed to go without repairs, in violation of the duty of those who had it in charge, it was held by the supreme court of Louisiana that there was not necessity to take private property for the same purpose. Lecoul v. Police Jury, 20 La. Ann. 308. So where on an application by a railroad company to "expropriate" lands, (as it is called in Louisiana,) it appeared that the company had already a sufficient quantity for its purpose, the supreme court held that the application should be denied. "The right of expropriation," says the court, "should only be enforced by inches, and upon conclusive proof of the necessity upon which it rests." Jefferson v. Hazeur, 7 La. Ann. 182. Necessity is therefore not made out by proof of great convenience, nor of enhancement of values, nor of accumulation of properties of the same kind for the same use.

Unquestionably, where the object of public use is a supply of fresh water, the public have the right to an unstinted supply, and the corporation to whom has been granted the franchise to furnish the supply has the capacity to appropriate private property for that purpose. But its capacity is limited to the real necessity which exists for the appropriation. If such a necessity exists, the individual use of property must give way to the necessity of it for the public use. But whatever may have been the opinion and judgment of the plaintiff as to the necessity in its affairs, which moved it, in 1875, to seek to appropriate this land for the use which it represents, the necessity for appropriation was disproved by its own showing that its utilized sources of supply were, and continued afterwards to be, adequate for the public requirements, and that it was entirely practicable for it at any time to utilize its unutilized sources so as to increase the supply to a comparatively unlimited extent; and also by the fact that it was entirely practicable for the plaintiff to construct on its own land, just above the land of defendant, the improvement for which it seeks to condemn the defendant's land. Utilization of the means on hand would, of course, incur expenditures of money; but so would the acquisition and utilization of suitable private property for the same public purpose; and it might be that the expenditures required for the former would be much greater than those required for the latter. The proofs, however, do not make out a case of financial impossibility, nor of any unreasonableness of expenditure required on the part of the plaintiff for making available its abundant resources. Indeed, it might well be inferred from the evidence of the plaintiff that the cost of utilizing its present resources would not measurably exceed the cost of acquiring and utilizing what it now seeks to condemn. But even if it ran beyond, and it were practicable to supply the use by the additional cost, whatever it might be, there would be no need for the plaintiff to invade private property for the same use. Necessary the property might be, under such circumstances, as a matter of economy; but necessary it would not be for the public use. A corporation in charge of such a use cannot condemn whatever it may find convenient and profitable to acquire, on the ground merely that it may save expense. On that question the following language by an English judge, the master of the rolls, in Fenwick v. East London Ry. Co., L. R. 20 Eq. 544, is applicable to condemnation proceedings in our own courts: "I think the case is concluded by the authorities,—I should have thought it would have been by good sense without authority,—that you cannot damage your neighbor's property merely for the purpose of saving yourself a little money, where it is unnecessary for the construction of the railway." This being conclusive of the case, it is unnecessary to consider the other questions arising out of the record. Judgment and order affirmed.

Thornton, Myrick, McKinstry, and Ross, JJ., concurred.

Sharpstein, J., was not present at the argument.

Rehearing denied.

92 Cal. 493

RICHARDS v. GRIFFITH *et al.* (No. 14,096.)

(*Supreme Court of California.* Dec. 29, 1891.)

SUBROGATION.

B. mortgaged his land, and the instrument was filed in 1885. In August, 1886, defendants acquired a lien on the land by virtue of a judgment against B. In October, 1886, B. gave a mortgage to plaintiff, with the understanding that plaintiff would pay the prior mortgage, which was done, and the mortgage satisfied of record. Thereafter defendants purchased under execution sale on their judgment, and, no redemption being made, they took a sheriff's deed. At the time they purchased they had no notice of a lien prior to their judgment lien. *Held*, in an action to foreclose, that, as against defendants, plaintiff was not subrogated to the rights of the mortgagee in the prior mortgage. Persons v. Schaeffer, 3 Pac. Rep. 94, 65 Cal. 79, followed.

Department 1. Appeal from superior court, Butte county; G. G. Clough, Judge.

Suit by Richards against Griffith, Stose, and Bunnel to foreclose a real-estate mortgage. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

H. V. Reardan, for appellant. *Gray & Sexton*, for respondents.

Paterson, J. The court below sustained the demurrer to the complaint, and, plaintiff having declined to amend, judgment was entered in favor of the defendants. It is alleged in the complaint that on November 11, 1884, defendant Bunnel made and delivered to Charles St. Sure a promissory note for the sum of $700, payable November 11, 1886, and to secure payment thereof executed and delivered to him a mortgage on certain lands, which are described; that on August 25, 1886, the defendants Griffith & Stose recovered and caused to be docketed a judgment against said Bunnel for the sum of $303.26; that on October 21, 1886, Bunnel made and delivered to plaintiff his promissory note for the sum of $1,200, payable two years after date, and to secure payment thereof he executed and delivered to plaintiff a mortgage on the same property owned by him, and described in the St. Sure mortgage; that plaintiff made the loan of $1,200 to Bunnel upon the express agreement with the latter that the St. Sure mortgage should be satisfied and discharged by said Bunnel out of the sum loaned to him by plaintiff; that thereupon the plaintiff paid St. Sure the amount due on the note which he held against Bunnel, ($904.16,) and St. Sure released Bunnel from the indebtedness and canceled the mortgage; that on November 8, 1886, an execution upon the judgment referred to was procured by Griffith & Stose, and that they at execution sale, after due proceedings, became the purchasers of the land described in the mortgage; that the property was sold at said sale December 11, 1886, for the sum of $315.60, and on June 23, 1887, no redemption from the sale having been made, the sheriff executed and delivered a deed to Griffith & Stose; that the St. Sure mortgage was recorded August 3, 1885, and the mortgage to plaintiff on the day it was executed. Upon these facts plaintiff prayed for a foreclosure of his mortgage, a sale of the property, and payment to him of the amount of $904.16, with interest thereon from the date of the discharge of the St. Sure mortgage. His contention is that by virtue of his agreement with Bunnel, and the payment and discharge of the St. Sure mortgage, he was subrogated to all the rights of St. Sure, and that the lien which was superior to the lien of the judgment, though changed in form, still subsists. It will be observed that there is no averment of fraud, accident, or mistake, or of any real or colorable necessity on the part of plaintiff to pay the St. Sure mortgage in order to protect his own interests. Plaintiff was a mere volunteer party to the transaction. It is not claimed that Griffith & Stose had any notice of the agreement between plaintiff and Bunnel, or of the fact that plaintiff paid off the St. Sure mortgage with money procured from Bunnel. At the time they purchased the land the St. Sure mortgage was satisfied and canceled of record. Before they were informed of the facts upon which appellant relies for subrogation they changed their position. They purchased the property in good faith, for a valuable consideration, without notice of appellant's claim that there was a lien superior to their judgment lien. We cannot say whether they would have paid $316.60 or any other sum for the property, if they had known of plaintiff's claim, but it is sufficient to say they did change their position before they had any notice of the facts. We think the learned judge of the court below, in reviewing the authorities, correctly held that this case falls within the principle discussed and applied in Persons v. Schaeffer, 65 Cal. 79, 3 Pac. Rep. 94. It was there held that a lien will be kept alive under some circumstances in favor of one who has paid the lienholder, although the latter has satisfied and discharged it of record; but that where the equity is a latent one the lien will not be kept alive to the prejudice of a subsequent *bona fide* purchaser. See, also, Guy v. Du Uprey, 16 Cal. 196; Bunn v. Lindsay, 95 Mo. 250, 7 S. W. Rep. 473, a case very much like this; 2 Pom. Eq. Jur. p. 102, § 658. The judgment is affirmed.

We concur: Harrison, J.; Garoutte, J.

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92 Cal. 388

BEASLEY v. SAN JOSÉ FRUIT-PACKING CO.

(No. 14,237.)

(*Supreme Court of California.* Dec. 17, 1891.)

EVIDENCE—DECLARATIONS OF AGENT.

In an action by a servant against his master for injury caused by the negligence of a fellow-servant, a declaration by defendant's foreman, made after the alleged injury, to the effect that the culpable servant "was a careless man before that, and they knew it, and that the company ought not to have kept him as long as it did," is not admissible to prove defendant's negligence.

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Beasley against the San José Fruit-Packing Company for personal injury. Judgment for plaintiff. Defendant appeals. New trial.

S. F. Leib, for appellant. *Richards & Welch*, for respondent.

Harrison, J. The plaintiff, an employe of the defendant, brought this action to recover for personal injuries caused by the carelessness of a fellow-employe in running a freight elevator. Judgment was rendered in his favor for $500, and from this judgment and an order denying a new trial the defendant has appealed. The plaintiff can maintain no action against the defendant for damages sustained solely through the negligence of a fellow-employe; but, to avoid the effect of this rule, the plaintiff has charged in his complaint that the defendant was negligent in selecting and retaining in its service the fellow-servant through whom the accident occurred. The presumption is that the master has done his duty, and has selected competent servants, and there is no presumption that the fellow-servant is incompetent or careless; hence it is incumbent upon the servant who seeks to recover from the master for the carelessness of a fellow-employe to show by affirmative proof, not only that the fellow-employe was in fact careless, but that the master had knowledge of such carelessness, or was negligent either in the selection or retention of such servant. There must be some personal fault of the master before he can be made liable, and the burden of showing such fault is on the plaintiff. Wood, Mast. & Serv. § 419. The facts shown at the trial in support of this allegation are that Henning, who had charge of the elevator at the time of the accident, had been previously employed by the defendant as a night watchman; that while in that service it was his duty at night to fill the gasoline tank, and that on one occasion about 10 days prior to this accident, when he went to the gasoline-house for that purpose with a lighted lantern, as was his custom, upon opening the door an explosion took place by reason of some of the gasoline having leaked out of the tank. It was not shown by any competent evidence that Henning was, in fact, careless at any time prior to the accident with the elevator, or that he was either known or reputed to be a careless man; and the fact that upon a single occasion an accident had occurred while he was in the service of the defendant, in a different employment, would not show any incapacity for another employment in the same service. There is no necessary inference that an accident is the result of carelessness; and it was testified by Wright, the foreman of the defendant, that, in his opinion, that accident was not the result of any negligent act of Henning. Upon this point the court instructed the jury that they should disregard any specific act of negligence on his part in his employment as night watchman, and that "the responsibility of the defendant for the exercise of reasonable care in his employment dates from his transfer to the receiving department, and must be considered in the light of the defendant's knowledge of facts affecting his character and reputation for care at that time." This took from the jury the right to consider his action connected with the gasoline explosion, and we must assume that the jury followed the instructions of the court. Emerson v. Santa Clara Co., 40 Cal. 543. For the purpose of showing that Henning was careless, and that his carelessness was known to the defendant at the time he was put in charge of the elevator, it was testified on behalf of the plaintiff that, on the evening of the day on which the accident occurred, Wright, who as foreman of the defendant had employed Henning, visited the plaintiff at his house, and in a conversation with him said that "Mr. Henning had been a careless man before that, and they knew it; he set their place on fire a few days before; that accidents had happened before with him, and that the company ought not to have kept him as long as it did." The testimony of what Wright had said to the plaintiff on the evening after the accident was not competent to prove the fact that Henning was careless, and did not in any respect bind the defendant. The admissions of an agent, not connected with the transaction to which they refer, cannot bind his principal, even though made in explanation of an act previously done by him while in the exercise of his agency. Much less can his opinion bind his principal with reference to a transaction with which he was not connected. Whart. Ev. §§ 1173, 1180. "The opinion of an agent, based upon past occurrences, is never to be received as an admission of his principal, and this is doubly true when the agent was not a party to those occurrences." Insurance Co. v. Mahone, 21 Wall. 157. "The declarations of an agent or servant do not in general bind the principal. To be admissible, they must be in the nature of original, and not of hearsay, evidence. They must constitute the fact to be proved, and must not be the mere admission of some other fact. They must be made, not only during the continuance of the agency, but in regard to a transaction depending at the very time." Luby v. Railroad Co., 17 N. Y. 133. See, also, Rockwell v. Taylor, 41 Conn. 59; First Nat. Bank v. Ocean Bank, 60 N. Y. 297; Packet Co. v. Clough, 20 Wall. 540; Gutchess v. Gutchess, 66 Barb. 483. The declarations of officers of a corporation rest upon the same principles as apply to their agents. Railroad Co. v. Decker, 82 Pa. St. 119. Inasmuch as the evidence of Wright was not competent to bind the defendant, there was no evidence before the jury from which they were authorized to find that the defendant "neglected to use ordinary care in the selection of the culpable employe," (Civil Code § 1970;) and the court should have given to them the following instruction, requested by the defendant: "Even if it be true that the accident happened by reason of the negligence of the fellow-servant of plaintiff, yet there is no proof sufficient to be submitted to you that the defendant neglected to use ordinary care in the selection of such fellow-servant." For its error in refusing to give this instruction the judgment and order are reversed, and a new trial granted.

We concur: PATERSON, J.; GAROUTTE, J.

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92 Cal. 433

In re HILDEBRANDT'S ESTATE, (two cases. Nos. 14,040 and 14,041.)

(*Supreme Court of California.* Dec. 22, 1891.)

EXECUTORS—CLAIMS AGAINST DECEDENT'S ESTATE.

1. An executor cannot pass upon his own claim against the decedent's estate, under Code Civil Proc. § 1510, providing that, if the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavit, must

be presented for allowance or rejection to a judge of the superior court.

2. The fact that an executor holds officially more money than the amount due him individually from the estate does not prevent him from making an affidavit for his claim, alleging, as required by Code Civil Proc. § 1494, "that there are no offsets to the same, to the knowledge of affiant."

Commissioners' decision. Department 2. Appeals from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Two appeals by William C. Hildebrandt, executor of Louis G. C. Hildebrandt, deceased: (1) From an order settling the executor's first account; (2) from an order of partial distribution. Both affirmed.

Rosenbaum & Sheeline, for appellant. *James M. Haven* and *William Loewy*, for respondent.

BELCHER, C. There are two appeals in this case, one from an order settling the executor's first account, and the other from an order of partial distribution. Both orders were based upon the same facts, and involved the same questions of law; the two appeals may therefore be considered together. On January 10, 1889, William C. Hildebrandt was appointed executor of the last will of Louis G. C. Hildebrandt, deceased, and letters testamentary were issued to him. On the 23d of the same month notice requiring the creditors of the decedent to present their claims to the executor within a time named was published, as provided by law and ordered by the court. On August 15, 1889, the executor filed in court a verified inventory and appraisement of all the estate of the decedent which had come to his possession and knowledge. In this inventory he charged himself with money due the estate in the sum of $11,429.43, "less offset of $10,000 claimed by said executor," thus making the balance due, $1,429.43, and the whole value of the estate, $5,962.43. On August 29th, upon motion of one of the legatees, the court ordered the inventory amended by adding thereto the $10,000 deducted, and it was so amended by the executor, thus making the whole appraised value, $15,962.43. In June, 1890, the executor filed in court his first annual account, which was in substance as follows:

"William C. Hildebrandt, executor, in account with the estate of Louis G. C. Hildebrandt, deceased.

"To cash received as follows, to-wit:

Due from William C. Hildebrandt.....	$11,429 43
Less offset claimed by William C. Hildebrandt..........................	10,000 00
	$ 1,429 43
Trunk containing, etc., appraised at..	20 00
	$ 1,449 43
Contra. Various sums paid out as expenses of administration	80 42
Balance.........................	$ 1,369 01"

Several of the legatees and heirs of the decedent filed objections to the allowance of the alleged offset, upon the ground that no claim for the same had ever been presented, and the time for presentation of claims against the estate had long since expired. When the matter of the settlement of the account came on to be heard, the executor was called as a witness, and testified "that the account, as filed, was correct;" but he "admitted that no claim whatever, as prescribed by statute, had been presented to the judge by him." Thereupon the court refused to hear further evidence, and entered an order sustaining the objections, and disallowing the alleged offset of $10,000. To this order an exception was reserved by the executor. In proper time, Marie Peters, one of the legatees named in the will of decedent, filed her petition praying for a partial distribution of the estate, and setting forth facts, which, if true, entitled her to such distribution. After a hearing upon the petition, the court found that its allegations were true, "and that the sum of fifteen thousand nine hundred and sixty-two and forty-three one hundredths ($15,962.43) dollars has been received by the executor; that the time has expired for the presentation of claims against said deceased, and that no claims against the said deceased have been presented to said executor, nor to the judge having charge of this estate; that said petitioner is entitled, as a legatee under the will of said deceased, to the four-fifteenths of the residue of the estate of said deceased, after the payment of the expenses of administration." And an order was thereupon made that the executor pay to the petitioner, "from the proceeds of said estate in his hands, the sum of twenty-five hundred ($2,500) dollars, taking the receipt of said Marie Peters therefor, on account of her distributive share of said estate." To this order an exception was also reserved. In support of the appeals it is contended that the first order was erroneous, because the court should have heard testimony as to whether the alleged offset was a just demand against the estate, and, if found to be so, should have allowed it, notwithstanding no claim therefor had been presented; and that the second order was erroneous, because if the offset had been allowed, as it should have been, then the petitioner would not have been entitled, under the will, to so large a sum as was distributed to her. The Code of Civil Procedure provides as follows: "Sec. 1493. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever," etc. "Sec. 1494. Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant," etc. "Sec. 1510. If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavit, must be presented for allowance or rejection to a judge of the superior court, and its allowance by the judge is sufficient evidence of its correctness, and must be paid as other claims in due course of administration," etc. It is urged that these sections do not apply to and cannot affect this case, for the reason that, as the executor had in his hands more money belonging to the estate than the amount of his claim, he could not have made the affidavit "that there are no offsets to the same, to the knowledge of affiant," and hence that he was entitled to have his claim allowed without presentation. This position cannot, in our opinion, be maintained. The statute is imperative, and applies to all claims arising upon contracts. If the effect of it is to cause a loss or work a wrong in some particular case, that is a matter for the consideration of the legislature, and not the courts. We are unable to see, however, how the loss sustained by appellant can have resulted from his inability to comply with the requirements of the law. It would seem rather to have resulted from his own carelessness and neglect. The money which he had received as executor he held in his official capacity, while the debt was due to him, if at all, in his individual capacity. The money of the estate was not an offset, in any sense, to his private claim, and the fact that he held that money in no way prevented his making the affidavit required. We advise that the orders appealed from be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the orders appealed from are affirmed.

ROGERS v. JONES. (No. 13,672.)

(*Supreme Court of California.* Dec. 22, 1891.)

For former report, see 28 Pac. Rep. 97.

PER CURIAM. The respondent having filed herein a remission from the judgment in accordance with the former order, the court below is directed to modify its judgment herein, by deducting therefrom as of the date of the entry of said judgment the sum of $112.25, and as so modified the judgment shall stand affirmed.

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92 Cal. 471

CHAFOIN v. RICH *et al.* (No. 13,859.)

(*Supreme Court of California.* Dec. 24, 1891.)

APPEAL—REMITTITUR—ENTRY OF JUDGMENT—ACTION ON NOTE—INTEREST.

1. In an action against R. and D., makers of a note, a judgment was rendered for plaintiff against R., and in favor of D. On appeal, the judgment in favor of D. was reversed, and a *remittitur* was issued to the court below to enter judgment against him also, and an entry was made by the lower court, which recited that the cause came duly before the court, and the *remittitur* was presented, "and it now appearing, upon and from due and legal proofs," that there is due on the note set out in the complaint, "for principal, the sum * * * and that plaintiff is now entitled to judgment therefor, with costs: Wherefore * * * it is ordered," etc. *Held*, that the entry did not show a retrial, but that judgment was entered according to the *remittitur*.

2. As against D., who was a joint maker, although in reality a surety, the note did not cease to draw the stipulated interest when the judgment was rendered against R.

3. The note was dated June 16, 1883, payable three months after date, with the interest payable semi-annually. The judgment against D. was entered January 12, 1889. *Held*, that it was not error to include in the judgment interest on the note, at the stipulated rate, from the time for the last semi-annual payment in December, 1888, up to the date of the judgment.

Commissioners' decision. Department 2. Appeal from superior court, San Mateo county; JOHN HUNT, Judge.

Action by Martin Chafoin against A. G. Rich and Michel Dubs on a promissory note. A judgment had been rendered against Rich, and in favor of Dubs; but on appeal the judgment for Dubs was reversed, and the cause remanded, with directions to the court below to enter judgment against Dubs. This is an appeal from the judgment as entered by the lower court. Affirmed.

W. R. Daingerfield and *Edw. F. Fitzpatrick*, for appellants. *Geo. W. Fox*, for respondent.

BELCHER, C. This is an action upon a promissory note, which reads as follows: "$4,000. Mayfield, June 16, 1883. Three months after date we promise to pay to the order of Martin Chafoin four thousand dollars, at two per cent. per month from date, value received. Interest to be paid semi-annually. A. G. RICH. MICHEL DUBS." The defendants answered to the complaint separately. Defendant Dubs, by his answer, denied that he executed the note for a good and valuable consideration, or for any consideration whatever, or that he was indebted to the plaintiff for or on account of the note in the sum due thereon, or in any sum; and he averred that he signed the note only as a surety for defendant Rich, and at the time was known by the plaintiff to be a surety, and was received and accepted by him as such; that plaintiff failed and neglected to present the note to Rich for payment at or about the time it became due, and failed and neglected to notify him (Dubs) of its non-payment until about the month of February, 1884. Wherefore he prayed that plaintiff take nothing as against him. After trial the court found the facts to be as alleged by Dubs, and accordingly rendered judgment against Rich for the principal of the note, and the interest thereon computed up to that time, making $5,778.67, and in favor of Dubs for his costs. From this judgment in favor of Dubs the plaintiff appealed to this court, where the judgment was reversed and the cause remanded, with directions to the court below to enter judgment against the respondent on the findings. Chafoin v. Rich, 77 Cal. 476, 19 Pac. Rep. 882. The *remittitur* in the case was filed in the court below January 12, 1889, and on the same day judgment was entered by that court in favor of the plaintiff and against Dubs for the sum of $9,349.16, besides costs; that being the amount found due on the note for principal and interest, computed at the rate named therein, up to the time of such entry. From the judgment so entered this appeal is prosecuted by Dubs. The judgment recites that the cause came duly before the court on the 12th day of January, 1889, and that the attorney for plaintiff presented to the court the *remittitur* from the supreme court, whereby it appeared, etc. "And it now appearing to the court, upon and from due and legal proofs, that there is now due and owing upon the promissory note set out in plaintiff's complaint, from said defendant Michel Dubs to the plaintiff, for principal the sum of four thousand dollars, and for interest the sum of five thousand three hundred and forty-nine 16-100 dollars, aggregating nine thousand three hundred and forty-nine 16-100 dollars, and that plaintiff is now entitled to judgment therefor, with costs: Wherefore, by reason of the law and the premises, it is ordered, adjudged, and decreed," etc. Appellant contends that this shows a new trial of the case, and not the entry of a judgment on the findings, as directed by the *remittitur*, and hence that the judgment was not erroneous or voidable merely, but absolutely void; citing Mulford v. Estudillo, 32 Cal. 139, and Hayne, New Trial & App. § 299. It is true that, where the supreme court directs a particular judgment to be entered, the court below must not retry the cause, but must enter the judgment directed, and the entry of a different judgment is void. But we fail to see how the rule applies to this case. As we read the recitals of the judgment, the court did not retry the cause, or attempt to do so, but simply found the amount then due on the note, and entered judgment therefor as it understood the *remittitur* to direct.

It is also contended that, appellant being a surety, no greater sum could be demanded or recovered from him than was due from his principal, and that the *remittitur* should have been construed as directing the entry of judgment for such sum only as was shown by the findings to be then due from Rich, with interest thereon at the rate of 7 per cent. per annum from the time the first judgment was entered. But, as between plaintiff and appellant, the latter was a maker of the note, and was obligated to pay it in full. As against him the note continued to be a binding obligation, and to draw interest at the stipulated rate until it was merged in the last judgment. He might have paid the note before suit was brought, or might have paid the judgment against Rich after the judgment in his own favor was reversed, and thus not only have relieved himself from further liability, but have placed himself in a position where, being a surety for Rich, he could have recovered back from him the money paid. He chose not to do this, however, but preferred to fight the matter out to the last in the courts, and whatever increased loss he may now sustain must be attributed to his own obstinacy and bad judgment.

It is further contended that each judgment was given for a sum in excess of what was then due; that as the note was payable three months after its date, (June 16, 1883,) and the interest was to be paid semi-annually, the installments of interest only became due on the 16th days of December and June following; that when the first judgment was rendered on April 23, 1885, the interest from December 16, 1884, was not due, and should not have been included, as it was; and when the second judgment was rendered on January 12, 1889, the interest from December 16, 1888, was not due, and should not have been included. We see nothing in this point. When the note was made, it was evidently contemplated that the holder would permit it to remain unpaid for a considerable time, provided the interest should be paid at the end of each half year. But there is nothing in this to indicate that, if the note should be paid or sued upon intermediate the half year, the full interest up to that date would not be due and payable. We think the judgment appealed from should be affirmed, and so advise.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

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92 Cal. 478

Ex parte GORDAN. (No. 20,868.)

(*Supreme Court of California.* Dec. 28, 1891.)

CONTEMPT — APPEARANCE BY ATTORNEY — ORDER OF ARREST—JURISDICTION.

On a petition for a writ of *habeas corpus*, it appeared that a divorced father failed to pay each month the amount ordered by a superior court for the support of his infant child, and was ordered to appear in person before the court to show cause why he should not be punished for contempt; that on the day appointed he appeared by his attorney, who offered to file the sworn answer of his client, together with certain affidavits in response to the order; that the court refused to receive them, and entered an order that the father was guilty of contempt for not appearing personally, and thereupon issued a writ of attachment causing his arrest. *Held*, that the father had a right to appear by attorney, and that the order for his arrest was without jurisdictional basis.

In bank. Appeal from superior court, Solano county; A. J. BUCKLES, Judge.

Petition by Solomon Gordan for a writ of *habeas corpus* in behalf of Robert Gordan. Writ granted.

Peter J. D. Sullivan and *James G. Maguire*, for appellant. *Henry I. Kowalsky*, for respondent.

MCFARLAND, J. The petition herein is by Solomon Gordan, praying that Robert Gordan may be restored to his liberty. The facts are as follows: Robert Gordan was plaintiff in an action for divorce against his wife, Elka Gordan. Judgment was rendered in said case in favor of plaintiff therein, on December 8, 1887, granting the divorce, but providing that the infant cihld of the parties, Leah Gordan, until further order, "be placed in the charge and custody of the grandmother, Sarah Patek, to be by her sustained at the expense of the plaintiff, Robert Gordan." In January, 1890, the said Sarah Patek filed a petition in which she stated that Gordan had been paying her $25 per month for the support of said child down to November, 1889; that for November and December, 1889, he had not paid anything; and that $25 per month was not sufficient. She prayed that the court order him to pay $50 for the two back months, and for the future $40 per month. Gordan answered and set up various reasons why such order should not be made. After a hearing the court, on January 25, 1890, ordered him to pay said $50, and also thereafter to pay said Sarah $30 per month. There seems to have been no further trouble until some time in 1891; but on June 27, 1891, the said Sarah Patek filed another petition, in which she stated that in February, 1891, said Gordan had ceased paying said $30 per month. Whereupon the court made an order, on June 27, 1891, "that said Robert Gordan be and appear in person," before the court on July 3, 1891, to show cause "why he should not be punished for contempt in failing and refusing to obey" the order requiring him to pay said $30 per month, and "why he should not pay the costs reasonably incurred in this matter." This order was served on Gordan on June 29, 1891, in San Francisco, where he resided; the court making the order being the superior court in and for the county of Solano. On said July 3, 1891, said Gordan appeared in court by his attorney, Herbert Choynski, who, on behalf of Gordan, offered to file the sworn answer of the latter, and certain affidavits in response to the order to show cause. But the court refused to receive the affidavits, or to hear the proceeding on its merits, because Gordan was not personally present, and because his counsel admitted that when last seen he "appeared to be in good health" and "physically able to attend court." Whereupon the court ordered the sheriff to call the said Gordan at the court-house door, and, no response having been made to the call, the court entered an order reciting the said facts, and adjudging that said Gordan was guilty of contempt in not appearing personally in court, and ordering a writ of attachment to issue to the sheriff commanding him to arrest said Gordan, and hold him in custody until the opening of the court, and then bring him before the court. Pursuant to said order such writ was issued and Gordan was arrested; and by virtue of said writ the sheriff claims to hold the said Robert Gordan. We do not deem it necessary to examine the points made by petitioner, that the original order to pay money to Sarah Patek was invalid because she was not a party to the divorce suit, and that the alleged contempt having been committed, if at all, without the immediate presence of the court, there should have been an affidavit stating the facts constituting the contempt, as provided in section 1211 of the Code of Civil Procedure. The alleged contempt for which Gordan is held in custody is not the refusal to obey an order requiring him to pay money, but his failure to appear in person in response to the notice to show cause. In civil proceedings, and even in many criminal proceedings not involving a felony, a party may appear in person or by counsel. Of course, in proper cases, he may be taken under attachment or warrant of arrest; and, within certain territorial limits, a person may be compelled to attend court as a witness by the process of subpœna. But in the case at bar Gordan was merely summoned to appear in court on a certain day, and show cause why a certain thing should not be done. He appeared on said day by counsel, and offered to show cause. This he had a right to do, and the court should have proceeded to hear and determine the issue before it. That part of the order which commanded him to appear in person the court had no power to make; and the subsequent order for his arrest for not appearing personally had no jurisdictional basis. It is ordered that the said Robert Gordan be discharged from custody.

We concur: De Haven, J.; Garoutte, J.; Harrison, J.; Sharpstein, J.

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92 Cal. 481

Gordan v. Buckles, Judge. (No. 14,588.)

(*Supreme Court of California.* Dec. 28, 1891.)

In bank. Appeal from superior court, Solano county; A. J. Buckles, Judge.

J. D. Sullivan and *James G. Maguire*, for petitioner. *Henry I. Kowalsky*, for respondent.

McFarland, J. This is a petition for a writ of prohibition to restrain the respondent from proceeding to hear and determine a charge of an alleged contempt committed by petitioner by not appearing in person in the court of respondent on July 3, 1891, in response to an order to show cause. The facts are stated in the opinion of this court this day rendered in Ex Parte Gordan, 28 Pac. Rep. 489. The petition contains some matters referring to the respondent personally, the insertion of which was a violation of professional propriety by counsel for petitioner. All of the petition is stricken out except so much thereof as consists of a bare statement of the facts necessary to show the character of said order of July 3, and the proposed action of the respondent thereunder. Let a final writ issue prohibiting respondent from proceeding to punish petitioner for a contempt in not appearing in person before the court of respondent on July 3, 1891.

We concur: De Haven, J.; Garoutte, J.; Sharpstein, J.; Harrison, J.

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92 Cal. 457

Felton *et al.* v. Le Breton *et al.* (No. 13,438.)

(*Supreme Court of California.* Dec. 24, 1891.)

Trusts — Foreclosure — Attorney and Client.

1. On the execution of a trust-deed to secure a loan from the grantee to the grantor, one F., who had been the attorney for both parties, and who acted for the grantee in making the loan, induced the grantee to include in the deed a sum due from the grantor to F. for legal services, and agreed that no part of such sum should be paid until the loan was repaid in full. F. did not inform the grantee that his rights might be affected by including such sum in the deed. Afterwards the grantee, desiring to terminate the trust, was advised by F. that he could not purchase at a sale under the power contained in the deed, but that he might do so on foreclosure by action, and take the land discharged of the trust. The action to foreclose was conducted by F., who was not made a party, as attorney for the grantee, (plaintiff therein,) until F. died. The grantee, being authorized by the decree, purchased at the foreclosure sale for less than the amount of his loan. *Held*, that he took the land discharged of any trust on account of the sum secured by the deed to F.

2. In an action by an attorney arising out of business transactions with his client which resulted in a benefit to the attorney and a detriment to the client, the burden is on the attorney to show that he fully advised the client of the legal effect and consequences of the transactions.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Equitable action by Felton and others against Le Breton and others to compel enforcement of a trust. Judgment for plaintiffs. Defendants appeal. Reversed.

Pillsbury & Blanding, for appellants. *Garber, Boalt & Bishop*, for respondents.

HARRISON, J. October 1, 1870, Juana I. Estudillo and others, owners of the Guadalupe rancho, in Santa Barbara county, and the San Leandro rancho, in Alameda county, and certain other real and personal proprty in Alameda county, executed to Theodore Le Roy a deed of conveyance of said property, in trust, to sell and dispose of the same, and out of the proceeds to pay certain indebtedness on their part to himself specified in the instrument, with interest, and such sums as should be afterwards advanced by him to them; and also all taxes, liens, costs, and legal expenses which might be paid or incurred by him in managing the property, and protecting the title thereto. The property had been in litigation for several years, and was at this time heavily incumbered, but measures had been agreed upon by which it was to be removed from litigation, provided a loan could be effected sufficient to pay off the various claims. In this emergency, Mr. John B. Felton, who had been attorney for the Estudillos in their litigation in reference to the property, applied to Le Roy to loan them money with which to free the property from its incumbrances, and to take the property himself as security for such loan. Felton was also, and had been for many years, the sole legal adviser of Le Roy, and acted as his legal adviser in the making of this loan. The Estudillos were indebted to Felton and certain other attorneys in the sum of $49,000, which Felton was also desirous of having secured by the deed of trust, and, as an inducement to Le Roy, proposed to him that these claims of the attorneys, including his own, should be subordinate to the claim of Le Roy for the indebtedness to him, as well as for his advances, and should be paid only after Le Roy had been fully reimbursed. Le Roy thereupon consented to the arrangement; and the instrument above named was executed to him, and he accepted the trust, and entered into possession of the property. The instrument recited that the grantors were indebted to Le Roy in the sum of $446.849, which sum was made up by adding the $49,000 due the attorneys to the amount of the money advanced by and owing to Le Roy. About a year after the execution of the instrument, Felton, at the request of Le Roy, executed to him a declaration in writing in conformity with his verbal agreement that the $49,000 item should not be paid until after Le Roy had been entirely reimbursed for the principal and interest of his own claim, together with the advances and expenses made and incurred by him in the management of the property. Le Roy continued in the management of the property under this conveyance for several years, making sales of portions from time to time, advancing additional amounts to the Estudillos, and incurring expenses in its management, but, finding that the indebtedness was increasing from year to year, instead of being extinguished, as had been anticipated when the instrument was executed, became desirous to have the trust extinguished, and for this purpose consulted Felton as his attorney, and was advised by him that he could not purchase at any sale made by himself under the power contained in the instrument without having the property so purchased by him subject to the same trust, but that, if he should institute an action in equity in the nature of a foreclosure, and for the sale of the property under a decree of the court, he could then purchase the property at such sale, and hold it discharged of the trust. Under this advice a suit was commenced in September, 1884, in the name of Le Roy, in the late third district court for Alameda county, against the grantors in the instrument, but without making Felton and the other attorneys defendants therein. Felton prepared the complaint in this action, had it signed by two attorneys who were employed in his office as attorneys for Le Roy, signed it himself as counsel for the plaintiff, and conducted the suit until his death, in May, 1877. After his death Le Roy employed B. S. Brooks, Esq., as his attorney, who thereafter conducted the litigation. Upon the trial of the action a full accounting on the part of Le Roy under the deed of trust was taken, and judgment rendered in January, 1879, that there was due to Le Roy the sum of $768,077, and directing a sale of the property by commissioners appointed by the court. In this sum was included the item of $49,000, and interest thereon from October 1, 1870, subject, however, to the priority in payment of the indebtedness due to Le Roy. Orders of sale were thereafter issued upon the judgment to the commissioners appointed therein, and after proper notice they made sales of the property mentioned and described in said judgment, and at such sales Le Roy became the purchaser of the property described in the complaint herein; and on the 26th of March, 1880, and on the 26th day of May, 1880. he received from the commissioners, respectively, conveyances of the property so purchased by him, and thereafter during his life-time, and his administrator after his death, held possession and received the income of said property under the claim that he was the sole owner thereof. The proceeds of the sales by the commissioners were not sufficient to satisfy the judgment in favor of Le Roy, but left a deficiency of $167,514.42 on the 29th day of May, 1880. The amount included in the judgment on account of the sum of $49,000, aforesaid, with interest thereon, was less than the amount of this deficiency, being only $109,821.25. The present action was brought by the representatives of Felton for the purpose of having it declared that the property, after its purchase by Le Roy at the commissioners' sales, under the order of the court, as aforesaid, was still held by him subject to the trust under which it was originally conveyed to him, in the proportion which Felton's claim for attorney's fees bore to the amount of indebtedness in favor of Le Roy at the time when the instrument of October 1, 1870, was executed, and that an accounting be taken between the plaintiffs and defendants concerning the trust; that the trust be executed by selling the land, and the proceeds be apportioned between the plaintiffs and the defendants in the proportions in which they might be entitled to receive the same. Upon the trial of the cause the court made its findings of fact substantially in accordance with the aforesaid statement, and found as conclusions of law that at the execution of the instrument of October 1, 1870, there was a resulting trust in favor of Felton and against Le Roy in the proportion which his part of the $49,000 bears to the sum of $397,849 which still exists in favor of the representatives of Felton against the representatives of Le Roy in and upon the lands described in the complaint, subject to a priority in favor of Le Roy as to his proportion of the same, secured by said trust-deed; that the decree rendered in 1879, in the suit of Le Roy v. Estudillo, in the third district court, did not extinguish the trust, either by its own force or by way of estoppel; and rendered judgment accordingly in favor of the plaintiffs, directing an accounting and a sale of the property, and an apportionment of the proceeds in accordance with said finding. A motion for a new trial was made by the defendants, which was denied; and an appeal has been taken from the judgment, and from the order denying a new trial.

1. One of the material findings of fact made by the court is unsupported by the evidence in the case, and is contradictory to other findings. In finding 40, the court finds that, when Le Roy consulted Felton for the purpose of bringing the action of Leroy v. Estudillo, he was advised by him that by the sales under a judgment rendered in such action the "trust would be wholly extinguished and terminated as to the defendants in said action, and he would become, as against such defendants, the owner in fee-simple absolute of all the property acquired by and through such sales," while in finding 41 the court finds that Felton advised him that such procedure "would fully terminate said trust." We find no evidence in the record showing that Felton at any time advised Le Roy that by a sale under such judgment the trust would be extinguished and terminated "as to the defendants in said action," or that there would be any qualification upon the termination of the trust. The only evidence in the record upon this subject is that of Steinbach, that Felton advised Le Roy that the trust would be terminated by a suit in foreclosure, and that Le Roy could bid in the property, and own it absolutely, and that, if he should purchase the property at the sale, he would have an absolute right and title to it, and be liable to nobody, and that the claim of Felton and the other attorneys would be terminated. The fact embraced in this finding is so material to the judgment that a failure to make the finding in accordance with the evidence necessitates a new trial. If, however, we should assume that only that finding which is supported by the evidence is to be considered by us, under the principle that when a finding of fact is susceptible of two constructions, one of which is supported by the evidence and the other not, only that which is supported by the evidence will be considered, we must then hold that the findings do not support the judgment.

2. By his purchase at the sales under the judgment in the case of Le Roy v. Estudillo, Le Roy became vested with all the title that the grantors in the instrument of October 1, 1870, had at the date of that instrument in the property so purchased, freed and discharged of the lien and trusts created by the instrument. All of the parties to that instrument were before the court, and under the issues presented by the pleadings in the action the acts of Le Roy in the management of the trust were investigated, and an account was taken of his receipts and disbursements, and also of the amount remaining unpaid of the original indebtedness, for the securing of which the instrument was executed, and his said acts and account were approved and confirmed by the court; and in its judgment directing a sale of the property for the purpose of satisfying the amounts thus determined to be due to Le Roy, the court directed that such sales should be made at public auction, upon notice thereof, by commissioners appointed by it, and that at such sale "the plaintiff, [Le Roy,] and any and all others, whether parties to this suit or not, may be and become purchasers upon compliance with the terms of sale," and that, upon the execution of a deed to the purchaser, he should become vested with the title in fee to said real estate so purchased by him. An absolute conveyance of property by a debtor to his creditor, in trust, that he may sell the same, and out of the proceeds discharge the debt, is in effect only a mortgage with a power of sale, and the grantee may treat it as such, and, instead of making a sale under the power, may go into a court of equity for a foreclosure and sale under its decree, and whenever such course is pursued his relation to the property is the same as that of a mortgagee in the foreclosure of an ordinary mortgage. The purpose with which Le Roy brought that action was to extinguish the trust upon which he held the property, by having the property sold under the direction of the court, and thereby to realize a sum sufficient in amount to satisfy the indebtedness for which it had been conveyed to him. It was for the interest of all parties to the instrument that any sale that might be made under such direction of the court should be for as high a price as could be obtained. If at such sale Le Roy could not bid as a purchaser, he might be

compelled to witness a sacrifice of the property which had been given as security for his debt, with the possible consequence of a loss of a portion of his indebtedness; and at the same time the debtors would fail to have their debt extinguished by the same sacrifice of their property. Unless the title which Le Roy would receive, if he became the purchaser at such sale, would be of the same character as that which would be received by any other purchaser, he would necessarily refrain from bidding at the sale; and thus the competition of bidders would be diminished, and the very object of the action would be defeated.

The rule which forbids a trustee from bidding at a sale made by himself is based upon principles of equity, and is the creature of courts of equity; but the same court which has established and which enforces the rule can dispense with its enforcement whenever the circumstances of any case do not require the application of those principles. The rule which forbids a mortgagee to purchase the property sold under a power of sale contained in his mortgage rests on the same principles; but in some states provision has been made by statute that under such power the mortgagee may cause the sale to be made by a sheriff or other public officer, and himself become the purchaser, while in other states it is provided that the mortgagee may become the purchaser at his own sale under such power, if it can be made to appear that the sale was made in good faith, and the proceedings were fairly conducted. A court of equity has the same right to determine in advance of the sale, in any particular case, that the circumstances are such as will justify it to authorize the trustee to become a purchaser, as it has after the sale to approve a purchase made by a trustee under statutory authority. When the sale is made under the direction of a court of equity, by officers appointed by the court, it is not a sale by the trustee, and the rule forbidding him to purchase at his own sale has no application. The appointment of commissioners in the case of Le Roy v. Estudillo to make the sale was equivalent to the appointment of a new trustee and the discharge of Le Roy, and gave to him the same right to purchase at the sale that the beneficiary has at a sale made by the trustee under a deed of trust created for his benefit. It must be borne in mind that Le Roy was the beneficiary under the trust, as well as the trustee, and that his rights as beneficiary, as well as his obligations as trustee, were entitled to receive consideration from the court. It is a rule in equity that the beneficiary under a deed of trust may become the purchaser at a sale by the trustee, to the same extent, and with the same results, as may be exercised by a creditor in any other action who purchases the property of his debtor at a judicial sale, (Oil Co. v. Marbury, 91 U. S. 587; Easton v. Bank, 127 U. S. 538, 8 Sup. Ct. Rep. 1297;) and the trustee may himself make the bid at the instance of the beneficiary without impairing the validity of the sale, (Richards v. Holmes, 18 How. 143.) In Wright v. Ross, 36 Cal. 414, many principles similar to those in the present case were involved; and it was there held that Ross, to whom Buckalew had assigned the Turner mortgage as security for his own debt, had the right, in a suit for foreclosure instituted by himself upon the Turner mortgage, to purchase the property covered thereby, and hold it discharged of any trust in favor of Buckalew; "that, having elected to purchase at that sale as a legitimate method of procuring payment *pro tanto* of the debt due to him from Buckalew, he is entitled to the exclusive benefit of the purchase, unless by the terms of the contract a trust is created which denies to Ross the usual right of a creditor to purchase the property of his debtor at a fair judicial sale." If Le Roy had proceeded against the will, or without the knowledge of Felton, in subjecting the property to a sale under the direction of the court, there would be much force in the proposition that the property purchased by him at such sale would not be divested of the trust in favor of Felton, under which he originally received it; but in view of the fact that the suit under which the sale was made was instituted upon the advice of Felton, that thereby the trust would be fully terminated, and that Felton was himself the attorney for Le Roy, and prepared the complaint, instituted and conducted the suit up to the time of his death, and that he included as defendants in the action such parties as he deemed essential for carrying out the purpose for which Le Roy had employed him, we do not think that it can lie in the mouth of the representatives of Felton to claim that the result of those proceedings is contrary to what he had advised. If Felton had included himself and his associates as defendants in the action, they would have been bound by the judgment, and the property purchased by Le Roy freed from any trust in their favor as fully as from the trust in favor of the other defendants. His failure to include them in the suit cannot be availed of by his representatives any more than it could have been by himself.

3. It was held by the court below that upon the execution of the instrument of October 1, 1870, Le Roy held the property under a double trust,—that which is expressed in the instrument, and that arising from the parol agreement between himself and Felton in reference to the $49,000, subsequently reduced to writing,—and that, although by his purchase under the judgment he held the land freed from the trust in favor of the Estudillos, it is still bound by the other. Felton had been the legal adviser of Le Roy for many years prior to the execution of that instrument, and was his sole adviser in the transactions which resulted in the execution of the instrument itself. It was at his solicitation that Le Roy consented to make the loan and accept the trust, and the item of $49,000 was included therein for the benefit of Felton and his associates, upon the inducement that that sum should not be payable out of the proceeds of the property until after Le Roy had been fully reimbursed. While an attorney is not prohibited from having business transactions with his client, yet, inasmuch as the

relation of attorney and client is one wherein the attorney is apt to have very great influence over the client, especially in transactions which are a part of, or intimately connected with, the very business in reference to which the relation exists, such transactions are always scrutinized by courts with jealous care, and are set aside at the mere instance of the client unless the attorney can show by extrinsic evidence that his client acted with full knowledge of all the facts connected with such transaction, and fully understood their effect; and in any attempt by the attorney to enforce an agreement on the part of the client growing out of such transaction the burden of proof is always upon the attorney to show that the dealing was fair and just, and that the client was fully advised. Kisling v. Shaw, 33 Cal. 440; Brock v. Barnes, 40 Barb. 533; Howell v. Ransom, 11 Paige, 542; Ford v. Harrington, 16 N. Y. 289; Evans v. Ellis, 5 Denio, 643; Dunn v. Dunn, 42 N. J. Eq. 437, 7 Atl. Rep. 842; 1 Story, Eq. Jur. 310, 311. In the words of Lord ELDON, he must make it manifest that he gave to his client "all that reasonable advice against himself that he would have given him against a third person." Gibson v. Jeyes, 6 Ves. 278. The relation of Felton to Le Roy, as his legal adviser, demanded of him the highest fidelity to the interests of his client. He was precluded from assuming any relation towards Le Roy which would prevent him from devoting his entire energies to his interests, and was likewise precluded from asking Le Roy to assume any relation to him by which their interests might become antagonistic. There is nothing in the record to show, or even to intimate, that Felton was at any time influenced by any other motive than to promote the interests of Le Roy. The court finds that "in effecting the said transactions between the said Estudillos and Le Roy, and inducing the said Le Roy to permit the said sum of $49,000 to be included in the said trust-deed, as aforesaid, the said Felton was not aiming to secure a benefit and advantage to himself, to the injury and detriment of the said Le Roy, nor by an abuse of the confidence of the said Le Roy in him as his legal adviser, but it was a detriment to said Le Roy to include said sum of $49,000 in said trust-deed, to the extent that it involved the bringing in of additional parties in any action to foreclose said trust-deed, and in defense of the action referred to in finding 51, herein;" referring to an action similar to the present, brought by one Newhall against Le Roy, in behalf of the other attorneys. Newhall v. Le Breton, 119 U. S. 259, 7 Sup. Ct. Rep. 225. When it was thus shown that, by the act and inducement of Felton, Le Roy had sustained injury and detriment in allowing the $49,000 to be included in the trust-deed, it was incumbent upon the plaintiffs, in their action to enforce the trust concerning said sum, to show to the court that Felton had fully discharged his duty towards Le Roy, and had advised him of the legal effect and consequences of so including it. The record fails to show that any such advice was given by Felton, or that Le Roy was in any way informed that any possible detriment could occur from assuming such relation of double trust in reference to the property conveyed to him. It was not necessary for the defendants to show that there had been any failure on the part of Felton in the performance of his duties to his client. The burden of proof was upon the plaintiffs to show that they had been performed by him, and a failure to make such proof imposed upon the court the necessity of adjudging the invalidity of the transaction between them. The judgment and order of the court below are reversed, and a new trial ordered.

We concur: GAROUTTE, J.; PATERSON, J.

92 Cal. 475

COFFEY v. QUINT *et al.* (No. 13,786.)[1]

(*Supreme Court of California.* Dec. 28, 1891.)

ATTORNEY AND CLIENT—ASSIGNMENT OF CLAIM—CONSTRUCTION—FINDINGS.

1. One C. transferred to plaintiff, his attorney, a claim against M. Plaintiff, subsequent to the death of C., stated that he had no interest in the claim, but that the assignment had been made for the benefit of C.'s estate. Afterwards, however, he asserted that the claim was his, the only evidence therefor being plaintiff's own statement that, prior to C.'s death, he and plaintiff had an accounting, and this claim was then assigned to plaintiff. *Held*, that the trial court was justified in finding that the assignment was made for the benefit of C.'s estate, and that the claim was never the property of plaintiff.

2. Several months after C.'s death plaintiff assigned the claim, and the trial court found that the assignment was made to secure a personal debt of plaintiff. *Held*, that such finding was not inconsistent with the finding that plaintiff was not the owner of the claim.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by John J. Coffey against one Quint and others. Judgment for defendants. Plaintiff appeals. Affirmed.

John J. Coffey, in pro. per. W. H. Payson, for respondents.

HARRISON, J. The evidence in this case fully sustains the finding of the court that the assignment to the plaintiff by Corcoran of the claim against McCloskey was for the benefit of Corcoran's estate, and was never the property of the plaintiff. Corcoran at the time of the assignment was upon his death-bed, and died five days thereafter. The plaintiff was at that time and had been for some years his attorney and legal adviser. The only evidence in support of his ownership of the claim was given by himself, that "prior to his death he and I had an accounting of business transactions; he gave me this assignment offered in evidence." In viewing the relations existing between plaintiff and Corcoran at the time of the assignment, and in the absence of any affirmative proof that Corcoran received any consideration therefor, the statements shown to have been made by the plaintiff subsequent to the death of Corcoran, that "the assignment was for the benefit of the estate of Mr. Corcoran," and "I have no claim against it; I don't own it, and I have no interest in it;" and which he did not deny,—justified the court in making the findings above named. About three years prior to the death of Corcoran certain of his personal property was attached in a suit by the Bank of California, and, for the purpose of releasing the property, McCloskey gave an undertaking to pay the judgment; and Corcoran, for the purpose of indemnifying him, transferred to him a claim which was the subject-matter of the claim assigned to the plaintiff. Upon this claim McCloskey, after Corcoran's death, collected certain moneys, and out of the same paid the judgment recovered by the bank, and the remainder to the administrator of Corcoran's estate. Several months after Corcoran's death the plaintiff assigned the claim to the defendant Diemer, and the court finds that at the time of such assignment he was indebted to Diemer in the sum of $50, and that the assignment was a security for said indebtedness. It does not appear that this indebtedness was ever paid. The plaintiff does not question the sufficiency of the evidence to sustain this finding, but claims that it is inconsistent with the finding that he was not the "owner" of the instrument. We see nothing inconsistent in the two findings. He could easily make an assignment, as security for his own debt, of property of which he was not the owner, but which he merely held in trust for another. The plaintiff in his complaint alleged that the defendants had collected the amount due on the assignment and converted it to their own use. Not only was there no evidence of this, but McCloskey testified that he had paid all of the money to Mrs. Corcoran, and none to Diemer. As we find no error in the record, the judgment and order denying a new trial are affirmed.

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[1] Rehearing in banc denied, 28 Pac. Rep. 799.

We concur: PATERSON, J.; GAROUTTE, J.

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64 Cal. 49

PEOPLE *ex rel.* SCHINDLER v. FLINT *et al.*[1]

(*Supreme Court of California.* July 27, 1883.)

INSURANCE COMPANIES—INCORPORATION—QUO WARRANTO.

1. Under Civil Code, § 290, (as it existed in 1874,) requiring articles of incorporation to state the capital actually subscribed, and section 419, which prohibited the formation of a fire insurance company without a capital of $100,000, articles of incorporation of such a company, which state that its capital stock is $100,000, and that $5,000 of that amount are actually subscribed, are insufficient, and the persons signing them do not form a corporation.

2. In a proceeding to have it adjudged that defendants have usurped a corporate franchise, and to restrain them from exercising it, the alleged corporation is a necessary party.

In bank. Appeal from superior court, city and county of San Francisco.

This was a proceeding by the people, at the relation of David Schindler, against Thomas Flint and others, to have it adjudged that defendants have usurped and wrongfully hold a corporate franchise, and to restrain them from exercising it. The alleged corporation was known as the "California Farmers' Mutual Fire Insurance Company." Defendants demurred to the complaint on the ground that it was not made a party, but the demurrer was overruled, and it was adjudged after trial that defendants "have wrongfully intruded into and wrongfully hold and exercise * * * the franchises of a corporation," and that they be restrained from transacting any business as such corporation," from which judgment defendants appeal. Judgment reversed.

Pillsbury & Titus and *A. W. Thompson*, for appellants. *A. L. Hart*, Atty. Gen., and *Fox & Kellogg*, for respondent.

MYRICK, J. This is a proceeding by the people to have it determined that the defendants have usurped, intruded into, and wrongfully hold and exercise a corporate franchise, and that they be restrained from exercising the same. The articles of incorporation stated the capital stock to be $100,000, of which the amount actually subscribed was $5,000. The certificate was filed May 22, 1874. As section 419 of the Civil Code then read, no corporation could be formed for insurance, except on live-stock, without a subscribed capital equal to $100,000. Section 290, as it then read, required the articles to state the amount actually subscribed. We think these sections should have been read together, to the extent of stating (1) the amount actually subscribed, and (2) that it equaled $100,000. This being so, the persons signing the articles did not form a corporation. But the alleged corporation is not a party, and has not been heard; therefore its right of existence, or its right to transact business, cannot be adjudged or determined in this proceeding. It may be that individuals, perhaps the relator, have had such transactions with the alleged corporation as not to be in condition to dispute its existence. The people are interested to the extent that no further insurance business shall be transacted by the defendants, (that is, no policies issued;) and to that extent the defendants might, perhaps, be enjoined; but to prevent the corporation from collecting its dues, or maintaining any action, without being heard as to its right so to do, is beyond the scope of the present proceeding. The complaint was demurred to upon the ground, among others, of defect of parties defendant, in that the corporation was not made a party. We think the demurrer well taken. The corporation was a necessary party. It certainly should be heard before any decree should be made affecting its rights; and possibly the very right of defendants, as individuals, to transact business, or do any act, might involve the right of the corporation to have the business done. The rights of the corporation may be, and probably are, involved in the very acts sought to be enjoined. It has the right to take issue on the allegation that the individuals enjoined are its trustees or directors. It is well to say, to prevent any misconception, that if on a new trial, after the alleged corporation has been made a party, it should be adjudged that it never had been legally a corporation, in that case appropriate proceedings should be had by which the affairs of such *de facto* corporation should be wound up and settled by the trustees, whatever due to it collected, and whatever due by it paid, the balance, if any, to be divided among the stockholders. The judgment is reversed, and the cause is remanded, with instructions to sustain the demurrer upon the ground above indicated, and for further proceedings not inconsistent with this opinion.

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[1] This case, filed July 27, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

THORNTON, ROSS, and MCKEE, JJ., concurred.

Rehearing denied.

64 Cal. 69

WEAVERVILLE & M. WAGON-ROAD CO. v. BOARD SUP'RS TRINITY COUNTY.[1]

(*Supreme Court of California.* Aug. 6, 1883.)

MANDAMUS—TO SUPERVISORS—FIXING RATES OF TOLL.

1. On a petition for *mandamus* to compel the board of supervisors of a county to fix the rates of toll on a wagon road therein, claimed by the plaintiff, the ownership of the road cannot be inquired into.

2. Nor, in such proceeding, can the plaintiff's right to the corporate franchise which it claims be questioned.

In bank. Appeal from superior court, Trinity county.

Petition for *mandamus* by the Weaverville & Minersville Wagon-Road Company against the board of supervisors of Trinity county. There were judgment refusing the writ, and an order denying a motion for new trial, from which plaintiff appeals. Judgment and order reversed.

W. J. Tinnin and *C. E. Williams*, for appellant. *Grove L. Johnson*, for respondent.

SHARPSTEIN, J. The plaintiff applied to the superior court of Trinity county for a writ to compel the respondent to fix the rates of tolls to be taken on the Weaverville & Minersville Wagon Road, which the plaintiff claims to own. The defendant filed an answer, in which it denied that the plaintiff was the party beneficially interested in the proceedings for obtaining a writ; denied that W. S. Lowden, who made the affidavit upon which the application for the writ was based, had any right or authority to make said affidavit on behalf of the plaintiff, and alleged that the plaintiff had no interest in said road, and that said Lowden instituted said proceedings for the exclusive benefit of himself and one Eligh. It also denied that the plaintiff was a corporation; that it owned said road; that it had a right to collect tolls; that it was the duty of the respondent to fix the rates of tolls; and that the plaintiff ever requested the respondent to fix the rates of tolls; and finally alleges that said road is, and since the date of its construction, in and about the year 1862, has been, an open public highway, over which the public has the right of passage free, and without the payment of tolls therefor. The findings are contradictory. It is found "that plaintiff is not a corporation duly or otherwise organized under the laws of California, and is not the party beneficially interested in this action;" and then it is found "that the Weaverville & Minersville Wagon-Road Company was incorporated in 1863, for the purpose of constructing a wagon road between the points specified in the affidavit upon which this action is based; that said company never constructed a wagon road between said points or elsewhere, but that said company repaired and operated a wagon road which had already been built, and collected tolls thereon, until about the year 1867." There is a finding "that the plaintiff is not the owner of the wagon road described in the affidavit upon which this action is based," and another "that from the date of the organization of said company in 1863 to the bringing of this action the said wagon road has been kept in repair by the company, and those claiming through said company, without cost to the county of Trinity or any road-district in said county; and that the right of said company, and those claiming under it, to collect tolls on said road, has never been disputed until a short time prior to the commencement of this action." It is also found "that plaintiff did not, on the 1st day of August, 1881, or at any time, demand of said board of supervisors to fix the rates of toll which plaintiff should be allowed to take, but that demand was made upon said board in behalf of W. S. Lowden and James Eligh, and such demand was made in the name of the plaintiff; that said board of supervisors did on the 3d day of August thereafter refuse, and still refuses, to fix the rate of tolls to be taken on said road either for this plaintiff or for any other person or corporation." The finding last above quoted is contrary to the evidence, which shows that the demand was made by officers of the plaintiff and on its behalf, and there is no evidence tending to prove that it was made otherwise. It appears by the findings that the plaintiff was incorporated in 1863, and that it in some way obtained the possession of the wagon road which it was incorporated to contruct and operate, and that it has ever since retained the possession of it. Such possession was *prima facie* evidence of ownership. Whether based upon paramount title or not, was a question which could not be inquired into except in an action or proceeding in which some person who claimed a better title was a party; and then it could not be tried by a board of supervisors, nor in a proceeding to determine whether a mandate should issue to compel the performance by said board of a duty imposed upon it by law. The question of title can be inquired into and determined in a proper proceeding, but clearly not in this. And it is equally clear that the board of supervisors could not inquire into nor determine the right of the appellant herein to exercise the franchise which it has been exercising without having its right to do so questioned for nearly 20 years. This right can be inquired into and determined in a proper action or proceeding, but not collaterally. Civil Code, § 358. We are satisfied that upon the findings as well as the evidence the appellant was entitled to the writ prayed. Judgment and order reversed.

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[1] This case, filed August 6, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

THORNTON, MCKEE, and MCKINSTRY, JJ., concurred. MYRICK, J., dissented.

92 Cal. 617

WINDHAUS v. BOOTZ *et al.* (No. 12,991.)

(*Supreme Court of California.* Dec. 31, 1891.)

FRAUDULENT CONVEYANCES—SUFFICIENCY OF EVIDENCE.

A deed will not be set aside as in fraud of creditors where the only evidence of fraud was that five years after the conveyance an execution against defendant was returned unsatisfied; there being no evidence of his financial condition at the time of the conveyance.

In bank. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Suit by Charlotte Windhaus against Adam Bootz and others to set aside certain deeds of gift on the ground of fraud. Defendants had a decree, and plaintiff appeals. Affirmed.

F. J. Castelhun, for appellant. *H. H. Lowenthal*, for respondents.

GAROUTTE, J. This is an action by a judgment creditor to have certain deeds of gift of real property made by respondent Adam Bootz to his wife and daughters set aside as fraudulent and void against creditors. The court made many probative findings, and also found as an ultimate fact that the transfers were not made with intent to defraud creditors, and thereupon rendered judgment for defendants. This is an appeal from that judgment and the order denying a motion for a new trial.

The principal error relied on by appellant is that the evidence is insufficient to support the finding that "the transfers were not made with intent to defraud creditors." The respondents presented no evidence to the trial court, and that introduced by appellant is neither full nor satisfactory, and is practically as follows: One Severin testified that in 1879 Bootz owed him $3,000 upon a certain promissory note, and at the end of the year 1880 he owed about $1,000 upon the note. He continued: "I needed money, and asked him for it. He told me to transfer the note. I afterwards borrowed one thousand dollars from Mrs. Windhaus, the plaintiff in this action. This lady and I went out to Bootz's park. I asked Mr. Bootz for the money. He told me he had the money, but he wanted to make some improvements, and wanted to keep as much money back as possible. I told him to pay as much as possible. He said he could pay two hundred dollars, and with the balance he wanted to build a shed. I asked her (Mrs. Windhaus) if she was satisfied. She said, 'If there is no help any other way, we have to be satisfied then.'" It seems the indebtedness was then transferred from Severin to Mrs. Windhaus, Bootz paying her $200, and giving her his note for $800, payable in 6 months. This transaction occurred September 12, 1882, and it appears that during the year 1882 he and his family were conducting a saloon, restaurant, and lodging-house upon Pine street, in the city of San Francisco, although the record is silent as to what capital was invested in that business. The plaintiff, Charlotte Windhaus, corroborated the testimony of the previous witness as to the facts occurring at the interview at Bootz's park, and further testified that after the $800 note became due she demanded its payment several times, without avail. She brought suit upon it May 10, 1885, recovered a judgment, and execution was issued August 21, 1886, and returned by the sheriff wholly unsatisfied.

The deeds to the various parcels of realty were deed of gift made by Adam Bootz to his wife and daughters, dated May 27, 1881, November 7, 1881, and April 8, 1882.

From the foregoing statement of the facts we are not disposed to disturb the finding of the court that "the transfers were made without any intent to hinder, delay, and defraud creditors." In the case of Judson v. Lyford, 24 Pac. Rep. 286, this court set aside such a finding of the lower court for lack of support in the evidence, but from a comparison of the evidence it can readily be seen that that case is not this case. Aside from other incriminating circumstances existing there, two all-controlling facts appear, which are not visible here, to-wit: Defendant conveyed away all his property, and at the time was practically insolvent. In the case at bar there is nothing to indicate but that respondent Bootz, at the time of these transfers, retained ample property to meet his obligations; neither is it shown that any other obligations were outstanding against him, nor that this indebtedness was more than a mere bagatelle as compared to his assets. Even conceding that the return of an execution *nulla bona* five years after these conveyances were made by Bootz would be some evidence that he was insolvent at the date of the transfers, still his acts subsequent to these transfers, in paying interest upon the note, and in paying a considerable portion of the principal, would seem to neutralize whatever effect could be given such fact. But, aside from that, we are unable to perceive any tenable ground upon which the presumption can be based "that a man insolvent now is presumed to have been insolvent five years ago." It can only be upon the principle that once a millionaire, always a millionaire; or once a bankrupt, always a bankrupt. In these pushing, busy times fluctuations in a man's financial condition are probably the general rule; and, aside from that, presumptions never run backwards. In Inhabitants of Hingham v. Inhabitants of South Scituate, 7 Gray, 232, the court said: "The law presumes that a fact, continuous in its nature and character, like domicile, possession, or seisin, when once established by proof, continues; and, in the absence of evidence to the contrary, legally infers therefrom its subsequent existence. But we know of no rule of law which permits us to reason in an inverse order, and to draw from proof of the existence of present facts any inference or presumption that the same facts existed many years previously." See, also, Chandler v. Aqueduct, 122 Mass. 307.

Appellant insists that a voluntary conveyance is *prima facie* or presumptively fraudulent as against existing creditors but such is not the law in this state, however courts of others states and text-writers upon the subject may hold. We have had occasion in the recent case of Bull v. Bray, 89 Cal. 286, 26 Pac. Rep. 873, to give this and kindred questions very careful consideration, and appellant's position is not in consonance with the law as there declared. Indeed, such contention is directly antagonistic to that portion of section 3442 of the Civil Code which says: "Nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration." Threlkel v. Scott, 89 Cal. 353, 26 Pac. Rep. 879, decides that an allegation of fraudulent intent is indispensable to a complaint in this character of action. And section 3442 of the Civil Code declares that the question of fraudulent intent "is one of fact, and not of law." It therefore appears from these authorities and the section of the Code cited that presumptions of law as to the fraudulent intent of a grantor have no standing under the laws of this state.

Appellant insists that the court failed to find upon all the material issues raised by the pleadings. Conceding such to be the fact, no injury could result to her by such failure. The ultimate fact in this case was whether or not these transfers were made with intent to defraud creditors. All other issues revolved around that fact. Its determination controlled the judgment. It may be conceded that appellant is entitled to a finding in her favor upon every other issue, still such findings would not justify a contrary judgment. Porter v. Woodward, 57 Cal. 535; McCourtney v. Fortune, Id. 617; Murphy v. Bennett, 68 Cal. 528, 9 Pac. Rep. 738; Dyer v. Brogan, 70 Cal. 136, 11 Pac. Rep. 589. For the foregoing reasons let the judgment and order be affirmed.

We concur: De Haven, J.; Sharpstein, J.; Harrison, J.; Paterson, J.; McFarland, J.

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92 Cal. 159

Wheeler v. Bolton. (No. 12,641.)

(*Supreme Court of California.* Dec. 3, 1891.)

Executors—Liabilities—Failure to Take Possession of Land—Measure of Damages—Duties.

1. In an action by a legatee against an executor for failure to take and hold possession of 72 acres of land claimed to have been left by her testator, it appeared that the inventory filed by defendant included the land as assets of the estate, and that it was appraised at $6,000; but it was shown that decedent had no right or title to 30 acres of the tract. *Held* that, if plaintiff was entitled to damages for the loss of the remaining 42 acres, it was error to take as a basis for computing such damages the value of the entire 72 acres, as appraised in the inventory.

2. Since an executor is chargeable with the entire estate of the decedent, the rule applicable to the loss of the personal estate by him should aply to the loss of the real estate also, and he should be charged with the value of the real estate at the time of its loss.

3. The facts that decedent had no title to 30 of the 72 acres claimed; that soon after his death the remaining 42 acres were seized and held by adverse possession; and that defendant had no funds in his hands belonging to the estate with which to prosecute a claim for recovery,—do not justify the recovery of punitive damages from defendant, in the form of compound interest on the value of the land at the time of its loss.

4. Prior to decedent's death, defendant purchased the Santillan grant to a tract of land embracing the 72 acres subsequently claimed by decedent, and afterwards, while executor, conveyed the entire tract, but neither he nor his grantee ever had possession, and the grant was worthless. *Held*, that such a conveyance by defendant

in his individual capacity, since it could not transfer any interest belonging to the estate, was not a violation of official duty.

In bank. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

Action by Margaret C. Wheeler against one Bolton, as executor of the estate of William L. Carman, deceased, for failure to take and hold certain real estate claimed by decedent. Judgment for plaintiff. Defendant appeals from an order denying a new trial. Order reversed.

Daniel Rogers and *Philip G. Galpin*, for appellant. *Cope & Boyd* and *Oliver P. Evans*, for respondent.

HARRISON, J. William L. Carman died in San Francisco, September 7, 1850, leaving a last will and testament, by which he devised and bequeathed all his estate to the plaintiff, and appointed the defendant and one Adams his executors. The will was admitted to probate January 10, 1851, and on the 20th of that month the executors qualified and entered upon the duties of their office. Carman in his lifetime had caused to be surveyed a tract of about 72 acres of land in the form of a parallelogram, in the vicinity of Mission and Twenty-Third streets, in San Francisco, to which he made claim, and on which he made certain improvements. About 30 acres of this tract lay to the west of the San Jose road, and was subsequently ascertained to be included within the limits of the Noe grant, while the remainder, about 42 acres in extent, was a part of the pueblo lands of San Francisco, and outside of the lands covered by the Van Ness ordinance. After the executors had qualified, they caused an inventory of the assets of the estate, with an appraisement thereof, to be prepared and filed in the probate court, and in said inventory was included as a part of the assets of the estate "seventy-two acres of land at the Mission Dolores, to which the deceased had a pre-emption right," which was appraised at $6,000. The court finds that the defendant never had the actual possession of any part of the 72-acre tract of land, and it appears from the evidence that soon after Carman died one Green took possession of that portion lying to the east of the San Jose road, and that the same has since been held adversely by him, and those claiming under him. The court also finds "that at the death of said Carman, and for a long time thereafter, to-wit, until the first day of January, 1852, there was no adverse holding or possession of the said forty-two acres of said Carman tract lying to the east of said San Jose road, which could have prevented the defendant, as executor of said estate as aforesaid, from taking possession as such executor of the said last-mentioned tract of land." Prior to any claim by Carman of this tract of land, viz., April 11, 1850, the defendant had purchased the Santillan grant to a tract of land comprising about three square leagues, in the vicinity of the Mission Dolores, which embraced the lands subsequently claimed by Carman; and on the 13th of July, 1853, he conveyed this tract so purchased to one George W. Wright by an instrument in which the sum of $200,000 was expressed as the consideration. It does not appear that any possession under this grant was ever had by the defendant, or taken by Wright under the conveyance to him, and the grant itself was subsequently adjudged to be fraudulent. June 30, 1852, the defendant filed an account in the probate court containing a statement of his receipts and disbursements in the administration of the estate, in which, under the heading of "Statement of property embraced in the inventory of the appraisers," was the item "seventy-two acres of land situate at the Mission Dolores, to which the deceased held a pre-emption right," etc., "valued at $6,000;" and under the heading, "Statement of disposition of the same property by the executors," was the item, "No disposition has been made of this property in consequence of a question of title now before the United States land commission." This account was settled and allowed by the court, July 12, 1852, and an order made canceling the bonds of the executors, and directing them to forward to the plaintiff the money in their hands ($61.06) belonging to the estate, which was done August 25, 1852. This was treated by the executors as a close of their administration of the estate, and nothing further was done therein until July 17, 1875, when, upon the petition of the plaintiff, the defendant (his co-executor having left the state) was cited to appear before the probate court, and render a final account in the matter of said estate. Such account was rendered by him, September 23, 1875, and was settled by an order of the court as of December 13, 1875. Thereafter, on the 17th of April, 1876, upon the petition of the plaintiff, the probate court made a decree of distribution in said estate, in which it "adjudged and decreed that the said real estate, as described in the inventory of said estate, and the account therein filed on the 10th day of June, 1852, be, and the same is hereby, distributed, to-wit, seventy-two (72) acres of land situated at the Mission Dolores, to which the deceased held a pre-emption right, be, and the same is hereby, distributed to Margaret C. Wheeler, sole legatee under and by virtue of the will of said William L. Carman, deceased." In its finding upon this point the court below, referring to the decree of distribution, states that in said decree "the plaintiff was adjudged to be entitled to the possession of said real estate, and the defendant required to surrender and deliver the possession of the same to the plaintiff;" but this portion of the finding must be disregarded, as it is contradicted by the terms of the decree itself, which is set out at length in the same finding.

The plaintiff commenced this action, December 23, 1876, to recover from the defendant the sum of $400,000, alleging in her complaint that the said 72 acres of land were then of that value, and were of the value of about $6,000 at the date of Carman's death, and that the defendant, "in violation of his duties as executor, did not safely keep, retain, and protect his possession of this land, but allowed and permitted himself to be dispossessed, and the property and title lost to the plaintiff." The action was tried by the court, and in its findings, in addition to the foregoing facts, the court found "that the said sum of $6,000 was the true value of the said claim of the said Carman to the said seventy-two (72) acres of land at the time of said appraisement and valuation, and at all times thereafter, to and including the 13th day of July, 1853," and found that the plaintiff had sustained damages for which the defendant is responsible in the sum of $109,000; stating in its finding that "the damages are estimated on the basis of six thousand dollars, ($6,000,) as the value of the claim or interest of the estate on the 13th day of July, 1853, and adding thereto legal interest from said day until the present time, computed with annual rests." Judgment was thereupon entered in accordance with the findings, a motion for a new trial made by the defendant was denied, and from the order denying a new trial the defendant has appealed.

The case has been before this court on two former appeals, the first from a judgment rendered on sustaining a demurrer to the complaint, (54 Cal. 302,) and the second from an order granting a new trial after a judgment of nonsuit, (66 Cal. 83, 4 Pac. Rep. 981.) As the present appeal is only from the order denying a new trial, we are limited in our consideration thereof to a review of the action of the court upon the grounds upon which the new trial was asked. Whether the conclusions of law are correctly drawn from the findings of fact, or whether the findings sustain the judgment entered thereon, can be examined only upon an appeal from the judgment. Nor are we required upon this appeal to determine what is the law of the case, as established by the opinions upon the former appeals, or whether the allegations of the complaint were sustained by the evidence offered at the trial, as neither of these questions has any relevancy in determining whether the court committed error in admitting or excluding evidence, or made its findings of fact without sufficient evidence to support them. Brison v. Brison, (Cal.) 27 Pac. Rep. 186.

The finding of the court "that the said sum of $6,000 was the true value of the said claim of the said Carman to the said seventy-two acres of land at the time of said appraisement and valuation, and at all times thereafter, to and including the 13th day of July, 1853," rests for its support entirely upon the valuation placed thereon in the inventory filed by the executors, and the statement thereof by the defendant in his account, filed June 30, 1852. The inventory itself was not offered in evidence, as it could not be found, nor was there any copy produced, although it appeared from one of the letters of the defendant to the plaintiff that he had sent her a copy. The court found, however, that the inventory was made and filed by the executors prior to June 30, 1852, and that in it they set forth as a part of the assets of said estate "seventy-two acres of land at the Mission Dolores, to which the deceased had a pre-emption right," and that the value of the land as stated therein was $6,000.

It must be considered that at the time when Carman caused this tract of land to be surveyed, and laid claim thereto, there was very great uncertainty, if not entire ignorance, concerning the character of title to any of the land in that portion of San Francisco. With the ideas brought with them from the older states, individuals sought to appropriate by possession whatever land they deemed necessary for themselves, a common idea being that 160 acres was the limit to any claim they might make. The witness Hoadley testified: "There wasn't any land in San Francisco but what there was a cloud about it, unless there was a few old Spanish grants made before the American occupation;" and again, "In those days a man took up what he could get, and hung onto it, and that is about the way of it. I suppose they got title the same as I did mine,—the 160 acres." Congress did not until March 3, 1851, pass the act for the purpose of settling land titles in California, and the pre-emption laws of the United States were not extended to California until 1853; nor was there any law, either state or federal, by which a person could acquire title to any of the public land. Although it was understood that Mexican grants had been made for lands in San Francisco, yet the boundaries of these grants were not defined, nor had their validity been established. The Santillan claim, which was then of great notoriety, although its validity was disputed, and it was afterwards rejected as fraudulent, covered the whole of this region. The Noe grant, above referred to, was not surveyed until after Carman's death, and it does not appear that it was at any time inclosed, or that there was anything to indicate its boundaries. One of the results of this uncertainty and ignorance of title was that those who sought to appropriate to themselves portions of what they may have supposed to be public land located their claims in part upon lands which afterwards proved to be within a Mexican grant, as was done by Carman in the present instance. The Carman claim for 72 acres appears to have always been treated as an entirety. There is nothing in the record to indicate that any distinction was ever made, either in value or character of title, in the life-time of Carman, or at any time afterwards, during the administration of his estate, between the portion included within what was afterwards determined to be a part of the Noe grant and the portion east of the San Jose road. It was included in the inventory, and valued by the appraisers as a single tract of 72 acres of land, and was valued as an entirety at the sum of $6,000. The finding that the tract on the east of the road was inclosed does not affect this proposition, for the court does not find that Carman inclosed this tract, and there is no evidence that Carman himself ever built or authorized the building of any fence or inclosure whatever. The court finds that he "caused to be surveyed and claimed to own" the 72-acre tract, and the witness Brown testified that at the time of his death the whole 72-acre tract was inclosed. The finding of the court that Carman was not the "owner of, nor seised or possessed of," any part of the 72 acres that was within the Noe grant relates to facts ascertained after Carman's death, and does not qualify the fact that he claimed the whole, or that he at all times supposed that his title to that portion of his claim was the same as his title to the other portion, or that the sum of $6,000, which the court takes as the "basis" for determining the damages chargeable against the defendant, was the value of his claim to the entire tract. At the date of the valuation it does not appear that it was known that any portion of the claim was within this grant, and the fact that it was named in the inventory and appraised as a 72-acre tract is a presumption that it was not so considered. The court, however, after finding that the original claim was for the 72-acre tract, and that in the inventory it was valued as an entirety at the sum of $6,000, finds that, as Carman was the "owner" of only the 42-acre tract, the liability of the defendant for negligence is limited to this 42-acre tract, but takes as the "basis" of this liability the valuation which was placed upon the 72-acre tract. In this the court erred. It is not necessary for us to determine upon this appeal whether, in an action by the heir against the executor after distribution, for a *devastavit*, the inventory filed in the probate court is competent evidence of the value of the property included therein, since we are satisfied for other reasons that the inventory was improperly considered by the court at the trial of the present cause. Upon the settlement of his accounts in the probate court the executor is chargeable "with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory," unless he shall exonerate himself, as provided by the statute. Code Civil Proc. § 1613. This inventory is, however, only *prima facie* evidence of the value of the estate, (Woerner, Adm'n, § 320;) and, as the inventory would be inadmissible as evidence of any matter not required to be expressed therein, so any valuation of property included therein would not be even *prima facie* evidence of the value of other property not therein specifically described or valued. In the present case, therefore, as the inventory offered related to a tract of land different in extent from that for which the court found that the plaintiff was entitled to recover the value from the defendant, the question of the competency of a proper inventory does not arise.

The court finds that the defendant never had actual possession of any part of the 72-acre tract, and its finding that until the 1st day of January, 1852, there was no adverse possession of the 42-acre tract "which could have prevented the defendant, as executor of said estate, as aforesaid, from taking possession as such executor of the said last-mentioned tract of land," is equivalent to a finding that on and after the 1st day of January, 1852, there was such adverse possession, and that the defendant was thereby prevented from taking possession of the land. It is a general rule that the executor is *prima facie* liable only for such assets of the estate as come into his possession. Williams, Ex'rs, *p. 1667. If the heir seeks to charge him for negligence in not taking possession of property belonging to the estate, the burden rests upon the heir to establish such negligence. The liability of the executor for his negligence is measured by the detriment sustained by the estate therefrom. If Carman's acts in his life-time gave him no right to the portion west of the San Jose road, and his estate had no right thereto by reason of the fact that the land belonged to the Noe grant, it was not incumbent upon the defendant to attempt to get possession of it, and the value of that portion of the 72-acre tract could form no element in determining the damage sustained by his failure to obtain possession of the tract on the east side of the road. If the defendant was liable to the plaintiff in damages to any extent upon the facts shown at the trial,—and upon this point we express no opinion,—his liability was to be measured by the value of that portion of the land which was lost to the estate through his negligence, and it was incumbent upon the plaintiff to present competent proof of such value. If the estate lost only 42 acres of land, the defendant was not liable for the value of 72 acres, nor could such value be made the "basis" for estimating the damages chargeable to the defendant.

There was no evidence before the court of the value of Carman's claim to the 42 acres lying to the east of the San Jose road. The valuation of the 72-acre tract in the inventory was not susceptible of segregation for the purpose of fixing different values to different portions of the tract; much less could that valuation be applied by the court exclusively to the 42-acre tract. Taken by itself, the inventory could not form a basis for determining the value of the portion of the tract east of the road, and, in the absence of any other evidence on the subject, the court had no basis for its decision, and its finding in that respect is unsustained by the evidence. The testimony offered at the trial with reference to the value of the land at a later date, as well as the finding by the court of the value of the 42-acre tract in 1866, is immaterial, and need not be considered, as such value did not enter into the basis adopted by the court in determining the damage sustained by the plaintiff, nor would the value at that date be the measure of the defendant's liability for a loss which was sustained by the estate in 1853.

The court also erred in adding compound interest to the sum found to be the value of the property lost to the estate through the negligence of the defendant. The general rule applicable to an executor, as well as to any other trustee, is that, except in cases in which he has been guilty of some positive misconduct or willful violation of duty, he is not to be charged with compound interest. In cases of mere negligence, no more than simple interest is ever added to the loss or damage resulting therefrom. In cases where he has mingled moneys belonging to his trust with his own funds, and used them for his own advantage, courts have charged him with compound interest, upon the theory that, in the absence of evidence to the contrary, he will be presumed to have received such profits from their use. Insurance Co. v. Lynch, 11 Paige, 520. This rule is of modern growth, and is applied more frequently in this country than in England. It has been adopted, "not for punishing the delinquent trustee, but for the purpose of attaining the actual or presumed gains, and to make certain that nothing of profit or advantage remains to the trustee, except, perhaps, his commission or compensation." Cruce v. Cruce, 81 Mo. 684. See, also, Story, Eq. Jur. § 1277; Perry, Trusts, § 471; Attorney General v. Alford, 4 De Gex, M. & G. 851; Jones v. Ward, 10 Yerg. 170; Barney v. Saunders, 16 How. 542; Hook v. Payne, 14 Wall. 257; Schieffelin v. Stewart, 1 Johns. Ch. 620; McKnight v. Walsh, 23 N. J. Eq. 146. But, even in such case, if the executor can show that he has acted in good faith, and has not made any greater profit by the use of the funds, he will be charged only simple interest. Perkins' Estate v. Hollister, 59 Vt. 348, 7 Atl. Rep. 605. The rule charging him with interest is, however, limited to cases in which it is either shown or presumed that the executor has himself profited by his acts, or has been guilty of such willful misfeasance as to justify the court in requiring from him compensation therefor.

Whether, in any instance, the executor is chargeable with even simple interest, must be determined by the trial court from all the circumstances of that case. It cannot be said, as matter of law, that interest is to be added to the value of the property that has been lost by his neglect. The circumstances connected with its loss may so completely exonerate him from any charge of neglect that he would not be held liable for even its value, and his neglect may have been so technical that the court would not feel justified in requiring from him more than a restoration of the value of the property; and it has been held that the heir himself may have been so negligent in prosecuting his claim that the court would consider that the executor should not be charged with interest. Brinkley v. Willis, 22 Ark. 1. The Civil Code fixes the measure of damages for the willful conversion of personal property to be its value at the time of conversion, with interest from that date. Section 3336. If a purchaser of land is evicted by paramount title, his recovery of damages is limited to the purchase price, with interest, and he cannot recover for any enhanced value which the land may have in the mean time received. The negligence of the defendant herein was of no higher grade than a simple tort resulting from non-feasance, and for the breach of such an obligation the measure of damages is the amount which will compensate for all the detriment proximately caused thereby. Civil Code, § 3333. We have not been cited to any authority in which the liability of the executor for the loss of real estate has been determined. In many states the executor does not have the charge of the real property of his testator. In California, however, he is entitled to the possession of both real and personal estate. Both are placed by our statutes upon the same footing. Upon a settlement of his accounts in the probate court, the executor is chargeable "with the whole of the estate of the decedent which may come into his possession at the value of the appraisement contained in the inventory," except as he may be exonerated in the instances provided by the Code. Code Civil Proc. § 1613. The statute makes no distinction between real and personal estate, and we think the rule applicable, in case of the loss by him of personal estate, should have equal application to a loss of real estate. His liability cannot be any greater because relief is sought in another forum than it would be if determined by the court which has been especially constituted for settling his accounts. As his liability for the loss of personal property would be fixed at the date of the loss, so it must be for the loss of real estate. We do not think that the facts in the present case justify the application of any rule of punitory damages to the defendant herein. Inasmuch as, very soon after the death of Carman, Green took adverse possession of the 42-acre tract of land, and the defendant never had the actual possession of any part of the 72 acres, and it does not appear that the executor at any time had in his hands funds belonging to the estate with which he could prosecute a claim for its recovery, there is an entire absence of proof or presumption of advantage to himself, or of wanton neglect of official duty. It does not appear that the defendant was ever in possession of any portion of the land covered by the grant, nor was it shown that Wright, to whom he conveyed the same, or any one under him, ever took possession thereof; and it was shown that the tract in question was taken possession of very soon after Carman's death, and has since been held by other parties claiming under hostile claims. The conveyance by the defendant of his own land, or any grant by him in his individual capacity, could not transfer any interest which belonged to the estate of Carman. Under these circumstances we think the court was not justified in attributing an official neglect or violation of duty on his part to the connection of the defendant with or his acts relating to the Santillan grant. The court, however, fixes the date of his conveyance to Wright, viz., July 13, 1853, as the time when the land was lost to the estate, and also takes its value on that date, as found by it, to be the basis of the defendant's liability to the estate for the negligence by which such loss was sustained. This value was therefore the measure of the right of recovery for the defendant's negligence. Such liability would not be increased because 20 years elapsed after the loss had occurred. The plaintiff had the right to call the defendant to an account in the probate court at any time after the neglect by which the loss had occurred, and no facts are shown in the record excusing her from bringing her action immediately thereafter. Whatever liability the defendant had incurred was fixed at that date, and could not be increased by any neglect on the part of the plaintiff to call him to an account. The court below assumed this to be the correct theory of fixing the basis of his liability, but, as we have seen above, erred in determining the amount of such liability, and adding thereto interest compounded each year for upwards of 20 years. The order denying a new trial is reversed.

We concur: BEATTY, C. J.; GAROUTTE, J.; PATERSON, J.; MCFARLAND, J.; DE HAVEN, J.

(92 Cal. 344)

DUNLAP v. STEERE. (No. 13,997.)

(*Supreme Court of California.* Dec. 14, 1891.)

VACATING JUDGMENT—SERVICE BY PUBLICATION—FRAUD.

Code Civil Proc. § 412, allowing service of summons by publication under certain circumstances, requires the plaintiff to present to the court a verified complaint or an affidavit showing that a cause of action exists against defendant. *Held*, that a judgment by default, quieting title to land in plaintiff, will be set aside by a court of equity, though the action is not brought till more than a year later, where defendant had no actual notice, and plaintiff had no title to the land, and knew that his affidavit, upon which service by publication was ordered, was false. MCFARLAND, PATERSON, and GAROUTTE, JJ., dissenting.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Action by Dunlap against Steere to quiet title and annul a judgment. Judgment for plaintiff. Defendant appeals. Affirmed.

Wells, Guthrie & Lee, for appellant. *Chapman & Hendrick*, for respondent.

DE HAVEN, J. The action is one in equity, and is in effect to set aside a former judgment between the parties, wherein the alleged title of the defendant herein to the land described in the complaint was quieted as against all claims of the present plaintiff. The findings of the court below show that this judgment was obtained by default, and upon a service of the summons therein by publication, and that the present plaintiff had no knowledge of the pendency of that action, or of the rendition of said judgment, until more than one year after its date. The court also finds, and the evidence is sufficient is sustain these findings, that in point of fact the plaintiff here was the owner of the property involved in that action, and that not only was the defendant here without title, but that he knew that the allegations of the complaint filed by him for the purpose of obtaining the judgment referred to were wholly false. The question, therefore, presented, is whether a judgment thus obtained is beyond the reach of successful attack in a court of equity The legal effect of this judgment, if permitted to stand, is to divest plaintiff of all title to his property, in favor of one who has succeeded by a compliance with the mere forms of law in obtaining such judgment, and that, too, without the knowledge of plaintiff, and therefore when it was morally impossible for him to defeat it. We think the plaintiff is entitled to the relief which he asks, not only upon authority, but upon the plainest principles of justice. "In general, it may be stated that in all cases where, by accident or mistake or fraud or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere, and restrain him from using the advantage whch he has thus improperly gained." Story, Eq. Jur. § 885. In order to justify the application of this rule, it must appear not only that the judgment against which relief is sought is unjust and unconscionable in itself, but that the person against whom it was rendered was not guilty of negligence in omitting to make his defense in the original action. The facts as found by the court below bring this case fully and clearly within the operation of the rule of equity just cited. In the first place the defendant practiced a fraud upon the court, as well as upon the present plaintiff, in procuring the order for the publication of the summons in the action referred to. Under section 412 of the Code of Civil Procedure, a plaintiff is entitled, under certain circumstances, to procure such an order; but, in order to be so entitled, he is required by that section to first present to the court or judge, either in the form of a verified complaint or an affidavit, a statement of facts showing that a cause of action exists in his favor against the defendant. Such an affidavit was presented by the defendant here in the action, which resulted in the judgment now sought to be set aside; but it necessarily results from the findings of the court that not only was the defendant's affidavit false in this respect, but that he knew that it was false. An affidavit of this character is always *ex parte*. The absent defendant is not present to impeach it, and if it is sufficient in form the court cannot disregard it, but is compelled to accept its statements as true, and make the order which is demanded. Under such circumstances a plaintiff who seeks to avail himself of the statutory mode for a constructive service of summons must exercise good faith in his representations to the court or judge. He must at least believe that the affidavit which he presents is true. The presentation of a willfully false affidavit for the purpose of obtaining an order for service of the summons by publication is itself an act of fraud; and when the judgment which rests upon it is itself unconscionable, and was obtained without the knowledge of the defendant therein, it should be set aside.

It is claimed, however, that the fraud here complained of is concluded by the judgment itself; that whether the defendant had a good title to the land in controversy was the very matter involved in the former action, and the judgment therein is conclusive upon the plaintiff; and in support of that the case of U. S. v. Throckmorton, 98 U. S. 61, and other similar cases, are cited. But the rule there announced is only applicable where the former judgment was the result of a trial between the parties, or where the one against whom the judgment was rendered had actual notice of the pendency of the action, and neglected to submit his proofs. The case just mentioned was one in which a retrial of an action which had been once fully tried was asked, and can have no kind of bearing here, where the plaintiff never had his day in court, or any opportunity to make his defense to the false and fraudulent claim upon which the judgment against him was based. Not having any knowledge of the pendency of that action, it was an absolute impossibility for him to protect his rights therein, and his failure to defend was not a negligent omission on his part. It is this difference in the facts which brings the plaintiff here within the protection of the exception to the general rule which was acted upon in U. S. v. Throckmorton, supra, and the existence of which exception was not only admitted in the opinion of the court in that case, but was afterwards applied in the later case of U. S. v. Minor, 114 U. S. 238, 5 Sup. Ct. Rep. 836. In the case of Adams v. Secor, 6 Kan. 542, it was held by the supreme court of that state that a judgment based upon a false and fraudulent claim should be set aside where the defendant therein had only been served by publication, and did not have actual notice of the pendency of the action. In Tomkins v. Tomkins, 11 N. J. Eq. 512, the court, while refusing relief upon the facts before it, recognized the justice of relieving a defendant from an unjust judgment obtained without his knowledge. It is there said: "The usual ground upon which a court of equity refuses to interfere with a judgment is because the defendant should have protected himself in the court where the judgment was obtained. In a case like the present, of foreign attachment, where the proceeding is *in rem*, and the judgment is obtained without the knowledge of the defendant, and the proceedings are all necessarily *ex parte*, it would be hard, indeed, if this court could not interpose to protect a party against the fraud of the plaintiff. The propriety of this court's interfering in such cases is too obvious to require its vindication." In the case of Irvine v. Leyh, 102 Mo. 200, 14 S. W. Rep. 715, and 16 S. W. Rep. 10, the supreme court of Missouri state what we deem the true rule to be applied here. After referring to the case of U. S. v. Throckmorton, supra, and other cases following it, the court say: "The principle thus so strongly stated in the cases cited proceeds upon the ground that the party had an opportunity to appear and interpose the defense in the suit in which the judgment complained of was rendered. The cases before cited are those in which the defendant in the first suit appeared, or had actual notice of the suit, and might have interposed the fraud as a defense. In all such cases the issues made by the pleading, or which might have been made, are justly regarded as settled and merged in the judgment, leaving collateral matters only open to investigation. But in our opinion the rule of the cases cited cannot be applied in all of its strictness to a case where the defendant has been brought in by newspaper notice only, and had no actual notice of the suit, and as a consequence had no real opportunity to defend. The rule must be applied to those cases where the reason upon which it is founded admits of its application. But, to entitle the plaintiffs to the relief which they asked and procured in the case, it is not enough for them to simply show that Leyh had no valid cause of action against them. They must at least show that the claim was founded upon or conceived in fraud, and that the machinery of the law was resorted to for the purpose of enforcing what was known to be a fraudulent demand." The facts found by the court here fully satisfy the rule as held in the case just cited. That rule, it seems to us, gives to one obtaining a judgment against another without a trial, and without his knowledge, sufficient protection. Its application to the facts of this case must result in an affirmance of the order appealed from. Appeal from judgment dismissed; order denying motion for new trial affirmed.

We concur: SHARPSTEIN, J.; HARRISON, J.

BEATTY, C. J. I concur. It appears that Dunlap was, without any fault of his own, deprived of the opportunity of interposing a perfect defense to the action of Steere v. Dunlap, and it is alleged in the complaint herein, and found by the court, not only that the allegations of the complaint in the former action were untrue, but that Steere at the time knew they were false. The evidence is sufficient to sustain this finding, at least so far as the complaint in the former action counted upon a title by prescription; but there is nothing to show that Steere in fact knew that his tax-title was void, though such knowledge is by the law imputed to him. The case, then, presents these features: Steere sues Dunlap upon a claim which he knows to be false. He obtains an order for publication of summons based upon the two grounds that Dunlap has departed from the state, and cannot after due diligence be found within the state. His affidavit is in itself sufficient to justify a finding that these grounds exist; and a judgment entered upon Dunlap's default, after publication of summons, is not void, and cannot be set aside upon motion unless the motion is made within a year. Code Civil Proc. § 473. Can it, then, be annulled by suit in equity after the year? I think it clear, on principle, that in a case where no rights of innocent third parties are involved a judgment so obtained ought to be set aside upon the ground that it was fraudulently obtained; the fraud consisting in taking a default judgment upon a claim made in bad faith against a defendant who, without any fault on his part, is prevented from interposing a perfect defense. The findings of the superior court, therefore, which are supported by the evidence, are themselves sufficient to support the judgment; and the order denying defendant's motion for a new trial should be affirmed.

McFARLAND, J. I dissent, and concur in the opinion of Commissioner VANCLIEF, prepared in department, a copy of which is hereto attached; and I desire to say further that, in my opinion, there is no sufficient evidence to support the latter part of the following finding of the court: "And the said John Steere was not then the owner of the said property, nor any part thereof, and had no right, title, or interest of any sort therein, all of which he well knew." In Steere's complaint in the original action, he first averred ownership and possession of the land, and afterwards also averred adverse possession in himself and grantors for five years; and it fully appears that he relied upon paper title founded on a certain tax-deed, as well as upon adverse possession,—if, indeed, he introduced any evidence at all about adverse possession, which does not appear. In the present action, Dunlap avers that the only claim which Steere had was a certain tax-deed, which he sets out in full in his complaint, together with the certificate of purchase which preceded it, in order to show that it did not, in law, convey title; the contention being that the deed, although good on its face, did not accomplish its purpose, because it did not follow the recitals of the certificate, and the recitals of the certificate showed an irregularity in the assessment. Assuming this to be the law, the attack upon Steere's deed is, at least, extremely technical; and it does not support the finding of fraudulent personal intent against him, viz., that "he well knew" that "he had no right, title, or interest of any sort" in the property described in his deed. The only other evidence tending to support the said finding relates to Steere's possession; and, assuming that it shows a want of adverse possession, under the views above expressed, there was no warrant for the general finding that he well knew that he had no right or interest of any sort. There are other reasons why, in my opinion, the former judgment should not be disturbed, but I consider further discussion unnecessary.

The following is the opinion of VANCLIEF, C., in department.

"Action to quiet plaintiff's title to two lots in the town of Santa Monica, in the county of Los Angeles, and for this purpose to annul a former judgment of the same court between the same parties as to the same lots, and to enjoin its execution. Judgment passed for the plaintiff, and the defendant appeals from the judgment, and from an order denying his motion for a new trial. The judgment was rendered September 24, 1888, and the appeal from it was taken July 18, 1890, and should, therefore, be dismissed; but the appeal from the order was taken within sixty days from the time the order was made.

"The principal question, and the only one that need be considered, is, was the former judgment conclusive of the rights of the parties to the land in question? This question arises on the appeal from the order by defendant's exception to the sufficiency of the evidence. The former action was by the present defendant, Steere, against the plaintiff here, to quiet the alleged title of Steere to the lots in question; and the judgment therein was rendered against the defendant (plaintiff here) by default. The service of summons in that action having been made by publication, it is contended that the affidavit upon which the order of publication was made is defective and untrue in material particulars. The following is a copy of that affidavit: 'John Steere, being duly sworn, says: That he is the plaintiff in the above entitled action. That the complaint in said action was filed with the clerk of said court on the 25th day of June, 1884, and summons thereupon issued. That said action is brought to obtain a decree of said court quieting the plaintiff's title to that certain tract or parcel of land lying and being situate in the county of Los Angeles, state of California, and particularly described as lots X and W, in block 193, in the town of Santa Monica, as designated on the map of said town. That in said decree it be declared and adjudged that plaintiff is the owner of said premises, and that the defendants, or either of them, have no estate or interest whatever in or to said land and premises. And affiant further says that said plaintiff is the owner in fee of said premises, and said plaintiff and his grantors have been for more than five years continuously in the open, notorious, and adverse possession of said premises, claiming the same adversely to all the world. That the defendants claim some interest in said premises adverse to plaintiff, but the said claims of defendants are without any right whatever, and that the said defendants, or either of them, have no right, title, or interest in said land or premises, or any part thereof. Reference is had to the verified complaint of plaintiff on file herein, in which the cause of action is fully set forth. That said defendant, R. T. Dunlap, cannot, after due diligence, be found within this state. That the said R. T. Dunlap has departed from this state, and cannot, after due diligence, be found within this state, and this affiant, in support thereof, states the following facts and circumstances: That the summons which was issued in said action was given to the sheriff of Los Angeles county, and said sheriff made diligent search for said defendant, R. T. Dunlap, but could not find him, and said sheriff informed affiant that he did not know where said defendant Dunlap was or where he could be found; that affiant has searched for said defendant, R. T. Dunlap, and has inquired of a great many of the citizens and residents of Los Angeles county—among them, M. B. Boyce, Wm. Flores, and John Milner—as to the whereabouts of said defendant, R. T. Dunlap, and as to his residence; that each of said persons so inquired of informed affiant that they did not know where said defendant, Dunlap, was, where he resided, or where he could be found; that said M. B. Boyce claims to be the agent of said R. T. Dunlap, but even he informed this affiant that he did not know where said Dunlap was, or where he could be found; that affiant does not know where said R. T.

Dunlap resides, where he is, or where he can be found; that affiant has made diligent inquiry to find said defendant, but cannot, after due diligence, find him within this state; that this affiant therefore says that personal service of said summons cannot be made on said defendant, R. T. Dunlap, and prays for an order that service of the same may be made by publication. JOHN STEERE.' The order of publication was in the usual form, requiring the summons to be published two months in a proper newspaper, and it was published as required by the order. More than one year after the rendition of the former judgment the defendant (plaintiff in this action) moved the court in which it was rendered to set it aside, and for leave to answer, upon his affidavit, stating substantially the same facts alleged in his complaint herein. This motion was denied, and no exception was taken to the order denying the same, and no appeal has been taken therefrom. As one of the express objects of this action is to set aside the former judgment, and to enjoin its execution, that judgment is fully set out in the complaint, and the judgment roll in that action was introduced as evidence in chief by the plaintiff. The defendant also pleaded the former judgment as a bar to this action.

"1. It appears that the former action was commenced by H. K. S. O'Melveny, as attorney for plaintiff, and that his name was indorsed on the summons as attorney for plaintiff; that before the order of publication was made an order substituting Messrs. Wells, Van Dyke & Lee as attorneys for plaintiff was made; but that the summons was published as originally issued, with the name of O'Melveny indorsed thereon as attorney for plaintiff. It is contended by respondent that the name of Wells, Van Dyke & Lee should have been indorsed on the summons as published, and that the omission so to indorse them is a fatal defect in the publication. The provision of the Code requiring the name of plaintiff's attorney to be indorsed on the summons relates to the summons as issued by the clerk, and was complied with in this case. As there is no requirement that the names of attorneys afterwards substituted for or added to the original attorney for plaintiff shall be indorsed on the summons, I think the summons was properly published in the form in which it was issued.

"2. No other defect in the form or substance of the affidavit is pointed out by counsel, and none is perceived; but it is alleged that the statements therein that Dunlap had departed from this state, and that, after due diligence, he could not be found within this state, are not true; and the court so found. The only evidence to sustain this finding is the testimony of the plaintiff, Dunlap, to the effect that, although he departed from this state in 1879, he returned to Inyo county, in this state, in the spring of 1881, where he openly and publicly resided and worked as a miner and farmer from that time until 1887; that he never during that time saw the newspaper in which the summons was published, nor had any actual notice of the publication of summons, or of the pendency of the former suit; that he left Mr. Boyce in charge of the lots when he departed from the state, but did not inform Boyce that he intended to leave, or where he was going; and that he never communicated with Boyce or any other person in Los Angeles county during his absence until 1887. This testimony has no tendency to prove that the affidavit was not made in good faith. The affidavit is sufficient to show that, 'after due diligence,' Dunlap could not be found 'within the state.' This, with the other facts therein stated, justified the order of publication. Code Civil Proc. § 412; Forbes v. Hyde, 31 Cal. 348; Ligare v. Railroad Co., 76 Cal. 610, 18 Pac. Rep. 777. The publication of the summons according to the order was service of it upon the defendant, having the same effect as if served by either of the other modes prescribed by the Code, (Code Civil Proc. §§ 413, 416,) except that in case of service by publication alone the defendant, on a proper showing, may be allowed to answer to the merits of the action at any time within one year after the rendition of the judgment. Id. § 473. After the expiration of one year the judgment by default, upon service of summons by publication, is just as conclusive as if it had been rendered upon personal service, and will not be opened or set aside by a court of equity except on the ground of fraud, accident, mistake, or surprise by which, without any fault or negligence on his part, the defendant was prevented from making a meritorious defense. U. S. v. Throckmorton, 98 U. S. 68; Zellerbach v. Allenberg, 67 Cal. 298, 7 Pac. Rep. 908; Amador C. & M. Co. v. Mitchell, 59 Cal. 179; Mastick v. Thorp, 29 Cal. 448; Boston v. Haynes, 33 Cal. 32; Phelps v. Peabody, 7 Cal. 52. Upon a sufficient affidavit the court found and determined that the defendant in the former action could not, 'after due diligence, be found within the state,' and so recited in the order of publication. This judicial determination of the fact is conclusive as against the mere testimony of the plaintiff that he was in Inyo county, in this state, at the time the former action was commenced, and when the order of publication was made, and that in his opinion personal service might have been made upon him there by the exercise of due diligence. There is no pretense that the plaintiff in the former action knew or had any reason to believe that the defendant was in Inyo county. Nor is there any evidence tending to prove that the acts of diligence stated in the affidavit were not performed, or to show fraud or bad faith on the part of the plaintiff in that action in procuring the order of publication. Nor is there any averment or evidence of any mistake, accident, or surprise, in the legal sense of those terms, by which the plaintiff herein, without fault or negligence on his part, was prevented from making his defense in the former action. That service of summons by publication is proper in an action to quiet title to land in this state was expressly decided in the late case of Perkins v. Wakeham, 86 Cal. 580, 25 Pac. Rep. 51.

"It follows that, for aught that appears by the record in this case, the former judgment is conclusive evidence that the appellant is the owner of the lots in question, and that the findings of the trial court to the contrary are not justified by the evidence. I think the appeal from the judgment should be dismissed, that the order denying a new trial should be reversed, and a new trial granted."

PATERSON, J. I dissent on the ground that the evidence does not justify the decision. I recognize the correctness of the rule stated in the cases cited by Mr. Justice DE HAVEN; but, to make it applicable, it should clearly appear from the evidence that the party charged with fraud deliberately commenced and prosecuted his action with the intent to defraud his adversary, and knowing that his claim was baseless in law and in fact. In this case the evidence, in my opinion, fails to show that the defendant, in prosecuting his action againt Dunlap, acted in bad faith. His complaint was filed on June 25, 1884. Summons was issued on the same day, but the affidavit for publication was not made until February 7, 1885. This does not show great activity on the part of Steere in attempting to consummate the fraud with which he is charged. No wrong can be predicated upon the fact that the summons was published in the Weekly Censor. The judge decided the question as to the paper in which the summons should be published. The default of the defendant in that action was entered on May 18, 1885. This action was not commenced until November 30, 1887. Mr. Dunlap testified that he left Boyce in charge of the property at Santa Monica, as his agent, in January, 1878. There was a house on the property at the time, and the land was fenced. Plaintiff testified, also, that he received rent for the property only one year, and the reason why he made no inquiries about it was because he had lost the address of Boyce. This is a singular excuse, and shows great negligence. The town of Santa Monica is so small that probably every man in the town knows every other inhabitant thereof; and it would have been easy to discover the whereabouts of his agent, if he had made any inquiry. Boyce testified that the plaintiff left the property in his charge to sell, and meantime to collect the rents; that the last time he saw Dunlap was in January, 1878; that Steere took actual possession of the property, and made improvements on the house, in the fall of 1885. He testified further that Steere called upon him several times, and inquired very earnestly where Dunlap could be found; that he came to see about getting service on him; that Steere was inclined to push matters, and that he (Boyce) was a little indifferent about the matter; that Steere claimed to have a tax-deed for the property, and asked him (Boyce) how soon he could hear from Dunlap, and that he told him he thought he would hear from him in three, four, or five weeks, probably. Milner, under whom Steere claims, paid the taxes on the property for the years 1879–80, 1880–81, 1882–83, 1883–84; and, when the defendant purchased from him, he repaid the amount of taxes which Milner had thus paid. Milner's certificate of sale from the tax collector was dated March 4, 1879. The evidence is entirely consistent with the theory of the good faith of Steere in the prosecution of his suit. The circumstances show that he believed himself to be the owner of the land. He paid a valuable consideration for the tax-title, and he and his grantor paid the taxes assessed upon the land every year, except two, after 1878. If he had desired to perpetrate a fraud upon Dunlap, it is not at all probable that he would have importuned Boyce so often to discover the very fact which would have effectually prevented him from making the affidavit, and procuring the order for publication. It is said that it must be presumed he knew his tax-deed was invalid. I do not think any such presumption should be indulged; but, if it can, it certainly is not sufficient to convict him of a willful and deliberate attempt to defraud, when it is admitted or appears that he paid a valuable consideration for the tax-title, and endeavored in good faith to give the defendant in the action personal notice of the claim set up. The worst construction that can be fairly put upon the conduct of Steere is that he had a doubt as to the validity of his title, and sought the aid of the court to settle the matter in his favor. This he had the right to do. He knew that plaintiff was claiming through his agent the right of possession, and to collect the rents. There is no evidence that any one ever advised Steere that his tax-deed was invalid. Probably not one man in a thousand, outside of the profession, would have known that the deed was void. The question of ownership, and the question whether one has held adverse possession, are questions so mixed with law that a statement in relation thereto by a layman should not be regarded with great strictness.

I concur: GAROUTTE, J.

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92 Cal. 292

GAVIN v. GAVIN. (No. 13,546.)

(*Supreme Court of California.* Dec. 14, 1891.)

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by Mary Jane Gavin against Patrick Gavin for divorce and other relief. Judgment for plaintiff. Defendant appeals. Affirmed.

Eugene N. Deuprey, for appellant. *T. J. Crowley*, for respondent.

MCFARLAND, J. The brief of counsel for appellant is substantially a mere recapitulation of the general assignments of error as they appear in the bill of exceptions. It contains frequent general statements, such as that "the evidence was insufficient to justify the decision," that "the court erred" in making certain findings of fact, that the "court erred in finding certain conclusions of law," that the "court erred in making the decree," etc. But no reasons are given why the court erred, no views are presented as to the questions sought to be raised, and no authorities cited. Under these circumstances, we can hardly be expected to do the work of counsel, and elaborately hunt up and consider what counsel has not argued. Upon a cursory view of the record, we have noticed no material error for which the judgment should be reversed. The judgment and order denying a new trial are affirmed.

We concur: De Haven, J.; Sharpstein, J.

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92 Cal. 372

Peterson v. Kinkead. (No. 13,428.)

(*Supreme Court of California.* Dec. 15, 1891.)

Estoppel to Deny Lessor's Title—Public Lands.

Plaintiff had possession of a tract of public land for six years, and annually cropped the land, and made valuable improvements thereon, including a house 12 by 14 feet in size. Defendant acquired possession of plaintiff's house by a verbal lease from plaintiff, to whom he paid rent for a while, and then refused, and claimed the land for himself on the strength of his possession and "intention" to enter the same as a homestead. *Held*, in an action by plaintiff to recover possession of the premises, that defendant was estopped to deny plaintiff's title.

Commissioners' decision. Department 2. Appeal from superior court, San Benito county; J. F. Breen, Judge.

Action by Peterson against Kinkead. Judgment for plaintiff. Defendant appeals. Affirmed.

John L. Hudner, for appellant. *N. C. Briggs*, for respondent.

Vanclief, C. Action in the nature of ejectment to recover from defendant the possession of the S. W. ¼ of the N. W. ¼ of section 29, township 14 S., range 6 E., M., D. M., in the county of San Benito. The action was commenced December 13, 1888. The answer of the defendant, after denying all the allegations of the complaint, proceeds as follows: "And for another and further answer defendant avers that the land described in the complaint is public land of the United States, open to settlement under the homestead and pre-emption laws. That defendant is a citizen of the United States, over the age of twenty-one years, and a married man, having a wife and child. That defendant is now residing upon said land with a view and intent of entering the same as a homestead under said homestead laws, and of acquiring title thereto under said homestead laws. That said land is subject to a claim of the Southern Pacific Railroad, but for a valuable consideration said company will abandon and relinquish its said claim to said land, and the same will thereby become open to immediate entry under said homestead laws; and defendant, with his said family, is now residing upon said land in good faith, and with the intention of procuring said relinquishment of said railroad company, and of immediately thereafter entering the same as a homestead as aforesaid. And that any claim of said plaintiff to said land is in fraud of the right of said defendant to enter said homestead, and of the government of the United States, and of the right of the latter to said land, and its right to dispose of the same under said homestead laws." Judgment passed for the plaintiff, and defendant appeals from it, and from an order denying his motion for a new trial.

The court found that the demanded premises "are a part of the government domain, and open to settlement under the homestead and pre-emption laws of the United States, subject, however, to the inchoate title of the Southern Pacific R. R. Company." That plaintiff "entered into possession of said land, under purchase of the 'right of possession' from one Hitchcock, about six years ago; said Hitchcock being at the time in the peaceable and exclusive possession thereof." That from the time of such purchase and entry until 1888 the plaintiff continuously cultivated about 10 acres of the land, taking therefrom annual crops of hay and grain. That, together with a larger tract of 80 acres, the land in dispute was inclosed by a wire and brush fence, "which, in connection with natural barriers, made an inclosure sufficient to turn stock. This inclosure was placed by plaintiff and his grantor, and has continuously, down to December 8, 1888, been maintained by plaintiff." It is further found that there was on the premises a small house, 12 by 14 feet in size, which was generally occupied by an employe of the plaintiff, and was occupied by one of them immediately prior to the entry of defendant and his family as hereinafter stated. On August 15, 1888, the plaintiff verbally leased this cabin to the defendant from month to month, at a rent of three dollars per month, which the defendant agreed to pay, the plaintiff agreeing to make an addition to the cabin at a future time not specified, but which he never made. The defendant entered into possession of the cabin under this lease, and continued to occupy it until December 8, 1888, when he refused to pay any rent, and denied that plaintiff had any right to the demanded premises, and claimed them for himself as a settler thereon under the homestead laws of the United States; and the court finds that at the time of the trial he was residing upon the land "with a view and intent of entering the same as a homestead, and acquiring title thereto under said homestead laws," but that he has not taken any step for that purpose required by law, except as above stated. It does not appear what was the nature of the alleged "inchoate title" of the railroad company to the land, nor under what act of congress the railroad claimed, nor that any railroad was ever located under such act of congress. Nor does it appear that either party ever acquired any right whatever from the railroad company. Counsel for appellant states in his brief that the right of the railroad company to the land was declared forfeited by act of congress before the trial of this action, but he does not cite the act.

Conceding to the appellant that the land was public land, open to entry under the homestead and pre-emption laws of the United States, that he had the requisite qualifications to make a homestead entry, and that he intended to do so, yet for that purpose he had no right to enter or settle upon improved land in the actual possession of the plaintiff. Goodwin v. McCabe, 75 Cal. 585, 17 Pac. Rep. 705; McBrown v. Morris, 59 Cal. 65; Davis v. Scott, 56 Cal. 165. Even if he was not estopped from denying plaintiff's title by the lease under which he was permitted to enter and occupy, he is entitled to no advantage by having gained plaintiff's permission to enter and occupy as tenant, while he secretly intended thereby to obtain a possession adverse to plaintiff, for the purpose of enabling him to claim the land as a settler under the homestead laws, if such was his intention. If such an entry upon the land was not surreptitious, it was, nevertheless, obtained by his fraudulent deception, from which the law will allow him no advantage to the prejudice of the plaintiff. The defendant failed to connect himself with the government title, under the homestead laws or otherwise, even by his answer, which avers only that he "is residing upon said land in good faith, and with the intention of procuring said relinquishment of said railroad company, and of immediately thereafter entering the same as a homestead." There is no pretense that he had ever filed any affidavit with the register or receiver of the land-office, or that he had in any manner indicated to the government his intention to claim or enter the land under any law. Nor, indeed, does it appear from the findings or answer when he conceived the intention to claim the land under the homestead laws, it being alleged and found only that he had such intention at the time of filing his answer. It is to be presumed, therefore, that he entered into possession as tenant under the lease in good faith, as he professed to do, and that he conceived the intention to claim adversely to his landlord afterwards. This being the case, and having failed to connect himself with the government title, he is estopped by the lease from denying the plaintiff's title. I think the judgment and order should be affirmed.

We concur: TEMPLE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(92 Cal. 378)

NEWMAN v. CITY AND COUNTY OF SAN FRANCISCO *et al.* (No. 13,561.)

(*Supreme Court of California.* Dec. 15, 1891.)

PUBLIC LANDS—MEXICAN GRANTS—RIGHTS OF CITY IN PUEBLO LANDS—CONVEYANCES TO BONA FIDE OCCUPANTS.

1. In an action to recover land the complaint alleged that the city of San Francisco passed an order by which it granted all its title to certain lands referred to in the order to the persons in the *bona fide* actual possession thereof on March 8, 1866, and that this order was repealed by a subsequent order, which prescribed different terms on which the legal title to said lands was to be acquired by those who were in the *bona fide* possession thereof at such date; that this latter order was passed by the board of supervisors of the city without jurisdiction; that the conditions therein prescribed were oppressive; and that the act of the legislature ratifying it was unconstitutional and void. It was nowhere alleged that plaintiff ever complied with the terms prescribed by the second order, or that he was prevented from so doing by defendants. *Held*, that such complaint did not state a cause of action, as Act Cong. March 8, 1866, (14 St. at Large, p. 4,) entitled "An act to quiet the title to certain lands in the city of San Francisco," which relinquished to the city all the right and title of the United States to the pueblo lands in suit, directed that the land not theretofore granted to the city should be conveyed by the city to parties in *bona fide* actual possession thereof, in such quantities and on such terms as the legislature of the state of California might prescribe, the complaint failing to allege that the first order was ratified by the legislature.

2. The averments in such complaint that defendants acquired their deeds from the city of San Francisco by fraud and false evidence are immaterial.

Department 2. Appeal from superior court, city and county of San Francisco; J. A. MAGUIRE, Judge.

Action by B. B. Newman against the city and county of San Francisco and others to quiet title, and for other purposes. Judgment for defendants. Plaintiff appeals. Affirmed.

B. B. Newman, in pro. per. Geo. Flournoy, Jr., Newlands, Allen & Herrin, Haggin & Dibble, Olney, Chickering & Thomas, and *Theodore H. Hittell,* for respondents.

DE HAVEN, J. The superior court sustained demurrers interposed by the several defendants to plaintiff's amended complaint, and thereupon entered judgment in favor of defendants. The plaintiff appeals.

The land described in the complaint is a part of the pueblo lands of the city of San Francisco, all the right and title of the United States to which was by the act of congress of March 8, 1866, (14 U. S. St. at Large, p. 4,) relinquished and granted to that city upon the following trusts, namely: "That all said land not heretofore granted to said city shall be disposed of and conveyed by said city to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities, and upon such terms and conditions, as the legislature of the state of California may prescribe." The complaint alleges that the plaintiff was in the *bona fide* actual and exclusive possession of the land described therein at the date of the passage of this act, and that on October 12, 1866, the city and county of San Francisco duly passed an order, known as "Order No. 733," by which said city "relinquished and granted forever to private proprietorship, irrevocably, all the right, title, claim, and interest which the said city then had, or ever had, or may thereafter acquire, in and to the lands in said order referred to, to the person and persons who were in the *bona fide* actual possession thereof on the 8th day of March, 1866." It is also alleged that this order 733 was repealed by another known as "Order 800," which precribed different terms and conditions upon which the legal title to said lands was to be acquired by those who were in the *bona fide* occupancy thereof at the the date of the passage of the act of congress of March 8, 1866. It is further alleged that this latter order was passed by the board of supervisors of the city and county of San Francisco without any jurisdiction or authority, and that the terms and conditions therein prescribed for acquiring title to said land were unconscionable and oppressive, and the act of the legislature ratifying it was unconstitutional and void. It is nowhere alleged in the complaint that plaintiff ever complied with the terms and conditions prescribed in order 800, or that he was prevented from so doing by any act of defendants; but it is charged in general terms that the defendants other than the city of San Francisco, their predecessors and grantors, by fraud and false evidence procured from the city of San Francisco deeds of the land in controversy, and judgment is demanded that the city and county of San Francisco now holds the legal title to said land in trust for plaintiff, and that the other defendants have no title thereto; that plaintiff be restored to the possession thereof, etc.

The facts alleged in the complaint are not such as to show that plaintiff has any legal or equitable title to the land therein described, and the demurrers thereto were properly sustained. Although plaintiff may have been in the *bona fide* occupancy of such land on March 8, 1866, as alleged, and, as such, one of the persons entitled to acquire the legal title thereto from the city of San Francisco under the act of congress of that date, and above referred to, still he was only entitled to do so upon complying with such terms and conditions as should be prescribed by the legislature of this state. This was so expressly adjudged in the case of Dupond v. Barstow, 45 Cal. 446. In that case the court said: "The act of congress in express terms conferred upon the legislature the right to prescribe 'the terms and conditions' on which the title should pass to the beneficiaries, and the quantity of land to which each should be entitled. The legislature partially performed this duty by ratifying and confirming order No. 800, and there can be no doubt that the order thereby became to all intents and purposes as definitely valid as though its provisions had been re-enacted by the legislature. Not having paid the taxes or assessment as provided in section eleven, the plaintiff has not performed the condition on which his rights as a beneficiary were made to depend." It is nowhere alleged in this complaint that plaintiff ever paid or tendered the assessment as required by order 800, and for this reason there is a failure to show, in the language of Dupond v. Barstow, supra, that plaintiff is "within the category of those who are entitled to the benefit of the statute." This omission is not covered by the general averment that the "terms and conditions" imposed by order 800, and ratified by the legislature, were oppressive, or that such act of the legislature ratifying that order was unconstitutional. That neither of these objections has any force is the necessary effect of the decision of Dupond v. Barstow, supra. The act of the legislature above referred to did not destroy any vested rights of plaintiff, as plaintiff acquired none under order 733, under which he claims. The "terms and conditions" upon which occupants were to secure the legal title were, by the act of congress, to be prescribed by the legislature, and not by the board of supervisors of the city and county of San Francisco; and, as this order was never ratified by the legislature, it was ineffectual to confer any rights.

The plaintiff, having failed to show that he was entitled to acquire the land in controversy, or that he was prevented by defendants, or either of them, from complying with the conditions of the order ratified and adopted by the legislature of this state, is in no position to call in question the manner in which the defendants acquired their deeds from the city and county of San Francisco, and the averments charging them with having done so by fraud and false evidence are for this reason immaterial. De Toro v. Robinson, (Cal.) 27 Pac. Rep. 671, and cases therein cited. Judgment affirmed.

We concur: Sharpstein, J.; McFarland, J.

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92 Cal. 370

In re Croghan's Estate. (No. 14,200.)

(*Supreme Court of California.* Dec. 15, 1891.)

Homestead—Right of Survivor.

Under Code Civil Proc. § 1474, providing that if the homestead was selected from the separate property of the person selecting or joining in the selection of the same, it shall vest, on the death of the husband or wife, absolutely in the survivor, a homestead selected by a husband from his separate property on his death vests in his wife, and is not affected by Civil Code, § 1265, and Code Civil Proc. § 1468, providing that, if property set apart for the use of a decedent's family be a homestead selected from the separate property of deceased without his consent, it shall go to his heirs and devisees, and that the court can set it apart for only a limited period.

Department 2. Appeal from superior court, Alameda county; E. M. Gibson, Judge.

In the matter of the estate of Francis Croghan, deceased. Appeal of the heirs from an order of the superior court. Affirmed.

J. J. Roche, *Wm. H. Metson*, and *D. I. Mahoney*, for appellants. *A. A. Moore* and *T. Z. Blakeman*, for respondent.

McFarland, J. This is an appeal by certain brothers and sisters and children of deceased brothers and sisters of the deceased from an order setting aside absolutely to the surviving wife a certain homestead. There is no attack made on the general validity of the homestead in question. It was the family residence, was not of greater value than $5,000, a proper declaration had been made and recorded, and it was in all respects in law a valid homestead. But the contention of appellants is that it should have been set apart to the widow only for a limited period, after which it should go, by operation of law, to the appellants as heirs. The facts upon which this contention arises are these: (1) The said homestead was the separate property of the deceased; and (2) the declaration of homestead was made by the deceased himself. Upon these facts we are clear that the homestead vested absolutely in the widow as survivor, and that the order appealed from was right. It is impossible for a state of facts to be more completely covered by a statutory provision than are the facts in this case covered by section 1474 of the Code of Civil Procedure. That section provides as follows: "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the superior court to assign it, for a limited period, to the family of the deceased." The contention is that section 1265 of the Civil Code and section 1468 of the Code of Civil Procedure are in conflict with said section 1474; and a good deal of reasoning is indulged in by counsel to show what the rule is when two different sections of the Codes are contradictory, and irreconcilably conflicting. But such is not the case here. The clear and explicit language of section 1474 deals in detail with the very identical case of a homestead on separate property, created by the owner of such property. The legislative mind, when enacting it, was directed specially to that particular kind of homestead; and its intent, thus directly and clearly expressed, is not to be taken as changed by other sections which use general language, and in which there is no direct reference made to a homestead carved out of separate property by the will of its owner. All the sections cited, when read together, clearly mean that when a homestead has been selected by one spouse out of the separate property of the other without the consent of the latter, then, upon the death of the one from whose property it was selected, it vests in his or her heirs, subject to the power of the court to assign it for a limited period to the family of the decedent; but when the selection has been "from the separate property of the person selecting or joining in the selection of the same," then it goes absolutely to the survivor. The cases cited by appellant do not establish any other doctrine. Order affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

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96 Cal. 494

TREWATHA v. BUCHANAN GOLD MINING & MILLING CO. (No. 14,366.)

(*Supreme Court of California.* Dec. 16, 1891.)

NEGLIGENCE OF FELLOW-SERVANT—DEFECTIVE APPLIANCES—INSTRUCTIONS.

1. Defendant's employes were raised and lowered in its mine by means of a hoisting tackle, which was also used to hoist the *débris* from the mine. Plaintiff, about to get into the bucket, gave, as he claimed, the proper signal to the engineer for hoisting a man. The bucket was at first raised slowly, and then at a great speed, and was not stopped at the proper time, but was hurled against the sheave with such force that plaintiff was injured. The engineer testified that he heard the signal for raising rock, but knew there was something lighter than rock in the bucket, and could not explain why he had not stopped the engine at the proper time. He had run engines for several years, and there was no proof of carelessness on his part prior to the accident in question. *Held*, that the accident was due to the negligence of the engineer, and defendant was not liable therefor, under Civil Code, § 1970, providing that an employer is not liable to his employe for the negligence of a fellow-servant, unless he neglected to use ordinary care in the selection of the fellow-servant.

2. A charge that if the bell and appliances used to signal the engineer were out of order, and defendant or its superintendent knew, or had the means of knowing, such fact, and plaintiff did not know, and did not have equally with defendant the means of knowing, this, and if plaintiff gave the proper signal, and the engineer, on account of the defect in the bell and other appliances, did not hear such signal, and for this reason hoisted plaintiff from the mine at such dangerous speed as to result in the accident in which plaintiff was injured, then the jury must find for plaintiff, is erroneous, because ignoring the rule of law that, where the proximate cause of the injury is the negligence of a fellow-servant, no recovery can be had.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

Action by Samuel Trewatha against the Buchanan Gold Mining & Milling Company. Judgment for plaintiff. Defendant appeals. Reversed.

James H. Budd and *E. A. Rodgers*, for appellant. *I. M. Kalloch* and *F. W. Street*, for respondent.

BELCHER, C. The plaintiff brought this action to recover damages for injuries received by him while he was employed in defendant's mine, known as the "Buchanan Mine," in Tuolumne county. It is alleged in the complaint that on the 3d day of June, 1889, the defendant was working its mine, and one James E. Donahue was the engineer employed by the defendant, and who at that time operated for the defendant its engine and hoisting tackle used upon and in connection with the main shaft of the mine to hoist the rock and *débris* therefrom, and also to raise and lower the miners and other workmen working at the various levels connected with the main shaft; "that at said time said Donahue was incompetent, negligent, and destitute of ordinary skill as an engineer, and the defendant at such time, and for a long time prior thereto, knew" such to be the fact; "that the defendant on the said 3d day of June, 1889, was guilty of further carelessness and negligence, in that it did willfully and knowingly neglect and fail to furnish said engineer with the necessary and proper appliances and means with which to properly and safely operate said engine and hoisting works, and defendant at said time knew that said engineer was not supplied with the necessary and proper appliances," etc.; that on the 3d day of June, 1889, while Donahue was so acting as engineer, plaintiff was in the employment of defendant, and was working in what is known as the "200-foot level," connected with the main shaft of the mine;

and having occasion to go up to the surface of the mine, in obedience to defendant's directions, and after having given to the engineer due notice thereof, he "got into the bucket connected with the said hoisting tackle, whereupon said engineer, by means of said imperfect and unsafe appliances made use of by said defendant in connection with and for the purpose of operating said engine and hoisting tackle, proceeded to hoist plaintiff from said 200-foot level to the surface; and the said Donahue, engineer as aforesaid, negligently, carelessly, and wantonly did hoist said plaintiff from said 200-foot level with such wrongful, unlawful, and dangerous speed that the bucket in which plaintiff had placed himself as aforesaid was thrown with great violence against and over the sheave," whereby plaintiff was greatly injured, etc. The answer denied all the material averments of the complaint, and alleged that any injuries sustained by plaintiff were caused by his own negligence. The case was tried before a jury, and a verdict returned in favor of the plaintiff for $4,000 damages. The defendant moved for a new trial on the ground that the verdict was not justified by the evidence, and that errors in law were committed by the court. The motion was denied, and this appeal was then taken from the judgment and order.

It appears from the evidence that the hoisting-engine was on the surface of the ground, and about 40 or 50 feet from the mouth of the shaft. The hoisting rope or cable was fastened to a drum, which was revolved by the engine, and ran thence over the sheave or pulley to and into the shaft. The sheave was about 30 feet above the mouth of the shaft, and the bucket was attached to the end of the rope, and by it let down into and drawn up from the mine. At the surface of the ground was a platform where men riding up and down got out of or into the bucket, and 6 or 7 feet above the surface was another platform where the rock and dirt brought up was dumped. The methods of working the engine were simple and easily learned, and Donahue had been working it as engineer, on the night shift, since October, 1888. In the mine were five levels, from which drifts ran out, and the bucket was used to hoist from the different levels rock and waste and the laborers employed there. Extending up through the shaft from the lower level was a cord which was attached to a bell hung near the engine. By pulling this, the bell was rung, and certain known signals given to hoist or stop or lower the bucket, and also to indicate whether the load to be hoisted was a man or rock. The signal from the 200-foot level to hoist a man was three bells, and, after a little interval, a fourth one. About the engine and platforms lights were kept burning at night to enable the engineer to see the machinery and watch all the movements. The plaintiff was at work at the 200-foot level of the mine on the night shift, and a little after 12 o'clock had occasion to go to the surface. The bucket was going down the shaft, and was stopped at the 200-foot level. Thereupon the plaintiff got into the bucket, and, as he says, gave the proper signal to hoist him. The bucket started up, and for about 40 feet rose slowly. It then began to go fast, and the plaintiff tried to reach out his hand and catch the cord to signal the engineer to stop it, but whether he succeeded in doing so he does not know. It continued to rise rapidly, and, instead of stopping at one of the platforms where it should have stopped, was hurled up against the sheave, and broken loose. The plaintiff was thrown down, and badly injured.

The engineer was called as a witness for plaintiff, and testified: "The bell I got to hoist was one bell, which indicated that I should hoist anything but a man. * * * When the one bell to hoist was given I commenced slowly. I always commence slowly, to see that the bucket is not caught. Then I increased speed. I knew at the time I had something lighter than rock. Unless a man is aboard, no matter what is in the bucket, I hoist fast. I turned on the steam when I hoisted Trewatha as though for rock; had no idea a man was aboard. I failed to stop the engine; why, I don't know; it was done so quick." And on cross-examination the witness said: "Don't know what caused the accident. I started slowly, as usual. Had no idea a man was in, and turned on steam as if I was going to raise ore. Had I known a man was in the bucket, I would have hoisted slow. I don't know whether I tried to stop the engine or not before it ran the bucket into the sheave. There was nothing to prevent my stopping it, however."

1. That the injuries sustained by the plaintiff were caused by the negligence of the engineer is very clearly shown by the evidence, and the first question is, can the plaintiff recover damages for injuries so caused? Section 1970 of the Civil Code provides: "An employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe." The engineer was a fellow-servant with the plaintiff, employed by the same employer, in the same general business, and the evidence wholly fails to show that there was any neglect to use ordinary care in his selection. He had been engaged in running an engine for some years, and there was no proof that he had been careless in attending to his duties prior to the night of this accident. It follows, in our opinion, that the plaintiff was not entitled to recover on the ground that his injuries were caused by the negligence of the engineer. See Collier v. Steinhart, 51 Cal. 116; McLean v. Mining Co., Id. 255; Congrave v. Railroad Co., 88 Cal. 360, 26 Pac. Rep. 175.

2. It is said in respondent's brief: "It is apparent from the allegations of the complaint that the injuries received by plaintiff were occasioned by the combined carelessness and negligence of the defendant in

not supplying the necessary and proper appliances and means with which to operate the engine and hoisting tackle, and carelessness of an engineer known by the defendant to be negligent and careless;" and it is claimed that the evidence as to the defective appliances was sufficient to justify the verdict. The appliances referred to were the lights about the engine and platforms, and the signal bell and its attachments. As to the sufficiency of the lights, the evidence was somewhat conflicting, but the engineer testified: "Question. Had you sufficient light to run by? Answer. Yes, sir. Q. The accident on this occasion was not due at all to the lack of light? A. No; I don't think it was. I had sufficient light to run by." As to the bell, it was proved that the attachments sometimes got out of order, so that it did not always ring when the cord was pulled; and it was claimed by the plaintiff that as he gave, or attempted to give, the proper signal to hoist a man, namely, three rings and then one, the engineer heard but one ring, the attachments must have been out of order at that time, and hence the engineer was put off his guard, and the injury resulted. And, in accordance with this theory, the court, at the request of plaintiff, instructed the jury as follows: "If you find from the evidence that the bell situated at or near the top of the main shaft of the Buchanan mine, with its appliances and appurtenances used by the miners and others in giving signals to the engineer in charge of the engine and hoisting tackle, was not in proper working condition, and did not all times give the signal intended when the rope was properly pulled for that purpose, and that the defendant, or its superintendent or foreman, knew, or had the means of knowing, of said defect in said bell and its appliances, and that the plaintiff did not know, and had not equally with the defendant the means of knowing of such defect in said bell or its appliances and appurtenances, and if you further find from the evidence that, by reason of said bell not working properly, said Donahue was not able to determine the true signal given by the plaintiff, and that plaintiff did give the right signal for the hoisting of a man from the mine, and that, by reason of said bell not giving the signal as rung by plaintiff, said Donahue hoisted the plaintiff from said mine with dangerous speed, and threw the bucket in which plaintiff had placed himself with great force against the sheave, whereby plaintiff was mangled, bruised, wounded, and injured, then you must find for the plaintiff." We do not think the verdict and judgment can be sustained, even if it be admitted that the appliances complained of were as defective as it is claimed they were. The immediate and proximate cause of the injury sustained by plaintiff was very clearly shown to have been the negligence of his co-employe; and this, as we understand it, is in substance the averment of the complaint. Nothing but carelessness can account for the fact that the engineer allowed the bucket to be hurled against the sheave, 23 feet above the upper platform, whether he supposed he was hoisting a man or something else. But the rule is that, where the promoting cause of the injury is the negligence of a fellow-servant, no recovery can be had, even though the machinery or appliances be defective. This was so declared in Kevern v. Mining Co., 70 Cal. 394, 11 Pac. Rep. 740, where the court said: "'The proximate cause of the injury is the object of inquiry, and when discovered must be regarded and relied on.' Hayes v. Western R. Corp., 3 Cush. 274. Even where machinery is defective, so that otherwise a recovery might be had for an injury received, yet, if the promoting cause of the injury is the negligence of a fellow-servant, no recovery can be had. Wood, Mast. & S. p. 812. The same rule must apply where the appliances for doing work are defective." The instruction quoted ignores this rule, and was therefore misleading and erroneous. We advise that the judgment and order be reversed, and the cause remanded.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded.

Rehearing granted.

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92 Cal. 382

HUGHES v. CANNEDY. (No. 14,292.)

(*Supreme Court of California.* Dec. 16, 1891.)

TAX-DEED—SUFFICIENCY—NOTICE OF SALE.

1. Under Pol. Code, § 3776, relating to delinquent taxes, which provides that the collector must make out a certificate specifying, among other things, "the time when the purchaser will be entitled to a deed," and under section 3786, which provides that "the matters recited in the certificate of sale must be recited in the deed," a tax-deed which fails to recite the time when the purchaser would become entitled to a deed is void.

2. Under Pol. Code, § 3785, which provides that the purchaser of property sold for delinquent taxes shall, in case the property is unoccupied, post upon it, in a conspicuous place, a written notice "stating that said property, or a portion thereof, has been sold for delinquent taxes, giving the date of sale, the amount of property sold, the amount for which it was sold, the amount then due, and the time when the right of redemption will expire," etc., a notice which fails to state that the property has been sold for delinquent taxes, or to give the date of the sale, or the amount for which the property was sold, is fatally defective.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Action by Cormack Hughes against W. J. Cannedy to quiet title and to cancel a tax-deed. Judgment for plaintiff. Defendant appeals. Affirmed.

J. C. Ball, for appellant. *Clark & Aram*, for respondent.

FITZGERALD, C. This is an action to quiet plaintiff's title to lots 19 and 20, in block 10, in the town of Winters, county of Yolo, and to cancel a tax-deed issued by the tax collector of that county to the defendant in pursuance of a delinquent tax-sale theretofore made by him of the property in question. The complaint, which is unverified, alleges ownership in fee and possession of the lots by plaintiff, and the adverse claim of an estate or interest therein by defendant, the nature of which is, in brief, as follows: The purchase of the lots by defendant on the 24th day of February, 1886, at a delinquent tax-sale made by the tax collector of Yolo county, and the unauthorized issuance by him, in pursuance thereof, of a deed to defendant to said lots on the 24th day of February, 1888, which deed was duly recorded, and is alleged to be a cloud on plaintiff's title. The answer contains a general denial of the allegations of the complaint, and avers title in the defendant under the tax-deed therein described. The case was tried by the court without a jury, and judgment rendered in favor of plaintiff. Defendant appeals from the judgment and an order denying his motion for a new trial. From the evidence, only a part of which is brought up by the record, it appears that at the time the property in question was sold for delinquent taxes to the defendant the undisputed title thereto was in one Hayes; that it had been redeemed from the operation of the tax-sale by respondent, for his sole use and benefit, before the time for redemption had expired, and that his sole right to redeem was derived from an unrecorded mortgage given by Hayes to respondent 10 or 12 years before to secure the payment of a debt: that subsequent to his redemption as such mortgagee, and prior to the issuance of the tax-deed to the defendant, plaintiff acquired by purchase the title of Hayes to the property; that said property was purchased by defendant at a delinquent tax-sale thereof made by the tax collector of Yolo county on the 24th day of February, 1886, and on the 10th day of March, 1887, the defendant being unable to find the owner, he posted on the premises the following notice of his application for a deed: "Notice. All whom it may concern will take notice that I have purchased at tax-sale the following described real estate, situated in the county of Yolo, state of California, to-wit, lots 19 and 20, block 10, in the town of Winters, and that I will on the 25th day of April, 1887, apply to the tax collector of said county for a deed of the whole of said real estate, unless the same is before that day redeemed. The amount necessary to effect such redemption is the sum of $6.39. W. J. Cannedy. Winters, March 7, 1887." Afterwards, when he applied to the tax collector for the deed, he made and filed with that officer the following affidavit, to which was annexed at the time a copy of the foregoing notice: "State of California, county of Yolo—ss: On the 21st day of November, A. D. 1887, personally appeared before me W. J. Cannedy, who, being first duly sworn by me, deposed and said that he is the identical W. J. Cannedy who, on the 24th day of February, 1886, became the purchaser at tax-sale of lots 19 and 20, block 10, of the town of Winters, in the county of Yolo, state of California, and that thereafter, on the 10th day of March, A. D. 1887, he posted up on said premises, in a conspicuous place, a notice, of which the annexed is a true copy, and the said premises were unoccupied at the time, and have remained unoccupied ever since. W. J. Cannedy." Thereupon, on the 24th day of February, 1888, the sheriff and *ex officio* tax collector of the county issued to the defendant a deed to said lots, which, among other things, contained the following recital: "Whereas, the said R. H. Beamer, tax collector, as aforesaid, thereupon made out in duplicate a certificate of said sale, containing the matters required by law, and on said day delivered one copy of said certificate to said purchaser, and filed the other with the recorder of said county." This is not a substantial recital of the matters required to be contained in the certificate of sale. No objection is made to the regularity of any of the proceedings prior to and including the sale of the property for delinquent taxes, but some of the proceedings subsequent to the sale are claimed to be so materially defective as to vitiate and render void the tax-deed. Section 3776 of the Political Code provides that, "after receiving the amount of the taxes and costs, the collector must make out in duplicate a certificate, dated on the day of sale, stating (when known) the name of the person assessed, a description of the land sold, the amount paid therefor, that it was sold for taxes, giving the amount and the year of the assessment, and specifying the time when the purchaser will be entitled to a deed." And section 3786 provides that "the matters recited in the certificate of sale must be recited in the deed." The certificate of sale is not before us, but the Code expressly declares what matters it shall contain, and, among them, that it shall specify the time when the purchaser will be entitled to a deed. There is no such recital in the tax-deed. The deed is therefore void. Anderson v. Hancock, 64 Cal. 456, 2 Pac. Rep. 31; Grimm v. O'Connell, 54 Cal. 522.

The other defect insisted upon, which is also fatal, arises out of the issuance of the deed to defendant without any notice having been served or posted as required by the provisions of section 3785 of the Political Code.[1] The notice of defendant's application for a deed, which was posted on the premises, and which is above set out in full, is fatally defective, because it fails to state that the property had been sold for delinquent taxes, or to give the date of the sale, or the amount for which the property was sold. Hence it follows that he was not entitled to a deed, and that the one issued to him by the tax collector was issued without authority, and is therefore nugatory and void. Landregan v. Peppin, 86 Cal. 122, 24 Pac. Rep. 859; Oullahan v. Sweeney, 79 Cal. 537, 21 Pac. Rep. 960; Grimm v. O'Connell, 54 Cal. 524.

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[1] Pol. Code, § 3785, provides that "the purchaser of property sold for delinquent taxes, or his assignee, must * * * serve upon the owner of the property purchased * * * a written notice stating that said property, or a portion thereof, has been sold for delinquent taxes; giving the date of sale, the amount of property sold, the amount for which it was sold, the amount then due, and the time when the right of redemption will expire, etc. In the case of unoccupied property a similar notice shall be posted in a conspicuous place upon the property," etc.

We would add in conclusion that as the alleged mortgage lien of plaintiff, under which alone he claimed the right to redeem, was absolutely extinguished by the lapse of time before the tax-sale was made, it follows that he was not such a party in interest as was entitled to redeem under section 3780 of the Political Code. Section 2911, Civil Code; Wells v. Harter, 56 Cal. 342; Henderson v. Grammar, 66 Cal. 335, 5 Pac. Rep. 488. But the court having found in its decision that plaintiff is the owner in fee, and in the possession of the lots in controversy, the right of redemption continues in him indefinitely until a notice is given and a deed applied for in accordance with the provisions of section 3785 of the Political Code. We recommend that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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92 Cal. 398

FORRESTER *et al.* v. SCOTT. (No. 13,863.)

(*Supreme Court of California.* Dec. 17, 1891.)

PUBLIC LAND—RAILROAD COMPANIES—CONFLICTING LAND GRANTS—LOCATION—NECESSITY OF PATENT.

1. In an action to enjoin defendant from maintaining a ditch upon certain land, plaintiffs claimed title to the land under a grant from the United States to the S. P. R. Co. under Act Cong. March 3, 1871, § 23. The rights and limitations of the grant were the same as those of the grant to the S. P. R. Co. by Act Cong. July 27, 1866, except there was a provision that the grant should not affect or impair the present or prospective rights of the A. & P. R. Co. It was admitted on the trial that the land in suit was within the primary limits of the grant of March 3, 1871, but it was contended that the land did not pass to the S. P. R. Co., because it was subject to the prospective rights of the A. & P. R. Co. *Held*, that the land was never subject to any right of the A. & P. R. Co. U. S. v. Railroad Co., 39 Fed. Rep. 132, followed.

2. It appeared that a map of the definite location of the line of the S. P. R. was filed with the commissioner of the general land-office; that the road was completed and accepted by the commissioners, and the report approved by the president of the United States; and that all the conditions of the grant were performed prior to defendant's digging the ditch. *Held* that, although no patent was issued, the S. P. R. Co. had the legal title to the land at the time the ditch was dug, since the grant was *in præsenti.*

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; J. L. CAMPBELL, Judge.

Action by E. H. Forrester and Southern Pacific Railroad Company against J. A. Scott to enjoin defendant from maintaining and using a ditch, etc. Judgment for defendant. Plaintiffs appeal. Reversed.

Waters & Gird and *Byron Waters*, for appellants. *H. C. Rolfe*, for respondent.

VANCLIEF, C. It is alleged in the complaint in this action that in May, 1886, the defendant wrongfully excavated a water ditch upon and across the E. ½ of the E. ½ of section 19, township 1 N., range 5 W., San Bernardino base and meridian, then and now the property of the plaintiffs. The prayer of the complaint is that defendant be enjoined perpetually from maintaining or using the ditch upon the land described, and that the ditch be abated, etc. Judgment passed for the defendant, and plaintiffs appeal from the judgment and from an order denying their motion for a new trial. The court found that the plaintiffs were never the owners of nor entitled to the possession of the land described, or any part thereof. Whether or not this finding is justified by the evidence is the only question presented or necessary to be considered on this appeal.

The plaintiffs claim title to the land under a grant of the United States to the Southern Pacific Railroad Company, on March 3, 1871, evidenced by the 23d section of an act of congress of that date, entitled, "An act to incorporate the Texas Pacific Railroad Company, and for other purposes." 16 St. at Large, 573. This grant was made in aid of the construction of a branch line of road from "Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river." The rights, privileges, conditions, limitations, and restrictions of this grant were the same as those of the grant to the Southern Pacific Railroad Company by the act of July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast," (14 St. at Large, 292,) except that it contained an express proviso "that this section (23) of the act of March 3, 1871, shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company." It was admitted on the trial that the land in suit is within the primary (20 miles) limits of said grant of March 3, 1871, to the Southern Pacific Company, and also within the indemnity (30 miles) limits of the grant to the Atlantic & Pacific Railroad Company, but not within the primary (20 miles) limits of the latter company. Also, that each of these railroad companies accepted the grant made to it according to the terms and provisions of said acts of congress of July 27, 1866, and of March 3, 1871. Also, that more than 1,000 acres within the primary limits of the Atlantic & Pacific Company's grant had been sold and disposed of by the United States prior to the date of said grant, for which no indemnity has been selected; that the Atlantic & Pacific Company never constructed any railroad in the state of California; and that the Southern Pacific Company did construct that section of its road adjoining the land in controversy within the time designated in said acts of congress, which section of the road was accepted by the commissioners of the United States, and that their acceptance was approved by the president of the United States, as provided for in said acts. The plaintiffs proved by proper official certificates of the register and receiver of the United States land-office at

Los Angeles, Cal., and of the United States surveyor general, that prior to April 5, 1885, and after the construction of its road as aforesaid, the Southern Pacific Railroad Company selected the land in question, with other lands, for patent, and filed a list thereof with said register and receiver, amounting to $181.50 on the whole list; and also, on April 4, 1885, paid to the surveyor general of the United States for the state of California the sum of $489.24, as cost of survey, and $163.08 for office work, which sums were in full of the costs of survey and office work for the lands described in said list. The plaintiffs also proved its contract to sell the land in question to the plaintiff Forrester for the sum of $2,400, to be paid in installments, the first of which—$614.40—was paid in advance. This contract was dated January 3, 1885. The defendant makes no claim to the land, and there is no question that plaintiffs are entitled to the relief prayed for if they owned the land when this suit was commenced.

1. It is contended that the land in question did not pass to the Southern Pacific Railroad Company by the act of March 3, 1871, because it was then subject to the prospective rights of the Atlantic & Pacific Railroad Company by the effect of the proviso contained in section 23 of that act, above set out. It is unnecessary to discuss the merits of this point, since it was fully considered and overruled by the circuit court of the United States for the southern district of California in the case of U. S. v. Railroad Co., 39 Fed. Rep. 132, wherein it was expressly decided that the Atlantic & Pacific Railroad Company never had either a present or prospective right to any indemnity or lieu lands within the state of California. This decision was rendered (May, 1889) on a demurrer to the complaint, which stated all the facts and acts of congress relative to the rights of the Atlantic & Pacific Railroad Company substantially as they appear in this case. A final decision on the merits as disclosed by the pleadings and evidence was rendered in the same case in June, 1891, (46 Fed. Rep. 683,) which establishes a perfect title in the Southern Pacific Railroad Company to all odd sections of land within the primary limits of the grant of March 3, 1871, not within the exceptions to that grant, upon substantially the same state of facts admitted and proved in the case at bar, except that no patent appears to have been issued for the land in question in this suit.

2. It appears in this case, by the admissions of the parties and uncontradicted evidence, that the Southern Pacific Railroad Company had performed on its part all the conditions of the grant of March 3, 1871, necessary to entitle it to a patent for the land in suit, prior to the 5th day of April, 1885, and more than one year prior to the digging of the ditch in question by the defendant. A map of the definite location of the line of the road was filed with the commissioner of the general land-office on April 3, 1871. The road (branch road) was completed and accepted by the commissioners in December, 1877, whose favorable report was afterwards approved by the president of the United States. A patent for the land was demanded, and the costs of survey and fees for office work were paid, as above stated, on April 4, 1885. There is no pretense that the land falls within any exception to the grant other than the proviso in favor of the Atlantic & Pacific Railroad Company, above considered and disposed of.

From the foregoing facts it follows, as matter of law, that the Southern Pacific Railroad Company had the legal title to the land in suit before and at the time the defendant dug the ditch in question by virtue of the congressional grant of March 3, 1871, though no patent has been issued. That grant was *in præsenti*, the words of it being, "that there be and hereby is granted," etc.,—sections 3, 18, Act July, 1866, (14 St. at Large, 292;) and section 23, Act March 3, 1871, (16 St. at Large, 573,)—and attached itself to the particular piece of land in suit on April 3, 1871, when the map of the definite location of the road was filed in the office of the commissioner of the general land-office. Denny v. Dodson, 32 Fed. Rep. 899; Rutherford v. Greene's Heirs, 2 Wheat. 196; McLaughlin v. Menotti, 89 Cal. 354, 26 Pac. Rep. 880. In Denny v. Dodson it was decided tht the plaintiff was entitled to recover in an action of ejectment upon a title similar, in all respects, to that of the plaintiff in this action, derived from the congressional grant of July 2, 1864, to the Northern Pacific Railroad Company, (13 St. at Large, 367.) I think, therefore, that the finding of the trial court in this case that "the plaintiffs were not, nor was either of them, at the commencement of this action, * * * or at all, the owners or owner, nor entitled to the possession, of the premises" described in the complaint, is not justified by the evidence, and that for this reason the judgment and order should be reversed, and a new trial ordered.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

PEOPLE v. MORGAN. (No. 20,801.)

(*Supreme Court of California.* Dec. 18, 1891.)

In bank. Appeal from superior court, city and county of San Francisco.

Carroll Cook and *J. E. Foulds*, for appellant. *Atty. Gen. Hart*, for the People.

PER CURIAM. The defendant was accused by information in the court below of the offense of petit larceny and two prior convictions of felony. Upon arraignment he pleaded guilty to the charge, and confessed the prior convictions. He was thereupon sentenced to imprisonment in the state prison for the term of four years. The case comes here by appeal upon the judgment roll alone. As the record herein is barren of any question involving any merit, we do not deem it necessary to discuss the points raised by appellant. The judgment is affirmed.

(92 Cal. 421)

PEOPLE v. AH TEUNG. (No. 20,826.)

(*Supreme Court of California.* Dec. 18, 1891.)

CHINESE RESTRICTION ACT—IMPRISONMENT—ESCAPE—RESCUE.

1. Under Act Cong. Sept. 13, 1888, (25 St. 476,) which provides that any Chinese person found in the United States may be brought before a commissioner, and, when adjudged not entitled to be or remain in the United States, shall be removed to the country whence he came, and Rev. St. U. S. § 787, which authorizes a marshal to execute process in the district wherein he was appointed, a Chinaman could not be lawfully imprisoned in a county jail in the northern district of the state by a deputy-marshal of the southern district on a finding of a United States court commissioner of the latter district, which, after reciting certain facts, declared that "now, therefore, from the foregoing facts, I find that the said" Chinaman "was found unlawfully within the United States, and that he is not lawfully entitled to be in or remain" therein.

2. Where one was unlawfully imprisoned, it was lawful for another, without violence, to assist in his escape.

In bank. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

Ah Teung was convicted of assisting Lee Yick, to escape from imprisonment, and appeals. Reversed.

James F. Smith, *Smith & O'Keefe*, and *J. J. Wests*, for appellant. *Atty. Gen. Hart*, for the People.

DE HAVEN, J. The defendant was convicted and sentenced to the state-prison for the term of five years for the crime of assisting one Lee Yick, confined in the county jail of Alameda county, to escape therefrom. From this judgment, and an order denying his motion for a new trial, the defendant has appealed to this court. Upon the trial the defendant requested the court to give the following instruction, which was refused: "It is not unlawful for one who is restrained unlawfully, and without authority and process of law, to withdraw from his place of confinement, and depart therefrom. Such departure is not an escape, within the meaning of the law. And so, likewise, when one assists, without violence, a person who is confined without any authority of law, and without any process of law, to depart from his place of confinement." It appears from the evidence that Lee Yick, whom the defendant is accused of assisting to escape, was, with the consent of a deputy-sheriff in charge thereof, placed in the Alameda county jail by a deputy United States marshal for the southern district of California, and that the only authority of said deputy-marshal consisted of a "finding" made by a United States circuit court commissioner for the southern district of California, at San Diego, which, after reciting that said Lee Yick was charged with having unlawfully come within the United States from a foreign place, and had been examined before him on that charge, proceeded to state as his conclusion from the evidence that "Lee Yick is a Chinese person and laborer; that he came within the United States on the 1st day of August, A. D. 1890, in the county of San Diego, state of California, from the republic of Mexico. Now, therefore, from the foregoing facts, I find that the said Lee Yick was found unlawfully within the United States, and that he is not lawfully entitled to be in or remain in the United States." No formal judgment was ever made or given upon this "finding," nor order or direction given by the commissioner or any court that the said Lee Yick be removed from the southern district of California to some other place in the United States for the purpose of returning him to the country whence he came, and that he be restrained of his liberty for that purpose.

1. It is provided by section 1601 of the Penal Code that "the sheriff must receive and keep in the county jail any person committed thereto by process or order issued under the authority of the United States until he is discharged according to law." Was the said Lee Yick committed to the county jail of Alameda under any process or order issued under the authority of the United States? We think not. Section 13 of the act of congress of September 13, 1888, "to prohibit the coming of Chinese laborers to the United States," (25 U. S. St. at Large, 476,) provides that any Chinese person found in the United States may be brought before a commissioner of the United States court, "and when convicted upon a hearing, and found and adjudged one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. * * * A certified copy of the judgment shall be the process on which such removal shall be made; and it may be executed by a marshal of the district, or any person having the authority of a marshal under the provisions of this section." It is evident that there is nothing in the language just quoted which would give to the above "finding" or declaration of the United States circuit court commissioner, that Lee Yick was unlawfully in the United States, the effect to justify the action of the deputy United States marshal in taking said Lee Yick into custody, and removing him from the district in which he was found to the county of Alameda; or for the sheriff of the latter county to imprison him in its jail by direction of such deputy-marshal. The authority of a marshal to execute process is confined to the district for which he is appointed, (Rev. St. U. S. § 787; Walker v. Lea, 47 Fed. Rep. 645,) unless in a case otherwise specially provided for by statute, or the lawful order of some court. The original exclusion act of May 6, 1882, (22 U. S. St. at Large, 58,) provided that Chinese unlawfully in this country should be removed by direction of the president. This provision is omitted from the act of September 13, 1888, and the removal is made a consequence of the judgment of the court or commissioner that such Chinese person is not entitled to remain in the United States; but no special direction is given in the statute for the removal of such person from the district in which he is convicted to the port of some other district for the purpose of carrying such judgment into execution. By section 1014 of the United States Revised Statutes it is provided that, when an offender is committed in "any district other than that where the offense is to be

tried, it shall be the duty of the judge of the district where such person is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had." It may be that in analogy to such a proceeding the United States district court for the southern district of California was possessed of authority to make an order directing the said Lee Yick to be removed from that district to some port of shipment beyond its limits, that he might be deported from this country, and could have lawfully committed him to its marshal for that purpose, or possibly the commissioner could have made such order; but the finding of the United States court commissioner, before referred to, is not equivalent to such an order, and without such order the marshal had no more authority to imprison Lee Yick in the northern district of California than he would have had to take him to New York or Alaska for the purpose of returning him to the country whence he came. It follows from this that Lee Yick was never lawfully committed to the jail from which the defendant is charged to have assisted him in making his escape; and this brings us to the point where we must consider whether the departure of Lee Yick from a jail in which he was confined in violation of law was a crime; for, if such departure was not a crime, the defendant was guilty of no offense in assisting him, without violence, to leave the place of his imprisonment, and the court erred in refusing to so instruct the jury.

2. It is contended by the attorney general that the question whether Lee Yick was or was not lawfully confined in jail is immaterial, and that the offense of assisting a prisoner to escape from jail is made out when it is shown that a defendant has assisted a person unlawfully confined therein to free himself from the restraint of a prison. In support of this proposition, it is argued that the purpose of the law is to throw a protection around jails, by making it unlawful for friends of those confined therein to proceed in any other manner than by the writ of *habeas corpus*, or other legal process, for the enlargement of such persons. We cannot accept this view. An escape is classed as a crime against public justice; and the law, in declaring it to be an offense, proceeds upon the theory that the citizen should yield obedience to the law; that, when one has been by its authority or command confined in a prison, it is his duty to submit to such confinement until delivered by due course of law, no matter whether he was committed to await a future trial or as a punishment after judgment of conviction, or for any other purpose authorized by law. But when the imprisonment is unlawful, and is itself a crime, the reason which makes flight from prison an offense does not exist. In such a case the right to liberty is absolute, and he who regains it is not guilty of the technical offense of escape. And this view seems to be the one which is adopted by the courts, without dissent from any. In the case of State v. Leach, 7 Conn. 452, the defendant was tried for an escape; and, it appearing that his imprisonment was illegal, the court held that the act, instead of being a crime, was justifiable, and further said: "It hence results that the keeper of the gaol is vested with no authority. The building in which the prisoner was confined is not a gaol, but, as to him, a mere private building, and hence he might regain his liberty, of which he was unjustly deprived; and it is no part of the case that he made use of more force than was necessary to accomplish this object." That there can be no escape, in the sense of the law, unless there was a lawful custody, is also held in Housh v. People, 75 Ill. 487; State v. Beebe, 13 Kan. 589; State v. Jones, 78 N. C. 420; 2 Bish. Crim. Law, § 1065. The cases cited by the attorney general are not in conflict with the conclusion we have reached, as an analysis of them will show. In Reg. v. Waters, 12 Cox, Crim. Cas. 390, the prisoner was arrested without warrant, taken before a magistrate, and remanded for three days. He broke out of the lockup and returned to his home, but appeared before the magistrate at the day fixed for his examination, and was discharged, because there was no evidence against him. He was then charged with the escape, and convicted. The conviction was sustained, the court holding that the magistrate had authority to remand him, and that he had escaped from a lawful custody. In this respect that case is like that of State v. Lewis, 19 Kan. 260, in which it was held that the lawfulness of the commitment did not depend upon the actual guilt or innocence of the prisoner, and that, even though innocent, it was his duty to remain until discharged by authority of law. State v. Murray, 15 Me. 103, was a case where there was an informality in the commitment, and the court held that this would not justify an escape. To the same effect is Com. v. Morihan, 4 Allen, 586. The distinction between these two latter cases and the one before us grows out of the wide difference which must necessarily exist between an imprisonment without any process, and wholly without authority of law, and an imprisonment under a process which is simply irregular in form; and this distinction is clearly stated and recognized in 2 Bish. Crim. Law, § 1094; Goodwin v. Griffis, 88 N. Y. 629; Dunford v. Weaver, 84 N. Y. 445. Indeed, for a mere irregularity in the form of a warrant or commitment, the court would not be authorized to discharge a prisoner on *habeas corpus*, (Pen. Code, § 1488;) and much less would the prisoner himself be justified in treating it with contempt, as he might do if it were wholly void, and incapable of amendment. The cases just referred to, as well as those in which the arrest of a person and his imprisonment for a limited time without any warrant or commitment are authorized by law, are clearly distinguishable from this, in which the alleged escaping prisoner was held without even color of authority. It may be stated, as the clear result of all the cases in which the point has arisen, that mere confinement within the walls of a

prison in violation of the law of the state is not an imprisonment from which it is a crime to escape if opportunity offers; and the court erred in refusing to give the instructions requested by defendant on this point. Judgment and order reversed.

We concur: McFARLAND, J.; PATERSON, J.; SHARPSTEIN J.; HARRISON, J.; GAROUTTE, J.

ALLINGHAM v. RIX *et al.* (No. 13,942.)

(*Supreme Court of California.* Dec. 19, 1891.)

REVIEW ON APPEAL.

Where there were no exceptions taken to the instructions, and the evidence warrants the finding of the jury, the verdict cannot be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by William Allingham against E. A. Rix and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Haggin & Van Ness, for appellants. *Cope, Boyd & Fifield*, for respondent.

FOOTE, C. In their reply brief the appellants abandon all the points made in their opening brief for the reversal of the judgment herein and the order refusing a new trial, except that "there is no evidence to sustain the verdict." There is no merit in that contention. There were no exceptions taken to the instructions given. Under them, upon the evidence for the plaintiff, the jury were warranted in returning their verdict. We therefore advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(92 Cal. 1)

TROMANS v. MAHLMAN *et al.* (No. 13,149.)

(*Supreme Court of California.* Dec. 19, 1891.)

REVIEW ON APPEAL — EVIDENCE—SPECIFICATIONS OF ERROR.

Where the specifications of the particulars in which the evidence was insufficient to sustain the findings of the trial court are too general, but there was but one specific issue tried in the case, such insufficiency is thereby cured.

In bank. Appeal from superior court, Alameda county; NOBLE HAMILTON, Judge.

Action by Joseph Tromans against Henry and Mary Jane Mahlman to recover land. Petition for rehearing denied. For decision on appeal, see 27 Pac. Rep. 1094.

Metcalf & Metcalf and *Benjamin Williams*, for appellant. *R. Percy Wright*, for respondents.

PER CURIAM. The petition for a hearing in bank is denied. In regard to the point urged in the argument and in the petition for a rehearing, that there was not in the statement on motion for a new trial any sufficient specification of the particulars in which the evidence was insufficient to sustain the findings of the superior court, we wish to add, to what is said in the opinion of the commissioner, that we should not regard these specifications as sufficient, except for the fact, disclosed by the statement, that all the facts of the case were settled by stipulation of the parties, except the single issue of residence of the Mahlmans on the demanded premises at the date of their declaration of homestead. In other words, the specifications, which are entirely too general in themselves, are aided by the fact that there was but one specific issue tried.

(92 Cal. 431)

WHALEY *et al.* v. KING. (No. 14,621.)

(*Supreme Court of California.* Dec. 21, 1891.)

MANDAMUS—JUSTICES OF THE PEACE—CONTINUANCE.

1. It was error to grant a continuance of a case on an oral statement of an attorney that material witnesses were absent from the county, and had not responded to letters and telegrams sent them.

2. Where a justice refused to proceed with the trial of a cause pursuant to Code Civil Proc. § 873, which provides that the trial must commence within one hour from the time fixed therefor, and continues the same, the remedy was by *mandamus* to proceed with the trial, rather than to dismiss the action.

In bank.

Application of Whaley and others for *mandamus* to a justice of the peace of Santa Clara county to dismiss a certain cause. Denied.

Lamar & Castle, for petitioners. *Wm. P. Veuve*, for respondent.

DE HAVEN, J. The petitioners are residents of the county of Santa Barbara, and are defendants in an action pending before the respondent, a justice of the peace for San Jose township, county of Santa Clara, and were present in said justice's court on July 27, 1891, the time fixed for the trial of said action. Upon that day, and more than one hour after the time fixed for the trial, the attorney for the plaintiff in the action moved for a continuance of the case. The petition alleges "that said motion for a continuance consisted in an oral statement that material witnesses were absent out of the county, and had not responded to letters written and telegrams sent to them," and that no other or further showing was made by oath or affidavit of any person, nor the name of any missing witness given, or any showing of diligence, etc. Thereupon petitioners demanded that the action be dismissed, and judgment of discontinuance given. This motion was denied, and that of the plaintiff therein for a continuance granted. The application here is for a writ of *mandamus*, commanding the said justice of the peace to dismiss the action. It is very clear that the respondent committed an error in granting the motion for a continuance without any affidavit or other legal evidence showing the necessity therefor, but the commission of an error in ruling upon such a motion does not authorize this court to direct that the action be dismissed because of such error. If a justice of the peace should refuse to proceed with the trial of a case, as required by section 873 of the Code of Civil Procedure, the remedy would be to obtain a writ of mandate compelling him forthwith to proceed with such trial, but upon the service of such a writ the justice would have still a right to entertain a motion for a further continuance, and, if sufficient cause was shown therefor in accordance with the provisions of the Code, he would be justified in granting it. Application for writ denied.

We concur: McFarland, J.; Garoutte, J.; Sharpstein, J.; Harrison, J.

(92 Cal. 427)

Coates v. Cleaves *et al.* (No. 13,992.)

(*Supreme Court of California.* Dec. 21, 1891.)

Ejectment — Pleading — Estoppel — Evidence.

1. Where a vendee of land, having entered under a bond for a deed and a contract that, if he failed to pay interest, the vendor might take possession without process of law, subsequently makes default in the payment of the interest, and notifies the vendor that he claims an adverse title, and records an instrument declaring that he surrenders to the vendor the bond for a deed, and all rights conferred thereby, a complaint by the vendor to recover the land need not aver a demand and refusal.

2. Under such circumstances the vendee is estopped to dispute the vendor's title.

3. The bond for a deed was competent evidence, especially when the vendee admitted its genuineness.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action to recover land by J. R. Coates against D. H. Cleaves and Hannah M. Cleaves. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

Chase & Miller, for appellants. *W. S. Tinning*, for respondent.

Temple, C. This is an action to recover the possession of real estate, in which plaintiff recovered judgment, and defendants appeal from the judgment and an order refusing a new trial. Appellants, who are husband and wife, entered into possession of the premises in controversy under a contract with plaintiff dated August 8, 1883, by which they agreed to purchase the same for the sum of $5,200, to be paid on the 8th day of August, 1886, with interest payable monthly. It was also stipulated as follows: "And it is further mutually agreed and contracted that, in consideration that the said obligees have immediate and absolute possession of said property, that, in case they do not pay said interest herein specified to the obligor, he may enter in and take possession thereof without process of law." Appellants have remained in possession ever since, and continued to pay the stipulated interest until about August 8, 1889, when they refused to make further payments, and notified plaintiff that they claimed title adversely to him. October 19, 1889, they executed, acknowledged, and recorded a formal instrument, by which they declared that they "do hereby and now surrender and turn over to J. R. Coates, of the above-named county and state, the bond for a deed, * * * and hereby relinquish and surrender unto the said J. R. Coates all rights and benefits transferred to us by said bond for a deed." After they repudiated the contract, plaintiff offered them $450 and a month's rent to leave, which they refused.

The complaint is sufficient. It was not necessary to aver a demand and refusal. The defendants entered under the plaintiff, agreeing to pay interest on the purchase price in place of rent, and expressly agreed that plaintiff could re-enter in case of a failure to pay. They repudiated the relation in the most formal manner, and set up title in themselves adversely to the plaintiff. In such cases, demand and notice are not necessary. Simpson v. Applegate, 75 Cal. 345, 17 Pac. Rep. 237. And the defendants are estopped from denying the plaintiff's title. Tyler, Ej. 558; Hicks v. Lovell, 64 Cal. 20, 27 Pac. Rep. 942. There was no deceit or fraud, and no failure of title. It seems there was outstanding a claim to an undivided interest in the property which the defendants purchased. This outstanding title or claim was known to the defendants when they entered into the contract. The defendant Hannah M. testified that she called attention to this outstanding title at the time they received the bond, and plaintiff promised to purchase it; otherwise she would not have accepted the bond. Whether failure to buy up this title would release defendants from their contract, or whether plaintiff could compel defendants to convey the same to him upon paying the purchase price, is not involved in this case. There was no error in admitting the bond in evidence. It was enough that it was executed by plaintiff, accepted by defendants, and possession taken under it. Besides, defendants admitted its genuineness in their testimony. The finding that plaintiff was the owner, was a sufficient finding that defendants were not; and, besides, defendants were estopped from claiming title. We advise that the judgment and order be affirmed.

We concur: Foote, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(92 Cal. 437)

Ohm v. City and County of San Francisco *et al.* (No. 12,689.)

(*Supreme Court of California.* Dec. 23, 1891.)

Mexican Grants—Adverse Title — Statute of Limitation.

1. In an equitable action to have the title of certain land in the city of San Francisco transferred to plaintiff, to have an accounting of the rents and profits thereof, and to charge defendants with the same, the complaint alleged that, prior to the conquest of California by the United States, the person from whom plaintiff derived title applied for a grant of the land in question, in area 800 varas square, to the prefect of the pueblo of Yerba Buena, (now San Francisco,) who, as required by law, referred the application to the alcalde, who reported the land vacant, and that the applicant had the necessary qualifications, but recommended that only about

50 varas square be granted, whereupon the prefect made a grant of 800 varas square; that the grantee entered into possession thereof, and, after the conquest, presented his claim to the board of commissioners created by congress to ascertain and settle private land claims in California; and that his title thereto was finally confirmed in 1859 by the district court of the United States. The city of San Francisco also presented its claim to land which included the land in controversy, and its claim was confirmed after the confirmation of such grantee's claim. The prefects of pueblos were adjudged by the California courts devoid of authority to grant lands in private ownership. *Held*, that the title of such grantee was adverse to that of the city of San Francisco as successor of the Mexican pueblo of Yerba Buena, as Act Cong. March 3, 1851, which created the land commission, provided that grants confirmed in accordance with that act would be conclusive against the United States and those claiming under them, but not against third persons.

2. Conceding that the allegations of the complaint on which the prayer for equitable relief is found are mere surplusage, and regarding the action as one at law for the recovery of the land, with its rents and profits, plaintiff has no right of action under St. 1863, p. 325, barring the holder of an imperfect title of Mexican origin after an adverse possession of five years, since the city and those claiming in privity with it have been in adverse possession of the land since before 1859, and plaintiff did not bring his action until 1885.

3. Conceding that the grant was made by an agent of the pueblo, and conveyed the pueblo title, plaintiff's right to maintain the action has been long since barred, as immediately on the confirmation and grant of the pueblo lands to the city of San Francisco by Act Cong. March 8, 1866, (14 St. at Large, 4,) the title either inured to plaintiff *ipso facto*, or his right to compel a conveyance from the city as his trustee accrued; and at that date St. 1863, p. 325, began to run.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Edward F. Ohm against the city and county of San Francisco and others. Judgment for defendants. Plaintiff appeals. Affirmed. For former hearing, see 25 Pac. Rep. 155.

A. Everett Ball and *J. M. Kinney*, for appellant. *Pillsbury & Blanding* and *Wm. S. Barnes*, City Atty., for respondents.

BEATTY, C. J. This is a suit in equity, instituted against the city of San Francisco and a large number of private parties, for the purpose of obtaining a decree ordering, adjudging, and declaring: *First.* That the plaintiff is the successor in interest of one Peter T. Scherrebeck, and as such the equitable owner of a tract of land 800 varas square, situated in the heart of the city. *Second.* That the United States, in conveying the premises to the city and county of San Francisco, did so in trust for the plaintiff, thereby imposing upon said city and county the duty of conveying the same to him. *Third.* That said city and county, as successor of the Mexican pueblo of Yerba Buena, is, with respect to said premises, bound by the acts of the various officials of the former government prior to the conquest, and by the acts and declarations of the United States and its military and other officers pending and since the conquest. *Fourth.* That said city and county, and the numerous private parties who are alleged to be in possession of the premises, and for that reason united as defendants in the suit, be adjudged to hold and to have held such possession with full notice of the equities of the plaintiff, his grantors and predecessors, and directed to convey their interest and surrender the same to him; that, if they refuse so to do, commissioners be appointed to execute such conveyances, and also to take an account of the rents and profits of the premises, and that defendants be charged therewith. Some other specific relief is asked, and there is a prayer for general relief, but the foregoing epitome of the prayer of the complaint is sufficient to indicate the nature of the action. The defendants demurred to the complaint upon numerous grounds, and their demurrers were sustained, whereupon final judgment was rendered in their favor. From this judgment the plaintiff appeals, and the question to be determined is whether the complaint is insufficient in any of the particulars stated in the demurrers.

For the purpose of this inquiry it is necessary to state at least the substance of the complaint, which it is to be observed is extremely prolix and redundant, especially in its allegations of matters of law, as to which it is not always strictly accurate. It is alleged that the state of California was, prior to July 13, 1848, a political department of the republic of Mexico, and was subdivided into pueblos, constituting political municipalities, supplied with such officials as the republic or governor of the department chose to appoint. That such officers could grant and distribute lands of the municipalities. That the pueblo of Yerba Buena, or San Francisco, was one of such municipalities, and was provided with a prefect appointed by the republic and the governor of California, and empowered, among other things, to make grant and distribution of land to private persons in fee within his district and said municipality. That there was also an alcalde of said pueblo, who had power to represent the community, and express its will as to the propriety of granting lands within the pueblo, and whose acts were binding, unless reversed on appeal to the governor. That at all times mentioned in the complaint prior to the conquest Manuel Castro was prefect and Jose de la Sanchez was alcalde of said pueblo. That prior to the grant hereinafter mentioned the land therein described was vacant, and within the boundary and jurisdiction of said pueblo, and subject to grant by said prefect. That Peter T. Scherrebeck, a resident and naturalized Mexican citizen, presented to said prefect the following petition: "Senor Prefect of the 2d District: I, Peter Scherrebeck, a native of Denmark, a citizen of Mexico, and a resident of this place, appear before your honor, and respectfully represent that, desiring to devote myself to agricultural pursuits, and also to establish a dairy, for which purpose I am in need of a suitable piece of land, I pray your honor, in the exercise of your powers, to be pleased to grant me the place called 'Rincon,' which is situated one-fourth of a league southerly from this place, containing one-half league, bounded by the beach and the wood, as explained in the accompanying sketch. Wherefore, I beseech you to accede to my petition, whereby I should receive favor," etc. "Yerba Buena, Nov. 24, 1845. [Signed] PETER SCHERREBECK." Thereupon said prefect, on receipt thereof, indorsed thereon as follows: "Yerba Buena, Nov. 25, 1845. The chief local authority of this place will report whatever he may deem convenient upon the contents of this petition. [Signed] CASTRO,"—and delivered the same to the said pueblo; and said pueblo of Yerba Buena, by its officer aforesaid, J. de la Sanchez, in its behalf, and as by law authorized, reported to the said prefect the following, to-wit: "Senor Prefect of the 2d District: In obedience to the supreme decree of your honor, I should report that the land which the party in this representation solicits is vacant; that the petitioner possesses the requisite qualifications to be heard, notwithstanding this '*juzgado*' is of the opinion that only land upon which to build a house and *corral* and to plant can be granted to him, upon which questions your honor will determine whatever you may deem most proper. Yerba Buena, November 26, 1845. [Signed] J. DE LA C. SANCHEZ." Which report, with the petition, was made and returned to the said prefect, who thereupon, by and with consent and approval of the pueblo of Yerba Buena and the governor of the territory of California, and approval of the republic of Mexico, granted and confirmed to the said applicant the lands petitioned for,—a tract of 800 varas square; the line bounding the same to correspond with the points of the compass bearing north and south and east and west, as adopted in official surveys, the central and initial central point being an oak tree which stood at the point now known and designated on the official map of the city and county of San Francisco as the "South-West Corner of Third and Harrison Streets;" the grant so made being in words and figures following: "In view of the present petition, the report of the municipal authority of Yerba Buena, and other proceedings had by virtue of the power invested in me by the law of the 20th of March, 1837, I grant to Don Pedro Scherrebeck the ownership of the place called 'Yerba Buena,' to the extent of 800 varas square, he being subject to pay the tax that may be assessed to him by the most excellent departmental assembly. Let this *expediente* be returned to the party interested, serving him as a title, that he may take possession of said land. The undersigned prefect thus decreed, orered, and signed in the pueblo of San Jose, this 5th day of December, 1845. [Signed] MAN'L CASTRO." Which said grant was at date of issuance duly recorded by the prefect in the archives and registers of said prefecture, as provided by law, and as was the custom in such cases. That the said prefect, on the 5th day of December, 1845, at the said Yerba Buena, delivered the *expediente* of the grant last described and named to the said Pedro T. Scherrebeck, who is the same person elsewhere called in this complaint Peter T. Scherrebeck, who thereupon, with the knowledge, consent, and approval of the authorities of said Yerba Buena, and especially that of the said Jose de la Sanchez, without objections from any one whomsoever, was placed in possession of the said 800 varas square, with its metes and bounds established, the same being the property granted to him as aforesaid by said Jose de la Sanchez, who was by the law invested with the power of placing parties in legal possession of property granted to them in said Yerba Buena; and said Peter T. Scherrebeck thereupon entered into the occupancy and possession of the said 800 varas square, granted as aforesaid, and described in the *expediente* heretofore set forth, it being the same 800 varas before described, located by measuring from an initial point now described as the "South-West Corner of Third and Harrison Streets," according to the present official map of the city and county of San Francisco, and running four lines with the points of the compass, as officially recognized by surveyors, 400 varas distant therefrom in each direction, and measuring the same by parallels drawn from the terminal points of the said four lines, so as to include 800 varas square, with said initial point in the center thereof.

It is further alleged that said Scherrebeck inclosed, improved, and occupied said premises, his occupation and ownership being recognized and respected by the government, the pueblo, and all other persons, until the cession of the territory by the treaty of peace between Mexico and the United States. The complaint then alleges the war, the conquest, the treaty and cession, the military proclamations pending the conquest, the terms and effect of the treaty, the admission of California as a state, the obligations she assumed, etc. Next are alleged the several and successive acts of the legislature incorporating the city of San Francisco in 1850 and 1851, and consolidating the city and county in 1856, and it is alleged that within the boundaries established by each of these acts was included said 800 varas so granted to Scherrebeck, and a part or all of the former pueblo. Next is alleged the act of congress of March 3, 1851, to expedite the settlement of private land claims in California, with the pleader's construction of it. It is next alleged that said city, in July, 1852, as trustee of said Scherrebeck, under said last-mentioned act, presented to the commissioners thereby created its claim for 4 square leagues of land, including said 800 varas, prosecuted the same to final decree of confirmation, and obtained a patent for said four leagues in June, 1883, which it took as trustee for plaintiff to the extent of said 800 varas. It is next alleged that, pending said proceedings for confirmation, the said city and county of San Francisco disputed with the said grantee touching the exact location of the said 800 varas square, and the fact of the grant aforesaid, when and whereupon the said grantee presented his petition to said board of land commissioners in his own behalf, praying confirmation and location thereof, etc.; that his claim was finally confirmed and exactly located by decree of the district court in December, 1859. It is next alleged that, pending said confirmation, the city and county of San Francisco assumed the management, control, and occupancy of said land by itself and those holding under it, and does yet control, hold, and enjoy the same, together with the rents, issues, and profits thereof, by itself and the other defendants; that the reasonable value of said use and occupancy is $1,500,000 to August 1, 1885, and $250,000 per month since that time; that plaintiff is successor to Scherrebeck; and that the defendants, and each of them, and their predecessors, have at all times had full knowledge of the relation of trust and confidence existing between the city and county of San Francisco and the plaintiff and his predecessors. Therefore plaintiff prays, etc.

In considering the objections to this complaint, we remark at the outset that its allegations are accepted as true so far only as they relate to matters of fact as distinguished from matters of law. As to the latter, they will be treated as if they were not made, because, so far as they are correct, they are useless, and, when erroneous, worse than useless. This remark applies not only to the allegations respecting the laws enacted and in force since the conquest and cession of California, but also to the laws of Spain and Mexico, which were in force prior thereto. As to the former, we do not understand counsel for appellant as contending for a different rule; but, as to the laws of Spain and Mexico relating to the powers and duties of prefects and other officials respecting the granting of lands, etc., he seems to contend that for the purposes of this appeal the allegations of the complaint must be taken as true. If such is his contention, we cannot accede to it. We understand that our legal tribunals, in adjudicating upon rights originating under and depending upon the laws of Spain and Mexico in force in California prior to the conquest, take judicial notice of such laws in the same manner and to the same extent that they take notice of the common law of England as a part of our own municipal law. The municipal laws of a conquered territory do not cease to exist by reason of the conquest and change of sovereignty, but continue in force so far as they are not repugnant to the paramount laws of the new sovereign, until changed by the legislature. This results from the absolute necessity of preserving the rules by which private rights are governed. Such laws, therefore, become and remain, until repealed or altered, the municipal law of the new sovereignty, which its courts are bound to notice and to enforce. Upon the same principle, and with the same necessity, it results that, so far as private and vested rights of the inhabitants of the conquered territory are dependent upon the exercise of official power by the functionaries of the former government, the rules defining such power must be noticed in the same way. For such purposes they are not to be treated as foreign laws, and alleged and proven as facts. Fremont v. U. S., 17 How. 547. Looking, then, to the complaint for facts, and to other proper sources for the law, we proceed to consider the principal points made in support of the demurrer.

First. It is contended by the respondent that the grant of Sherrebeck, under which the plaintiff claims, is void, and that it conferred no rights upon the grantee, and gives none to the plaintiff as his successor. We do not think this proposition can be sustained in its full extent. The facts alleged as to the making of the grant, the possession under it, the presentation of the claim to the land commission, and its final confirmation by the district court, show a grant which is valid, at least against the United States and all persons claiming thereunder, although not conclusive against the third persons mentioned in the act of congress of March 3, 1851.[1] And, with respect to this grant, we think the city of San Francisco, as successor to the pueblo, and those claiming under the city, are such third persons. In other words, we think it clearly appears from the complaint that the grant to Scherrebeck was not made by the prefect as an officer of the pueblo, empowered to transmit its title, but that it was made by such prefect by authority from and approval of the governor of the department by virtue of his superior power to grant vacant lands within the boundaries of the pueblos, irrespective of their claim to hold and to dispose of them. We think it was and continued to be a grant held under a title adverse to that of the pueblo. We cannot find in any of the laws or ordinances of Spain and Mexico to which we have been referred any authority conferred upon prefects to make grants in fee of the pueblo lands. It is not contained in the decree of the Spanish cortes of January 4, 1813; nor in the Plan of Pictic; nor in the Mexican law of colonization of 1824; nor in the regulations of 1828; nor, we think, in the law of March 20, 1837, to which the prefect himself refers as the source of his authority. The clause of this act cited and relied on by appellant is given in the original Spanish and in translation at page 314, addenda, Dwinelle's Colonial History of San Francisco. In terms it merely authorizes the prefects in their respective districts to "regulate executively" the distribution of the common lands of the pueblos, provided there are no lawsuits pending in the courts concerning them, saving a right of appeal to the governor. The law-writers do not agree in their construction of this article. Dwinelle thinks it conferred authority to make grants of the pueblo lands for the pueblo. Halleck thinks that it merely conferred a power to regulate the temporary use of the common lands. This court has decided that it did not expressly confer power to grant lands in private ownership. Hart v. Burnett, 15 Cal. 530. As a matter of history, it is known that the prefects very rarely attempted to exercise such power,—not more than two or three instances, including this grant to Scherrebeck, appearing in the records of San Francisco, and one of those subsequent to the conquest, by Horace Hawes. It is also well known as a fact and as matter of law that the claim of such power by the prefects has been repudiated by the city from the beginning. The complaint here shows that the validity of this Scherrebeck grant was denied by the city as early as 1853, and ever since. The Van Ness ordinance, passed in 1855, and ratified by the legislature in 1858, practically confirmed all previous grants of pueblo lands made by any *ayuntamiento*, town council, alcalde, or justice of the peace of the former pueblo or of the city, but was entirely silent as to grants by prefects. Even the allegations of the complaint do not show that the prefect had power as agent, and acting in behalf of the pueblo, to alienate its lands in fee. He is said to have authority to make grant and distribution of lands within the pueblo limits, but this power may have been derived from the departmental authorities, and exercised independently and against the will of the municipal authorities. And this appears to have been the case with the Scherrebeck claim. The making of the grant was opposed by the alcalde, the only municipal officer who appears to have had anything to do with it; but it was approved by the governor and the superior authorities.

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[1] Creating a board of commissioners to ascertain and settle private land claims in California, and permitting an appeal from the board to the district court of the United States, and providing that grants confirmed in accordance with the act were conclusive merely against the United States and those claiming under them, but not against third persons. 9 St. at Large, 631.

The strongest proof, however, of the real character of this grant is found in the circumstances of its presentation to the land commission, and its confirmation by the district court. The city of San Francisco, as successor to the pueblo, had already, in conformity with its right and duty under the act of congress of March 3, 1851, presented its claim to four leagues of land for confirmation by the land commission. Meantime it was denying and repudiating the Scherrebeck claim. In consequence of this dispute the Scherrebeck claim was presented by the grantee, and, pending the confirmation of the city's claim, that of Scherrebeck was in 1859 confirmed by the district court on appeal from the commission. This shows that it was regarded and treated as a claim of a third party, adverse and hostile to that of the city; for the land commission had no jurisdiction, pending the confirmation of the claim of a city or town to lands of a former pueblo, to adjudicate a controversy between the city and the claimant of a grant from the pueblo as to the validity of such grant. Its function was to determine what claims were good against the United States under the treaty of cession. It had nothing to do, except incidentally, with subordinate controversies between the holders of such claims and those claiming under them. Possibly, if a city, as successor to the right of a pueblo, had neglected to present its claim for confirmation, it might have been allowable for one or more holders of pueblo titles, in behalf of themselves and others, to petition for a confirmation of the pueblo claim. But when the city was itself proceeding with its application for confirmation of its claim to the entire four leagues of pueblo lands, we cannot see how, under the law, the holder of a pueblo grant of a smaller parcel could be allowed to proceed in his own behalf, and still less how he could procure from the land commission or the district court a conclusive adjudication that his grant from the pueblo was valid. We do know, on the contrary, as a part of the judicial history of the state, that such individual claims to pueblo lands were frequently presented for confirmation, but were always held to be claims adverse to the city, and confirmed as such. When so confirmed, the question of superior right was left to be determined in the ordinary tribunals, where its determination properly belongs. Of many instances of such claims to tracts of lands situated within pueblo boundaries, and held under grants from the governor and departmental authorities, we cite those litigated in Leese v. Clark, 18 Cal. 535; Lynch v. Bernal, 9 Wall. 315; Steinbach v. Moore, 30 Cal. 505. Our conclusion from all the facts alleged in the complaint is that this claim of Scherrebeck, as confirmed by the district court, stands in the same relation to the city's claim as successor to the pueblo as did the claims above referred to. It is, and always has been, a claim adverse and hostile to that of the city, and the city's claim is adverse and hostile to it. There is no relation of trust between the city and its grantees on the one side and the plaintiff on the other. The city never has held any legal title in trust for the plaintiff, and there is nothing to support this suit in equity, or to justify the granting of any of the specific relief asked. The whole case amounts simply to this: that the city and its grantees are holding the land in controversy under one title, and the plaintiff is claiming it under an independent and adverse title. His remedy, therefore, is by an action at law for the recovery of the land, and not by a suit in equity to compel the transfer of a title under which he can claim nothing. The demurrer was therefore properly sustained on this ground.

Second. Even if it were conceded, as appellant seems to claim, that all the allegations of his complaint upon which is founded the prayer for equitable relief can be treated as surplusage, and the action regarded as one at law for the recovery of the land with its rents and profits, it would still follow that the demurrer was rightly sustained, on the ground that such an action had been barred by sections 318, 319, of the Code of Civil Procedure, long before this action was commenced. The character of plaintiff's claim or title has not changed since 1859. Such as it was then it still continues,—an inchoate title, unperfected by survey and patent. The city and those claiming in privity with it have been in adverse possession of the demanded premises ever since a date prior to 1859, and this action was not commenced until 1885. Five years of adverse possession at any time since the passage of the act of April 18, 1863, (St. 1863, p. 325,) bars an action by the holder of an imperfect (unpatented) title of Spanish or Mexican origin. San Jose v. Trimble, 41 Cal. 536; Gardiner v. Miller, 47 Cal. 576; Montgomery v. Bevans, 1 Sawy. 681; Henshaw v. Bissell, 18 Wall. 269.

Third. These reasons are sufficient to compel an affirmance of the judgment. But the same result would follow if it were allowed that under a proper construction of the complaint the Scherrebeck grant was made by an agent of the pueblo, and conveyed the pueblo title; for, if so, the moment the city's claim to the pueblo lands was confirmed, the title either inured to the plaintiff *ipso facto*, or his right to compel a conveyance from his trustee accrued. If the theory of the complaint is correct, that the final confirmation of the pueblo title and the grant from the United States in pursuance of such confirmation invested the city of San Francisco with the legal title, in trust for plaintiff, as to the Scherrebeck claim, and if it is true, as alleged, that the city had denied the validity of the grant years before, then certainly the right to sue for a conveyance—the right, in other words, to maintain this action—at once accrued, and the statute of limitations began then to run against it. But the pueblo title was confirmed and the lands granted to the city by the act of congress of March 8, 1866, (14 St. at Large, 4.) The previous grant contained in section 5 of the act of July 1, 1864, (13 St. at Large, 332,) was not, in terms, a confirmation of the pueblo title, but merely relinquished to the city the title of the United States to the lands within the corporate limits as established by the act of 1851, and the conveyance was expressly made for the uses and purposes specified in the Van Ness ordinance, which, as we have seen, did not recognize grants by prefects. It is probable that the plaintiff could not have maintained this action on his own theory of his relations to the city under the act of 1864; but under the act of 1866 he certainly could have done so, unless he admits that by the terms of that act he was excluded from the benefit of the confirmation; and if he makes this admission he gives up his entire case, for what that statute took away no subsequent patent issued by the executive department of the government could possibly restore. His right, then, to commence and maintain this action, if it has ever existed, accrued in 1866, and, however it may be classed, whether as an action to recover land or otherwise, it was barred long prior to 1885. And so, also, if we assume that the grant to the city inured to plaintiff's benefit, passing the legal title to him without the necessity of any further conveyance from the city, (as we think it would have done if his grant had been from the pueblo,) his right to maintain an action at law against those in possession then immediately accrued. The legislative grant was for every purpose as effectual as the patent, so far as the transfer of the title is concerned. All that the patent added was a convenient method of proving the exact boundaries. By the grant the title was perfected, and the statute of 1863 then began to run. It is true that the act makes the issuance of a patent final confirmation of a Mexican grant, but the act does not, by its terms, postpone the running of the statute until final confirmation. On the contrary, it declares that the time shall run irrespective of final confirmation, and it is only by a construction imposed upon the statute by the courts that five years is allowed for suit on a Spanish or Mexican title after it has been perfected. The usual mode of perfecting such titles is, of course, that which is mentioned in the statute, *i. e.*, survey and patent; but when title is perfected by act of congress, the same construction of the act which sets it in motion upon issuance of the patent would set it in motion upon the passage of the act, the reason therefor being in each case the same, viz., that the perfection of the title by grant from the United States in any form confers a new right of entry and a new cause of action. That legislative grants have all the effect of a patent, see the following cases: Montgomery v. Bevans, 1 Sawy. 653; Harris v. McGovern, 2 Sawy. 515; Palmer v. Low, 98 U. S. 16, 17, and cases there cited; Tripp v. Spring, 5 Sawy. 210. Many other decisions might be cited to the same effect, but we do not deem it necessary. There are other objections to the complaint, but they need not be discussed. For the reasons above given, the judgment of the superior court is affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.; DE HAVEN, J.; PATERSON, J.

HARRISON, J., being disqualified, did not participate in the foregoing opinion.

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92 Cal. 482

PEOPLE v. WILLARD. (No. 20,823.)

(*Supreme Court of California.* Dec. 28, 1891.)

PROOF OF MARRIAGE—TRIAL—REMARKS OF COURT—CONVICTS AS WITNESSES—ATTENDANCE—RECEIVING STOLEN GOODS—EVIDENCE.

1. Where defendant was indicted for receiving goods stolen by W., and the question was whether defendant was the wife of W., her admission of a former marriage, refusal to disclose the name of her former husband, and failure to show a dissolution of the marriage in any manner, were sufficient to discredit her statement that she was single at the date she claimed to have married W., and sufficient to warrant the jury in finding that her marriage with W. was unlawful.

2. In ruling against an objection to the admission in evidence of letters from W. to defendant, it was error for the court to state in the presence of the jury that his chief reason for admitting them was that defendant had several times contradicted herself on the record.

3. Code Civil Proc. §§ 1878-1881, make convicted felons competent witnesses. Const. art. 1, § 13, confers on defendants in criminal cases the right to have the process of the court to compel the attendance of witnesses. Pen. Code, § 1567, provides that a person imprisoned in the state-prison may, on order for that purpose, be brought before a court sitting in another county. *Held*, that where notice had been given to the state of an application to produce W. from the state-prison to testify on behalf of defendant, and it was clearly shown that his testimony was the only evidence obtainable, and would exonerate defendant, the application should have been granted.

4. Where the information alleged that the property was received on or about December 8,

1888, and the evidence showed that it was stolen between the 7th and 11th of December, and the purpose was to show guilty knowledge by defendant on December 8th, it was error to admit evidence that other articles found in the house occupied by defendant and W. on March 11, 1889, had been stolen by reason of burglaries committed subsequent to December 8th.

In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Information against May Willard for receiving stolen goods. Verdict of guilty, and judgment thereon. Motion for new trial denied. From the judgment, and the order denying such motion, defendant appeals. Reversed.

J. W. Taggart and *W. S. Day*, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

BEATTY, C. J. Appeal from a judgment of conviction on a charge of receiving stolen goods, and from an order denying defendant's motion for a new trial. A preliminary statement of the leading facts of the case is necessary to a proper understanding of the points urged in support of the appeal. For about 18 months prior to March 11, 1889, the defendant and one Frank Willard lived together in the city of Santa Barbara, holding themselves out as man and wife; and the defendant claims that they were in fact married by contract in San Bernardino in August, 1884, and from that time openly assumed towards each other the mutual relations of husband and wife. The people, on the other hand, contend that they were not married, but were living in a meretricious relation. The rulings of the court as to the evidence offered upon this matter present one of the principal questions in the case. While the defendant and said Willard were so living together under the assumed name of Strohm, during the months of November and December, 1888, and January, February, and March, 1889, a series of burglaries was committed in Santa Barbara, and a large quantity of personal property was stolen. On the morning of March 11, 1889, officers with search-warrants visited the house occupied by defendant and said Frank Willard, and found most of the stolen property therein. The principal portion was found packed in two ordinary packing-cases, which were nailed up preparatory for shipping. The remainder was found in two or three trunks, along with articles of wearing apparel, etc., of defendant and said Frank Willard. One of these trunks was claimed by defendant, and in it were found various articles belonging to Mrs. Hazard, described in the information upon which she has been convicted. Informations against Frank Willard for burglary were filed, upon two of which he was convicted, and sentenced to be imprisoned at Folsom for a long term of years. At the same time an information was filed against the defendant, charging her with receiving certain property stolen from one Williams at about the same time the Hazard property was stolen. Upon this information she was tried and acquitted. Thereafter the present information was filed, charging her with receiving the Hazard property, to which she interposed a plea of not guilty, and a further plea of former acquittal,—or of former jeopardy, as her counsel denominates it,—claiming that the two charges of receiving the Williams property and the Hazard property include the same identical offense, making an acquittal on the first information a bar to any conviction on the second. At her first trial, Frank Willard testified as a witness in her behalf to the effect that he had brought the stolen property into the house in her absence, had packed most of it in the packing-cases and nailed them up, and without her knowledge had put a few articles in her trunk, which was open and to which he had a key. The jury at this trial failing to agree, the case was again set for trial; and, Frank Willard having in the mean time been confined in the state-prison at Folsom, defendant applied to the superior court for an order for his attendance at the trial as a witness in her behalf. Her application being refused, she moved in this court for a writ of mandate to the superior court, commanding it to make such order for the attendance of Frank Willard as a witness. After a hearing this court refused to issue the writ upon the ground that the making of such orders is a matter of discretion which cannot be controlled by mandate. Willard v. Superior Court, 82 Cal. 456, 22 Pac. Rep. 1120. Thereupon the defendant caused Frank Willard's deposition to be taken, which was used on her trial, and the jury again disagreed. The case was then set down for trial a third time, whereupon defendant renewed her application to the superior court for an order for the attendance of Frank Willard as a witness. The court again refused to make the order, and such refusal is one of the errors assigned in support of her appeal. With this preliminary statement, we proceed to consider the points which counsel have urged in the argument.

It is not by any means clear that the bill of exceptions in this record is sufficient to enable us to review the ruling of the superior court on defendant's application for an order for the attendance of Frank Willard as a witness; but, since the judgment must be reversed and the cause remanded upon other grounds, and since this question must again arise in the further progress of the case, we consider it better to disregard respondent's objections to the record in this particular, and to pass upon the merits of this question. Convicted felons are by the statute made competent witnesses, (Code Civil Proc. §§ 1878-1881;) and Const. art. 1, § 13, confers upon defendants in criminal cases the right "to have the process of the court to compel the attendance of witnesses" in their behalf. Before the law was so amended as to allow convicted felons to testify, prisoners awaiting trial, and others not rendered infamous by conviction of felony, were competent witnesses; and there was a common-law writ of *habeas corpus ad testificandum*, which was the appropriate process for securing their attendance in court. Bac. Abr. "Habeas Corpus."

By the Code provisions above cited, prisoners after conviction were put upon the same ground as prisoners awaiting trial, with respect to their competency as witnesses; and the same process that will compel the attendance of the latter will compel the attendance of the former. Section 1567[1] of the Penal Code, so far as it relates to the attendance of witnesses, provides for an order exactly equivalent to the writ of *habeas corpus ad testificandum;* and, as will be seen by reference to its terms, it is made equally applicable to the case of a prisoner in the state-prison and a prisoner in the county jail. We think the power conferred by this section of the Code should be exercised under the same circumstances and with the same restrictions under which the common-law courts were accustomed to issue the writ of *habeas corpus ad testificandum.* In order to procure the issuance of that writ, it was necessary to make an application to the court or judge; and it was necessary to make a strict showing of the materiality of the testimony, and the necessity of securing the attendance of the prisoner as a witness. Bac. Abr.; Tayl. Ev. § 1272 et seq. We feel that this is a privilege extended to persons accused of crime which is capable of gross abuse, unless strictly guarded, and we do not wish to be understood as holding that the order should be made except upon a very strict showing, and upon previous notice to the state of the application; but when such notice has been given, and a case of apparent necessity is made out, or, in other words, when the materiality of the evidence and its importance are clearly and satisfactorily shown, and the good faith of the defendant making the application also appears, the court should, in the exercise of its discretion, make the order for the attendance of the prisoner as a witness. In this case it was shown, among other things, that Frank Willard and defendant were the occupants of the house in which the stolen property was found, and that she could prove by him, and no other person, that she had not received it. She set out specifically the testimony he had given on her first trial, which, if true, completely exonerated her. It covered the whole issue in the case, and completely rebutted the charge against the defendant. It was the only evidence obtainable. It related to matters of detail of considerable variety and complication. It was to be offered in rebuttal to testimony of the state which was liable to vary in its details from that previously given. We think this presents a case upon which the court ought properly, in the exercise of its discretion, to have ordered the attendance of the prisoner as a witness. We wish to be understood as expressing ourselves upon this point very guardedly, in order not to open the door to the abuse of the right which the statute and constitution seem to confer.

The information in this case alleges that the property of Mrs. Hazard was received by the defendant on or about the 8th day of December, 1888; and the evidence shows that it was stolen between the 7th and 11th of December. For the purpose of showing that it was received by the defendant with a guilty knowledge that it had been stolen, the prosecution introduced evidence that a large number of other articles found in the house occupied by defendant and Frank Willard on the 11th of March, 1889, had been stolen by means of burglaries committed, some of them prior to December 8th, and some of them subsequent thereto. The defendant objected to the evidence in regard to subsequent burglaries on the gound that they, and the possession of their fruits, could have no tendency to prove guilty knowledge on December 8th. The evidence was admitted over her objection, and she duly excepted. We think the court erred in this ruling. There is no doubt that, when a defendant is shown to have received stolen goods from a thief, evidence of previous dealings with the thief in like transactions is competent to show that defendant at the time knew that the property had been stolen; but we have been cited to no authority, and we know of none, which holds that evidence of subsequent dealings is admissible. Several of the cases cited by respondents show that such evidence is not within the rule, and the reason for the distinction is manifest. The question to be determined is as to the state of mind of the receiver at the date of the receipt, and subsequent dealings can throw no light upon that. It is no answer to this proposition to say that the only evidence of the receiving of the stolen property by defendant was the finding of it in her possession on March 11, 1889,—a date subsequent to any burglary proved. It is true that this evidence did not necessarily show that she had received it before that day. Indeed, it does not by itself prove anything else; but the circumstances of the case, including the manner in which defendant and Frank Willard were living together during the time when the burglaries were committed, might have warranted the inference that he gave to defendant the property stolen from different houses at the time of the respective burglaries. And this, indeed, was the theory upon which the prosecution rested; for if it had been claimed that the goods were received on or about March 11th the defendant's plea of former acquittal could not have been avoided. The same proof, and the only proof, of a receipt of the Hazard goods on or about March 11th, equally proved a receipt of the Williams goods at the same time; and, if both were received at the same time, it was one offense, and the acquittal on the first charge was a bar. People v. Stephens, 79 Cal. 428, 21 Pac. Rep. 856. The prosecution was therefore driven, in order to obviate the plea of former acquittal, to proceed upon the theory that the property described in the information was received at or about the time it was stolen; and that such was the theory of the case for the people is clearly demonstrated by the instructions given to the jury at their request, as well as by the argument here. We are not to be understood as denying that there was evidence to sustain a finding to that effect. All we decide is that, on that theory of the case, evidence of the matters coming to the knowledge of the defendant subsequently to the date charged and relied on was not competent to prove guilty knowledge, and its admission was error.

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[1] Section 1567 provides that persons imprisoned in the state-prison may, on order for that purpose, be brought before a court sitting in another county.

It is contended by the appellant that the evidence shows that she was the wife of Frank Willard, and therefore could not be guilty of receiving stolen goods from him. The law of this proposition is conceded by the state, but the fact is denied. We think there is evidence to sustain the implied finding of the jury against a lawful marriage. The admission by defendant of a former marriage, her refusal to disclose the name of her former husband, and her failure to show a dissolution of the marriage by death, divorce, or disappearance, were sufficient to discredit her naked statement that she was a single woman at the date she claims to have been married to Willard. The letter, Exhibit B, if written by Willard and received by her, also tends to prove a meretricious union. We think the evidence was sufficient to show that it was so written and received. It was postmarked Los Angeles, and directed to defendant at San Diego, at a date when he is shown to have been at the former and she at the latter place. It begins, "My darling little wife," is signed "Frank," and was found in her possession among a number of other letters addressed to her.

The court, in ruling upon an objection to the admission in evidence of the letter, Exhibit B, in commenting upon the testimony of the defendant in relation to it, remarked in the presence and hearing of the jury that "she had contradicted herself several times in the record," to which language the defendant excepted. Whereupon the court reiterated the statement, adding: "That is the chief reason why I admit those letters in evidence." We do not think these remarks were necessary to explain the ruling of the court, and we do think that, unretracted and unexplained, after they had been objected to, they must necessarily have prejudiced the case of the defendant. She was her own sole witness, and in effect the jury were told by the court that she was unworthy of credit. Even if her self-contradictions had been much more evident than they appear to us, the judge should not have given his opinion to the jury that she had sworn falsely. "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Const. art. 6, § 19; McMinn v. Whelan, 27 Cal. 319.

We do not think there was any error in the instructions given at the request of the people. They are purely hypothetical, and contain no assumptions of criminating facts. Nor do we think the defendant can have been prejudiced by the modification of her instruction 15, in view of the theory upon which the prosecution conducted the case with reference to the time of receiving. The evidence would certainly not have justified the finding of the jury against the defendant on her plea of former acquittal, if the prosecution had been based upon the theory of a receiving on or about March 11th. But, as we have seen, the theory was of a receiving at or about the date of the burglary. The evidence was sufficient on that theory to justify a finding against the special plea; but, as we have seen, on that theory incompetent evidence of subsequent dealings was introduced to prove guilty knowledge. The prosecution could not go upon one theory to make out its case, and upon a wholly inconsistent theory to meet the special defense. The evidence of independent and exclusive possession by defendant of the stolen property was sufficient to sustain the verdict as to that point. The record does not show, so far as we can discover, that the talesman, Schofield, was challenged for actual bias, and therefore we cannot review the rulings of the court upon the questions asked him on *voir dire*.

For the errors above pointed out the judgment and order are reversed.

We concur: De Haven, J.; Sharpstein, J.; Harrison, J.; Garoutte, J.

McFarland, J. I concur in the judgment of reversal, but I fear that some language in the leading opinion will be construed as holding that a defendant has a constitutional right to have a convict brought out of the state-prison whenever the former is ready to swear that the latter is a material witness. It is admitted, however, that whether or not a convict will be ordered out of prison into court (and his term of imprisonment thus interfered with) depends upon the discretion of the court; and I cannot understand how a constitutional right can depend upon the discretion of a judge. I think that the law upon the subject is simply this: The statute gives a court discretion to break the continuity of a convict's term of imprisonment by ordering him to be brought out of prison into court as a witness; and, if the court abuses its discretion by not making the order when it clearly ought to have been made, such abuse is ground for a reversal of the judgment, just as abuse of discretion in refusing to grant a continuance may be ground for reversal. I do not think that there is any constitutional question involved. If the word "process," as used in the constitution, is to be construed as referring to the extraordinary proceeding provided for in section 1567 of the Penal Code, then I see no escape from the proposition that defendants may in all cases have material witnesses brought out of the state-prison, and that the discretion of a court cuts no figure in the matter. And I think, further, that courts would not abuse their discretion in refusing such orders except in peculiar and extraordinary cases,—some of which are referred to in the opinion of Mr. Justice Paterson in Willard v. Superior Court, 82 Cal. 459, 22 Pac. Rep. 1120. In the case at bar there were some peculiar circumstances which made it, I think, the duty of the court to order the witness brought into court. Upon other questions I concur in the opinion of the chief justice.

(92 Cal. 506)

PEOPLE v. THOMSON. (No. 20,814.)

(*Supreme Court of California.* Dec. 29, 1891.)

HOMICIDE — EVIDENCE — THREATS—SELF-DEFENSE —MALICE—INSTRUCTIONS.

1. On a trial for murder, where a witness for the prosecution testifies that shortly after the shooting he went to the scene of the homicide, and took his rifle with him, and that he was sorry defendant got into the trouble, it is proper, in order to show the state of the witness' mind, to ask him, on cross-examination, why he took his rifle, and if he expressed his sorrow by going towards the house with a rifle.

2. Where, on a trial for murder under a plea of self-defense, defendant introduces evidence to show that for many years, extending down to the time of the shooting, the deceased had manifested hostility towards him, and threatened his life, and that just before the shooting the deceased advanced towards him three or four steps with a pistol in his hand, the error of the court in charging that testimony of the conduct of the deceased had been introduced by defendant for the sole purpose of showing the unfriendly relation between them, and must be considered for that purpose only, and that in weighing such evidence its remoteness and the difficulty of meeting it owing to the lapse of time must be carefully considered, is not cured by other portions of the charge where the law of self-defense is correctly stated.

3. For the purpose of showing malice on the part of defendant, it may be shown in a general way that he and the deceased had previous difficulties, although such difficulties cannot be examined in detail, for the purpose of seeing which party was in the wrong.

4. On such trial for murder, the fact that defendant's cellar and well were filled with impure water, caused by the deceased irrigating his adjoining tract of land, is irrelevant, since it was not a justification for the killing.

In bank. Appeal from superior court, Amador county; C. V. GOTTSCHALK, Judge.

Indictment of Alexander Thomson for murder. Verdict and judgment of conviction. Defendant appeals from an order denying a new trial. Order reversed.

Reddy, Campbell & Metson and *W. J. McGee*, for appellant. *E. C. Farnsworth, Eagon & Rust*, and *Atty. Gen. Hart*, for the People.

GAROUTTE, J. The appellant was convicted of murder in the first degree, and now appeals from the judgment and order denying his motion for a new trial. At the trial he admitted the killing, and insisted that the homicide was committed in self-defense. The prosecution, against the objection of defendant, offered in evidence a United States patent to the tract of land upon which the deceased was killed, for the purpose, as the district attorney stated, of showing that "he was killed upon his own land." There was no question of defense of property or habitation involved in the trial. The plea was a plea of self-defense, arising from a threatened personal injury, and it was entirely immaterial and foreign to the issue on trial, whether the deceased was killed upon his own land or upon the land of another. Such fact could have shed no possible light upon the question of murder or justification for the commission of the homicide. While the assignment of error has merit, owing to the views we entertain upon other matters, we do not deem it necessary to decide the question as to whether the error is of such a character as to justify a reversal of the judgment. The witness Norris was an important witness for the prosecution. Upon cross-examination he testified that "shortly after the shooting he went to the scene of the homicide, and took his rifle with him. Question. What did you take your rifle with you for?" An objection to this question was sustained, upon the ground that it was not cross-examination. Upon redirect examination the witness stated: "I am sorry the defendant got into that trouble." And defendant's counsel then asked him the following question: "And you expressed your sorrow by going out towards the house with a Winchester rifle?" An objection was sustained to this question upon the grounds already stated. These rulings of the court were erroneous. It is elementary law, supported by all authority, that the state of mind of a witness as to his bias or prejudice, his interests involved, his hostility or friendship towards the parties, are always proper matters for investigation, in order that truth may prevail and falsehood find its proper level. If the inner workings of a witness' mind are actuating his testimony, and the workings of that mind are brought forth to the light and held up in full view before the jury, results will be obtained much more in accord with truth and justice than though the witness' testimony is weighed and measured by his words alone. If the feelings of the witness Norris were so hostile towards the defendant that when he went to the scene of the homicide he took his rifle with him for the purpose of wreaking vengeance upon the slayer of his friend, that would be a fact proper to be placed before the jury, as throwing light upon the state of the witness' mind, in order that they might properly weigh his testimony. See People v. Lee Ah Chuck, 66 Cal. 667, 6 Pac. Rep. 859.

The court gave the jury the following instruction: "Testimony of the acts and conduct of the deceased have been introduced by the defendant for the purpose of showing that the relations existing between the deceased and the defendant were unfriendly, and for that purpose alone, and you are charged to consider it for that purpose only; and, in weighing such evidence, you are to consider the remoteness of it and the difficulty of meeting it, owing to the lapse of time, by contradictory evidence, and weigh it carefully." This instruction has no law to support it, and requires a reversal of the judgment upon various grounds.

There was evidence introduced by the defendant tending to show that for a period of many years, extending down to the very moment of the shooting, the deceased had at various times manifested overt acts of hostility towards the defendant, by drawing and exhibiting deadly weapons, threatening his life, etc. There is nothing in the record to indicate that the acts and conduct of the deceased were introduced for the purpose of showing an unfriendly relation between deceased and defendant. Indeed, it does not seem clear why the defense should be zealous in showing such unfriendly relations, for such evidence more properly would be arrayed upon the side of the prosecution. But the evidence was material, and material for a double purpose, and should never have been passed to the jury, limited in effect and practically handicapped out of all usefulness, as was done by the instruction of the court. The evidence was admissible for the purpose of showing that the defendant, as a reasonable man, did believe that he was in danger of losing his life, or suffering great bodily harm, at the time he fired the fatal shot. The instruction is so broad in its language as to include all the acts and all the conduct of the deceased. The defendant testified that the acts and conduct of the deceased immediately prior to the shooting were that "the deceased advanced towards me three or four steps with a pistol raised in his hand." Of course, no one will maintain that the evidence of such acts and conduct of the deceased should go to the jury, simply for the purpose of showing unfriendly relations. If such were the rule, evidence to support the plea of self-defense would ever be lacking, and the plea itself a myth, for the acts and conduct of the deceased alone furnish the test by which that question is measured and determined. Conceding the instruction was framed with reference to the conduct and acts of deceased occurring at a time prior to the day of the homicide, still the same principles of law would apply, and the evidence be admissible for the purposes already stated. Again, in this case, a deadly encounter took place, one party was killed, and the survivor insists that the killing was done in self-defense, and that the deceased made the first attack. Who was the aggressor was an issue of vital importance to the jury, justice could only be reached by its proper solution, and, as disclosed by the evidence, it was enveloped in doubt. Under these circumstances, all the acts and conduct of the deceased, either in the nature of overt acts of hostility or threats communicated or uncommunicated, were proper evidence to be considered by the jury as shedding light, to some extent at least, upon the issue as to whether the deceased or the defendant was the aggressor in this fatal affray. These principles are elementary in criminal law, and a citation of authorities not demanded, but the general principles are found discussed in People v. Arnold, 15 Cal. 479; People v. Scoggins, 37 Cal. 677; People v. Travis, 56 Cal. 252; People v. Tamkin, 62 Cal. 469.

The latter portion of the instruction under consideration is as follows: "And, in weighing such evidence, you are to consider the remoteness of it, the difficulty of meeting it, owing to lapse of time, by contradictory evidence, and weigh it carefully." Inasmuch as the acts and conduct of the deceased showing hostility towards the defendant, according to the evidence of the defense, extended down to the very moment of the killing, the word "remoteness" is improperly used as not being justified by the facts. It is the duty of the court to instruct the jury as to the law of the case. The jury are the only judges as to the weight to be given any special portion or branch of the evidence. The above suggestions made to them by the court trenched upon the province of the jury, and were matters, if borne out by the facts of the case, only proper to be suggested by counsel in his plea to the jury; for they were matters of argument, and not matters of law. In other portions of the court's charge the law of self-defense, and the object and purpose for which the acts and conduct of a deceased can be exhibited to the jury, are fully, clearly, and correctly stated, yet these portions of the charge cannot cure the defects found in the instruction already considered. A serious conflict exists, which must have confused the minds of the jury, for both instructions could not be followed. The former is bad law, and we know not but that the jury acted upon it in rendering their verdict. People v. Wong Ah Ngow, 54 Cal. 154; People v. Bush, 65 Cal. 134, 3 Pac. Rep. 590.

As the case must be remanded for a new trial, there is another matter we will incidentally mention. For the purpose of showing malice on the part of the defendant, the prosecution is entitled to prove that the parties to the homicide had had difficulties upon previous occasions. These matters may be shown in a general way, and it is not proper to enter into an examination of them in detail for the purpose of determining which of the parties was in the wrong. In this case, during the progress of the defense, it was developed that defendant's cellar was at certain seasons of the year flooded with water, and that the water in defendant's well was impure and unhealthy; that these matters caused the serious ill health of defendant's family, and were occasioned by the irrigation of an adjoining tract of land by deceased. Conceding all these matters to be true, the evidence was irrelevant and incompetent, for it formed no kind or part of a justification by the defendant for the killing of the deceased. Upon cross-examination, and in rebuttal, the prosecution attempted to show that the water in defendant's well was always bad, and that at certain seasons of the year chills and fever were common to the people of the entire neighborhood. These matters were entirely foreign to the issue under investigation, and under no aspect of the case could shed any light upon it, whatever the truth may have been regarding them. The entire evidence in this regard was collateral to the issue, and could only have served the purpose of mystifying and confusing the minds of the jury, by leading them far away from the merits of the cause they were impaneled to decide. We find no other error in the record. Let the judgment and order be reversed, and the cause remanded for a new trial.

We concur: Sharpstein, J.; Paterson, J.; McFarland, J.; Harrison, J.

De Haven, J. I concur in the judgment of reversal, on the ground that the court erred in giving the instruction referred to in the opinion of Mr. Justice GAROUTTE. It was error to direct the jury that, in weighing the testimony referred to in the instruction, the jury must "consider the remoteness of it and the difficulty of meeting it, owing to the lapse of time, by contradictory evidence, and weigh it carefully." If the testimony was given by a credible witness, and was not unreasonable or improbable in itself, or when compared with other established facts in the case, it was the duty of the jury to accept and act upon it, and they should have been so instructed, and the force of such testimony could not be weakened upon any supposition that, if the witness had placed the occurrences testified to as of a later date, the prosecution might have been able to contradict the witness.

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92 Cal. 502

GERMAN SAVINGS & LOAN SOC. v. FISHER *et al.* (No. 14,003.)

(*Supreme Court of California.* Dec. 29, 1891.)

EXECUTORS—FAILURE TO PRESENT CLAIM—FORECLOSURE OF MORTGAGE.

An action to foreclose a mortgage brought after the death of the mortgagor, in which the complaint waives all recourse against other than the mortgaged property, is not barred by failure to commence within the time for the presentation of claims against the deceased mortgagor's estate. Corporation v. Nadeau's Exr's, (Cal.) 27 Pac. Rep. 302, followed.

Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action by the German Savings & Loan Society against Michael Fisher and others. Judgment for plaintiff. Defendants appeal. Affirmed.

B. McFadden and *J. B. Richardson*, for appellants. *Jarboe & Harrison*, (*John R. Garber*, of counsel,) for respondent.

MCFARLAND, J. This is an action against the executor of a will and others to foreclose a mortgage. Judgment went for plaintiff, and defendants appeal. The mortgage was not presented to the executor for allowance; but all recourse against other property is waived in the complaint. This action, however, was not commenced until after the expiration of the time for the presentation of claims against the estate; and appellants contend that respondent's right of action was barred after the expiration of that time. But the point was decided directly against the contention of appellants in the case of Corporation v. Nadeau's Ex'rs, (Cal.) 27 Pac. Rep. 302, and upon the authority of that case the judgment must be affirmed. Judgment affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

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92 Cal. 500

BJORMAN v. FT. BRAGG REDWOOD CO. (No. 13,227.)

(*Supreme Court of California.* Dec. 29, 1891.)

APPEAL—DISCRETION OF TRIAL COURT—NEW TRIAL.

An order of the trial court granting a new trial on the ground of the insufficiency of the evidence to sustain the verdict will not be reversed on appeal unless it appears that there was a manifest abuse of the trial court's discretion.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

Action by Henry Bjorman against the Ft. Bragg Redwood Company. Judgment for plaintiff. From the order of court below granting a new trial plaintiff appeals. Affirmed.

A. Morganthal and *J. M Mannon*, for appellant. *J. A. Cooper*, *T. L. Carothers*, and *C. E. Wilson*, for respondent.

BELCHER, C. This is an appeal from an order granting the defendant's motion for a new trial. The action was brought to recover damages for an injury to plaintiff, resulting in the loss of his right leg, and alleged to have been caused by the negligence and gross carelessness of the defendant. The answer denied all the averments as to negligence and carelessness on the part of defendant, and alleged that the injury to plaintiff was caused by the negligence and carelessness of his fellow-servant. The case was tried by a jury, and a verdict returned in favor of plaintiff for $7,000, on which judgment was entered. The defendant moved for a new trial upon the ground, among others, that the evidence was insufficient to justify the verdict, and on this ground alone, as appears from the order, the motion was granted. It is earnestly contended by counsel for appellant that the verdict was sustained by a clear preponderance of the evidence, and hence that it was error to set it aside. But the rule is well settled in this court that, though the evidence is conflicting, if the judge of the trial court is satisfied that the verdict is contrary to the weight of the evidence, it is his duty to grant a new trial. Hall v. The Emily Banning, 33 Cal. 522; Dickey v. Davis, 39 Cal. 565; Sherman v. Mitchell, 46 Cal. 576; Irving v. Cunningham, 58 Cal. 306. And the rule is also equally well settled that a motion for new trial on the ground of the insufficiency of the evidence to justify the verdict or decision is addressed to the sound legal discretion of the court, and that an order granting a new trial on this ground will not be reversed on appeal, unless it appears that there was a manifest abuse of such discretion. Gerold v. Brunswick & Balke Co., 67 Cal. 124, 7 Pac. Rep. 306; Pico v. Cohn, 67 Cal. 258, 7 Pac. Rep. 680; Breckenridge v. Crocker, 68 Cal. 403, 9 Pac. Rep. 426; Nally v. McDonald, 77 Cal. 284, 19 Pac. Rep. 418. It would subserve no useful purpose to state at length the facts of the case, as they are shown by the record. We have carefully read all the evidence, and, while we are not entirely satisfied that the conclusion reached by the learned judge of the court below was correct, still we cannot say that any such abuse of the discretion with which he was clothed appears as would justify this court in reversing the order. We advise, therefore, that the order be affirmed.

We concur: FITZGERALD, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

92 Cal. 503

FRANCAIS v. SOMPS. (No. 13,524.)

(*Supreme Court of California.* Dec. 29, 1891.)

CONSTITUTIONAL LAW — TITLE OF ACT — MINING CORPORATIONS—POSTING ACCOUNTS.

1. Act March 30, 1874, entitled "An act for the better protection of the stockholders in corporations formed under the laws of the state of California for the purpose of carrying on and conducting the business of mining," and imposing on directors of mining corporations the duty of making and posting itemized monthly accounts or balance-sheets, is not invalid under Const. art. 4, § 24, as containing more than one subject.

2. The directors of a corporation formed for the purpose of mining, which chooses officers, disburses money, incurs liabilities, etc., must make and post the itemized accounts required by this statute, although they never carried on or conducted the business for which they were formed.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by Francais against Somps. Judgment for plaintiff. Defendant appeals. Affirmed.

T. I. Bergin, for appellant. *J. J. Dwyer*, for respondent.

SHARPSTEIN, J. This action is brought to recover $1,000 against the defendant as a director of the Yosemite Queen Gold, Silver & Lead Mining Company, a corporation, for omitting to cause to be made and posted an itemized account or balance sheet on the first Monday of November and December, 1886, and the first Monday of January, 1887, as required by the provisions of an act amendatory of an act entitled "An act for the better protection of the stockholders in corporations formed under the laws of the state of California, for the purpose of carrying on and conducting the business of mining," approved March 30, 1874. That an action of this kind may be maintained has been settled in Loveland v. Garner, 71 Cal. 541, 12 Pac. Rep. 616; Beal v. Osborne, 72 Cal. 305, 13 Pac. Rep. 871; Schenck v. Bandmann, 81 Cal. 231, 22 Pac. Rep. 654; Chapman v. Doray, 89 Cal. 52, 26 Pac. Rep. 605. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The first point presented in appellant's brief is that the subject of the act is not sufficiently expressed in its title. But under the decision in People v. Parvin, 74 Cal. 552, 16 Pac. Rep. 490, the title is sufficient to satisfy the provision of the constitution relating thereto.[1]

The second point is that, if the statute be constitutional, this case is not within its provisions; the argument being, in effect, that the object of the act as expressed in the title is for the better protection of the stockholders in corporations formed for the purpose of carrying on and conducting the business of mining, and that the evidence shows, without conflict, that this corporation was not carrying on or conducting the business of mining. We think the findings of the court are justified by the evidence, and the court finds that at all the times in the complaint mentioned the corporation had a duly-appointed president, superintendent, and secretary, and that during the months of October, November, and December, 1886, said corporation disbursed certain sums of money and incurred indebtedness and liabilities, and had a certain sum of money on hand during said month of October, 1886, and thereafter, till and including the first Monday of November, 1886; and that during said months of November and December, 1886, and January, 1887, the directors, of whom the defendant was one, failed and neglected to make or cause to be made the itemized accounts or balance-sheets of the business of said corporation, or the accounts or reports or statements of the superintendent by said act required to be made, or any itemized accounts or balance-sheets whatever, and failure to cause said superintendent to make or file with the secretary, or forward to the office of said company, the monthly and weekly reports, accounts, and statements, or any or either of them, as are by said act required. If the law imposed the duties specified upon the directors of corporations actually carrying on or conducting the business of mining, the contention of appellant's counsel would be unanswerable; but the law imposes such specified duties upon the directors of corporations formed for the purpose of carrying on and conducting the business of mining. There can be no question of the formation of this corporation for that purpose, although it was very feebly, if at all, prosecuted. The itemized accounts or balance-sheets and reports would have shown very little, but that little might in some cases be of interest to stockholders, and we cannot apply the maxim, *de minimis non curat lex*, in this case, because we think the law under which this action is prosecuted does care for small things. It does not except them, and we do not feel authorized to. Judgment and order affirmed.

We concur: DE HAVEN, J.; MCFARLAND, J.

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92 Cal. 497

BLUM v. McHUGH, Constable. (No. 13,952.)

(*Supreme Court of California.* Dec. 29, 1891.)

APPEAL—DISCRETION OF TRIAL COURT—NEW TRIAL.

Where a new trial is granted on the ground of insufficiency of the evidence to support the verdict, the supreme court will not disturb the ruling, unless there has been a clear abuse of discretion.

Department 2. Appeal from superior court, Contra Costa county; JOS. P. JONES, Judge.

Action by Simon Blum against William McHugh. Judgment for defendant. Judgment set aside, and new trial ordered. Defendant appeals from the order granting new trial. Affirmed.

Chase, Chase & Miller, for appellant. *W. S. Tinning*, for respondent.

MCFARLAND, J. This is an appeal by defendant from an order of the court below setting aside a verdict and judgment in favor of defendant and granting a new trial. The new trial appears to have been granted upon the ground of insufficiency of the evidence to support the verdict; and in such a case we do not disturb the ruling, unless where there has been a clear abuse of discretion. The action was to recover certain hay on a farm that had been leased by Stewart, the owner of the farm, to Chubbuck & Son. The defendant, McHugh, who was a constable, claimed to have taken the hay by virtue of a writ of attachment against said Chubbuck at the suit of one McHarry. Stewart had assigned the lease and all rights which he had under it to the plaintiff, Blum. The lease provided that "the title to and right of possession of all crops" on the farm "shall be in" the lessor Stewart, until the rent shall be paid. The whole amount of rent which Chubbuck was to pay was $950; and it seems from the evidence—stated in the opinion of the court when granting the new trial—that when this action was commenced the rent had all been paid except about $100, and that Blum had in his possession, in his warehouse, 40 tons of the hay raised on the farm, which Chubbuck had delivered to him. This 40 tons would have been more than sufficient to pay the balance of the rent due. The court seemed to lay some stress on the fact that the defendant (the constable) did not prove that he had a valid writ of attachment under which he acted. But in this case that matter was immaterial. If plaintiff owned the hay still on the farm, the defendant could not have legally taken it as the property of Chubbuck under any writ of attachment, however valid; and if the plaintiff did not own it, then he could not have reclaimed it, although the constable was a mere trespasser. Whether or not plaintiff owned the hay still remaining on the land, or had any lien on it, depended upon the question whether or not the rent had all been satisfied. Plaintiff had another account against Chubbuck, in addition to the rent; and it seems that he (or the firm of Blum Bros.) had also sued out a writ of attachment intending to levy on the hay on the farm as the property of Chubbuck, but, finding that McHarry's attachment was ahead of his, he fell back upon the theory of his ownership or lien under the lease. Now, whether the rent had been all satisfied, or whether some of the hay which Chubbuck had delivered to Blum, or the money arising from its sale, could have been and was rightfully applied on the other account, and not on the rent account, was a question about which there was conflict and confusion of evidence; and therefore, upon this point, we cannot say that the court abused its discretion in granting a new trial. If the fair understanding of the parties was that the hay delivered by Chubbuck and the proceeds of its sale were to be applied first to the payment of the rent; and if, thus applying it, all the rent had been satisfied except about $100, and Blum had still under his control at the warehouse sufficient hay to more than satisfy the balance of the rent due,—then we do not see how he had any ownership of or lien upon the hay still remaining upon the farm. And in that event it would make no difference whether or not the defendant acted under a valid writ of attachment. We have said this much in view of the probability of a new trial. The order granting a new trial is affirmed.

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[1] Article 4, § 24.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

NORRIS v. NORRIS. (No. 14,641.)

(*Supreme Court of California.* Dec. 29, 1891.)

APPEAL—BILL OF EXCEPTIONS.

Where there is no bill of exceptions on an appeal from an order of the court below, the appeal will be dismissed. White v. White, 26 Pac. Rep. 236, 88 Cal. 429, followed.

In bank. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

G. W. & G. S. Langan and *W. S. Tinning*, for appellant. *Wheeler & Garber* and *Boalt & Bishop*, for respondent.

PER CURIAM. This is an appeal from an order directing the appellant to pay to respondent certain money for counsel fees, expenses, and alimony *pendente lite*. The respondent moves to dismiss the appeal upon the ground, among others, that no bill of exceptions in the matter of said order has been "served, settled, allowed, approved, or filed." The precise question here presented was passed upon in White v. White, 88 Cal. 429, 26 Pac. Rep. 236, and upon the authority of that case the motion to dismiss the appeal herein must be granted. Appeal dismissed.

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92 Cal. 514

ALEXANDER v. JACKSON *et ux.* (No. 13,489.)

(*Supreme Court of California.* Dec. 29, 1891.)

HOMESTEAD—EQUITABLE INTEREST IN LAND.

J. bought a lot on a contract providing for a deed to him upon payment of deferred payments, in default of which the contract should become void, and the amount paid "forfeited." J. built a dwelling, and made valuable improvements on the lot, and his wife filed for record her declaration of homestead thereon. Several years later, when J. was in default on his contract, he agreed with A., who had full knowledge of the declaration of homestead, to sell to him the dwelling-house and improvements, and assigned to him the contract. A. paid the amount due on the contract, and received a deed in fee to himself, whereupon he demanded possession, when J.'s wife was, for the first time, informed of A.'s claim. A. did not demand of her the balance of the purchase money paid by him, nor was there any notice of forfeiture given. *Held*, under Civil Code, § 1237, providing that the homestead consists of the dwelling on which the claimant resides, and the land on which it stands, and section 1265, providing that the premises shall be a homestead from the time of the filing of the declaration, that the homestead of J.'s wife attached when she filed her declaration, and that, when A. received a deed, he acquired the legal title subject to the homestead interest, and would be compelled to convey the legal title on repayment of the purchase money paid by him. PATERSON, J., dissenting.

In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

Proceeding in equity by W. H. Alexander against W. A. Jackson and Mary Jackson. Judgment for defendant Mary Jackson. Plaintiff appeals. Reversed in part.

Wright & Hazen, for appellant. *L. J. Maddux*, for respondents.

Harrison, J. The defendant W. A. Jackson, in the year 1884, purchased from Charles Crocker the property described in the complaint for the sum of $150, paying a portion of the price, and taking from him an agreement for a conveyance upon the payment of the remainder in 2 equal payments within 6 and 12 months thereafter. In September of that year, Jackson erected a dwelling-house and made other improvements upon the land, at a cost of about $1,300, and upon the completion of the house the defendants, with their children, moved into the house, and have since occupied it as their home. The money paid for the purchase of the lots and the construction of the dwelling-house was the community property of the defendants; and on August 12, 1885, the defendant Mary duly executed and acknowledged a proper declaration of homestead upon said land and dwelling-house, and on the same day filed it in the office of the county recorder of said county. Jackson made a further payment on account of his purchase from Crocker in October, 1885, and took from him a new agreement, providing for the payment of the remainder in 30 days; and on February 8, 1886, he paid a still further sum, and took an agreement providing for the payment of the remainder in 30 days from that date. Each of these agreements contained the following clause: "If paid as above stated, with three dollars as cost of conveyance, the above-named W. A. Jackson will be entitled to a deed for the above-described lots; otherwise, this agreement becomes null and void, and the amounts now paid shall be forfeited. If forfeited, the said W. A. Jackson shall thereafter be, and he hereby consents to be, tenant of Charles Crocker, liable to be dispossessed upon three days' notice." At the time the last agreement was given him, there was unpaid upon the contract price of the lots the sum of $47.21. October 6, 1887, the plaintiff made an agreement with the defendant W. A. Jackson for the purchase of said dwelling-house and improvements for the sum of $1,500, less such an amount as was to be paid to Crocker upon the agreement for the conveyance of the land, and at the same time Jackson made the following indorsement upon the agreement of February 8, 1886, viz.: "I hereby surrender and relinquish all claims to receive a conveyance of the within property to W. H. Alexander, and authorize him to take and demand the conveyance therefor in his own name. Dated, Modesto, October 6, 1887. W. A. Jackson,"—and delivered the same, so indorsed, to the plaintiff, receiving from him $100 as part payment for the improvements. A few days thereafter the plaintiff presented the agreement with the indorsement to Crocker, and received from him a conveyance of the land, paying him the balance on said purchase price, amounting at that date to $40.21, and on the 28th of October placed the deed on record in the county recorder's office On the 3d of November, 1887, the plaintiff paid to Jackson the further sum of $325, and executed to him his promissory note for $1,000, with a mortgage upon the property to secure its payment, thus completing the payment of the $1,500 under his agreement for the purchase of said improvements. Immediately after, he demanded possession of the land and premises from the defendants, which was refused, and in May, 1888, commenced this action in ejectment to recover possession thereof. The defendant Mary had no knowledge or notice of the plaintiff's right or title to the land and premises until November 6, 1887, and at the time of his demand for the possession repudiated any interest of his therein. The defendant Mary has alone made answer to the complaint, and alleges therein her claim of homestead and the invalidity of her husband's assignment of the agreement to the plaintiff. It does not appear whether the defendant W. A. Jackson was ever served with the summons in the action or not, but the court found that he refuses to make answer to plaintiff's complaint, or to join with defendant Mary in making answer thereto. The action was tried by the court without a jury, and judgment was rendered against plaintiff and in favor of the defendant Mary alone. From this judgment the plaintiff has appealed upon the judgment roll.

Upon the execution of the contract of sale by Crocker to Jackson on the 8th of February, 1886, the latter became vested with the equitable title to the land, and thereafter Crocker held the legal title to the land in trust for Jackson, to be conveyed to him upon the payment of the remainder of the purchase price. The estate in the land thus conveyed was subject to be impressed with the lien of a homestead as fully as an estate in fee. The declaration of homestead thereon was subordinate to the rights or claim of Crocker; but upon the ripening of the equitable estate into a fee by a conveyance to Jackson of the legal title, in accordance with the terms of the agreement, the homestead claim would attach to the fee and be superior to any claim to the land which accrued after the declaration of homestead was filed for record. The Civil Code does not require a person who desires to make a declaration of homestead to have a fee in the land, or any particular title thereto. "The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, as in this title provided." Section 1237. "From and after the time the declaration is filed for record the premises therein described constitute a homestead." Section 1265. Whatever be the character of the title or interest in the land held at the time of the filing of the declaration, the claim will attach to such title or interest, and whatever may inure to or grow out of that title will be impressed with the lien equally with the original title. Moore v. Reaves, 15 Kan. 150; Stinson v. Richardson, 44 Iowa, 373; McKee v. Wilcox, 11 Mich. 359; McCabe v. Mazzuchelli, 13 Wis. 478; Thomp. Homest. & Ex. §§ 170-172. After the declaration of homestead had been filed by Mary, her husband could not, by any act in which she did not join, transfer the estate created by the contract with Crocker, and upon which the homestead claim had been impressed. The instrument by which the estate was created was not itself the estate in the land, but the evidence by which that estate was manifested, and in accordance with whose terms such estate could be ripened into a fee. This instrument, being in the name of Jackson, was, after the declaration of homestead was filed, held by him in trust for the community for the purpose of perfecting the title to the land represented thereby, and without any right by his individual assignment thereof to alienate the estate which it represented. The statute has conferred upon the wife as well as the husband the right to create a homestead out of the community property, and when the wife has made the declaration the husband is bound by its effect as fully as though the declaration had been made by himself. Although Jackson had the opportunity, by reason of the instrument being in his name, to make a transfer of the right to receive a conveyance from Crocker by mere indorsement upon the instrument, yet the effect of such transfer to the plaintiff, who took it with full knowledge of the circumstances under which Jackson had held it, and of the rights of defendant Mary in the land which it represented, was to render it, in the hands of the plaintiff, subject to the same trust as it was in the hands of Jackson, and make him a trustee thereof for the same purposes as was Jackson.

The court finds that at the time of the assigment to the plaintiff, and long prior thereto, the "plaintiff had full, actual knowledge and notice of said declaration of homestead, and that defendant Mary claimed and occupied the premises as a homestead," and that on the 6th day of October, 1887, the plaintiff made the agreement with Jackson for the purchase of the dwelling-house and improvements on the land, and that on that day Jackson made the transfer of the agreement hereinbefore set out, and that "the plaintiff never received any assignment or made any contract for the purpose of cheating said defendant Mary out of her homestead." Assuming, then, as we must from these findings, that the transaction between Jackson and the plaintiff was in good faith towards the defendant Mary, and that the plaintiff received the transfer of the Crocker agreement with full knowledge that the land therein described was impressed with the homestead claim, and was charged with knowledge of the law that such homestead or the means by which the title to the land was held could not be alienated by Jackson alone, we must hold that the plaintiff became in equity merely the custodian of the right to obtain the deed, and that, when he received the deed from Crocker, he held the legal title to the land thereby conveyed in trust for the Jacksons, according to their rights, and subject to the homestead claim of the defendant Mary. The court does not find that the plaintiff ever made any purchase of the land from Jackson, but that they merely "made an agreement for the purchase and sale of said dwelling-house and improvements;" and it appears from the findings that Jackson did not, by the terms of his assignment of the contract, attempt to transfer to the plaintiff any right to the land, the assignment itself being but the equivalent of an authority to the plaintiff to receive from Crocker in his own name the deed provided for therein. Viewing these transactions in the light of the circumstances under which they were had, and considering that they were had without any purpose to deprive the defendant Mary of her homestead, we can only say that the good faith under which the plaintiff then acted, as well as all principles of equity, will prevent him from saying now that he thereby acquired any estate in the land which he can hold adversely to her, or that his relation to her is other than that of a trustee of the estate so acquired by him.

The respondent Mary was not, however, by virtue of such relation, entitled to demand that the plaintiff should immediately make a conveyance to her of the land. Although he held the land in trust for the defendants, as above stated, still it was subject in his hands to the same superior claim for the unpaid amount of the purchase money that it was in the hands of Crocker; and, until that claim had been satisfied, Mary could not demand a conveyance from him. The plaintiff could not, however, assume a hostile relation to her until after she had herself renounced her obligation to discharge this claim.

The provision for a forfeiture at the maturity of the time fixed in the agreement for such payment had not been enforced by Crocker, and his subsequent execution of the deed to plaintiff was a recognition by him that such forfeiture had been waived. If it should be conceded that that provision was not extinguished by his failure to avail himself of it at the time it accrued, yet it could not afterwards be enforced without a demand for payment on his part, and a refusal on the part of Jackson. Armstrong v. Pierson, 5 Iowa, 317. "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." Civil Code, § 1442. When time is not made of the essence of the contract, it is incumbent upon the party who would terminate the contract to give notice to the other, and a reasonable time within which to do any act required on his part before he can be absolved therefrom. By the terms of the agreement with Jackson, Crocker had a right, in case of non-payment, to declare the agreement null and void, and the previous payment forfeited. Mere failure to make the payment did not, *ipso facto*, make the agreement void except at the option of Crocker; and such option must have been expressed by proper notice to Jackson. The plaintiff could not enforce this claim assigned to him by Crocker upon any other terms than could Crocker, and his failure to make a demand for the payment left the agreement still in force. The plaintiff obtained the deed from Crocker October 15th, and "immediately after November 3d"—that is, as early as November 4th—made a demand upon the defendants for the possession of the premises. No demand was made by him for the purchase price, nor did he give any notice that he elected to treat the agreement as at an end. Considering the relation which he bore to the defendants in respect to the title to the land held by him for them, he was not, at the time of his demand for the possession or at the commencement of this action, entitled thereto. The fact that when he made such demand the defendant Mary repudiated his title is immaterial. She did not, until the 6th of November, have any knowledge that he had any interest in the premises, or was entitled to receive the unpaid portion of the purchase money; and, after she had such knowledge, no demand was made upon her. It was incumbent on him, in order to put her in default, to inform her of his relation to the property, and his failure to do so took from her repudiation of his claim all significance.

At the trial of the cause the equitable defense presented in the answer was considered by the court, and many transactions between the plaintiff and the defendants not presented by the answer were incorporated by it into its findings. It is evident that the parties presented to the court their respective rights to the premises without much regard to the form of the pleadings, and that the judgment of the court was based more upon the facts disclosed at the trial than upon the issues presented for trial. In its judgment the court directs that the defendant Mary pay to the plaintiff the balance of the purchase price on the lots in question, but makes no direction to the plaintiff respecting a conveyance thereof. There is no averment in her answer of any offer by her to pay to the plaintiff this amount of money, and the plaintiff commenced his action without making any demand therefor. Unless the judgment should direct a conveyance from the plaintiff upon the payment of the money for which he holds the title as security, the payment by Mary would still leave the question of title to the premises unsettled. Considering the entire case as presented by the record, we are of the opinion that complete justice can be best administered to all parties by reversing the judgment and directing a new trial, with leave to the parties to amend their pleadings as they may be advised; and it is so ordered.

We concur: BEATTY, C. J.; DE HAVEN, J.; McFARLAND, J.; GAROUTTE, J.; SHARPSTEIN, J.

PATERSON, J. I dissent. By the conveyance from Crocker the plaintiff became vested with the legal title and the right, as grantee of Crocker, to enforce the contract made between Crocker and Jackson. After the conveyance, he stood in the same position Crocker would have held if no conveyance had been made. Dwight v. Phillips, 48 Barb. 118; sections 1083, 1084, Civil Code. Crocker could not have declared a forfeiture without giving defendants an opportunity to pay the balance, and thus avoid the forfeiture provided for in the agreement. He never had claimed a forfeiture by reason of a failure to make payments at the times required by the contract, and a court of equity would not allow a forfeiture without a reasonable notice to defendants that a forfeiture would be declared unless payment was made. Plaintiff paid Crocker and received his deed on October 15, 1887. On November 3, 1887, plaintiff paid Jackson $335.20, gave him his promissory notes for $1 000, secured by mortgage on the premises, and on the following day he demanded possession of the land; but defendants refused, and ever since have refused, to deliver the same, and no offer has ever been made by defendants, or either of them, to pay plaintiff the balance of the purchase price. In this I think Mrs. Jackson made a mistake. If Crocker had made a demand for possession of the premises, it would have been the clearest kind of a notice that he claimed a forfeiture on account of a failure to pay the balance of the purchase price. It then would have been the duty of the defendants, if they desired to avoid the forfeiture, to immediately, or as soon as they could do so, tender the amount remaining unpaid. The same duty was owing to plaintiff, the grantee of Crocker. His demand was a proper one to make, and was unmistakable proof of his claim of forfeiture, and the right to possession under the terms of the contract. Pom. Spec. Perf. § 393; Doe v. Birch, 1 Mees. & W. 402; Dendy v. Nicholl, 4 C. B. (N. S.) 376. Instead of offering to pay the balance due, as she ought to have done, Mrs. Jackson, the court finds, "repudiated any right, title, or interest of plaintiff in or to said premises, and threatened him with violence if he attempted to take or have possession thereof; and said defendant ever since has denied, and now does deny and repudiate, any right, title, interest, or claim of plaintiff in or to said premises, or any part thereof." Under the contract, payment of the purchase price was a condition precedent. The parties intended—and their intention is expressed in clear language—that the fee should not pass until the purchase money was fully paid. Before defendant Mary can claim a deed, or the right to retain the possession given under the contract, she must pay the purchase price. She cannot claim under the contract, and at the same time repudiate it. The legal title is in plaintiff. He paid a valuable consideration for it; and if the defendants, or either of them, have any defense to his claim for the possession, it must be an equitable defense. One who asks the interposition of a court of equity between himself and the owner of the legal title must show that he is not in fault. That he who seeks equity must do equity, and do it promptly, is a rule especially applicable to contracts of this kind, and particularly in this state. Green v. Covillaud, 10 Cal. 324. Defendant Mary had notice of plaintiff's claim as early at least as November 4, 1887, and had full notice of his rights two days later. This action was not commenced until May 8, 1888. The court finds that each of the defendants was at all times able to pay the balance of the purchase price. Neither of them offered to do so. Six months had passed before plaintiff commenced this action. In view of the fact that no tender of the balance had been made up to that time, it is not likely that a court of equity, after such delay without excuse, would have relieved the defendant Mary from the forfeiture that had been incurred, even if she had offered in her answer to pay the balance and all costs that had been incurred by the plaintiff; but not only was no such offer made, but she still repudiated the claim of the plaintiff, and, so far as the record shows, still denies that he has any interest in the property, or that the defendants owe him any duty. To entitle a party who is in default under such circumstances to relief, it must appear that he has promptly and in good faith offered to do what his contract required him to do, and neither infancy nor ignorance of his rights is a sufficient excuse. Pom. Eq. Jur. § 452; Conrad v. Lindley, 2 Cal. 175; Steele v. Branch, 40 Cal. 11; Grey v. Tubbs, 43 Cal. 364; Hicks v. Lovell, 64 Cal. 18, 20;[1] Marshall v. Means, 12 Ga. 68; Cross v. Carson, 8 Blackf. 138; McClartey v. Gokey, 31 Iowa, 509; Jones v. Robbins, 29 Me. 353; Wells v. Smith, 2 Edw. Ch. 83; Hancock v. Carlton, 6 Gray, 58, 59. The indulgence or non-action of the plaintiff from the time he demanded possession until the commencement of this action cannot be taken as a waiver of the forfeiture. Kerns v. McKean, 65 Cal. 416, 4 Pac. Rep. 404. "The vendor is not bound to wait indefinitely after the failure of the purchaser to comply with the terms of his agreement. If the payments are not made when due, he may, if out of possession, bring his ejectment and recover possession." Railroad Co. v. Mudd, 59 Cal. 590. The court below, recognizing the rule that "he who asks equity must do equity," say that it would be inequitable to allow the defendant to retain the possession of the land without paying to plaintiff the balance of the purchase price. It was adjudged and decreed, therefore, "that defendant Mary Jackson pay to plaintiff the sum of forty-seven 21-100 ($47.21) dollars, balance of purchase price paid on the lots involved, with interest on the same at seven per cent. per annum from date hereof." In this I think the court erred. There is no power in a court of equity to grant relief on a ground not claimed, and on which one of the parties has not had an opportunity to be heard. The question whether defendant Mary should be relieved from the forfeiture was not in issue, and the court could not consider it. Bank v. Mitchell, 73 N. Y. 415. Even where evidence was given of an offer to pay the full amount due after the action was commenced, this court held that it was new matter, which ought to have been pleaded. Hegler v. Eddy, 53 Cal. 599. In the case at bar, defendant Mary has never offered to pay the plaintiff anything, but has at all times denied that he had any interest in or right to the property, and has asserted that he conspired with her husband to cheat and defraud her out of her homestead right. Judicial amnesty of one who has without just cause expressed such repudiation, charges, and defiance continuously down to the date of the decision, it seems to me, would be mutilated equity. There is no precedent for relief from forfeiture under such circumstances. To add to the injustice of allowing the defendants after such conduct to tender to plaintiff the balance of the purchase price, and require him to convey the legal title to them, it appears from the record that the plaintiff paid the full value of the property to Jackson, and that the latter and his wife have ever since remained in possession of the property. The record does not show affirmatively that the defendant Mary has had the benefit of the money paid by plaintiff to her husband; but, as the money paid was community funds, and they have always lived together, it must be presumed that they enjoyed it jointly.

92 Cal. 563

MATTHEWS v. JONES *et al.* (No. 14,227.)[2]

(*Supreme Court of California.* Dec. 30, 1891.)

APPEAL — INSTRUCTIONS — ASSIGNMENT OF ERROR.

Where an appeal is brought on a judgment roll in which there is no bill of exceptions, exceptions to the instructions of the court, printed in the transcript, cannot be considered, as they form no part of the judgment roll.

Commissioners' decision. Department 1. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

Ejectment by Hugh Matthews against James M. Jones and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Montgomery & Scott, for appellants. *Briggs & Hudner*, for respondent.

VANCLIEF, C. The action is ejectment for the recovery of 320 acres of land situate in the county of San Benito. The case was tried by a jury; verdict and judgment for plaintiff. Defendants bring this appeal from the judgment upon the judgment roll, in which there is no bill of exceptions. There was a general demurrer to the complaint, which was properly overruled by the court, and no specific objection to the complaint is made here. What purport to be instructions of the court to the jury are printed in the transcript, and appellants contend that some of them are erroneous. As they constitute no part of the judgment roll, they were improperly included in the transcript, and cannot be considered. As it appears that the appeal is without merit or plausible excuse, and was evidently taken for delay alone, I think the judgment should be affirmed, with $200 damages.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed, with $200 damages.

92 Cal. 590

PEOPLE v. MITCHELL. (No. 20,787.)[3]

(*Supreme Court of California.* Dec. 30, 1891.)

FORGERY—INFORMATION—INSTRUCTIONS—VERDICT—EVIDENCE.

1. An information which charges that defendant did "unlawfully, feloniously, and fraudu-

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[1] 27 Pac. Rep. 942.

[2] Modified on rehearing, 28 Pac. Rep. 798.

[3] Order modified on rehearing, 28 Pac. Rep. 788.

lently make and forge a certain check," and did "falsely, fraudulently, knowingly, feloniously, and with intent to defraud, prejudice, and damage one M., utter, publish, and pass the" same, is fatally defective, in that the part charging the forgery fails to allege that it was done with intent to defraud. De Haven, J., dissenting.

2. The second part of such information, charging the passing of the forged instrument, is also fatally defective, in that it fails to allege that defendant knew that the instrument was forged; Pen. Code, § 470, providing that a person passing a forged paper must, to be guilty of a crime, know that the paper was forged. De Haven, J., dissenting.

3. Such information gains no additional strength when its charging parts are joined together and taken as a whole. De Haven, J., dissenting.

4. To say that "defendant forged a check" implies a false making as fully as to say that he "falsely forged a check."

5. Conceding that one part only of such information was defective, a verdict of guilty as charged will be set aside, where the court instructed the jury that they should convict if the evidence showed either a forgery of the check or the passing thereof, the evidence being such that, under the instructions, it would be impossible to say on which portion of the information such verdict was based.

6. Where all the evidence against defendant on trial for forgery was given by an expert on handwriting, who by a comparison with the genuine writing of defendant testified that in his opinion the face of the check was written by defendant, such evidence is insufficient to sustain a conviction, even if the words "face of the check" included the signature.

In bank. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Fred Mitchell was convicted of forging and uttering a certain check, and appeals. Reversed.

Carroll Cook, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

Garoutte, J. This is an appeal from a judgment and order denying defendant's motion for a new trial. The charging part of the information is as follows: "That the defendant did then and there unlawfully, feloniously, and fraudulently make and forge a certain check, an instrument in writing, in the words and figures following, to-wit, * * * and, having indorsed thereon the words 'Fred J. Mitchell,' did," etc., "willfully, unlawfully, falsely, fraudulently, knowingly, feloniously, and with intent to defraud, prejudice, and damage one M. J. McBride, utter, publish, and pass the said false and forged check and instrument in writing hereinbefore set forth, and said indorsement thereon, to said M. J. McBride as true and genuine." There are various matters relied upon by appellant as error arising during the progress of the trial, but it will only be necessary to notice a few of the more important assignments. The information is fatally defective, and the motion in arrest of judgment should have been granted. It will be observed that the charging part of the information consists, as it were, of two branches; that the defendant is charged with making and forging a certain check, and with uttering and passing the same with intent to defraud. This character of pleading has been recognized and approved in the cases of People v. Shotwell, 27 Cal. 394, and People v. Frank, 28 Cal. 513; and it is there decided that, under such an information, evidence of the false making of the check, or of uttering and passing the same knowing it to be forged, or evidence both of the making and uttering, will sustain a verdict of guilty. Under the portion of the information charging the felonious making and forging of the check, there is no allegation that such acts of the defendant were done with intent to defraud. Forgery is a statutory offense, and the intent to defraud is the essential element, and must be alleged in the information in order that the judgment of conviction upon such a charge will have sufficient support.

As to the portion of the information charging the passing and uttering, it is alleged that the defendant "did willfully, unlawfully, falsely, knowingly, and feloniously, with intent to defraud, utter, pass, * * * as true and genuine, the said false and forged check." Section 470 of the Penal Code provides that the defendant, at the time he utters and passes the instrument as genuine, must know the same to be "false, altered, forged, or counterfeited;" and the allegation that he falsely and knowingly uttered and passed as genuine a false and forged check cannot be construed to mean that he knew the check was false and forged at the time he uttered and passed it. For these reasons we think the charging part of both branches of the information is fatally defective when taken separately, and it gains no additional strength when joined together and taken as a whole.

Appellant insists that the information is also defective, in alleging that "the defendant did make and forge," the statute using the words "falsely make and forge." The Century Dictionary thus defines the verb "forge:" "To fabricate by false imitation; specifically, in law, to make a false instrument, in similitude of an instrument, by which one person could be obligated to another, for the purpose of fraud and deceit." The words "forge, "forger," and "forgery," when used in law, have no honest meaning, but imply fraudulent deceit; and to say that "the defendant forged a check" would imply the false making fully to the same extent as if it was said "he falsely forged a check."

In this case the court instructed the jury that it was their duty to convict the defendant if the evidence sufficiently disclosed either a forgery of the check or an uttering and passing of the check. This instruction was entirely correct if those two elements of the charge had been properly pleaded, but, as we have seen, neither was properly alleged, and consequently the instruction was wrong in both regards; but, aside from that, the jury found the defendant guilty as charged in the information. He was charged with forging the check, and uttering and passing it, and the jury was told he could be convicted of either under the law. Now, even conceding that one of these elements of the offense only was fatally defective by reason of bad pleading, then the judgment must be reversed; for it is impossible to say, under the instructions of the court and the evidence introduced, but that the jury based their verdict upon the portion of the information which was absolutely void. No presumption can be indulged in to support the judgment in this respect, for the jury was told that it could find the defendant guilty under either branch of the information.

The evidence in the case is very weak. All the testimony indicating that the defendant forged the check was given by one Gumpel, an expert upon handwriting, who, by comparison with genuine writing of the defendant, testified that in his opinion the face of the check was written by the defendant. Conceding that the face of the check included the signature, still there is no evidence in the record to indicate but that Thompson, the purported drawer of the check, had authorized the defendant to attach his signature thereto. Indeed, there is no evidence that there is or ever was such a person in existence as the said Thompson. Judgment and order reversed, and cause remanded for a new trial.

We concur: PATERSON, J.; HARRISON, J.; SHARPSTEIN, J.

DE HAVEN, J., (*concurring specially.*) In my opinion, the information in this case is sufficient, but I concur in the judgment upon the ground that the evidence is insufficient to sustain the verdict. The only evidence that the check described in the information was a forgery, or that defendant knew its character when he transferred it, consisted of the testimony of one Gumpel, based upon a comparison of the check in question with certain writings proven to be in the handwriting of defendant. This witness was asked whether, in his opinion, the face of the check and the writings referred to were in the same handwriting. In answer to which "the witness testified that, in his opinion, the check and examples in evidence were all written by the same person." This is not sufficient proof that the signature to the check was a forged one. Whether the signature to this check was genuine or false was a material fact in the case, and the attention of the witness should have been directed to this. The record in this case leaves it in doubt whether the witness meant to say anything more than that the body of the check was in the handwriting of the defendant, but the jury should not have been compelled to guess as to his meaning, when a specific question would have made the matter clear.

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92 Cal. 548

GREEN v. REDDING. (No. 13,308.)

(*Supreme Court of California.* Dec. 30, 1891.)

LEASE — REPAIRS — ABANDONMENT OF PREMISES.

Under Civil Code, § 1941, requiring the lessor to put buildings intended for human occupation in a condition fit for occupancy, and section 1942, providing that the lessee, after notice to the landlord of dilapidations, may either repair at the expense of the landlord or vacate the premises, a lessee of a dwelling who discovers the premises to be in an untenantable condition cannot abandon the premises, so as to relieve himself from liability on the lease, without notice to the landlord to repair, where the lease was executed by both parties in good faith.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. P. HOGE, Judge.

Action by Fred H. Green against Joseph D. Redding. Judgment for defendant. Plaintiff appeals. Reversed.

Horace W. Philbrook and *Arthur Rodgers*, for appellant. *W. H. L. Barnes*, for respondent.

FOOTE, C. This action is for the recovery of $400 for rent claimed to be due by virtue of a written lease of a "residence and premises, including the furniture therein, on the corner of Octavia and Pine streets, in the city of San Francisco, and known as 'Number 1,716 Octavia Street,' with the appurtenances, for the term of six months." The lease is an exhibit to, and made a part of, the complaint. The answer admits the due execution of the lease, but denies that any rent is due under it, and sets up as a defense that, at the time of the execution and delivery of that instrument, the leased premises were in an untenantable condition, and unfit for the occupation of the defendant and his family; that they were filthy from want of care upon the part of the landlord, and unsafe for that reason for the occupation of defendant and his family; that as soon as he ascertained their condition he vacated and delivered up the premises, and has not occupied them at any time during the period covered by the lease. It is not alleged therein that the landlord was guilty of the least bad faith or deception towards the defendant, or that the latter entered into the contract in any other way than of his own free will and accord, and with full opportunity to demand and make inspection of the premises, and satisfy himself of their condition, before entering into the contract. The proposition advanced by him seems to be that it is the duty of the landlord, in all cases where he rents such premises as here involved, to see to it at the peril of a rescission of a contract of lease that the premises shall be clean and safe to live in, notwithstanding the tenant may not have insisted, as a careful man would, as a condition precedent to entering into the lease, that he should inspect the premises, and be satisfied with their condition, and although the lease does not contain a warranty or anything whatever putting any responsibility for the condition of the premises upon the landlord. In other words, that there is an implied warranty in such a letting that the premises shall be fit for the purpose for which they are leased. The findings of the court were responsive to the issues raised by the pleadings, and found that the matter set up in defense was true. Upon them a judgment was given and made in favor of the defendant, from which this appeal is taken.

The question for determination is whether, under such a contract, entered into by both parties in good faith, the tenant can rescind the contract after abandoning the premises, and be free of all responsibility for rent, when the landlord, as in this case, was willing to put the premises in such condition, upon short notice, as they might require, so as to render them safe and habitable, and where the tenant had given him no notice even that they must be put in that condition. The evidence as to the condition of the house is conflicting, so that the whole matter depends for its solution upon whether the facts set out in the findings are sufficient in law to uphold the judgment. In Van Every v. Ogg, 59 Cal. 565, it was said: "The tenant takes the premises for better or for worse, and cannot involve the landlord in expense for repairs without his consent;" quoting Mumford v. Brown, 6 Cow. 475. The Civil Code, § 1942, however, gives the option to the tenant, after notice to the landlord, to make repairs not requiring an expenditure of more than a month's rent,—the same to be deducted from the rent,—or to vacate the premises discharged from performance of the conditions of the lease. The preceding section of the same Code (1941) provides that "the lessor of a building for the occupation of human beings must, in the absence of an agreement to the contrary, put it in a condition fit for such occupation, and repair all subsequent dilapidations thereof which render it untenantable, except such as are mentioned in section 1929," being deteriorations occasioned by the hirer's "ordinary negligence." It is insisted that the section last cited by operation of law inserts in every lease a covenant on the part of the landlord to repair. But, bearing in mind that at the common law no such covenant was implied, and reading the two sections together, the intent seems clear that the obligation of the landlord should be limited by the extent of the privilege conferred upon the tenant; that is, it is the duty of the landlord to repair upon notice, and if he does not perform this duty he is to be compelled to pay by deducting from the rent to the extent of a month's rental, or, at the option of the tenant, the term be concluded without redress to the landlord. In the present instance no notice was given, as we have seen, to the landlord, nor was he allowed to repair to the fullest extent, as he offered; but the tenant threw up the lease, abandoned the premises, and refused to abide by his contract entered into by both parties in good faith. We do not think that he can, under the law, be permitted thus to escape the effect of his contract, uninfluenced by any act of the landlord of deception or fraud, when, as a proposed tenant, he had it in his power, before entering into the contract, to visit and inspect the premises if he chose to do so, and, if inspection could not be had from any cause whatever, could have refused to enter into the contract. To say otherwise is to declare that an individual desiring to rent premises may see the outside thereof, never insist on looking minutely inside, and when he is satisfied, after taking possession, that they are not safe, can, notwithstanding the contract of the lease he has made, which does not contain any warranty of the landlord, and which is entered into honestly and fairly upon both sides, rescind the contract, without notice to the landlord to put the premises in proper condition, and even going further, and refusing him any opportunity to do so. This would be placing the burden of looking out for the health of one's family on the landlord, and leaving the husband and father without any responsibility therefor in renting a house for them to live in. An inspection of the decision just quoted and sections 1932, 1941, and 1942 of the Civil Code is, it seems to us, conclusive of the matter. The findings do not support the judgment, and we are therefore of opinion that it should be reversed, and we so advise.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order refusing a new trial are reversed.

92 Cal. 568

PEOPLE v. CARROLL *et al.* (No. 20,778.)

(*Supreme Court of California.* Dec. 30, 1891.)

ALTERATION OF INDICTMENT—HARMLESS ERROR—OBSCURE INSTRUCTIONS.

1. In a trial for robbery the information was against defendants "and John Murphy," but was withdrawn against Murphy, and some one connected with the court, after arraignment and before trial, erased the words "and John Murphy" by drawing a black-ink line through them. Defendants were convicted. *Held*, that while the act of erasing was unauthorized, yet, as it did not prejudice defendants, it was not ground for reversal.

2. In a trial for robbery, defendants asked the court to instruct the jury that "any fact in favor of a defendant is sufficiently established when proven by a preponderance of evidence, and, even though as to such fact the jury have some doubt, if it has been proven by a preponderance of evidence, they must acquit." *Held*, that the instruction asked for was too obscure to warrant a reversal for its refusal.

PATERSON, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

James Carroll and James Bradley were convicted of robbery, and appeal. Affirmed.

Carroll Cook and *J. E. Foulds*, for appellants. *W. H. H. Hart*, Atty. Gen., for the People.

MCFARLAND, J. The defendants were convicted of robbery, and appeal from the judgment, from an order denying a new trial, and from an order denying a motion in arrest of judgment. The main point made by appellants is that the original information was altered after arraignment and plea, and before trial. The facts are that the information charged the appellants and also one John Murphy. It appears that afterwards the information was withdrawn as against Murphy, and that some one connected with the court erased the words "and John Murphy," and the word "and," where it occurred in another place, by drawing a black line through the same. This was certainly an unauthorized and dangerous act; and if it did not appear clearly what the alterations were, and that they could not have prejudiced or injured appellants, the consequence might have been serious. But as the alterations clearly appear, and as they could not "have actually prejudiced defendants, or tended to their prejudice, in respect to a substantial right," they are not good grounds for a reversal of the judgment, no matter how censurable the act of making them. We hope, however, that this case will not be taken as a precedent for similar conduct hereafter.

We do not think that, under the circumstances detailed by the bill of exceptions, the court abused its discretion in curtailing the cross-examination of the prosecuting witness, or of sustaining the objections to the questions asked him.

The objection to evidence of a certain conversation between appellants and a police officer, upon the ground that it did not appear that appellants were acting voluntarily, and uninfluenced by promises or threats, is not tenable. It does appear that the conversation was voluntary, and without being influenced by the officer. Neither was there any material error in sustaining objections to certain questions asked by appellants' counsel of the witness Egan. It does not appear that he was present at the time of the alleged assault. Moreover, he testified without objection as follows: "I saw the Chinaman, the prosecuting witness, there. I did not see the defendants there at all. I did not see anybody doing anything to the Chinaman at all."

We see no error in the instructions to the jury. In the instruction mainly objected to, given by the court of its own motion, the word "evidence" is either a misprint or was used inadvertently instead of "defendant," and could have done no harm. Moreover, the precise instruction, with the word "defendant" in its proper place in the sentence, was given at the request of defendant, as follows: "No fact in the case can be considered as sufficiently proven by a preponderance of evidence, and facts against the defendant must be proven by even more than a preponderance of evidence; they must be proven beyond a reasonable doubt." As this instruction was asked by appellants, they cannot object to it. And there was no error in denying the fourth instruction asked by appellants. It was as follows: "Any fact in favor of a defendant is sufficiently established when proven by a preponderance of evidence; and even though, as to such fact, the jury have some doubt, if it has been proven by a preponderance of evidence they must acquit." This language is obscure, and before a judgment will be reversed for a refusal to give an instruction the meaning of the proposed instruction must at least be clear. The meaning of the proposed instruction here is probably that, if a jury have "some doubt" whether a fact in favor of defendant has been proven by a preponderance of evidence, "they must acquit." But this proposition cannot be maintained. In People v. Bushton, 80 Cal. 160, 22 Pac. Rep. 127, 549, and kindred cases, the lower court had affirmatively instructed that on a trial for murder the defendant must show circumstances of mitigation, justification, or excuse by a preponderance of evidence,—by evidence stronger than that of the prosecution; and this court held that such affirmative instruction was wrong, and that the defendant should be acquitted "if, upon the whole case, they entertained a reasonable doubt from the evidence of his guilt." But that is very different from saying that, if a jury had some doubt whether a defendant had proven a fact in his favor by a preponderance of evidence, they should acquit.

We think that the case was fairly submitted to the jury. The real question in the case was whether the evidence warranted a conviction. But the determination of that question rested upon the credibility of certain testimony, a matter clearly within the proper province of the jury. The judgment and orders appealed from are affirmed.

We concur: De Haven, J.; Sharpstein, J.; Harrison, J.; Garoutte, J.

Paterson, J. I dissent. The court erred, I think, in permitting the prosecution to show that the defendant had asked a police officer whether the charge could be reduced to petty larceny. Whart. Crim. Ev. § 655; State v. Emerson, 48 Iowa, 172. I think the court erred in excluding the question asked by defendants in the cross-examination of the prosecuting witness, Loo Goon.

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92 Cal. 552

Shepperd v. Tyler. (No. 13,044.)

(*Supreme Court of California.* Dec. 30, 1891.)

Survival of Action—Death of Party Pending Appeal—Liability of Administrator.

Where a defendant in ejectment died after executing an undertaking on appeal, pursuant to Code Civil Proc. § 945, that, if the judgment be affirmed, or the appeal dismissed, he would pay the value of the use and occupation of the premises pending the appeal, the right of action for such use and occupation survived against his estate, to be collected from it as any other claim, or from the sureties on the undertaking, and not against the administrator personally, who collected rents of the premises.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by one Tyler against one Shepperd for rents collected as administrator of the estate of one McCauley of certain premises during the pendency of an appeal from a judgment in ejectment. Plaintiff had judgment, and defendant appeals. Reversed.

D. H. Whittemore, for appellant. *E. P. Cole*, for respondent.

Harrison, J. In an action of ejectment for certain land in San Francisco,—Brummagin v. McCauley,—pending in the superior court of San Francisco, judgment was rendered June 9, 1882, in favor of the plaintiff from which an appeal with an undertaking staying execution was taken to this court. That judgment was affirmed, and the *remittitur* filed in the superior court April 4, 1885. Pending this appeal the plaintiff herein, February 2, 1884, succeeded to the rights of the plaintiff in that action, and on the same day the defendant herein was appointed the administrator of the estate of McCauley, who had died intestate after the appeal was taken. The land in controversy had been rented by McCauley in his life-time, and after his death the tenant attorned to the defendant herein as administrator, paying him as rent for the premises in the aggregate the sum of $75, which was applied by him in the administration of the estate of McCauley. Upon the affirmance of the judgment in this court the defendant herein directed the tenant to attorn to the plaintiff herein, and thereafter to pay the rent of the premises to her. The plaintiff afterwards brought the present action, alleging ownership of the premises on the 2d day of February, 1884, an ouster by the defendant on that day, and that thereafter until April 4, 1885, the defendant took and received the rents and profits of the land, amounting to $495, and prayed judgment for the value of the same. Judgment was rendered in her favor for $242, from which, and an order denying a new trial, the defendant has appealed.

The court found as facts "that on 2d February, 1884, the defendant unlawfully entered on the possession of said land, and ousted and ejected the plaintiff therefrom, and kept her so ousted and ejected for the period of eight months; that during said eight months defendant took and received to his use all the rents, issues, and profits of said land and the tenements thereon." These findings are unsupported by the evidence. There was no evidence before the court that the defendant was ever in possession of the land, or had ousted the plaintiff therefrom, nor was there any evidence that the defendant took or received more than $75 of the rents, issues, and profits of the land; and it was shown that he took and received them not to his own use, but for the use of the estate of which he was administrator. There can be no ouster of a person from the possession of land unless such person was entitled to the possession. The undertaking staying execution pending the appeal, which was given by McCauley, deprived the plaintiff in ejectment of all right to any possession of the land until the determination of such appeal, and the plaintiff herein could have no greater right of possession than had her predecessor. The undertaking on the part of McCauley "that he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof" (Code Civil Proc. § 945) operated, by virtue of the statute, to give to him a lease of the land during that period in consideration of the obligations contained in the undertaking; and when the plaintiff herein became the owner of the land she took it subject to this outstanding lease. And, as in the case of any other lease, the agreement to pay the value of the use and occupation was a personal obligation of the defendant who appealed, and upon his death survived against his estate, to be collected as any other claim against it. The profits which he might receive from its use, or the rents which he might collect from his tenant, was his own property, and such rent, as well as the term created by such statutory lease, belonged to his estate. The defendant herein, as his administrator, incurred no personal liability by collecting such rent during the period that the statute authorized him to retain possession of the land. The remedy of the plaintiff herein must be sought from the estate of McCauley in the ordinary mode of prosecuting claims against an estate, or from the sureties upon such undertaking. The judgment and order denying a new trial are reversed.

We concur: Garoutte, J.; Paterson, J.

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92 Cal. 542

Farnum v. Hefner. (No. 14,195.)

(*Supreme Court of California.* Dec. 30, 1891.)

Assignment of Lease—What Amounts to.

A lessee executed an assignment of the lease, and gave it to the lessor for his written consent, as required by the terms of the lease. The lessor refused to consent to the assignment, and retained possession of it, so that it was never delivered to the assignee. *Held*, that there was no breach of the covenant against assigning, and the leasehold was subject to execution against the lessee.

Commissioners' decision. Department 1. Appeal from superior court, Butte county; P. O. Hundly, Judge.

Action by C. E. Farnum against Philip Hefner. Judgment for defendant. Affirmed.

Carter P. Pomeroy, for appellant. *H. V. Reardan*, for respondent.

Foote, C. This cause has been here before, (79 Cal. 575, 21 Pac. Rep. 955,) where the facts pertaining to it are fully stated. It was contended on that appeal that Hefner, the defendant, was entitled to certain wheat which had been grown upon Farnum's land by a tenant named Butler, by virtue of an execution sale of the interest of Butler to Hefner in the leasehold; and in support of this view the judgment roll in the action of Hefner against Butler was offered in evidence by Hefner, and refused by the court. The court here held that this should have been admitted, because the transfer of the leasehold interest of Butler by the execution sale was an involuntary assignment of the lease, which was not specified in the lease as a forfeiture thereof; the opinion on the point reading thus: "The covenant in the lease is the ordinary kind, which applies, it seems to us, to a voluntary, and not an involuntary, assignment of the lease. It is firmly established by authority that under such a covenant an involuntary assignment by sale under execution—bankruptcy and the like—is not a violation of the covenant, and does not work a forfeiture." 79 Cal. 580, 21 Pac. Rep. 957, and authorities cited. The effect of the decision, then, was to reverse the judgment which Farnum had obtained against Hefner for damages for conversion of the wheat raised on the leased premises by Butler, and claimed by Farnum, as also the order denying Hefner a new trial. It is now contended by Farnum, the appellant, that the lease was forfeited by a written assignment to one Gibbs by Butler before the judgment of Hefner against Butler was obtained; and this seems to be the only point made as against the decision of the court below on the last trial. The court found, among other things, "that at the date of the levy of the said execution the interest or estate vested in said D. L. Butler by virtue of the execution and delivery of said lease was still vested and remained in him." The facts pertaining to that matter, as they appear in the record, are that the assignment of the lease, although written out and acknowledged, was never delivered to the proposed assignee, Gibbs, who had been the foreman of Butler in raising the wheat, and was upon the premises for Butler; the reason for the non-delivery thereof being that the permission of Farnum, which was sought to be indorsed on the assignment, was refused when the document was sent to him for that purpose, and he thereafter retained possession of it, and it never reached the hands of Gibbs or any one for him. There was, therefore, no breach of the condition against assigning the lease growing out of that transaction. We therefore conclude that there is no prejudicial error appearing in the record, and advise that the judgment and order be affirmed.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(92 Cal. 564)

In re TAYLOR'S ESTATE. (No. 14,251.)

(*Supreme Court of California.* Dec. 30, 1891.)

WILLS—TESTAMENTARY CAPACITY—OPINION EVIDENCE—HARMLESS ERROR.

1. Under Code Civil Proc. § 1870, declaring that an intimate acquaintance may give in evidence his opinion respecting the mental capacity of a person, in connection with the reasons upon which it is based, the opinion of such a witness, in the contest of a will on the issue of testamentary incapacity, is admissible only as to the mental soundness of the deceased, and not as to his capacity to make the will.

2. Where evidence is erroneously admitted in the contest of a will, in regard to the lack of testamentary capacity on the part of the deceased, and the jury find that certain fraudulent representations were made to the deceased by one of the legatees, and that by reason of such representations the deceased was induced to execute the will, it cannot be said that these issues were so independent of that relating to testamentary capacity that the jury may not have been influenced in their findings by the said evidence, and the error in admitting it must therefore be deemed to have been prejudicial.

Department 2. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge.

This was a proceeding to annul and set aside an order admitting to probate the will of Simpson P. Taylor. From a judgment annulling and setting aside the said order this appeal is taken. Reversed.

J. A. Barham, (*A. E. Bolton*, of counsel,) for appellant. *D. R. Gale*, for respondent. *J. R. Leppo*, for Maud M. Berghstrom.

DE HAVEN, J. On December 24, 1889, the superior court of Sonoma county admitted to probate a certain will of Simpson P. Taylor, deceased, dated October 29, 1889. Thereafter a petition was filed in that court asking that the order admitting said will to probate be annulled and set aside upon the alleged grounds of the incompetency of the deceased to make said will, and also because at the time of making the same he was acting under the influence of certain fraudulent representations, alleged to have been made by one C. C. Taylor, one of the legatees named in the will. Special issues were submitted to the jury, involving every question in issue, and the jury found, in substance, that all the allegations of the petition were true. Judgment was thereupon entered annulling and revoking the probate of said will, and this appeal is from that judgment and an order denying a motion for a new trial.

1. Mrs. Harriet Wetmur was a witness for contestants, and during her direct examination she was asked: "Will you tell the jury whether or not, in your judgment, from conversations you had with him, seeing what you saw, and knowing what you knew, and now know, about it whether, in your judgment, on the 29th day of October, 1889, Simpson P. Taylor was capable of making a will?" This question was objected to as incompetent and irrelevant; the objection was overruled, and the witness answered, in substance, that the deceased was not capable of making a will. The court erred in overruling the objection to this question. Under section 1870, Code Civil Proc., the opinion of an intimate acquaintance respecting the mental capacity of a person is admissible, the reason for the opinion being given; but there is a wide difference between such an opinion and one as to the quantum of intelligence or mental capacity that in law is deemed sufficient to enable one to make a valid disposition of his property. The latter involves a question of law as well as of fact, and was in this case the very thing for the jury to determine from the evidence, and under the instructions of the court. The precise question was before the supreme court of Alabama, in the case of Walker v. Walker, 34 Ala. 470; and the court, in passing upon it, said: "Capacity to make a will is not a simple question of fact. It is a conclusion which the law draws from certain facts as premises. Hence it is improper to ask and obtain the opinion of even a physician as to the capacity of any one to make a will. Under our system, that question was addressed to the jury. All evidence which tended to shed light on his mental *status*—the clearness and soundness of his intellectual powers—should have gone before them. This being done, however, the witness should not have been made to invade the province of the jury." The case from which we have just quoted was cited and expressly approved by this court in Conner v. Stanley, 67 Cal. 315, 7 Pac. Rep. 723. In that case the validity of a contract made by a deceased person in his life-time was a question in issue, and the court held that it was error to allow the witness to give an opinion as to the competency of the deceased to make contracts with people who came to him and claimed to be mediums, and "whether or

not they would have any undue influence over him." So, also, in Gibson v. Gibson, 9 Yerg. 329, the inquiry was as to the competency of a testator to make a will, and a witness was asked "whether, from the situation in which he saw the old man on that morning, and from the facts which he had just stated to the jury, he believed the old man was then in his senses, and capable of making a will." The court held this to be improper, saying: "The latter part of the question, 'capable of making a will,' as it involved a question of law and fact, and the very question to be determined by the jury, was entirely illegal." To the same effect are the cases of Fairchild v. Bascomb, 35 Vt. 398; Farrell v. Brennan, 32 Mo. 328; Runyan v. Price, 15 Ohio St. 1. In this case it would have been proper for the witness to have given an opinion as to the mental soundness of the deceased in connection with the facts upon which the opinion was based. The jury could then have judged of the value or weight of such opinion, by a consideration of the reasons upon which it was based; and if they deemed the opinion correct, and that the testator was not mentally sound, the next question for them would be whether such mental unsoundness affected his capacity to make a will; and in passing upon this, in addition to considering the fact of such mental unsoundness, the jury would have to be guided by the instructions of the court as to the nature and degree of mental unsoundness which would render the testator incapable of disposing of his property. But, in allowing this witness to answer the question referred to, not only was the province of the jury invaded, but that of the court also, and the whole issue of law and fact was determined by the mere opinion of the witness. What has been said applies also to evidence of the same general character given by other witnesses.

2. The jury also found that certain specific fraudulent representations were made to the deceased by one of the legatees, C. C. Taylor, and that by reason of such false and fraudulent representations the deceased was induced to execute the will in question. We think the evidence was sufficient to justify these findings; but we cannot say that these issues were so entirely independent of that relating to the testamentary capacity of the deceased that the jury may not have been influenced in their findings upon this branch of the case by the erroneous evidence already referred to, in regard to the want of testamentary capacity upon the part of the deceased. It cannot, therefore, be said that, upon the whole case, the error in admitting this evidence was harmless. The jury may have in a great degree based their finding that the deceased was influenced by the false representations of C. C. Taylor, and thereby induced to execute the will in question, upon his want of capacity to make a will,—his inability to understand the true relation of things. If the jury had believed him to have had the capacity to make a will, it may be they would have found that he was not unduly influenced by the alleged false representations. Judgment and order reversed.

We concur: McFarland, J.; Sharpstein, J.

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92 Cal. 594

People v. Ellsworth. (No. 20,780.)

(*Supreme Court of California.* Dec. 30, 1891.)

Criminal Law—Opening Statement of Counsel—Challenges to Jurors.

1. Where the evidence is sufficient in a criminal prosecution to justify the verdict, it is immaterial whether or not the district attorney fully stated it in his opening to the jury.

2. Where a defendant is represented by counsel, the neglect of the court to inform him of his right to challenge jurors, as required by Pen. Code, § 1066, is not prejudicial.

In bank. Appeal from superior court, city and county of San Francisco; F. W. Van Reynegom, Judge.

Indictment against Frank Ellsworth for burglary. There was a judgment of conviction, and defendant appeals. Affirmed.

Carrol Cook and *J. E. Foulds*, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

McFarland, J. The appellant was convicted of burglary in the second degree, and appeals from the judgment and order denying him a new trial. The evidence was sufficient to justify the verdict; and it was immaterial whether or not the district attorney fully stated all the evidence and facts in his opening statement to the jury. There was sufficient proof of the venue, (People v. McGregar, 88 Cal. 140, 26 Pac. Rep. 97,) although, as to that matter, the prosecution showed great carelessness. We see no error in the matter of instructing the jury.

The appellant suffered no prejudice from the neglect of the court to inform him of his right to challenge jurors, as provided in section 1066 of the Penal Code, as he was represented by counsel, (People v. Mortier, 58 Cal. 266,) unless we are to assume that his counsel was incompetent. Courts, however, should never allow such a point to get into a case. If judges, when trying criminal cases, would keep the Code before them, and look into it occasionally, they could avoid many technical exceptions which arise out of the failure to perform mere routine duty. We see no error in the record. Judgment and order affirmed.

We concur: De Haven, J.; Sharpstein, J.; Garoutte, J.; Harrison, J.

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92 Cal. 555

Roddan v. Doane. (No. 13,901.)

(*Supreme Court of California.* Dec. 30, 1891.)

Claims against Decedent's Estate — Evidence—Partnership Debt.

1. Where the notice required creditors to present their claims against an estate at a certain attorney's office, a claim left with the clerk of the attorney for the administratrix on the day specified was a valid presentation of the claim.

2. Where plaintiff, in an action against an estate for money received to plaintiff's use, claimed under a contract with decedent and his copartner, and the evidence failed to disclose that any money belonging to plaintiff was indi-

vidually received by decedent, a judgment for plaintiff was not sustained by the evidence.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Action for money had and received by Hugh Roddan against Carrie O. Doane, administratrix. Plaintiff had judgment, and defendant appeals. Reversed.

E. W. McGraw, for appellant. *Young & Powers*, for respondent.

TEMPLE, C. Defendant appealed from the judgment on a bill of exceptions within 60 days after its rendition. The action was for money had and received by defendant's intestate, and it is contended that the claim presented to the administratrix had not been rejected before the commencement of the action. The notice to creditors required them to present their claims to the administratrix at the office of E. W. McGraw, Esq., 318 California street, San Francisco. June 25, 1889, plaintiff went to the office indicated, and, the administratrix not being present, left his claim for her, and took a receipt for it signed by McGraw, through his clerk. McGraw was an attorney at law, and the place indicated was his office, and presumptively his clerk was authorized to receive papers for him. But the notice did not require or authorize the presentation to McGraw, but to the administratrix at this office. Is such a presentation good, in the absence of the administratrix? The precise question does not seem to have been passed upon by this court, but in Bollinger v. Manning, 79 Cal. 7, 21 Pac. Rep. 375, the court considered the sufficiency of a notice requiring claims to be presented to the administrator at the office of his attorneys; "the same being his place for the transaction of the business of the estate." This was held to be a compliance with the Code, which directs the administrator to publish a notice requiring presentation of claims "at the place of his residence or business to be specified in the notice." The court said: "It seems to us that the words, 'place of his business,' should be construed to include the place where the administrator transacts the business of the estate, though he may be engaged in transacting some kind of business elsewhere. To hold otherwise would often render it quite inconvenient for creditors to present their claims at all. For example, the administrator may live and be carrying on a farm many miles distant from the county-seat, where most or all of the creditors reside, or he may live and be employed in a workshop in some obscure part of a city, not easily accessible." The rationale of this decision goes the full length of respondent's contention; for, to avoid the inconvenience supposed, it is necessary to hold good a presentation at the office while the administrator is absent at his farm or workshop. The requirement that claims must be presented before suit can be instituted is for the protection of the estate, and implies that an opportunity will be afforded to creditors to present their claims. Here the administratrix certainly did not expect to remain at McGraw's office; and it seems necessary to hold either that such a presentation is good in her absence, or that such a notice is void. We think it must be held that such a presentation is good. We see no point in the suggestion that the claim was left with the clerk. The Code requires that it be presented to the administrator, and does not authorize the attorney to act for him. It follows, also, that it must be held that the claim was presented when left at the office. It is important for the claimant to know when the claim was presented and to be able to prove such fact. The administrator cannot prejudice the claimants by requiring claims to be left with his attorney, to be by him presented at his convenience, or not at all. The claim having been duly presented on the 25th day of June, and not acted on for 10 days, the claimant had the right to consider it rejected; and this right was not affected by the fact that the administratrix demanded proofs and vouchers.

The next important question raised is whether the evidence shows that Marshall Doane did receive any money belonging to plaintiff or his assignors, Steinman & Roddan. Doane & McBean contracted with the state of California to do work under the drainage act (St. 1880, p. 123,) and Steinman & Roddan were subcontractors. The contract under which they performed work is not set out or proven, but McBean testified that they sublet to them a portion of the work. Steinman & Roddan were to furnish the material and do the work. That seven-twelfths of $6,060.34 and two-thirds of $4,179.10 belonged to them. He gave them an order on the comptroller for the amount, because they were to be paid in warrants. The suit is against the estate of Marshall Doane, and the point is made in the answer that McBean is a necessary party. It is necessary for plaintiff to show, not that Doane & McBean received the money, but that it came to the personal possession of Marshall Doane. The drainage act having been declared unconstitutional, (People v. Parks, 58 Cal. 624,) a contract was drawn purporting to be between Doane & McBean, as partners, of one part, and Steinman & Roddan of the other part; but it was signed by Doane individually. This agreement specifies the amount due from first parties to second parties for work and materials, recites that the money is being withheld by the state, and expenses will be incurred, and the parties therefore stipulate to pay the expenses in proportion to their claims, and "that after said claims shall have been fully adjusted, and all expenses paid, and before any warrants shall issue for the payment of the same, or any part thereof, the proceeds or residue of said sums of money shall be owned, held, and possessed as follows." The proportion in which the parties shall then be owners of the funds is then repeated. The contract then sets out that the parties of the first part sell and assign to the parties of the second part their proportion of the claims, to take effect from the date, Doane to represent and manage the claims, without the power to alienate except as to 15 per cent., which he may dispose of without being accountable therefor. July 22, 1889, McBean, surviving partner of Doane & McBean, executed a document wherein he states that he desired to ratify and confirm the conveyance by Doane, above recited, and therefore "I hereby sell and assign and set over to Hugh Roddan * * * all my right and interest of said firm of Doane in and to," etc., said proportion of the claim. In 1885 the legislature passed an act appropriating money for the payment of these claims, and this act was held valid by this court. Miller v. Dunn, 72 Cal. 462, 14 Pac. Rep. 27. It would appear from these facts that plaintiff became the owner, as between himself and Doane & McBean, of a fixed proportion of the claims against the state, but here plaintiff's case seems to break down. There is no evidence at all that Doane individually received any money from the state on account of any claims in which plaintiff was interested. The evidence which plaintiff claims establishes this essential fact is: *First.* The payment of the warrants by the state. These were all paid to the National Bank of D. O. Mills & Co. upon the indorsement of Doane & McBean, and presumably placed to the credit of that firm. The evidence fails to show whether the indorsements were made by Doane or McBean, or either of them, or who received the money from the bank. And, *second*, certain statements of Doane that he had received all his money without paying the 15 per cent. These declarations do not show that any money was received by Doane individually. They are all just as consistent with the idea that the money went to the firm, when the surviving partner would be liable. The evidence does not show that Doane had the sole management of the affairs of Doane & McBean, nor that McBean after a few months had nothing further to do with the management. On the contrary, it appears that he did participate; for we find that he gave an order on the comptroller in favor of plaintiff and himself which transferred to them warrants for more than $5,000. This finding of the court is properly excepted to, and we think is not sustained by the evidence. The judgment should be reversed and a new trial had, and we so advise.

We concur: Vanclief, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, and a new trial ordered.

92 Cal. 605

RANKIN v. COLGAN. (No. 14,483.)

(*Supreme Court of California.* Dec. 31, 1891.)

STATE OFFICERS—COMPENSATION—CONSTITUTIONAL LAW.

Where an act of the legislature, appropriating money to an individual for services rendered the state under appointment by the governor, is valid on its face, the court will not look into evidence *aliunde* to determine whether it violates Const. art. 4, § 25, subd. 29, and sections 31 and 32, which provide, respectively, that the legislature shall not pass any law affecting the fees or salary of any officer, make any gift of the public money, or award extra compensation to an officer, after the service has been rendered.

In bank.

Petition by James W. Rankin for *mandamus* to compel E. P. Colgan, as state comptroller, to draw a warrant on the state treasurer. Writ granted.

Peter J. C. Campbell, for appellant. *W. H. H. Hart*, Atty. Gen., for respondent.

PATERSON, J. This is an application for a writ of mandate to require Hon. E. P. Colgan, state comptroller, to draw his warrant on the treasurer in favor of the petitioner for the sum of $250. The application is based upon an act of the legislature, approved March 31, 1891, the material portion of which reads as follows: "The sum of $250 is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, to pay James W. Rankin for services in the state treasurer's office, during the period elapsing from November 13, 1884, to December 15, 1884, both dates inclusive, under appointment by Governor George Stoneman, on account of the delinquencies of Arthur January, deputy state treasurer." Respondent filed an answer denying that the petitioner has ever performed any services for the state except such as had been fully paid for, and claiming that the act referred to is unconstitutional and void, in that it violates the provisions of subdivision 29 of section 25 and sections 31 and 32 of article 4 of the constitution, because it attempts to award extra compensation to an officer after the service has been rendered, or is a gift of public money. The act is not void on its face. It does not purport to award extra compensation, and we cannot assume that the legislature intended to do so. The nature of the services rendered under and by virtue of his appointment by Gov. Stoneman does not appear. As chief executive of the state, the governor always has full power to protect public property. We must presume that the legislature before passing the act, and the governor before approving it, made inquiry as to the nature of the services for which the petitioner claimed compensation, and found that the claim was legal and just. The act, on its face, is at least as fair and free from suspicion as the one which we had under consideration in Stevenson v. Colgan, 27 Pac. Rep. 1089, (filed November 16, 1891.) We held there that, the act being valid on its face, no authority is conferred upon the court to look into evidence *aliunde* to determine whether it was a gift in violation of the provisions of the constitution. It follows that the matters set up in the answer of the respondent herein cannot be considered, and that the petitioner is entitled to the writ prayed for. It is ordered that writ of mandate issue under the seal of this court commanding the respondent, as comptroller of the state, to draw his warrant on the treasurer of the state in favor of the petitioner for the sum of $250.

We concur: DE HAVEN, J.; MCFARLAND, J.; SHARPSTEIN, J.; GAROUTTE, J.

92 Cal. 403

KULLMAN *et al.* v. GREENEBAUM *et al.*

(No. 13,632.)

(*Supreme Court of California.* Dec. 17, 1891.)

COMPOSITION WITH CREDITORS — PREFERENCES — CONVERSION OF PLEDGE.

1. Where friends of defendants paid certain creditors the full amount of their several demands, with the knowledge, but without the direction, of defendants, and not out of their assets, nor under any promise or expectation of repayment, and thereby made a preference of such creditors, and induced them to sign a composition deed, by which the other creditors agreed to receive *pro rata* the proceeds of the sale of defendants' assets, and thereupon to release them from all claims, and the preferred creditors thereby received a larger sum than they were entitled to under the composition deed, such preference is fraudulent, and the deed invalid.

2. In an action for the conversion of $18,000 worth of stock, the court found that the stock was deposited as security for money loaned to plaintiffs by defendants; that when plaintiffs demanded the stock there was due on the loan $8,000, with $37 interest; and that the $8,000 was paid. Defendants contended that the conversion alleged was not established, because the interest was not paid or tendered. *Held*, that defendants' point was of no avail, on the maxim of *de minimis non curat lex.*

Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Action by Simon Kullman and William Lowenberg against Jacob Greenebaum and Emanuel Straus for the conversion of certain shares of stock. Judgment for plaintiffs. Defendants appeal. Affirmed.

Jarboe, Harrison & Goodfellow, (*Edward R. Taylor*, of counsel,) for appellants. *Wal. J. Tuska*, for respondents.

MCFARLAND, J. The main question in this case is about the validity of a composition deed, by which the respondents and the other creditors of appellants agreed to receive *pro rata* the proceeds of the sale of appellants' assets, and thereupon to release them from all claims and demands. Respondents contend that said agreement is invalid because a fraudulent preference was given to certain of the creditors who signed it, and the court below so found. The court found as facts that some of the creditors at first refused to sign the agreement, and that, to induce them to sign, "some of the relatives and friends of the defendants did pay such creditors the full amount of their several demands, with the knowledge, but without the direction, of the defendants, and not out of the assets of the said defendants, nor under any promise or expectation of repayment, and thereby did make a preference of such creditors, and induced them to sign the said composition; and that such creditors did receive a larger proportion or sum than secured by said agreement; of all of which facts the plaintiffs at the time of signing such composition were ignorant, and upon the discovery thereof notified the defendants," etc. We think that the ruling of the court below was right, and in line with the current of authorities. The general rule is correctly laid down in Story, Eq. Jur. § 378; and we stated it quite fully in the recent case of O'Brien v. Greenebaum, (Cal.) 28 Pac. Rep. 214. It is strenuously argued by counsel for appellants that the principle does not apply here, for the reasons that the payments to the preferred creditors were not made by the debtors or their agents; and particularly that the payments were not made out of the debtors' assets,—that is, out of the actual and disposable property which they then had. It is to be noticed, however, that the appellants knew of these secret payments to preferred creditors; and, as the utmost good faith is required in such transactions, the appellants can hardly be said to be innocent of the imposition practiced upon respondents. But, beyond all that, the rule does not, by any means, rest solely upon the participation of the debtor in the fraud, and the diminution of the actual assets. In a composition agreement each creditor is a party as to each other creditor as well as to the debtor. "Creditors sign upon the consideration that others sign upon the same terms, and, if they are deceived, they are misled into an act to which they might not otherwise have assented." See Story, Eq. Jur. § 379, and notes. Solinger v. Earle, 82 N. Y. 393, was a case where a brother-in-law (as in the case at bar) had given his note to induce a creditor to sign a composition deed; and in the opinion of the court in that case there is aptly expressed the views which are determinative of the point in question against appellants in the case at bar. The court say: "The agreement between the plaintiff and the defendants to secure to the latter payment of a part of their debt in excess of the ratable proportion payable under the composition was a fraud upon other creditors. The fact that the agreement to pay such excess was not made by the debtor, but by a third person, does not divest the transaction of its fraudulent character. A composition agreement is an agreement as well between the creditors themselves as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt. The signing of the agreement by one creditor is often an inducement to the others to unite in it. If the composition provides for a *pro rata* payment to all the creditors, a secret agreement, by which a friend of the debtor undertakes to pay to one of the creditors more than his *pro rata* share, to induce him to unite in the composition, is as much a fraud upon the other creditors as if the agreement was directly between the debtor and such creditor. It violates the principles of equity, and the mutual confidence as between creditors, upon which the agreement is based, and, diminishes the motive of the creditor who is a party to the secret agreement to act in view of the common interest in making the composition. Fair dealing and common honesty condemn such a transaction."

2. We think that there was sufficient evidence to support the finding of the court that the shares of stock mentioned in the complaint were deposited by respondents with the appellants as security for certain loans of money made by the latter to the former, and not upon any other account; and that when respond-

ents demanded said stock of appellants there was due upon said loan account $8,000, and $37 interest. At the time of the demand respondents paid to appellants (and the latter received it) the said $8,000, but nothing was said about the $37 for interest, and it was not paid. And it is now contended by appellants, among other things, that respondents did not establish a technical conversion of the stock mentioned in the complaint, because said $37 was not paid or tendered. But it is evident that the item of interest was overlooked or forgotten by both parties. Appellants did not refuse to deliver the stock because this item of interest was not tendered. They received the $8,000 as the amount due on the loan, and did not demand or call attention to the interest. They delivered to respondents at the time they received the $8,000 other stocks which had been pledged in the same way; and they evidently refused to deliver the stocks mentioned in the complaint because they contended, as they still contend, that they were held upon the stock account as well as upon the loan account. Under these circumstances, and without considering other views presented on the question by counsel for respondents, it is sufficient to say that the item of interest was so small, when compared with the $8,000 received and the $18,000 worth of stock involved, that we are justified in determining the point against appellants upon the maxim, *de minimis non curat lex*. Judgment and order affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

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92 Cal. 492

Ex parte HEYLEMAN. (No. 20,841.)

(*Supreme Court of California*. Dec. 28, 1891.)

LICENSES TO PEDDLERS—CITY ORDINANCES—CONSTITUTIONALITY.

An ordinance which fixes the license of a peddler of meats "from a vehicle" at $75 per quarter, and the license of all other peddlers at $10, irrespective of the commodity peddled, is valid. BEATTY, C. J., and DE HAVEN, J., dissenting.

In bank. Petition by George Heyleman for *habeas corpus*.

The petitioner was tried before the police court of the city and county of San Francisco, and committed to jail upon a sworn complaint charging that upon August 1, 1890, "he did unlawfully engage in and carry on the business of peddling meats from a vehicle in said city and county," thereby violating the provisions of sections 2 and 8 of order 1589 of the board of supervisors, as amended by order 2216 of the said board. Prior to the passage of order 2216 there had been one general provision, uniform in its character, fixing the rate of license for peddlers, viz., $10 per quarter, irrespective of the character of the commodity peddled. This had been the rate established for the 10 years next preceding. Order 2216 left the rate the same as to all peddlers except as to a peddler of meats from a vehicle or basket, and fixed the latter's license at $75 per quarter. The petitioner contended that this was an unreasonable and unjust discrimination, and that his commitment to jail was consequently illegal. Petition dismissed.

Alfred Clarke, for petitioner. *Davis Louderback*, for respondent.

PER CURIAM. Ordinances similar to that which petitioner was convicted of having violated have frequently been considered by this court. The validity of such ordinances is not now an open question here. We are unable to discover any legal ground upon which the petitioner could be discharged. Petitioner remanded to the custody of the chief of police of the city and county of San Francisco.

We dissent: BEATTY, C. J.; DE HAVEN, J.

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92 Cal. 296

In re BONDS OF MADERA IRRIGATION DIST. (No. 14,157.)

(*Supreme Court of California*. Jan. 13, 1892.)

IRRIGATION DISTRICTS—INDEBTEDNESS—CONSTITUTIONAL LAW.

St. 1887, (Ex. Sess. 1886,) p. 29, providing for the organization of irrigation districts, and for the issuing of bonds for irrigation improvements with the assent of a majority of the voters of the district, is not in violation of Const. art. 11, § 18, prohibiting certain public corporations from incurring indebtedness "without the assent of two-thirds of the qualified electors thereof;" the constitutional prohibition being limited to "county, city, town, township, board of education, or school-district" corporations.

This is a petition for a rehearing. The case was previously argued and decided against the petitioners in 28 Pac. Rep. 272. Rehearing denied.

PER CURIAM. In their petition for a rehearing appellants have called attention to the fact that in the opinion heretofore rendered the court has failed to pass upon two propositions urged by them in their appeal, and request that, if in the opinion of the court these propositions are untenable, it be so stated, in order that there may be no occasion for another appeal in which to present them for consideration. It does not follow from the fact that the propositions were not discussed in the former opinion that they were not fully considered. Because each proposition urged in the briefs of an appellant is not taken up and discussed *seriatim*, it does not follow that they have not all received due consideration. A due regard for the amount of business before the court and the time allowed for its disposition compels us to limit the opinions in the several cases to such principles and rules of law as will be a guide to the courts below in disposing of the case upon its return, and a rule of action for the citizens of the state in their subsequent transactions. The proposition again called to our notice by the appellants in their petition for a rehearing, that the act in question is in violation of the provision of article 11, § 18, of the constitution, prohibiting certain public corporations from incurring indebtedness "without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose," cannot be maintained. This prohibition in the constitution is limited to the public corporations enumerated in that section, viz., "county, city, town, township, board of education, or school-district," and, under familiar rules of construction, cannot be extended to any other public corporation. Many of the sections of this article of the constitution include in their provisions "any public or municipal corporation," (sections 10, 12, 16,) while the provisions of section 19 are limited to a "city," and of section 11 to a "county, city, town, or township." In view of the fact that different provisions are made in the constitution for different classes of public corporations, it must be held that the prohibition in section 19 is limited to the corporations which are therein designated. For such other corporations for municipal purposes as under the provisions of section 6 the legislature might, by general laws, authorize to be incorporated, the constitution has left to the legislature power to provide the terms and conditions upon which an indebtedness may be created, as well as its amount. At the time that the constitution was framed and adopted there were many other public corporations in the state, such as reclamation and irrigation districts, that had been organized for many years, and, if it had been the intention to subject all such corporations to the prohibition, we must conclude that express language therefor would have been inserted in the constitution. The case of Harshman v. Bates Co., 92 U. S. 569, cited by the appellants, is inapplicable. The constitution of Missouri had required the assent of two-thirds of the qualified electors of a "county, city, or town" as a prerequisite to a subscription for building a railroad, and it was held that the legislature could not confer authority upon a "township" to vote a credit for such subscription; that while counties, cities, and towns had a corporate character and organization, a township was only a geographical division of the county, and that the provision of the constitution prohibiting a county from voting such credit could not be evaded by authorizing the several geographical subdivisions of the county to vote such credit. The fact that the town of Madera is included within the boundaries of the Madera irrigation district neither renders the act unconstitutional nor invalidates the organization of the district. This principle was discussed and was sustained in Board v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237. The objection that the land within a town or city cannot be benefited by a system of irrigation, and therefore cannot be taxed for such improvement, proceeds upon an erroneous view of the power of taxation. While the benefit to the land is assumed as the basis of the assessment, still, as was said in Lent v. Tillson, 72 Cal. 428, 14 Pac. Rep. 71, such benefit is not the source of the power. Even though the land is not susceptible of irrigation, yet it may be benefited by the improvement, and should bear its proportion of the burden upon the same principle that land in a city which can make no use of a sewer or other street improvement is nevertheless deemed to receive a benefit from its construction, and is required to pay a portion of its cost. The object of the act is the improvement of the district as an entirety, and the extent of the district, as well as the lands to be included therein, has been left to be determined by the discretion of the board of supervisors. Whether they have properly or improperly exercised such discretion cannot be investigated by the courts. The act cannot be declared unconstitutional by reason of any improper exercise of such discretion. Neither is it in violation of the constitution to incorporate into such district a town or city that has been incorporated for other municipal purposes. A system of irrigation contemplated by the act in question cannot be considered as a "municipal purpose," within the scope of the organization of a city or town, and there can be no conflict between a corporation organized under the act to produce a system of irrigation within the district and the municipal incorporation of the town of Madera. A water supply for the two corporations is distinct and for different purposes. The liability of the inhabitants of the town of Madera for the bonded indebtedness of the Madera irrigation district, as well as for that of their own municipality, does not impair the validity of the organization of the district. It is a liability of the same character as rests upon the inhabitants of any town for its proportion of all the indebtedness of the county within which it is situated. Rehearing denied.

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92 Cal. 639

Town of Arcata v. Arcata & M. R. R. Co. (No. 13,929.)

(*Supreme Court of California.* Jan. 9, 1892.)

Municipal Corporations — Control of Streets —Railroad Companies — Grant of Right of Way—Forfeiture of Grant.

1. Under Civil Code, § 465, conferring authority on railroad companies to lay their tracks on any highway or street subject to the condition of section 470, that the right to do so within any incorporated city or town must be granted by a two-thirds vote of the municipal authority from which the right must emanate, a board of trustees of an incorporated town may grant the use of the streets to a railroad for a side track.

2. Where such right is granted, it is not revocable at the mere pleasure of the board, but there must be failure on part of the road to comply with the terms of the grant before the privilege can be recalled.

3. Civil Code, § 468, providing that, after beginning the construction of its road, a railroad company must complete, every year, at least five miles of the road, under penalty of forfeiture of the right to extend its road beyond the point completed, does not apply to the construction of switches and side tracks.

4. Where a town has granted the use of a street to a railroad for the purpose of laying a side track, the right of the company thereto, in the absence of a statutory provision declaring a forfeiture for a failure to complete the work within a reasonable time, can be determined only by judgment of forfeiture in an action commenced directly for that purpose.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Ejectment by the town of Arcata against the Arcata & Mad River Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Turner & Coonan and *J. N. Gillett*, for appellant. *Buck & Wheeler*, for respondent.

PATERSON, J. The defendant was incorporated in July, 1881, for the purpose of constructing and operating a railroad from the northern end of Humboldt bay to the north fork of Mad river, on a line passing through Arcata, which is an incorporated town. In due time thereafter the road was constructed. In March, 1885, the defendant applied to plaintiff's board of trustees for the privilege of constructing and operating a side track between certain points within the town limits, and an order was made by the board granting to defendant "the right to lay and maintain a side track from Dean & Campbell's switch across Seventh street, to and down J street, to Tenth street, to intersect with the said track in Sharp's field, subject to such rules and conditions as the board of trustees may think proper and just." Nothing was said in the order as to the time within which the work was to be commenced or completed. The distance between the points named is about four and a half blocks. Two disconnected pieces of track covering a distance of about three and a half blocks were laid in 1885. Nothing further was done until September 10, 1888, when the gap between the two sections was filled, and the switch or side track was completed. On August 8, 1888, the board of trustees passed an order—of which defendant had notice before the work was completed—rescinding the order of March 9, 1885, granting defendant the privilege of constructing a side track, it appearing to the board that, up to that time, the company had not taken advantage of the privilege granted; and on July 16, 1889, a resolution was adopted directing the institution of a suit to compel defendant to remove the track. The complaint is in ejectment form. It alleges plaintiff's ownership, subject to the right of the public to use the land as a street, defendant's unlawful entry, and ouster of plaintiff, and its continued obstruction of the street. The answer consists of a general denial, and a claim that defendant is rightfully in possession under the order of March 9, 1885, and by virtue of the acts performed and money expended in pursuance of the franchise therein granted. It is claimed by appellant that the trustees had no power to grant the use of the streets to the defendant for a side track on which to run cars for loading and unloading; but there can be no question, we think, as to the right of the legislature to delegate to municipal boards the power and discretion to say whether a railroad shall be laid in the streets, and, if so, where and under what conditions. The authority to construct the road on any highway or street is conferred by the legislature, (section 465, Civil Code,) subject to the condition that the consent of two-thirds of the members of the council or board must be obtained before any street or avenue of an incorporated city or town can be taken for such purpose. Section 470, Civil Code. Defendant obtained such consent in 1885.

There is no merit in the contention that the order of March 9, 1885, was a mere license revocable at the pleasure of the board. After the defendant had acted upon the terms of the order, and expended money in the construction of the road, the board could not rescind or recall the privilege it had granted, unless the company failed to comply with the terms or conditions of the grant.

If this or any other action can be maintained against defendant, it must be upon the ground that the defendant, through its failure to complete the construction of the side track when it should have been completed, has forfeited its right to maintain the same. Respondent insists that such a question cannot be considered in an action of this kind; that a forfeiture must be judicially established in a direct proceeding on the part of the people, and cannot be brought up collaterally in an action of ejectment. At common law a forfeiture did not operate to divest the title of the owner, or to restore to the government the thing granted, until a judgment of forfeiture had been obtained in a suit instituted for that purpose. After such judgment, under the doctrine of relation, the title was carried back to the owner as of the time of the happening of the event or the commission of the offense upon which the estate was conditioned; but where the statute provides that a failure to pay at a certain time or to complete the contemplated work within a certain time shall work a forfeiture, no action is necessary to enforce the forfeiture. In such a case, upon the happening of the event of the commission of the offense which is the statutory basis of forfeiture, the title to the thing forfeited immediately vests in the state. Rush v. Jackson, 24 Cal. 316; Borland v. Lewis, 43 Cal. 572; Oakland R. Co. v. Oakland, B. & F. V. R. Co., 45 Cal. 379; Upham v. Hosking, 62 Cal. 257. There is some language employed in the opinion in People v. Railway Co., (Cal.) 27 Pac. Rep. 673, which appears to hold that a forfeiture must in all cases be judicially declared, but the learned justice who wrote the opinion was not then considering the question of forfeiture based upon a failure to perform the work within statutory time. We do not think that section 468 of the Civil Code is applicable to this case. That section is as follows: "Every railroad corporation must, within two years after filing its original articles of incorporation, begin the construction of its road, and must every year thereafter complete and put in full operation at least five miles of its road, until the same is fully completed; and upon its failure so to do for the period of one year, its right to extend its road beyond the point then completed is forfeited." These provisions apply to the main road provided for in the company's articles of incorporation, and not to every switch or side track which the company may find necessary for the proper conduct of business and the convenience of the public after the road has been put in operation. The switch or side track under consideration was a mere convenience in the operation of the road which defendant was incorporated to construct and operate. It was no more a part of the work referred to in section 468 than the site for a depot or landing-place in a street of the town would be. The right to use the street for a switch upon which to run cars for the purpose of loading and unloading was a privilege that operated to the mutual benefit of the defendant and its patrons, the public. The board of trustees could have named the conditions upon which the company might exercise the privilege granted, including the time of the commencement and completion of the work, and could have provided that, upon a failure to perform such conditions, the right to the franchise would be forfeited. The order of March 9, 1885, stated that the privilege was granted "subject to such rules and conditions as the board of trustees may think proper and just." But the board has never fixed any time, or named any conditions, upon which the right of the company to act and enjoy the franchise granted should depend.

It is a general rule, applicable to legislative grants of the right to use public lands for a particular purpose, that, where the time within which the grantees are to accept the franchise is not fixed in the grant, the grantees must signify their acceptance by commencing the work within a reasonable time, and by prosecuting the same to completion with ordinary diligence. Rush v. Jackson, supra. But if it be conceded that such a rule is applicable to a municipal order like the one before us, it does not follow that this action can be maintained. In the absence of a statutory provision or municipal ordinance or order declaring a forfeiture for a failure to complete the work within a reasonable time, the right of the company to the use of the street could be terminated only by a judgment of forfeiture in an action commenced directly for that purpose. U. S. v. Grundy, 3 Cranch, 351.

Judgment affirmed.

We concur: Harrison, J.; Garoutte, J.

92 Cal. 545

Westphal v. Nevills. (No. 13,611.)

(*Supreme Court of California.* Dec. 30, 1891.)

Action on Note—Want of Consideration

In an action against joint makers of a note, one of defendants pleaded want of consideration, in that the money was loaned to his co-defendant on the verbal agreement that it should be repaid in a few days, and for no other consideration, and that defendant received no part of the money so loaned. *Held* insufficient.

Department 1. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Action by Henry Westphal against W. A. Nevills and R. L. Hopkins on a note. Judgment for plaintiff. Nevills appeals. Affirmed.

Campbell & Wright, for appellant. *L. J. Hardy*, for respondent.

Per Curiam. The complaint alleges that on the 22d day of May, 1888, the defendants, in consideration of the sum of $850 then and there loaned to them, made their promissory note, as follows, viz.: "$850.00. San Francisco, May 22d, 1888. On the 22d day of June, 1888, we promise to pay to the order of Henry Westphal eight hundred and fifty dollars, with interest at the rate of —— per cent. until paid. Principal and interest payable in United States gold coin, for value received. R. L. Hopkins. W. A. Nevills." The only defense presented by the appellant was a want of consideration, in this: That the money "was loaned and delivered by the plaintiff to the defendant Hopkins upon the verbal agreement, then and there made to the plaintiff by the defendant Hopkins, to pay said sum of money to the plaintiff in a few days, and upon and for no other further or additional inducement or consideration whatever, and before the execution of said promissory note by this defendant; that this defendant received no part of the said sum of money so loaned by the plaintiff to the defendant Hopkins, and received no benefit or advantage whatever therefrom." This allegation presented no defense to the action. By the terms of the note the appellant is liable as a maker. The matter set up in his answer would have the effect to contradict his express promise. It was not necessary that the appellant should have received any benefit for his promise; a detriment to the plaintiff—the time given to Hopkins within which to make the payment—was sufficient consideration to support the promise of the appellant.

The judgment is affirmed.

92 Cal. 631

Barney v. Vigoreaux. (No. 13,641.)

(*Supreme Court of California.* Jan. 5, 1892.)

Action on Note—Complaint.

In an action on a promissory note, part of which has been paid, a complaint which fails to allege that some part of the note has not been paid is fatally defective.

Department 2. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Action by Barney against Vigoreaux. Judgment for plaintiff. Defendant appeals. Reversed.

I. N. Thorne, for appellant. *W. H. Allen*, for respondent.

Sharpstein, J. The record shows that the plaintiff brought his action against the defendant upon a promissory note, of which a copy is contained in the complaint. Copies of several receipts of payments which it is alleged were indorsed upon said promissory note are set out in the complaint, and plaintiff demands judgment for $340, balance of principal, with interest, etc. There is no allegation that no part of the sum for which said note was given, except the sums indorsed upon it, has been paid. The defendant did not appear in the action, although there was proof of the service of summons upon him, and his default was regularly entered, and judgment thereon entered against him, and within 10 days thereafter he gave notice of a motion to vacate said judgment. The motion was heard and denied, and from the order denying that motion, and the judgment, the defendant appeals. The omission to allege in the complaint that some part of the said note had not been paid constituted a fatal defect, for which the judgment must be reversed. Frisch v. Caler, 21 Cal. 71; Davanay v. Eggenhoff, 43 Cal. 395; Scroufe v. Clay, 71 Cal. 123, 11 Pac. Rep. 882. It is unnecessary to consider the questions raised and discussed by counsel upon the motion to vacate the judgment, as the reversal of it accomplishes all that was sought by that motion. Judgment and order reversed.

We concur: McFarland, J.; De Haven, J.

92 Cal. 623

Anderson v. Richardson. (No. 14,042.)

(*Supreme Court of California.* Jan. 2, 1892.)

Boundaries—Monuments—Course and Distance.

1. For the purpose of identifying and locating artificial monuments in a deed to plaintiff, the court admitted in evidence a written contract to convey made by a former owner of the land in dispute, together with parol testimony showing that, in pursuance of the contract, the monuments in question were located by a surveyor, and that the descriptions in the deed to plaintiff's predecessor were made from the report of the surveyor. Evidence was also admitted, by one of the surveying party, as to the location of the monuments. *Held*, that all this evidence was competent.

2. Where monuments mentioned in a deed are identified, they control both courses and distances given, whether they were seen by the parties to the deed or not.

Department 2. Appeal from superior court, Sonoma county; J. G. Pressley, Judge.

Ejectment by Anderson against Richardson. Judgment for defendant. Plaintiff appeals. Affirmed.

Thos. Rutledge, *W. E. McConnell* and *J. A. Barham*, for appellant. *A. B. Ware*, *J. J. Geary*, and *H. A. Powell*, for respondent.

De Haven, J. Action of ejectment, and the matter in dispute is as to the true location of the line separating the land of plaintiff from that of defendant. The defendant recovered judgment.

1. The evidence is sufficient to justify the findings, and the court did not err in its rulings upon the admission of evidence. It appears that on March 22, 1882, the Gualala Mill Company and William Bihler were the owners of the land described in the complaint, and upon that day conveyed the same to Platt and Boyd, to whose title the plaintiff has succeeded; so that the real question in controversy is whether any part of the land of which defendant is in possession, and to which he claims title, is within the description contained in the deed made by said mill company and Bihler to the grantors of plaintiff. The description of the land so conveyed to the grantors of plaintiff, so far as necessary to be here stated, is as follows: "Commencing at the upper gatepost on the county road leading from Fisk's Mills to Fisherman's bay; * * * thence north, 36½ degrees west, 51 chains, to a stake with rock mound on shore; thence, leaving the shore, north, 37 degrees ten minutes east, 100 chains, to a stake; thence * * * to a redwood tree with three stems; * * * thence * * * to Kruse & Uhler's fence," etc. It will thus be seen that in describing the boundaries of the land conveyed the deed refers to certain artificial monuments; and for the purpose of identifying them, and ascertaining their location, the court admitted in evidence a written agreement, dated January 23, 1882, made by the Gualala Mill Company with one Boyd, (one of plaintiff's predecessors,) whereby the mill company agreed to convey to said Boyd within 60 days, or as soon before that time as a proper survey could be made, a portion of the German rancho, together with parol evidence that one Wackenreuder was selected by the parties to make the survey, which he did, and that he located on the ground the stakes referred to in said deed, and that the description given in the deed was made from the report of his survey, and that the deed to Boyd and Platt was executed in performance of the former agreement to convey to Boyd. There was also evidence given by one of the persons who assisted in the Wackenreuder survey as to the location of the stakes set in making that survey. All of this evidence was competent. The deed made by the mill company and Bihler to Boyd and Platt refers to certain artificial monuments on the ground, and which, necessarily, must have been erected by some one before its date. The evidence of the prior contract and the survey of Wackenreuder were relevant and competent for the purpose of identifying these monuments; and, when identified, such monuments would control both the courses and distances given in the deed, if there was any conflict. It is not a material circumstance that Boyd did not, in fact, see the line as actually located on the ground by the Wackenreuder survey. The monuments are controlling, whether in fact seen by the parties to the deed or not. Judgment and order affirmed.

We concur: McFarland, J.; Sharpstein, J.

92 Cal 183

In re Williams' Estate. (No. 14,214.)

(*Supreme Court of California.* Jan. 6, 1892.)

Sale of Decedent's Land.

Where a testator devises all his property in trust to his executor, and the executor, in proceedings by him for confirmation of a sale of land, moves to dismiss his own petition before the hearing, on a satisfactory showing that the sale had in fact been made by him as trustee, it is error for the court to deny the motion.

In bank. On rehearing. For former report, see 28 Pac. Rep. 227.

Per Curiam. A rehearing of this cause is denied, but the court desires to modify its opinion heretofore filed. The case does not require a decision going to the extent of holding that the probate court had no jurisdiction to hear and decide upon the report of sale and petition for confirmation, showing, as it did, a sale by the executor in that character. Anything in the opinion which seems to affirm this proposition is withdrawn. We desire to be understood as deciding only this: that the executor having moved to dismiss his own petition before the hearing, upon a satisfactory showing that the sale had in fact been made by him in his character of devisee in trust, and no creditor of the estate or distributee objecting, the court should have dismissed the proceeding, and left the sale to stand upon the same footing with other sales made by the trustee as such. By this course the rights and powers of the trustee under the will would have been left undisturbed, and no rights of creditors or distributees—whatever they may be—would have been concluded or affected, except so far as, under the law and the terms of the will, it is in the power of the devisee to bind them by sales made of his own motion.

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92 Cal. 648

People v. Ah Sum. (No. 20,805.)

(*Supreme Court of California.* Jan. 9, 1892.)

PERJURY—INDICTMENT—USE OF ENGLISH LANGUAGE.

Defendant was convicted of perjury for testifying falsely in a charge against him for selling a lottery ticket. A photographic copy of the ticket was set out in the information. It was in Chinese characters, and was not translated into English, nor was there any allegation of its contents in English. *Held*, under Pen. Code, § 950, providing that an information must contain a statement of the offense in ordinary language to enable a person of common understanding to know what is intended, and under Const. art. 4, § 24, requiring judicial proceedings to be conducted in English, that the court erred in overruling defendant's motion in arrest of judgment.

In bank. Appeal from superior court, Alameda county; JOHN ELLSWORTH, Judge.

Defendant was convicted of perjury, and appeals. Reversed.

Robert Ferral, M. C. Chapman, and *E. C. Chapman*, (*G. W. McEnerney*, of counsel,) for appellant. *Atty. Gen. Hart*, for the People.

SHARPSTEIN, J. Appellant was tried and convicted upon an information charging him with perjury, committed as follows: That on the 4th day of April, A. D. 1890, there was pending and on trial, in the police court of the city of Oakland, "a certain action and proceeding wherein the people of the state of California were plaintiffs and said Ah Sum was defendant, and said court, having competent jurisdiction to hear, decide, and determine said trial, action, and proceeding, according to the laws of the state of California, was then and there fully empowered to administer the law in said trial, action, and proceeding. That it then and there became and was material on said trial, action, and proceeding to know whether or not the said defendant, Ah Sum, did furnish, sell, and transfer to one John Ferrin, in the city of Oakland, county of Alameda, state of California, on or about the twenty-second day of January, 1890, a certain document, instrument, paper, and lottery ticket in the words and figures following, to wit:" (A space of about two inches square is occupied by Chinese characters, and then the information proceeds as follows:) "And said defendant, Ah Sum, was then and there duly called as a witness on said trial, action, and proceeding on his own behalf, and said Ah Sum was thereupon duly sworn as a witness by William S. O'Brien, then and there the duly appointed, qualified, and acting clerk of said police court, and an officer then and there authorized by law to administer oaths and to administer an oath to the said Ah Sum; and then and there before said William S. O'Brien in said police court the said Ah Sum took his corporal oath that the testimony he should give upon the trial of said issue then and there pending in said police court in said trial, action, and proceeding should be the truth, the whole truth, and nothing but the truth, and being so sworn the said Ah Sum did then and there on said fourth day of April, 1890, in said police court upon the said trial of said issues, willfully, knowingly, corruptly, falsely, and feloniously, and contrary to said oath, state, testify, and declare under oath, among other things, in substance, as follows, to-wit: That he, said Ah Sum, did not on said 22d day of January, A. D. 1890, at the said city of Oakland, or at any other time or place whatsoever, furnish, sell, and transfer, or furnish or sell or transfer to and for, or to or for, said John Ferrin, or to and for, or to or for, any other person whatsoever, the said or any instrument, document, paper, and lottery ticket. Whereas, in truth and in fact, as was then and there well known to the said Ah Sum, all of the said testimony and declaration hereinbefore in substance set forth was and is false and untrue, and then and there was material matter to the issues then and there being tried in said police court, as aforesaid, whereby he, the said Ah Sum, did then and there, as aforesaid, feloniously, willfully, knowingly, and corruptly swear falsely, and feloniously commit willful perjury, contrary," etc. To that information the defendant pleaded not guilty. A trial was had, which resulted in a verdict of guilty. Defendant made a motion in arrest of judgment upon all the statutory grounds. The motion was denied, as was also a motion for a new trial, and the court sentenced the defendant to imprisonment in the state-prison for the term of 18 months. This appeal is from the judgment and order denying the motion for a new trial.

The first point raised by counsel for appellant is that "the paper or certificate about which appellant is charged with having given false testimony is in the Chinese language. It was capable of translation into English. But instead of translating it, the information contains a photographic copy, without any allegation of its tenor in English." To one not versed in any language other than the English language the "certain document, instrument, paper, and lottery ticket," alleged to be in the words and figures set out in the complaint, would be wholly unintelligible. An indictment or information must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Section 950, Pen. Code. An information partly in English and partly in Chinese, cannot be said to be in "ordinary" language. The constitution requires judicial proceedings to be conducted, preserved, and published in no other than the English language. Const. art. 4, § 24. Mr. Bishop says: "In some of our states there are statutes expressly excluding all languages but the English, and such is clearly the general American law." 1 Bish. Crim. Proc. § 342. The attorney general says: "Assuming for the purpose of the argument, and only for the purpose of the argument, that a mistake was made by the pleader by inserting in the information in this case the alleged lottery ticket in question, still we claim that the setting out of the alleged original lottery ticket, in the manner and character in which it is set out in the information, constitutes an objection to the information, if such an objection exists at all, on the ground that the information is 'defective in matter of form' only, and not in matter of substance." Who can determine that question without first knowing all that it contains? Whether the unknown matter is a matter of substance, or of form only, cannot be determined until it ceases to be unknown. The allegation of the information is that, on the trial at which the appellant is alleged to have committed perjury, "it then and there became and was material on said trial, action, and proceeding to know whether or not the said defendant, Ah Sum, did furnish, sell, and transfer to one John Ferrin, in the city of Oakland, county of Alameda, state of California, a certain document, instrument, paper, and lottery ticket in the words and figures following, to-wit:"—which are said to be words and figures in the Chinese language; certainly not in English. The section of the Penal Code under which the defendant was prosecuted and tried in the police court reads as follows: "Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person any ticket, chance, share, or interest in, or depending upon the event of, any lottery, is guilty of a misdemeanor." The thing which the defendant is alleged to have sold is alleged to have consisted of certain words and figures set out in the information. On examination of the matter set out as words and figures, we discover no words, and but few figures,—nothing to indicate that the thing alleged to have been sold by the defendant to John Ferrin was a lottery ticket. A translation of it might have shown that it was not. And so long as we do not know what it was we have no right to assume that the selling of it constituted a misdemeanor. If we strike out of the information everything except what is expressed in English, there will remain no allegation of the sale of anything by the defendant to anybody.

The court erred in overruling the motion in arrest of judgment, and for that error the judgment and order appealed from are reversed.

We concur: De Haven, J.; McFarland, J.; Harrison, J.; Garoutte, J.

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3 Cal. Unrep. 474

Chace v. Jennings, Sheriff, *et al.* (No. 13,-510.)

(*Supreme Court of California.* Jan. 4, 1892.)

INJUNCTION—SALE OF LANDS ON EXECUTION—DISSOLUTION ON ANSWER.

1. In an action to restrain the sale of land under execution against plaintiff's grantor the court should continue the restraining order pending final determination, and it is an abuse of discretion to dissolve it upon the filing of an answer denying the allegations of the bill.

2. Under Code Civil Proc. § 437, authorizing denials upon information and belief, such denials, while sufficient to raise an issue, will not justify the dissolution of a temporary injunction on the ground that the bill is fully denied by the answer.

Department 2. Appeal from superior court, Santa Cruz county; F. J. McCann Judge.

Action by one Chace against Jennings sheriff of Santa Cruz county, and others. for an injunction. Judgment for defendants. Plaintiff appeals. Reversed.

A. S. Kittredge, for appellant. *T. H. Laine* and *Z. N. Goldsby*, for respondents.

Sharpstein, J. The case is not materially different from Porter v. Jennings, 89 Cal. 440, 26 Pac. Rep. 965. As admitted by respondents' counsel, "it is against the same defendants. The purpose is to restrain the sale of the same premises, threatened to be sold by the defendant Jennings (as sheriff) under the same execution in favor of Mary A. Cummings vs. William N. Cummings." The only difference between that case and this is the party plaintiff. We think that case was correctly decided, and on its authority the order appealed from is reversed, with directions to the court below to issue the injunction as prayed for by plaintiff pending the final determination of the action upon its merits.

We concur: De Haven, J.; McFarland, J.

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92 Cal. 528

Spring Valley Water-Works v. Drinkhouse. (No. 12,623.)

(*Supreme Court of California.* Dec. 29, 1891.)

EMINENT DOMAIN—LAND FOR RESERVOIR—NECESSITY—COMPENSATION—EVIDENCE.

1. Under Code Civil Proc. § 1238, which provides that the right of eminent domain may be exercised in taking land for conducting water for the use of the inhabitants of any county, incorporated city, or city and county, and under Code Civil Proc. § 1239, which provides that a fee-simple may be taken for a reservoir, a corporation organized for the purpose of supplying the city and county of San Francisco with water may condemn land for a reservoir site. Lake Pleasanton Water Co. v. Contra Costa Water Co., 8 Pac. Rep. 501, 67 Cal. 657, followed.

2. Whether the land is reasonably required is a question of fact to be determined by the court or jury, and the burden of proof is on the plaintiff.

3. In an action to condemn land for a reservoir site, it is not proper for defendant to ask

one of her witnesses on direct examination how much plaintiff paid for certain other tracts of land, or to inquire as to the amount offered, since such questions are only admissible by way of cross-examination to test the fairness of the witness' opinion in regard to the value of the property involved in the action.

4. Defendant is entitled to the market value of the land, to be determined in view of all the facts which would naturally affect its value in the minds of purchasers generally.

5. Where the land sought to be condemned is, because of its situation and adaptability for reservoir purposes, regarded by purchasers generally as more valuable than if it did not possess such advantages, defendant should be allowed to show it, and for that purpose should be permitted to ask whether a witness has the means of knowing, and does know, the value of the land for reservoir purposes. McFarland and Sharpstein, JJ., dissenting.

6. Where defendant, as a witness in her own behalf, testifies that she has owned the land sought to be taken for 20 years, and has lived on it, a sufficient foundation has been laid to ask her the value of the land. McFarland and Sharpstein, JJ., dissenting.

In bank. Appeal from superior court, San Mateo county; E. F. Head, Judge.

Action by Spring Valley Water-Works against one Drinkhouse to condemn certain land for a reservoir site. Judgment of condemnation and damages awarded defendant, from which she appeals. Case remanded, with directions to retry the issues as to the value of the land sought to be taken, and the damages to the remaining portion of the land not taken.

Ben Morgan and *A. Ruef*, for appellant. *Wm. F. Herrin*, for respondent.

De Haven, J. The respondent is a corporation organized under the laws of this state for the purpose of supplying the city and county of San Francisco and its inhabitants with water, and is engaged in that business. This action is brought to condemn certain land of the defendant as part of a reservoir site, and which is alleged by the plaintiff to be necessary for it in the prosecution of the said business for which plaintiff was created. The answer of defendant, among other things, denies that such intended use of the land sought to be taken is a public use, or that the same was necessary for the purpose of enabling plaintiff to effect the purpose for which it was created.

1. It was held by this court in the case of Lake Pleasanton Water Co. v. Contra Costa Water Co., 67 Cal. 657, 8 Pac. Rep. 501, in construing sections 1238 and 1239 of the Code of Civil Procedure, that the power of eminent domain extended to the taking of land for such purposes as are named in the complaint in this action. We there said: "The supplying of inhabitants of an incorporated city with pure, fresh water is by section 1238 declared to be a public use, in behalf of which the right of eminent domain may be exercised, and section 1239 provides in effect that the entire estate in a given piece of land may be taken when needed for a reservoir in behalf of such use." We have no doubt of the correctness of this conclusion, and therefore hold that the purpose for which plaintiff alleges that it desires to acquire the appellant's land, by this proceeding, is a public use, and consequently one in behalf of which the power of eminent domain may be exercised.

2. There is no doubt of the proposition that, before land can be taken for a public use, it must appear that the taking is necessary for such use. This is a question of fact to be determined by the court or jury in view of all the evidence in the case, and the burden of proof is upon the plaintiff. The evidence must be sufficient to show that the land is reasonably required for the purpose of effecting the object, or carrying on the business, for which the plaintiff was organized; and, in this case, not only the present demands of the public upon the plaintiff, but those which may be fairly anticipated on account of the future growth of the city, are to be considered. We think the evidence was sufficient to show a necessity for the taking of defendant's land within the meaning of the law, and we cannot disturb the finding of the court below on that point.

3. The court did not err in sustaining objections to the questions asked the witness Howard as to how much the plaintiff had paid per acre for the Sherwood and Howard tracts, or as to offers made by plaintiff to purchase these tracts. Howard was a witness for defendant, and these questions were asked by defendant in the examination in chief of the witness. However the rule may be in other states, it is settled here that such facts are not admissible as evidence in chief, but only by way of cross-examination for the purpose of testing the fairness or honesty of an opinion which the witness may have given upon his direct examination in relation to the value of the property involved in the action. Railroad Co. v. Pearson, 35 Cal. 262.

4. The witness Howard was also asked the following questions: "Do you know what the value of that land is down there for reservoir purposes? Have you any means of knowing the value of this land for reservoir purposes?" The questions were objected to by plaintiff as irrelevant and incompetent. The objections were sustained. The witness was the president of the plaintiff corporation, and the objections made to these questions do not proceed upon the ground that the witness was not competent to answer them, or that the proper foundation had not been laid by proof that in point of fact the land did have, by reason of its situation and surroundings, an added, distinctive value for reservoir purposes. The question is thus presented whether, assuming that the land sought to be taken was specially valuable for the purpose named, it was relevant and competent to show such value. There is undoubtedly some conflict in the authorities as to the admissibility of questions put in this form; but we think the point was decided in favor of the admissibility of such evidence in the case of Land & Town Co. v. Neale, 78 Cal. 63, 20 Pac. Rep. 372, and in the same case on a second appeal to this court. 88 Cal. 50, 25 Pac. Rep. 977. Nor would this rule, as supposed by respondent, justify the admission of speculative opinions based upon the necessities of the

plaintiff, or what the plaintiff could afford to give for the land rather than to do without it. If it should appear, during the course of the examination, that a witness had given an opinion as to value formed upon any such considerations, it would be the duty of the court to strike such opinion evidence out, as resting upon an illegal and improper basis. The rule is that the owner is entitled to the market value of his land, to be determined in view of all the facts which would naturally affect its value in the minds of purchasers generally, which necessarily makes it proper to consider for what purpose it is most valuable. "Any existing facts which enter into the value of the land in the public and general estimation, and tending to influence the minds of sellers and buyers, may be considered." Russell v. Railway Co., 33 Minn. 213, 22 N. W. Rep. 379. If, therefore, the land sought to be condemned in this action, by reason of its situation, and because it is part of a basin adapted for reservoir purposes, would be regarded as more valuable by purchasers generally than if it did not possess such advantages of location and adaptability for use as a reservoir. the defendant should be permitted to show its value with reference to such facts by the testimony of competent witnesses; and, as said in Land & Town Co. v. Neale, 78 Cal. 69, 20 Pac. Rep. 372, this is not in reality any departure from the rule which requires the evidence of value to be confined to what the property is worth in the market, having regard to the most valuable use to which it may be devoted. The court there said: "What is done is merely to take into consideration the purposes for which the property is suitable, as a means of ascertaining what reasonable purchasers would, in all probability, be willing to give for it, which, in a general sense, may be said to be the market value."

4. The defendant, Mrs. Drinkhouse, was a witness in her own behalf; and after testifying that she had owned the land sought to be taken for over 20 years, and was using it for a summer residence for herself and family, she was asked: "Question. Do you know the value of this land? Answer. I know what the water company has paid other people. Q. Do you know the value of this land of yours? A. What do you consider value? Q. Answer yes or no. A. I think I do. Q. What is its value?" An objection was made to this last question upon the ground that no foundation had been laid for it, which was sustained. This was error. All that is necessary to be shown to entitle a witness to give an opinion is to show "that he has some peculiar means of forming an intelligent and correct judgment as to the value of the property in question, or the effect of a particular improvement, beyond what is presumed to be possessed by men generally." Lewis, Em. Dom. § 437. In this connection the same author says: "These peculiar means may consist in * * * a long acquaintance with the particular property, and the neighborhood where it is situated, accompanied with the occupation or ownership of similar property, and especially if accompanied with a knowledge of sales of similar property." We think the witness was competent to give an opinion as to the value of her own land within the general rule on that subject. She had a particular knowledge of it, being a resident upon it, and had owned it for over 20 years. The natural presumption would be that she had during that long period acquired sufficient acquaintance with it, and of the value of the land in that neighborhood, to be able to give an intelligent estimate as to the value of her own property. Railroad Co. v. Schluntz, 14 Neb. 423, 16 N. W. Rep. 439; Lehmicke v. Railroad Co., 19 Minn. 464 (Gil. 406.) See, also, Walker v. City of Boston, 8 Cush. 279; Pierce, R. R. 227. In the first case cited the court, in passing upon the competency of the owner of the land to testify to its value, said: "He swore explicitly that he knew its value, and from the fact that he had lived there for twelve years, had made the improvements upon it, and appears to have possessed ordinary intelligence, at least, I am satisfied he was qualified to give his opinion on that point." The witness should have been permitted to testify to the value of the property. It may be that a cross-examination would have shown that such opinion was entitled to but little weight, but that does not affect the question of its admissibility.

We find no errors in the record other than those we have pointed out, and these do not require a retrial of any of the issues except those relating to the value of the land sought to be taken, and the damage to the remaining portion of defendant's land not taken. Judgment and order reversed, with directions to the court below to retry the issues as to the value of the land sought to be taken, and the damage to the remaining portion of the land not taken, and, thereupon, to enter judgment in accordance with the prayer of the complaint, and in favor of the defendant for such value and damage, and costs.

We concur: BEATTY, C. J.; PATERSON, J.; GAROUTTE, J.

HARRISON, J., (*concurring*.) The court erred in not permitting the witness Howard to answer the questions: "Do you know what the value of that land is down there for reservoir purposes? Have you any means of knowing the value of this land for reservoir purposes?" The "just compensation" which is guarantied to the owner whose property is to be taken or damaged for public use is its market value, and the market value of land is determined by a consideration of all of the uses to which it may be applied, as well as the purposes for which it is adapted. For the purpose of ascertaining this value, it is proper to show its condition and surroundings, the uses to which it has been applied, and its capabilities for other uses, including that for which its condemnation is sought. Its value is not limited either by that of its present use or by the use for which it is sought, since either of these may be less than its actual market value.

The owner is entitled to its highest market value for any use to which it is adapted; and any advantage that the property has, present or prospective, by virtue of its position, and for which it may be available, constitutes an element in its value, which is to be considered by the jury in determining the compensation to be awarded him, and which the owner is entitled to show to the jury by any competent evidence. The market value of the land is neither the aggregate nor the average of the different values of the uses to which it may be applied, but it is the result to be determined from a consideration of each of these uses in connection with all the other conditions. A tract of land may be eligible as a site for a railroad station, but its value would vary with the contingency of its being selected for such a purpose. It may be adapted for a reservoir site, but its value for such a purpose would be qualified by the prospect, greater or less, of any one seeking to build such a reservoir. Its market value is affected by such contingency, but is not to be determined by the fact that the party seeking to condemn it has already determined to build a reservoir. To allow that element to enter into the computation would be to make the plaintiff's necessity the owner's opportunity.

It appears to have been conceded at the trial that the territory of which the land of the defendant forms a portion is a suitable site for a reservoir, and as a consequence it has a value for such a purpose. Whether that purpose gives it a higher market value than any other to which it is adapted was to be determined by evidence; but, if it does, the owner is entitled to compensation for such value. The general rule is that witnesses are to give evidence only of facts, and that the inference from those facts is to be drawn by the jury; but, in determining the value of land, opinions of those who, from their familiarity with the subject, are supposed to have learned its value, are received in evidence. Such witnesses are not experts, in the strict sense of that term,—that is, they are not persons skilled in any science or art; but their opinions are received more from the necessity of the case, as being the most satisfactory, and often the only attainable, evidence of the fact to be proved, and upon the theory that, from their knowledge of the locality and its surroundings, they have acquired a better means of determining the value of the land than the jury could from all the evidence which it would be practicable to place before it. Swan v. Middlesex, 101 Mass. 177. When, therefore a witness is called upon to prove such value, it is essential in the first place to show that he has the qualification and ability to give an opinion, and for that purpose to call his attention to the elements which go to make up its market value; and in order that his opinion may be listened to by the jury, and receive from them its proper consideration, it is also proper that, after he has given his opinion, he be allowed to give the basis upon which it has been formed, or the elements out of which it is composed The jury can then readily perceive the force of the reasons upon which it is based, and the soundness of his conclusion, and can judge of his capacity to give the opinion, as well as the weight to which it is entitled. The capacity of the expert is generally tested upon cross-examination, but it is equally competent for the party calling him to support his opinion after he has given it by having him give the details upon which it is based. Keith v. Lothrop, 10 Cush. 457; Dickenson v. Fitchburg, 13 Gray, 557; Hawkins v. Fall River, 119 Mass. 94. Inasmuch, however, as such evidence is admissible only for the purpose of testing the weight to be given to his general opinion of its market value,—to corroborate it or to defeat it,—it is evident that the principle upon which it is admitted demands that he shall first give his estimate of such value in consideration of all of those uses and elements; but he is not to be allowed in the first instance to give an opinion of its respective values for those independent uses. Such evidence would not be competent, independent of the main question of what is its market value, or for any other purpose than in support of his general opinion. Burt v. Wigglesworth, 117 Mass. 306. And it might be that, after having given his opinion of its value for a specific use, he would not be able, or might not be asked, to give an opinion of its market value. The land might be very valuable, abstractly considered, for reservoir purposes, while such value would be greatly diminished by the want of a demand for such purpose, and its market value therefor less than for any other purpose. The jury would not be authorized to determine its market value from its own consideration of only the elements of value that might be given by the witness, as there might be many other elements going to determine its market value, of which they had no knowledge.

In Land & Town Co. v. Neale, 78 Cal. 80, 20 Pac. Rep. 380, this distinction was not sufficiently presented in the opinion of the court; and, while some of the language in the opinion might lead to the conclusion that it was proper to introduce testimony of the value of the property for a reservoir site as an independent fact to be considered by the jury, yet the reasoning of the opinion, and the authorities cited in support of it, as well as the facts in the record, show that the question really determined was whether the jury had the right to take such value into consideration for the purpose of determining the market value of the land. To the extent that the opinion countenances the right to offer evidence of such value as an independent fact to be considered by the jury as a measure of the compensation to be awarded, it is at variance with an almost unbroken line of authorities, and in my opinion ought not to be followed. It appears from the record in that case, although not so stated in the report, that the witnesses had first given their opinion of the market value of the land for general purposes, and were then asked its value as a reservoir site. The form of the question was obnoxious to objections stated herein, but the ground upon which its admission was argued was the right to have such value considered as an element in determining its market value. When the case came here upon the second appeal (88 Cal. 50, 25 Pac. Rep. 977,) the court, in commenting upon its opinion as construed in Alloway v. Nashville, 88 Tenn. 518,[1] said, speaking through Mr. Justice PATTERSON: "It was decided on the former appeal, and is the law of the case, that the value of the land for any special purpose may be taken into account as one of the elements tending to show its market value. The fact that the land is suitable for such purpose, and a chance exists that it may some time bring an enhanced value therefor, has a tendency to increase its market value, and may properly be considered in determining what its present market value is." "We did not hold that the value of the land for reservoir purposes was a measure of damages independent of any other consideration or element of market value. On the contrary, the opinion distinctly states that the market value is to be the measure of damages, and that evidence of value for a special purpose is only to be considered as an element of the question." Page 56.

Inasmuch, then, as the owner is entitled to receive as compensation for his land its highest market value for any use to which it is adapted, and as such value is to be shown to the jury by the opinions of witnesses who must at the same time satisfy the jury of their qualification to give the opinions, it is proper for the party calling the witness to show by preliminary questions whether the witness has such qualifications. As it was proper in the present case for the jury to take into consideration the fact that the land had a value for reservoir purposes, it was equally proper for the witnesses, in giving their estimates of its value, to take the same element into consideration, and unless they knew, or had the means of knowing, such value, their testimony would not accomplish its purpose. The witness Howard was not asked at this point of examination to state what such value was, but was merely asked whether he knew the value. If he had such knowledge, it would greatly strengthen any testimony he might give on the subject, while, if he should state that he had no such knowledge, the party calling him might not question him any further. The court should also have allowed Mrs. Drinkhouse to answer the question asked of her. She was the owner of the land, and had lived upon it for 20 years, and must be presumed to have some knowledge of its value. All opinions respecting values of real estate (even of those who are dealers therein) are based more or less upon hearsay,—the statements of others, for what different parcels have been sold. The fact that she knew only of sales to the plaintiff affected her capacity only in degree. The weight to be given to her testimony could easily have been determined by the jury. "The market value of land is not a question of science or skill, upon which only an expert can give an opinion. Persons living in the neighborhood may be presumed to have a sufficient knowledge of the market value of property with the location and character of the land in question. Whether their opinion has any proper ground to rest upon, or is mere conjecture, can be brought out on cross-examination." Pennsylvania, etc., Co. v. Bunnell, 81 Pa. St. 426. Upon the other points involved in the case, I concur in the opinion of Mr. Justice DE HAVEN. I also concur in the order of reversal, and the direction to the court below.

MCFARLAND, J. I dissent from the judgment. I concur in the opinion of Mr. Justice DE HAVEN, except as to the two points upon which the judgment is reversed.

1. I think the objection to the question asked Mrs. Drinkhouse about her opinion as to the value of the land was properly sustained. The only knowledge she showed upon the subject was her knowledge of what "the water company has paid other people." But if, as is admitted, what the company paid other people for other lands could not be received in evidence, how could the knowledge of what they so paid be a proper foundation for allowing the opinion of the witness?

2. It is doubtful if the question asked Howard, "Do you know what the value of that land is down there for reservoir purposes?" referred to the land involved in this action. The questions immediately preceding it referred to another piece of land, called the "Sherward Tract," which plaintiff had purchased; and defendant had been trying to find out what plaintiff had paid for that tract. But, assuming that the land "down there" may have meant the land of defendant, it is plain from the whole course of the examination that defendant was seeking to show what the land was worth to plaintiff; that is, what plaintiff, from necessity, would be compelled to pay. The object of the question, under the circumstances, was to show, not what the general value of the land was, but what it was worth to the particular party who was compelled to have it. There has been a good deal written upon the subject of value in condemnation proceedings, and a good deal of loose language has been (sometimes inadvertently) used; but I apprehend that a comparison of all the authorities will show that the rule to be gathered from them goes no further than this: The condition of the property, all its surroundings, its availability for any purpose,—any use to which it could be profitably put,—all these things can be shown; but, when a witness is asked as to value, the proper question is, what is its market value? and not, what is its value for the particular purpose for which the plaintiff wants it? Lewis, Em. Dom. § 479; Stinson v. Railway Co., 27 Minn. 291, 6 N. W. Rep. 784. I think that the case at bar was fairly tried, and that the judgment should stand.

SHARPSTEIN, J. I concur in the dissenting opinion of Mr. Justice MCFARLAND.

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[1] 13 S. W. Rep. 123.

92 Cal. 665

Kockemann v. Bickel *et al.* (No. 14,355.)

(*Supreme Court of California.* Jan. 15, 1892.)

Adverse Possession — Claim under Tax-Deed.

The grantee of land conveyed under a tax-deed immediately entered thereon and inclosed it by a fence, except a gate-way, and claimed title. Shortly afterwards he sold the land. His grantee at once entered, and began to improve the land, and built a house thereon. Afterwards the land was conveyed to defendants, who have ever since resided thereon. Plaintiff contended that the evidence was insufficient to establish adverse possession, in that the gate-way was not closed, and that there was no verbal expression as to how defendants and defendants' grantor claimed to occupy the land. There was no question but that they had occupied the land more than five years. *Held* sufficient to prove all that is required by Code Civil Proc. § 322, providing that the possession of land for five years by one entering under a written instrument purporting to convey it shall be deemed adverse, and section 323, providing that, for the purpose of constituting an adverse possession, land is deemed to have been possessed where it has been improved.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by one Kockemann, executor, against Charlotte Bickel and husband. Judgment for defendants. Plaintiff appeals. Affirmed.

Mortimer & Harris and *Hutton & Swanwick*, for appellant. *J. D. Bicknell* and *Brosseau & Hatch*, for respondents.

Vanclief, C. Action to quiet title to a lot of land in the city of Los Angeles. Besides denying the material allegations of the complaint, the defendants pleaded the statute of limitations, (section 318, Code Civil Proc.,) under which they claim title by prescription. The trial was by the court without a jury; and the court found for the defendants on all the issues, and gave judgment accordingly. Plaintiff appeals from the judgment and from an order denying his motion for new trial.

It is clear that the defendants and their grantors were in the possession of the lot in controversy continuously during the period of more than five years immediately preceding the commencement of this action, and the only question presented for decision is, was such possession continuously adverse to the plaintiff and his testator? Defendants' grantor entered into possession under a tax-deed executed by the proper officer, definitely describing the lot, and otherwise in due form, except it recited, in substance, that the lot in question was offered for sale, together with three other lots in the same city, to pay the delinquent taxes assessed on the four lots, to unknown owners; and that, the lot in question being the smallest portion for which any bidder would pay said taxes, it was struck off to N. P. Campbell, who was the lowest bidder, and who paid said taxes, with costs and charges, etc. Campbell assigned the certificate of this sale to Frank Ellis, and upon it the tax-deed was executed to Ellis on November 12, 1883. Ellis testified that he bought the tax-title from Campbell, September 24, 1883, (this refers to his purchase of the certificate of sale,) and within a week or ten days after that he inclosed the lot by a fence, except a gate-way about four feet wide, and claimed to own as good a title as a man could under a tax-sale. Other witnesses testified as to the character of the fence; and the court found that Ellis took possession immediately after the assignment of the certificate of sale, and "inclosed and protected the same with a substantial fence, excepting a small gate-way on the front end of said lot which opened on the street; that said fence was composed of posts, boards, and wires, and sufficient to turn stock; that said Ellis claimed title to said lot * * * founded upon the tax-deed; * * * and that he occupied the same solely, exclusively, notoriously, and adversely to every other person in the world." On December 3, 1883, Ellis conveyed the lot to Mrs. O. A. George, who, with her family, immediately moved upon and commenced to improve the lot, and built a good, substantial house thereon, and resided thereon until March 26, 1886, when she conveyed the lot to the defendant Charlotte Bickel, who, with her husband, has ever since resided thereon. And the court found that Mrs. George and Mrs. Bickel "have been in the open, exclusive, notorious, and adverse possession of the said land and premises, and the whole thereof, claiming title to the same by an instrument in writing, duly executed and acknowledged, and of record in the office of the county recorder of Los Angeles county, Cal., for a period of more than five years immediately prior to the commencement of this action, holding and claiming the same adversely to the said plaintiff and his testator, and against all and every person."

The tax-deed, though invalid as a conveyance of title, was sufficient to give color of title. It "was a written instrument, purporting to convey the real estate in controversy by a proper description. It was properly executed, and there is evidence tending to show that the defendant and her grantor claimed title under it as being a conveyance of the property." Wilson v. Atkinson, 77 Cal. 485, 20 Pac. Rep. 66. The evidence was sufficient to make a *prima facie* case of adverse possession, under section 322 of the Code of Civil Procedure, which provides: "When it appears that the occupant, or those under whom he claims, entered into possession of the property under claim of title exclusive of other right, founding such claim upon a written instrument as being a conveyance of the property in question, * * * and that there has been a continued occupation and possession of the property included in such instrument, * * * or some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely." There was no attempt to overcome the *prima facie* case, except in regard to the character of the fence; and the only grounds upon which it is contended here that the evidence was deficient are that the gate-way was not closed, and that there was no evidence tending to show "how or in what way either Mrs. George or her husband, or either of the defendants, claimed to own or occupy the premises." That is to say, no verbal expression, as to "how they claimed to own or occupy" was proved. It was proved, however, that Ellis entered, improved the lot, and claimed, under the tax-sale and deed, as good a title as could be acquired by a tax-sale; that Mrs. George and Mrs. Bickel, by conveyances from him, entered, resided upon, and improved the property as none but owners usually do,—thus indicating that they claimed absolute title, founded upon the tax-deed and conveyances from Ellis, "exclusive of other right." These acts tended to prove all that is required by sections 322 and 323 of the Code of Civil Procedure; and, in the absence of countervailing evidence, were sufficient to justify the finding of adverse possession; for, conceding that the inclosure was not complete, yet the lot was "used * * * for the ordinary use of the occupant," viz., that of a city residence. Subdivision 3, § 323, Code Civil Proc. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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92 Cal. 652

COX v. DELMAS. (No. 14,178.)

(*Supreme Court of California.* Jan. 10, 1892.)

APPEAL—SETTLEMENT OF CASE IN SUPREME COURT.

Under Code Civil Proc. § 652, which provides that where the judge has refused to allow an exception a petition will lie to the supreme court to prove the same, the supreme court has no authority to correct the settlement of a case, and decide what matters of evidence were erroneously included therein. Hyde v. Boyle, 24 Pac. Rep. 1059, 86 Cal. 352, followed.

Appeal from superior court, city and county of San Francisco; JAMES McM. SHAFTER, Judge.

Action by Cox against Delmas. Decision in favor of plaintiff. Defendant filed a proposed statement of the case in support of his motion for a new trial, and, claming that plaintiff's amendments to the statement were improperly allowed, he petitions the supreme court to settle the statement correctly. Petition denied.

Galpin & Zeigler, for appellant. *W. H. L. Barnes* and *Garber, Boalt & Bishop*, for respondent.

PER CURIAM. The petition of the above-named defendant shows that said cause was decided by the superior court in favor of the plaintiff; that in support of his motion for a new trial the defendant filed a proposed statement of the case, to which the plaintiff proposed amendments, which the superior court allowed; that such amendments were not properly allowed, because they set forth evidence that was never introduced at the trial. Wherefore petitioner prays this court to settle said statement correctly. The proceeding is based upon section 652[1] of the Code of Civil Procedure, and assumes that this court is empowered by said section to revise the proceedings of the superior court in settling statements of cases, and in so doing to examine witnesses, and decide as to what matters of evidence included in a statement as settled were, in point of fact, erroneously included therein. This precise question was decided adversely to the claim of petitioner in the case of Hyde v. Boyle, 86 Cal. 352, 24 Pac. Rep. 1059, and on the authority of that case the petition is denied.

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92 Cal. 656

DOUGLASS v. McFARLAND *et al.* (No. 14,003.)

(*Supreme Court of California.* Jan. 13, 1892.)

REVIEW ON APPEAL — LIENS ON PERSONAL PROPERTY—UNLAWFUL SEIZURE BY CONSTABLE.

1. The refusal of the trial judge to grant a new trial will not be reviewed on appeal, where the proposed statement on motion for new trial was not signed or certified by the judge, as required by Code Civil Proc. § 659, subd. 3.

2. Under Civil Code, § 3052, which provides that any person who "makes, alters, or repairs" any article of personal property, at the request of the owner, has a lien on the same for his reasonable charges, and may retain possession until the charges are paid, a person who under contract manufactures ties for the owner on the latter's land has a lien thereon, and can recover the ties or the amount of his lien from a constable who, without his consent, takes the ties on execution against the owner.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. McGARVEY, Judge.

Action by J. C. Douglass against W. McFarland and others to recover possession of personal property unlawfully seized on execution. Judgment for plaintiff. Defendants appeal. Affirmed.

R. G. Knox and *Henley, Swift & Rigby*, for appellants. *J. A. Cooper*, for respondent.

FITZGERALD, C. This action is brought by plaintiff against the defendant McFarland as constable, and the defendants Markle and Cameron as sureties on his official bond, to recover the possession of certain lots of redwood railroad ties and redwood shakes, alleged to have been wrongfully and unlawfully seized and taken from his possession by said McFarland, as constable, under and by virtue of certain writs of attachment and execution theretofore issued against the property of one Matt Harney, and by said McFarland wrongfully detained from the possession of plaintiff, or for the sum of $689, the alleged value thereof, in case delivery could not be had. The complaint contains allegations that plaintiff is entitled to the possession of the property, and of a demand, before the commencement of this action, upon McFarland by plaintiff for its delivery, and of his refusal to do so. The answer denies generally the allegations of the complaint, and, for a further separate answer and defense, justifies under a writ of execution. The case was tried by the court without a jury, and judgment given in favor of the plaintiff, against the defendants, for the recovery of the possession of the property in question, or for the sum of $226, the amount of plaintiff's lien thereon, in case delivery cannot be had. The transcript on appeal contains what is designated therein as "defendant's proposed statement on motion for a new trial," but as it is not signed and certified by the judge, as required by the provisions of subdivision 3 of section 659 of the Code of Civil Procedure, it must be disregarded, and the order denying the motion for a new trial affirmed. The case must therefore stand on appeal upon the judgment roll alone.

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[1] Section 652 provides that, where the judge has refused to allow an exception, a petition will lie to the supreme court to prove the same.

It appears from the findings that at all the times mentioned in the complaint the defendant McFarland was a duly-qualified and acting constable, and that his codefendants, Markle and Cameron, were the sureties on his official bond. That about the 1st day of October, 1888, plaintiff entered into a contract with one Matt Harney, by which he agreed to manufacture railroad ties and shakes for Harney, on Harney's land; and for such ties and shakes so manufactured plaintiff was to receive the sum fixed by the terms of the contract, which sum was due and payable on the 1st day of June, 1889. That for the purposes of manufacturing said ties and shakes the plaintiff was allowed to enter upon said lands. That on the 3d day of June, 1889, plaintiff had manufactured on said land the ties and shakes in controversy, and that they were piled up by him on said land in piles of 1,000 each, and each pile was marked on the top with a cross; and that there was due and payable to him from said Harney, for the manufacture thereof, the sum of $286. That on said last-mentioned date plaintiff was in the possession of said property, and claimed the right to the possession thereof until said sum of money was paid. That on the 3d day of June, 1889, the defendant McFarland, in his official capacity as constable, under and by virtue of a writ of execution issued upon a judgment theretofore recovered against Harney, levied upon and took into his possession, as the property of Harney, the ties and shakes in controversy. That said property was taken from the possession of plaintiff without his consent by the defendant McFarland, who wrongfully withholds it from plaintiff's possession. These facts bring the case at bar, as we think, within the provisions of section 3052[1] of the Civil Code, and gave plaintiff a lien upon the property and the right to retain possession thereof until the lien thereon should be discharged by the payment of the amount due him for the manufacture of the same. We are of the opinion that the judgment and order should be affirmed, and so advise.

We concur: Foote, C.; Vancliff, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

92 Cal. 573

Taylor v. Reynolds, Judge. (No. 14,555.)

(*Supreme Court of California.* Dec. 30, 1891.)

Jury Trial—Violation of City Ordinance.

Where defendant is prosecuted under a city ordinance for an offense which is declared a misdemeanor by the city charter and Penal Code, he is entitled to a jury trial, under Pen. Code, § 1042, providing that issues of fact in criminal cases must be tried by a jury unless the right be waived in cases not amounting to felony.

Commissioners' decision. In bank.

Proceeding by F. A. Taylor for a writ of *mandamus* commanding the court to allow plaintiff a jury trial to determine a charge against him for violating a city ordinance. Writ granted.

Morehouse & Tuttle, for plaintiff. *W. B. Hardy*, City Atty., for defendant

Belcher, C. The plaintiff was convicted in a justice's court of the violation of a municipal ordinance of the city of San José, and sentenced to pay a fine of $30, or be imprisoned in the city prison for 30 days. He appealed the case to the superior court of the county, where the judgment was reversed, and a new trial granted. Thereafter the case was set down for trial in that department of the superior court of which the defendant herein was judge. When the case was set, the defendant (plaintiff here) demanded a trial by jury; but the judge of the court denied the demand, and refused, and still refuses, to comply therewith. Thereupon this proceeding was commenced to obtain a peremptory writ of mandate commanding the defendant to grant plaintiff a jury trial. The answer admits all the facts alleged, and waives all objections that might be made to the writ, to the end that the questions sought to be raised may be decided upon their merits.

The city of San José is a municipal corporation existing under a charter passed by the legislature, and approved March 17, 1874. St. 1873–74, p. 395. Section 9 of the charter provides that the common council shall have power "to lay out, open, vacate, improve, cleanse, water, and repair streets and sidewalks; * * * to define, prevent, and remove nuisances; * * * and any violation of any lawful order, regulation, or ordinance * * * is hereby declared a misdemeanor, and all prosecutions for the same may be in the name of the state of California." The ordinance which the plaintiff is charged with violating provides: "Section 1. No person shall place, erect, or maintain any business stand or other obstruction on any portion of any street or sidewalk of the city of San José. Sec. 2. Any person violating any of the provisions of this ordinance, upon conviction thereof, shall be fined in a sum not exceeding one hundred ($100) dollars, or be imprisoned for a term not exceeding thirty days." The obstruction of a public street or sidewalk in a city is a public nuisance. Pen. Code, §§ 370, 372, declare: "Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor." The action was then a criminal proceeding, and the accused was authorized to plead to the charge, (as he did,) "Not guilty;" and, when he was convicted in the justice's court, he had a right to appeal from the judgment to the superior court of the county, and, a new trial being therein granted, it had to be in that court. Pen. Code, §§ 1466, 1469. The plea raised an issue of fact which could only be tried in the manner prescribed by statute. As to the manner of such trials in the superior court, the Penal Code, § 1042, declares: "Issues of fact must be tried by jury, unless a trial by jury be waived, in criminal cases not amounting to felony, by the consent of both parties, expressed in open court, and entered in its minutes." By this section it is clearly provided that all offenses amounting to felony must be tried by a jury, and all amounting to misdemeanor must be so tried unless a jury is waived. The attorney for respondent urges that there are many minor or petty offenses arising from the violation of municipal police regulations which are not intrinsically criminal, and may be prosecuted summarily without a jury, and that the offense charged against the plaintiff is of this character. In support of this position, he cites Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. Rep. 1301, where, after reviewing the authorities, the court says: "The doctrines of many of the cases are thus summarized by Mr. Dillon in his work on Municipal Corporations, (volume 1, § 433:) 'Violations of municipal by-laws proper, such as fall within the description of municipal police regulations,—as, for example, those concerning markets, streets, water-works, city officers, etc.,—and which relate to acts and omissions that are not embraced in the general criminal legislation of the state, the legislature may authorize to be prosecuted in a summary manner, by and in the name of the corporation, and need not provide for a trial by jury. Such acts and omissions are not crimes or misdemeanors to which the constitutional right of trial by jury extends.'" It will be observed that it is said "the legislature may authorize" the summary trial without a jury of the above class of cases spoken of, they not being embraced in the general criminal legislation of the state; but the offense charged here is declared by statute to be a misdemeanor, and the legislature of the state has not attempted to authorize the trial of such a case without a jury, unless a jury be expressly waived. And the learned author goes on further in the same section to say: "So, here, where the act or omission sought to be punished by imprisonment under a municipal ordinance is in its nature not peculiarly an offense against the municipality, but rather against the public at large, and where it falls within the legal or common-law notion of a crime or misdemeanor, and especially where, being of such nature, it is embraced in the criminal code of the state, then the constitutional guaranties intended to secure the liberty of the citizen, and the right to a trial by jury, cannot be evaded by the nature of the powers vested in the municipal corporation, or the nature of the jurisdiction conferred upon the municipal courts." This case clearly falls within the rule last declared, and the plaintiff is entitled to a trial by jury. We therefore advise that a writ of mandate be issued as prayed for.

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[1] Civil Code, § 3052, provides: "A person who makes, alters, or repairs any article of personal property, at the request of the owner or legal possessor of the property, has a lien on the same for his reasonable charges for work done and materials furnished, and may retain possession of the same until the charges are paid," etc.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion, ordered that a writ of mandate issue as prayed for.

BEATTY, C. J. I concur in the judgment, not because I think the constitution secures the right of trial by jury in prosecution for petty misdemeanors created by statute or municipal ordinance, but solely upon the ground that the right seems to be conferred by the provisions of the Penal Code. In my opinion, the legislature has the power to provide for summary proceedings to enforce municipal regulations without a jury trial, but I cannot discover that such power has been exercised. By sections 1430–1435 of the Penal Code, relating to proceedings in justices' and police courts, and section 1042, relating to proceedings in the superior court, the defendant in a criminal action, who pleads "Not guilty," is entitled to demand that the issue be tried by a jury. In other words, the statute, irrespective of the constitution, secures the right. The evil involved is one which may well engage the serious attention of the legislature; but, as long as the law remains as it is, I see no escape from the conclusion that in any criminal action prosecuted in the name of the people of the state the defendant must be tried by jury, unless in cases of misdemeanor a jury is waived.

(92 Cal. 659)

PEOPLE *ex rel.* ENGLISH *et al.*, State Harbor Commissioners, v. ROBERTS. (No. 12,989.)

(*Supreme Court of California.* Jan. 13, 1892.)

CONSTITUTIONAL LAW—TONNAGE DUTY LEVIED BY STATE—"DOCKAGE" AND "WHARFAGE."

1. The assessment by a state of rates of dockage to be paid by barges and lighters for the use of docks and slips owned and maintained by the state does not violate Const. U. S. art. 1, § 10, which provides that "no state shall, without the consent of congress, lay any duty of tonnage."

2. The assessment by state harbor commissioners of rates of "dockage" or charges upon vessels for the privilege of mooring to docks or in slips does not violate St. 1880, p. 11, providing that no "wharfage" shall be collected on commerce within the state, since "wharfage" is a charge against merchandise for the use of wharves.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action by State of California ex rel. William D. English, John H. Wise, and A. C. Paulsell, state harbor commissioners, against M. R. Roberts, to recover dockage. Judgment for plaintiff. Defendant appeals. Affirmed.

Rosenbaum & Scheeline, for appellant. *F. C. Coogan* and *F. S. Stratton*, for respondent.

BEATTY, C. J. This is an action to recover from the owner of a barge and lighter employed in the business of transferring merchandise to and from vessels in the harbor of San Francisco the amount of dockage due under the regulations of the relators, the board of harbor commissioners. The judgment of the superior court was for the plaintiff, and the defendant appeals from the judgment only upon the ground that the facts, as found, do not support it. The findings, among other things, show: "(2) That, bounding upon and within that portion of said bay, there are a large number of wharves, docks, and slips, all of which have been constructed by and are owned by the people of the state of California, and plaintiffs, as such board, have jurisdiction over, and possession and control of, said wharves, docks, and slips. These wharves are about six hundred feet long, extending from the main-land into the waters of the bay, and are about one hundred feet wide, and between them there are spaces, called 'slips,' of about two hundred feet in width. The wharves are kept in repair, and the slips kept dredged to a sufficient depth to permit vessels of all tonnage to enter them, and make fast to and use the wharves; and defendants could not have used said wharves, docks, and slips, as hereinafter found, if they had not been kept in repair and dredged by plaintiffs as such board. (3) Prior to the 20th day of November, 1885, said board of state harbor commissioners, pursuant to the powers conferred upon it by law, by an order duly given and made and entered in the records of its proceedings, fixed and regulated the rates of dockage to be paid by and collected from lighters at one cent per ton per day, whenever said lighters discharged or loaded at any wharf within its jurisdiction and control, or when they discharged into or loaded from any vessel while lying at any of said wharves, or while lying with cargo on board in any of the slips within its jurisdiction and control, and said board on the 25th day of June, 1885, fixed and regulated the rates of dockage to be paid by and collected from vessels and all classes of water craft that might use or make fast to any of the wharves, pier, slips, quays, landings, or thoroughfares within its jurisdiction and control, and at the same time and by the same order fixed and regulated the rates of dockage to be paid by and collected from barges of two hundred registered tons or under at two cents per ton per day, and that said barges, while taking in cargo, or receiving or discharging ballast, or occupying outside berths, or moored in any of the docks, slips, basins, or canals, should be subject only to half rates, namely, one cent per ton per day. (4) Defendant was and is the owner and in possession of the lighter Contra Costa; and on divers days between the 20th day of November, 1885, and the filing of the said complaint herein, said lighter, Contra Costa, by permission of said board of state harbor commissioners, used and occupied various wharves, docks, slips, within the harbor of San Francisco, and within the jurisdiction and control and possession of said board, in discharging and loading at and upon said wharves, and in discharging into and unloading from vessels lying at said wharves and within said slips; and at all said times said lighter was attached to said wharves by hawsers and lines fastened to the mooring piles which had been placed there for that purpose by said board. That there is due and unpaid for said dockage, as found in this paragraph, according to the rates established by said board, the sum of one hundred and six dollars and ten cents. (5) That during the same period the same lighter, by permission of said board, used and occupied the various docks and slips within the harbor of San Francisco, and within the jurisdiction and control of said board, in discharging into and loading from vessels lying at said wharves within said slips, and not from the wharves; and at all said times said lighter was attached to the side of said vessels, and not to the wharf, but the vessels were moored up against and fastened to said wharves with hawsers and lines attached to said mooring piles. The vessels paid the regular rates of dockage to said board. That there is due and unpaid for the dockage of said lighter, as found in this paragraph, according to the rates established by said board, the sum of eleven dollars and fifty cents. (6) Defendant was and is the owner and in the possession of the barge Edison, which barge was and is a vessel of one hundred and forty four tons measurement; and on divers days between the 20th day of November, 1885, and the filing of said complaint, said barge Edison, by permission of said board, used and occupied various wharves, docks, and slips within the harbor of San Francisco, and within the jurisdiction and control of said board, in discharging and loading at and upon said wharves, and discharging into and loading from vessels lying at said wharves and within said slips, and at all said times said barge was attached to said wharves by hawsers and lines fastened to said mooring piles. That there is due and unpaid for said dockage, as found in this paragraph, according to the rates as established by said board, the sum of thirty-six dollars and twenty-five cents. (7) That during the same period of time the same barge, by permission of said board, used and occupied the various docks and slips within the harbor of San Francisco, and within the jurisdiction and control of said board, in discharging into and loading from vessels lying at said wharves, and within said slips, and not from the wharves; and at all times said barge was attached to the side of said vessels, and not to the wharves, but the vessels were moored up against and fastened to said wharves with hawsers and lines attached to said mooring piles. These vessels paid the regular rates of dockage to said board. That there is due and unpaid for the dockage of said barge, as found in this paragraph, according to the rates as established by said board, the sum of thirty-one dollars and ninety cents. (8) Both said lighter and said barge were engaged in transporting freight between different points in the state of California."

It is contended by appellant, upon these facts, that the judgment of the superior court must be reversed, for two reasons: *First*. Because the charges assessed against the barge and lighter are a duty on tonnage, and therefore that the state law and the regulations adopted by the board are in conflict with section 10 of article 1[1] of the constitution of the United States, which forbids the states, without consent of congress, to lay any duty of tonnage. *Second.* Because, by section 5 of an act of the legislature passed March 17, 1880, (St. p. 11,) no wharfage is to be collected upon commerce within the state.

We do not think that either proposition can be maintained. As to the first, we find that the supreme court of the United States has decided in a number of cases that for the use of wharves, landings, and other artificial means for facilitating the loading of merchandise, a charge proportioned to the tonnage of the vessels using such accommodations may be exacted by individuals or municipal corporations authorized by the states; and the distinction is clearly drawn between such charges for the use of facilities provided at state expense, and tonnage duties levied in the exercise of sovereign power. Cannon v. New Orleans, 20 Wall. 577; Packet Co. v. Keokuk, 95 U. S. 84; Packet Co. v. St. Louis, 100 U. S. 423; Vicksburg v. Tobin, Id. 430. The facts of this case, we think, bring it fully within the principle of these decisions. No charge is made against the lighter or barge, except for the use of artificial facilities created by the labor and expenditure of the harbor commissioners; and there is a plain distinction between the privilege of mooring in the slips which are dredged out between the wharves, and anchoring in the bay or along the unimproved water-front. The finding is that, but for the dredging, defendant's vessels could not have used the slips; and, this being so, we think, on the principle of the decisions above cited, they are bound to pay for such use, and that the exaction of reasonable charges therefor is no infraction of the constitution of the United States.

As to the second proposition, it is clear that the word "wharfage" in the act of 1880 is used in the same sense in which it is used in section 2524 of the Political Code; that is to say, in contradistinction to the word "dockage." Section 2524 of the Political Code, along with many other important provisions, limits and defines the power of the board of harbor commissioners, and prescribes their duties as to the collection of harbor dues, etc. Throughout the section the word "wharfage" is used to designate the charge against merchandise for the use of the wharf, while the word "dockage" is used to designate the charge against vessels for the privilege of mooring to the wharves or in the slips. By the act of 1880, domestic shipments were only exempted from wharfage, the authority to collect dockage being left intact. This being a suit for dockage, exclusively, the act of 1880 is inapplicable. The judgment is affirmed.

We concur: GAROUTTE, J.; DE HAVEN, J.; SHARPSTEIN, J.; HARRISON, J.

PATERSON and MCFARLAND, JJ. We concur. When this case was first argued, our attention was not called to the distinction between wharfage and dockage. The case was argued, considered, and decided upon the assumption that the action was for the recovery of wharfage. An inspection of the various provisions of the statute bearing upon the subject shows that the legislature has preserved the etymological distinction between the two terms.

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[1] Const. U. S. art. 1, § 10, provides, *inter alia*, that "no state shall, without the consent of congress, lay any duty of tonnage."

93 Cal. 133

Bradbury v. McClure. (No. 14,484.)

(*Supreme Court of California.* Feb. 1, 1892.)

Assumpsit — Money Had and Received — Evidence—Violation of Trust.

In an action for money had and received it was proven that the money was deposited with defendant's intestate by plaintiff's intestate in pursuance of an agreement by the latter and a third party who had sued him and attached some of his property; and that defendant's intestate agreed to hold the money and other property as security for any judgment that the attaching creditor might recover. The court then admitted evidence that defendant's intestate immediately paid the money to plaintiff's intestate. *Held*, that the evidence was properly admitted, since, regarding the transaction as a trust, the plaintiff's intestate could end it at any time with the consent of defendant's intestate so far as the latter's obligations to the former were concerned.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William Wallace, Judge.

Action by W. B. Bradbury, administrator, against J. S. McClure, administrator. Judgment for defendant. Plaintiff appeals. Affirmed.

Gordon & Young, for appellant. *G. W. McEnery*, for respondent.

Temple, C. Plaintiff appeals from the judgment and order denying a new trial. The action is for money had and received. There is but one finding, as follows: "That on the 7th day of June, 1888, David McClure received the sum of $2,790, to and for the use and on behalf of James McCord, and that on the same day he, said David McClure, paid the same sum of $2,790, and the whole thereof, to said James McCord." There can be no doubt that there is evidence to sustain this finding, but it is contended that the evidence was improperly admitted, and that is really the only question that is involved on this appeal. It seems that the money was deposited with McClure by McCord in pursuance of an agreement between himself and one Schmitt, who had sued him, and attached some of his property. The property was released in pursuance of this agreement, McClure agreeing to hold the money and other property as security for any judgment Schmitt might recover. Notwithstanding this agreement, the evidence tended to show, and the court found the fact to be, that McClure immediately paid the money to McCord. It is contended that such payment, if made, would be a violation on the part of McClure of his trust; that he could not, and his estate cannot, defend on that ground; that therefore, the evidence should have been excluded on plaintiff's objection, and, being in, the court should construe it so as not to find that McClure failed in his duty as trustee. McClure died before the suit was determined. When judgment was finally recovered by Schmitt, it was satisfied out of other property of McCord. Schmitt therefore has no further interest in the trust. If this had been otherwise, and Schmitt were plaintiff here, the rule invoked by appellant would have prevailed. But McClure had violated no confidence of which McCord could complain. Regarding the transaction as a trust, McCord was both trustor and beneficiary, and, with the consent of his trustee, could end it at any time, so far as McClure was under obligations to him, leaving McClure still responsible to Schmitt. McClure's contract with McCord was to pay the money to Schmitt in satisfaction of McCord's debt, or directly to McCord. McCord could not be injured by having the money paid at once to himself. So far as the fact that the payment would be in violation of a trust would affect the value of the evidence in determining the question as to whether McClure had paid McCord, we must presume the trial court gave it its proper weight. It seems to us that the question was properly determined. We think the judgment and order should be affirmed.

We concur: Fitzgerald, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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91 Cal. 481

Leach v. Aitken. (No. 14,540.)

(*Supreme Court of California.* Oct. 2, 1891.)

Settling Bill of Exceptions—Expiration of Judge's Term—Mandamus.

Though Code Civil Proc. § 653, authorizes a judge to sign and settle a bill of exceptions after as well as before he ceases to be judge, yet, under section 1085, which provides that a writ of mandate may issue to compel the performance of an act which the law enjoins as a duty, such writ will not lie to compel a judge before whom an action has been tried to settle a bill of exceptions after his term of office has expired.

In bank.

Application of Leach for a writ of mandate to John R. Aitken, former judge of the superior court of San Diego county, whose term of office had expired, to compel him to settle a bill of exceptions. Writ denied.

Wellborn, Parker & Stevens and *Homer & Wood*, for petitioner. *Luce, McDonald & Works* and *Gibson & Titus*, for respondent.

Sharpstein, J. Application for a writ of mandate to issue out of this court, commanding respondent to settle a bill of exceptions.

The only question to be considered is, whether respondent, who was the judge before whom an action was tried, can be compelled, after his term of office has expired, to settle a bill of exceptions in such action. The Code authorizes him to "settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer." Code Civil Proc. § 653. A writ of mandate may be issued to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Id. § 1085. "It is the very essence of this proceeding that there be some officer or officers in being, having the power, and whose duty it is, to perform the act. If there be no such officers, it is obvious that the writ cannot go, nor the mandate of the court be enforced." State v. Supervisors, 21 Wis. 280. Respondent holds no office, trust, or station. Therefore no duty is enjoined on him which can be said to result from an office, trust, or station. The legislature could not enjoin upon a private citizen the duty of settling a bill of exceptions, nor require a person who had been a judge to continue to discharge judicial duties after his term of office had expired. The legislature might authorize him to perform such an act as it has authorized him to perform in settling a bill of exceptions, but it could not enjoin it upon him as a duty. No person can be compelled to perform judicial or official duties unless he is a judge or other officer at the time when the duty is required to be performed. We cannot issue a writ of mandate to compel any one other than an officer to perform an official act. Application denied.

We concur: Beatty, C. J.; De Haven, J.; Garoutte, J.; Harrison, J.; Paterson, J.

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92 Cal. 560

City and County of San Francisco v. Staude *et al.* (No. 14,056.)

(*Supreme Court of California.* Dec. 30, 1891.)

Action on Bail-Bond — Pleading—Sufficiency of Answer—Denial.

A city sued the sureties on a forfeited bail-bond. The answer contained no denial of any of the material allegations of the complaint, but set up as a defense that the woman for whose release the undertaking was executed had been confined upon two charges; that she had previously been tried upon one of them, and acquitted; and that by reason of such acquittal, and the improbability that she would be convicted upon another trial of the cause, the defendants, without any knowledge of the other charge, and having been led by the officers of the city to believe that there was no other charge, executed the undertaking. It also alleged that the attorney who brought the suit had no authority from the city. *Held* that, as the complaint was to be taken as true, under Code Civil Proc. § 462, because none of its material allegations were controverted by the answer, and the answer failed to present anything by way of new matter to defeat the action, a motion for judgment upon the pleadings was properly allowed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Action by the city and county of San Francisco against John Staude and Charles E. Kelly as sureties on a bail-bond. There was judgment for plaintiff, and defendants appeal. Affirmed.

Carroll Cook and *J. E. Foulds*, for appellants. *Frank J. Fallon* and *Curtis H. Lindley*, for respondent.

Fitzgerald, C. This action is brought by plaintiff against the defendants as sureties on a forfeited undertaking of bail. The answer contains no denial of any of the material allegations of the complaint, but sets up two so-called "separate defenses," which are, in substance, as follows: *First*. That the woman whose release was procured by the execution of the undertaking herein was previous thereto tried by a jury for the crime of grand larceny, and they, having failed to agree upon a verdict, were discharged from the further consideration of the case. That by reason of such disagreement and the insufficiency of the evidence adduced at the trial, all apprehension or fear on the part of defendants that she would be convicted upon another trial of the case was entirely removed, in consequence of which, and without any knowledge on their part of the pendency of any other charge against her, and having been led by the acts of plaintiff, its officers and agents, to believe there was none, they executed the undertaking herein. That there was at the time of the execution of said undertaking another charge pending against her in the police court of San Francisco for larceny, which fact, though well known to plaintiff and its officers, was suppressed and concealed by them from the knowledge of defendants, and that they allowed her to be released and discharged from custody on said charge without requiring bail for her appearance. "That upon said last-mentioned charge the proofs against said Fanny Lyle were strong, and the presumption of guilt great; and she, the said Fanny Lyle, as defendants are informed and believe, feared conviction upon trial thereof, and that, by reason of such fear, and not in fear of the charge in the complaint herein mentioned, she, the said Fanny Lyle, departed from the state of California before the date of the alleged forfeiture of the bail-bond mentioned in the complaint herein." The *second* so-called "separate defense" avers generally upon information and belief that the attorney herein had no authority to bring this action, and that his appearance as such attorney was unauthorized by the plaintiff. Upon the filing of this answer plaintiff moved the court for judgment upon the pleadings on the usual grounds. The motion was granted, and the defendants excepted. The defendants then moved for and obtained leave to amend their answer, "if they were so advised," within 10 days; but they afterwards declined to do so, and judgment was thereupon given in favor of the plaintiff. The case comes here by appeal upon the judgment roll alone. Section 462 of the Code of Civil Procedure provides that "every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true." As the complaint herein is sufficient in all respects, and the answer does not deny any of the material allegations thereof, and further fails to present anything by way of new matter to bar or defeat the action, it follows that the motion for judgment on the pleadings was properly granted by the court. Felch v. Beaudry, 40 Cal. 439; Hemme v. Hays, 55 Cal. 337; Loveland v. Garner, 74 Cal. 298, 15 Pac. Rep. 844. We recommend that the judgment be affirmed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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92 Cal. 580

EYRE v. HARMON *et al.* (No. 13,497.)

(*Supreme Court of California.* Dec. 30, 1891.)

MINING CORPORATIONS—DUTIES OF OFFICERS—FAILURE TO FILE REPORT.

1. St. 1880, p. 134, § 1, providing that the directors of a mining company shall cause to be made and posted every month an itemized account "or" balance-sheet for the previous month, embracing a full statement of all receipts and disbursements, showing the sources from which the receipts were derived, and for what the disbursements were made, must be construed as referring to two separate papers,—a balance-sheet and an itemized account,—either of which may be posted; and the detailed statement mentioned in said section is intended to apply only to the itemized account, and to show what such an account should contain, when posted instead of a balance-sheet.

2. St. 1880, p. 134, § 1, provides also that the superintendent of the company shall file with the secretary reports of all discoveries of ore, upon the occasion of such discovery, and weekly reports showing the work done in the mine, the amount of ore extracted and sent to the mill, the amount of bullion shipped to the office of the company or elsewhere, and the amount, if any, retained by the superintendent. Section 3 provides that, in case the directors shall fail to have the "reports and accounts made and posted" as provided in the foregoing section, they shall be liable to an action by any stockholder to recover $1,000 as liquidated damages. *Held* that, as the only reports mentioned are those of the superintendent, the statute, although they are not required to be posted, must be construed as applicable thereto, and as making the directors liable for a willful failure to have the superintendent make such reports, but not for the mere neglect of the superintendent; and the fact that the mine is being operated in a distant state does not prevent the reports from being made, since they are not required to be on file on any particular day, but only to be made and forwarded weekly.

McFARLAND, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

This was an action by Eyre, a stockholder of a mining corporation, against A. K. P. Harmon and others, directors, to recover a penalty provided by statute for the failure to have made and posted certain accounts for the better protection of the stockholders of such corporations. There was judgment for plaintiff, and defendants appeal. Reversed.

Manual Eyre, for appellants. *Newlands, Allen & Herrin*, for respondent.

DE HAVEN, J. The plaintiff is a stockholder of a mining corporation formed under the laws of this state, and this action is to recover from the defendants, who are directors of said corporation, a penalty of $1,000 for the alleged failure to have made and posted in the months of October and November, 1888, certain accounts provided for by the statute for the better protection of stockholders of mining corporations, approved April 23, 1880. St. 1880, p. 134. The act provides: "Section 1. * * * It shall be the duty of the directors on the first Monday of each and every month to cause to be made an itemized account or balance-sheet for the previous month, embracing a full and complete statement of all disbursements and receipts, showing from what sources such receipts were derived, and for what and to whom such disbursements or payments were made, and for what object or purpose the same was made; also all indebtedness or liabilities incurred or existing at the time, and for what the same was incurred, and the balance of money, if any, on hand. Such account or balance-sheet shall be verified under oath by the president and secretary, and posted in some conspicuous place in the office of the company. * * * It shall also be the duty of the superintendent to file with the secretary a weekly statement, under oath, showing the number of men employed under him, and for what purpose, and the rate of wages paid to each one. He shall attach to such account a full and complete report, under oath, of the work done in said mine, the amount of ore extracted, from what part of the mine taken, the amount sent to mill for reduction, its assay value, the amount of bullion received, the amount of bullion shipped to the office of the company or elsewhere, and the amount, if any, retained by the superintendent. It shall be his duty to forward to the office of the company a full report, under oath, of all discoveries of ore or mineral-bearing quartz made in said mine, whether by boring, drifting, sinking, or otherwise, together with the assay value thereof." "Sec. 3. * * * In case of the failure of the directors to have the report and accounts current made and posted as in the first section of this act provided, they shall be liable, either severally or jointly, to an action by any stockholder * * * for one thousand dollars liquidated damages, with costs of suit." The court below made an order striking from the complaint certain allegations which charged the defendants with failure to cause the superintendent to make and file the reports mentioned in section 1 of the act above mentioned, and also with a failure to have posted in the office of the company the superintendent's itemized account. This ruling of the court was excepted to. The case was then submitted to the court upon an agreed statement of facts, showing that a paper, in the following form, and duly verified, was posted in the month of October, 1888:

"Statement of the Consolidated Imperial Mining Company for the month of October, 1888.

RECEIPTS.	
For sale of company's stock	$ 962 15
Assessment No. 25	1,548 45
	$2,510 60
EXPENDITURES.	
For Supt.'s draft	$175 87
Office expenses	271 50
Interest on overdraft	2 15
	$149 52
Cash on hand October 31st	$1,633 89

"A. K. P. Harmon, President.
"C. L. McCoy, Secretary."

There was also posted a statement, in similar form, for the month of November, 1888.

It was further agreed that each of the statements referred to was a balance-sheet, according to the understanding of the meaning of that term by book-keepers and merchants, and that both were made and posted in supposed compliance with the act of the legislature before referred to, and for the purpose of so complying; that such had been the form of the accounts since the passage of the act, and that no stockholder, prior to the commencement of this suit, had ever complained; and further, that complete books were kept, showing in detail the items from which such balance-sheets were made. Upon these facts the court gave judgment in favor of the defendants. The plaintiff appeals. It will thus be seen that the question arising upon the ruling of the court below in striking out parts of the complaint, and in giving judgment upon the agreed facts, involves a construction of the provisions of sections 1 and 3 of the statute above referred to.

1. It being conceded by the agreed statement of facts that there was properly posted in the office of the corporation, of which defendants are the directors, a paper which was in fact a balance-sheet, according to the understanding of merchants and book-keepers, we think this was a sufficient compliance with the law in that respect. The proper construction of the statute is that the directors shall cause to be posted either a balance-sheet or an itemized account, showing in detail all the matters especially enumerated in section 1. This would appear with greater clearness if in the formation of the sentence requiring such posting the word "balance-sheet" had been placed before the words "itemized account." But it is very certain that the statute refers to and expressly names two papers, a "balance-sheet" and an "itemized account," either one of which may be posted. Each of these words has a well-known and definite meaning, entirely different from the other, and they cannot be construed to mean the same thing, and both to designate a paper, stating in minute detail all the separate items of an account. A balance-sheet, as that word is uniformly used by book-keepers and business men, is a paper which shows a "summation or general balance of all accounts," but not the particular items going to make up the several accounts; and it is therefore essentially different from a paper embracing "a full and complete statement of all the disbursements and receipts, showing from what sources such receipts were derived, and for what and to whom such disbursements or payments were made, and for what object or purpose the same was made;" but such matters may find an appropriate place in an itemized account, and the clause just quoted from section 1 of the statute under consideration must therefore be construed as applying only to such an account, and the section is to be read as if such clause immediately followed the words "itemized account," in accordance with the familiar rule of construction which permits the transposition of words or sentences whenever it is necessary to do so, in order that every word may have a practical effect, according to its appropriate meaning. French v. Teschemaker, 24 Cal. 539. See, also, Waters v. Campbell, 4 Sawy. 121, in which case a section was construed as if a proviso found in the middle of a clause were placed at the end, in order to give effect to the obvious meaning of the section.

2. The remaining question before us arises upon the ruling of the court striking out certain portions of the complaint, and, in our opinion, the court erred in so far as such ruling relates to the allegations of the complaint charging the defendants with a failure to have the superintendent make the reports referred to in section 1. Section 3 declares that, "in case of the failure of the directors to have the reports and accounts made and posted, as in the first section of this act provided they shall be liable, either jointly or severally," to an action by any stockholder to recover $1,000 as liquidated damages. The natural and obvious meaning of this language is that for a failure upon the part of the directors to have such reports made and accounts posted as are provided for in the first section of the act, they shall be liable to the penalty named. Any other construction is forced and unnatural, and opposed to well-settled rules adopted by courts in the interpretation of statutes. The only reports directed by section 1 to be made are the weekly reports of the superintendent, showing the work done in the mine, the amount of ore extracted, from what part of the mine taken, the amount and assay value of the ore sent to mill for reduction, the amount of bullion received and shipped to the office of the company or elsewhere, and the amount, if any, retained by the superintendent; and the other report, in relation to discoveries of ore, to be made on the occasion of such discovery. Now, unless these are the reports referred to in section 3, it is evident that the word as there found must be given no meaning whatever. It must be eliminated entirely, and the section read as if it did not appear

therein; and, in addition to this, there must also be attributed to the legislature the absurdity of declaring in elaborate detail what reports shall be made by the superintendent, and yet making no provision for the enforcement of the duty enjoined. It will not do to say in answer to this that the section only refers to reports which are to be made and posted, and therefore cannot apply to those of the superintendent, as they are not to be posted, for that is only another way of stating that nothing whatever was meant by the use of the word "reports." The language of section 3 is plain, not only in itself, but becomes even more so, if possible, when considered, as it must be, with reference to the general scope and purpose of the act of which it forms a part. The statute proceeds upon the theory that the stockholders, whether in the minority or majority, have a right to be informed as to the manner in which the business of the corporation is being conducted, the receipts and disbursements, the number of men employed, and the wages paid each, and also the value of the bullion shipped from time to time, and how much ore or bullion remains with the superintendent, and also whether any discoveries of ore have been made in the prosecution of the work, which, if known, would affect the value of the mine in which they own an interest. The means by which the stockholders are to receive this information are provided with great particularity in section 1. These means are: (1) Full and complete books of account to be kept by the secretary, and to be open to the inspection of the stockholders; (2) the monthly balance-sheet, or, in place thereof, an itemized account, to be posted in the office of the company; and, lastly, the reports of the superintendent, which are to be forwarded to the office of the company, and kept there, subject to the inspection of stockholders. Now, undoubtedly, it is the intention of this law that all of these accounts and reports shall be made as directed. There is nothing unreasonable in what is required, and it is the duty of the court, unless there is some fatal omission which defeats its intention, to so construe the statute that it shall have effect. It is urged that the duty of making reports cannot be compelled, because no penalty is imposed upon the superintendent for a failure to make them. This argument, however, does not meet the real question involved here, which is only whether the act has made the directors of the corporation liable for their failure to have these reports made. The directors are the governing body of the corporation, and as such have the power to employ the superintendent, to prescribe his duties, and to dismiss him if he fails to discharge such duties. They have the right to direct the superintendent to make these reports; and, if such direction were given in good faith, it would doubtless be obeyed, as it would be unreasonable to suppose that an officer would refuse to obey when such action might insure his dismissal from their service. Now, it was in view of these obvious considerations, which must have been in the minds of the legislators as men of ordinary experience, that the act in its penal clause addresses itself to the governing and controlling body of the corporation, and makes the directors liable for a failure to have made the reports referred to in section 1. This does not, as respondent contends, make the directors liable for the mere neglect of the superintendent, without any fault on their part. The statute is both remedial and penal in its nature. Its general purpose is to secure to stockholders their right to have general information of the manner in which the business of the corporation is being conducted, and in order to enforce this right they are permitted to institute actions for liquidated damages for a failure on the part of the directors to give them the information referred to in the statute, and in order to justify a recovery it must appear that there has been an intentional disregard of the law, a willful neglect to comply with its requirements. Under this construction directors are only liable for a willful and intentional failure to have the superintendent perform his duty. Impossibilities are not required of them, but only that they shall in good faith direct this officer, who is at all times subject to their control, to obey the positive requirements of the law in the matter of these reports. The fact that the mine is being operated in a distant state or territory does not place it beyond the power of the superintendent to make these reports. They are not required to be on file on the first Monday of the month, or at any other particular date; they are to be made and forwarded weekly, and, if so made, will be received weekly; and that is all that is required, and this is easy of accomplishment. The reports in regard to discoveries of ore are only to be made upon the occasion thereof.

As thus construed, this statute imposes no unreasonable burden upon directors of this class of corporations. It requires only good faith and common honesty in their management of property intrusted to them, and enforces from them a proper regard for the rights of those for whom they are trustees, so far at least as giving information of the working and development of the mine, and of all receipts and expenditures and discoveries attending the same. It is true that this class of statutes in their penal clauses ought to be strictly construed, but this rule does not mean that when the intent and object of the law is plain such object may be defeated by an overnice construction. In the language of the supreme court of the United States in U. S. v. Hartwell, 6 Wall. 396: "The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended." To hold that the word "reports," as found in the penal clause of this act, is meaningless, is not only to refuse to give effect to a word which in the connection used obviously and naturally refers to the reports of the superintendent, which by section 1 are required to be made, but such construction defeats the general purpose of the statute itself. But it is a general rule, applicable to the construction of penal as well as other statutes, that no word is to be eliminated from a section by the court if a sensible meaning can be given to it, unless by giving such word its meaning the real object of the statute would be defeated. With much greater reason is the court required to give effect to each word in a sentence, when not to do so is to deprive the law of the vitality necessary to secure respect for its commands. Applying this rule, there is no difficulty in the construction of section 3 of this act. It simply makes the directors liable to the penalty named for a willful failure to have such reports made and accounts posted as are referred to in section 1. If the directors cause the reports of the superintendent to be made and the monthly accounts to be posted as required by the statute, the law is complied with, otherwise not; and they incur the statutory penalty if the failure to do so was intentional on their part. Judgment reversed.

We concur: Beatty, C. J.; Sharpstein, J.; Garoutte, J.

McFarland, J. I dissent.

Harrison, J., being disqualified, did not participate in the foregoing opinion.

(92 Cal. xix)

Eyre v. Levy *et al.* (No. 13,795.) Same v. Hirshfeld *et al.* (No. 13,390.) Same v. Scott *et al.* (No. 13,797.) Same v. Frey *et al.* (No. 13,796.)

(*Supreme Court of California.* Dec. 30, 1891.)

In bank. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Manual Eyre, for appellant. *Newlands, Allen & Herrin,* for respondents.

Per Curiam. Upon the authority of Eyre v. Harmon, (No. 13,497,) 28 Pac. Rep. 779, the opinion in which has been this day filed, the judgment in each of the above-named cases is hereby reversed.

Harrison, J., being disqualified, did not participate in the foregoing.

(92 Cal. 607)

People v. Donguli. (No. 20,828.)

(*Supreme Court of California.* Dec. 31, 1891.)

Homicide—Instructions.

1. An objection that an instruction as to reasonable doubt, given by the court on its own motion in a murder trial, "would exclude from the consideration of the jury a doubt founded upon a knowledge of natural laws inconsistent with the hypothesis contended for by the prosecution," is not available, where defendant made no request to charge, and it does not appear from the record that the prosecution contended for any hypothesis claimed to be inconsistent with any natural law, or that evidence of any natural law would have been relevant or material.

2. Defendant on trial for murder having made no request to charge, it was not error in the court to charge the jury that, to justify the killing in self-defense, it "must be done under a well-founded belief that it was absolutely necessary for such person to kill the deceased at that time to save himself from great bodily harm. * * * It must appear to you that the danger to defendant must be present, apparent, and imminent, and the killing must have been done under a well-founded belief that it was absolutely necessary for the defendant to kill Ryan at the time to save himself from death or from great bodily harm."

Commissioners' decision. In bank. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Donguli was convicted of murder, and appeals. Affirmed.

Geo. A. Lamont, M. C. Chapman, and *L. L. Chamberlain,* for appellant. *W. H. H. Hart,* Atty. Gen., for the People.

Vancliff, C. The defendant was convicted of the crime of murder in the second degree, and sentenced to imprisonment in the state's prison for a term of 11 years. Defendant appeals on the judgment roll alone, containing no bill of exceptions; and the only points made relate to the propriety of certain instructions given to the jury. It does not appear that any instructions were requested by either party, and those given appear to have been given by the court of its own motion, and, in the absence of any part of the evidence, seem to be correct.

1. The defendant contends that the court erred in giving the following instruction: "I instruct you that a reasonable doubt is that state of the case which, after entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. I instruct you further, under this head, that in a legal sense a reasonable doubt is a doubt which has some reason for its basis; it does not mean a doubt from mere caprice or groundless conjecture. *If you should entertain a reasonable doubt, then you should be able to give some reason, founded upon the evidence or want of evidence in this case, for such doubt. And you are not at liberty, under the law and your oath, to go outside of this case to hunt for or find a reason for doubting the guilt or innocence of the defendant, or the existence, or non-existence, of any fact or circumstance necessary to a conviction or acquittal of the defendant, but you must look only to the evidence in this case.* A doubt, to justify an acquittal, must be reasonable, and arise from a candid and impartial consideration of all the evidence in the case. Therefore, if, after a careful and impartial consideration of all the evidence which has been submitted to you in this case, you can say and feel that you have an abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge, then you are satisfied beyond a reasonable doubt, and should convict." The only part of this instruction objected to is the part italicized. It is said that "it would exclude from the consideration of the jury a doubt founded upon a knowledge of natural laws inconsistent with the hypothesis contended for by the prosecution." It does not appear from the record that the prosecution contended for any hypothesis claimed to be inconsistent with any natural law, or that evidence of any natural law would have been relevant or material. When the record contains no part of the evidence, "it is well settled that this court will not reverse the judgment on ac-

count of instructions alleged to be erroneous, 'unless it appears that such instruction would have been erroneous under every conceivable state of facts.'" People v. Smith, 57 Cal. 130.

2. It is contended that the court erred in giving the italicized parts of the following instruction: "To justify a person for killing another upon the ground of self-defense, the killing must be done *under a well-founded belief that it was absolutely necessary for such person to kill the deceased at that time, to save himself from great bodily harm.* Should you believe from the evidence, beyond a reasonable doubt, that the defendant did kill the said John Ryan, then, in order that he may avail himself of self-defense, *it must appear to you that the danger to the defendant must be present, apparent, and imminent, and the killing must have been done under a well-founded belief that it was absolutely necessary for the defendant to kill Ryan at the time, to save himself from death or from great bodily harm,* or to save some one in his habitation from great violence from Ryan or his associates." It is contended by counsel for defendant that "if the appearances were such as would have led a man of ordinary courage, firmness, and intelligence to believe the danger imminent, and the killing necessary to avoid death or great bodily harm, such killing was justifiable, even though there may have been in truth no danger at all. It is the appearance of danger, not the actual danger, which justifies." Conceding this to be correct, it is not inconsistent with the instruction properly construed by reading all parts of it together. So read and construed, it means only that to justify the killing on the ground of self-defense it must have been done under a well-founded belief that it was absolutely necessary to save the defendant from death or great bodily harm, and does not mean that the danger must have been real or actual. The expression, "it must appear to you that the danger to the defendant must be present, apparent, and imminent," read by itself, is not clear, and perhaps might be understood as requiring the danger to be actual, but, read in connection with what precedes and that which immediately follows it, I think it could not have been so understood by the jury. But the principal objection is to the expression that the belief must be "a well-founded belief." A belief that the danger is such as to justify the killing may be "well founded," although there may be no actual danger. Of this counsel's supposed case is an example in point. I think the judgment should be affirmed.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

MCFARLAND, J. I concur in the judgment, because I think that, taking the charge to the jury as a whole, the appellant was not prejudiced. But I do not think that courts hereafter should adopt that part of the charge which deals with the subject of reasonable doubt as an entirely proper instruction. For instance, the jury are told that if they have a reasonable doubt, then they "should be able to give some reason * * * for such doubt." Now, there are intelligent and sensible jurors able to come to correct conclusions, which are expressed by the formula "guilty" or "not guilty," whose minds have not been trained in the exercise of expressing in language the train of reasoning by which they arrive at their verdicts. They are not required to "give" their reasons,—that is not their business.

(92 Cal. 577)

In re SHARP. (No. 14,835.)

(*Supreme Court of California.* Dec. 30, 1891.)

INSOLVENCY—APPEAL OF ASSIGNEE—STAY.

Under Insolvent Act 1880, § 67, which provides that an appeal may be taken from an order settling the account of an assignee, and that the notice, undertaking, and procedure on appeal shall conform to the laws regulating appeals in civil cases, where an assignee perfected an appeal from an order settling his account, he is entitled to a stay of proceedings in execution of the order appealed from pending the appeal, though the appeal pertains to the disallowance of only one item in the account.

In bank.

Application of Charles R. Allen for an order to the superior court staying proceedings in execution of an order settling his account as assignee of J. H. Sharp, insolvent, pending an appeal therefrom. Order granted.

Walter D. Mansfield, for petitioner. *E. P. Cole*, for respondent.

DE HAVEN, J. Charles R. Allen, the petitioner herein, is the assignee in insolvency of one Sharp, an insolvent debtor, and has given a bond for the faithful discharge of his duties as such assignee. On November 10, 1891, the court in which said insolvency proceeding was pending made an order settling the final account of said Allen as such assignee, in which order a certain credit of $250, claimed in the account filed by him, was disallowed by the court, and, as a part of the same order, directed him to pay over to the creditors of the insolvent the amount of money adjudged to be in his hands by the order settling the final account, to-wit, the sum of $3,662.86. Thereafter the assignee perfected an appeal to this court from the order settling his account, and filed an undertaking for the payment of all damages and costs which might be awarded against him on the appeal, not exceeding $300. The assignee, having failed to distribute the money belonging to the estate of the insolvent, as required by the order before referred to, was cited to appear before the judge of the superior court, and show cause why he should not be punished as for a contempt of court. This is an application for an order of this court directing a stay of all proceedings under and in execution of the order settling the account of said assignee pending the decision of this court on the appeal therefrom.

1. The petitioner is entitled to the order which he asks. By section 67 of the in-

solvent act of 1880 it is provided that an appeal may be taken from an order settling the account of an assignee, and it is further provided: "The notice, undertaking, and procedure on appeal shall conform to the general laws of this state regulating appeals in civil cases, except that when the assignee has given an official undertaking and appeal(s) from a judgment or order in insolvency, his official undertaking stands in the place of an undertaking on appeal, and the sureties therein are liable on such undertaking." Under this section the bond of the assignee itself operates as an undertaking on appeal when the assignee appeals from any judgment or order in the insolvency proceedings, and also has the effect to stay proceedings on that judgment or order when it directs him to pay over money, as effectually as if a new undertaking were given for that purpose. The object of this provision of the statute is apparent. The official bond of the assignee is a security for the proper distribution of all money or property found to be in his hands by the final judgment settling his accounts, and hence, when he appeals from such an order, it is not necessary for the security of the creditors whom he represents that another undertaking should be given, binding him to the performance of the same obligation. It is urged, however, that the assignee was not aggrieved by the order settling his account, except in so far as it disallowed the credit of $250, which he claimed in his account, and that he has no right to appeal from the entire order, and, by staying all proceedings, be permitted to retain in his hands over $3,000, about which there is no dispute. That is a question, however, which goes to the merits and the good faith of the appeal, and cannot be considered in this collateral proceeding. The order settling the account has the effect of a judgment, and draws a like rate of interest, and if, upon the hearing of the appeal, the court should be of opinion that the interest allowed by law is not sufficient compensation for the delay, and that the appeal is not taken in good faith, but for delay, it has the power to make an additional allowance by way of damages. Ordered, that a stay of proceedings be granted in accordance with the prayer of the petition.

We concur: McFarland, J.; Garoutte, J.; Sharpstein, J.

Harrison, J. I concur in the order staying proceedings, but I am not prepared to say that an order settling the account of an assignee in insolvency, and directing the payment of a dividend to the creditors, is such a judgment as will bear interest from its entry. The assignee is an officer of the court, and his relation to the creditors is only that of a trustee; and the general rule is that a trustee is not liable for interest upon moneys of which he is only the custodian, until he repudiates the trust, or does some act inconsistent therewith. The assignee's relation as trustee is not terminated by the entry of the judgment, and his trust would not be repudiated until after a demand of payment by the creditors and a refusal on his part. If, when such demand is made, there is a sufficient reason for his refusal, he cannot be said to have repudiated his trust. The statute gives to an appeal from the order the effect of staying proceedings, and to prevent him from making payment of the dividend. The question, however, is not involved in the present motion, and, as any *dictum* in reference thereto will not be authority upon the court when the question may be presented for decision, I am unwilling to concur in any statement that might hereafter be treated as prejudging the case of some one who may desire to present it with argument for actual decision.

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92 Cal. 596

Mickle v. Heinlen. (No. 14,384.)

(*Supreme Court of California.* Dec. 31, 1891.)

Pleading Payment.

In an action for wages in conducting defendant's business, under the denial that there is now due from defendant to plaintiff any sum whatever for services, defendant may show payments made by plaintiff to himself out of the business, and which he had not charged to himself, though he kept the books, though no payment was pleaded.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by Porter Mickle against J. R. Heinlen for work and labor and money had and received. Plaintiff had judgment, and defendant appeals. Reversed.

N. O. Bradley, *G. A. Heinlen*, and *A. B. Hunt*, for appellant. *Brown & Daggett* and *Daggett & Adams*, for respondent.

Temple, C. Defendant appeals from a judgment and order denying his motion for a new trial. The complaint, which is verified, charges that plaintiff performed work for defendant from the 1st day of December, 1887, to and including the 23d day of March, 1889, under an agreement whereby defendant agreed to pay him $100 per month, amounting to $1,576.66⅔, of which sum part has been paid, leaving a balance of $1,000.73⅔ still due. There is also a count for $110, for money had and received. The answer contains specific denials, and, among them, denies that defendant has not paid plaintiff in full, or that there is now due from defendant to plaintiff any sum whatever for work, labor, or services, or at all. On the trial the plaintiff, being a witness, testified that as defendant's agent he carried on the business of butchering, and kept a shop and sold meat at the town of Hanford. That he managed the business himself, kept the books, paid himself out of the business as he saw fit. That he purchased cattle, made deposits in the bank, and drew it out on checks as required. That at the end of the year he added up what he had drawn for his own use, and either charged or credited himself with the difference between that and his salary on the books. In that way he ascertained the balance due him, for which suit was brought. On cross-examination plaintiff admitted that hay, oats, and barley, to the amount of $71.64, had been paid for out of the business, and taken by him to his own use, and that he had never been charged with it or settled for it in any way. Plaintiff's counsel objected to the evidence because there was nothing in the answer that calls for a statement of an account, and asked to have it stricken out so far as it would show a counter-claim or payment. The court held that payment could not be proven under the answer; there was no recoupment, set-off, counter-claim, or payment pleaded: and therefore sustained the objection and motion, defendant reserving his exception. An answer was then made substantially to show that plaintiff had paid himself, out of the business, the entire sum claimed as wages, which offer was objected to on like grounds, with a similar ruling and exception. This court has often held that, under denials such as are contained in the answer in this case, payment may be proven, though not affirmatively averred. The question then is, did the evidence ruled out tend to prove payment? As the plaintiff had entire charge of the business and kept the books, was in fact his own pay-master, and was in the habit of paying himself from the business by taking what and when he chose, these appropriations must have been intended as payments or embezzlements. The fair conclusion is that he intended to charge himself, and forgot it. But, if he intended a misappropriation, the result would be the same. Under the pleadings the defendant could not recover judgment if the balance were found against the plaintiff. But to the extent of paying the debt the motive would be immaterial. We do not appreciate the suggestion that this may necessitate going through the books and stating an account. If that be necessary, to ascertain the balance due plaintiff, it is part of his case. As there must be a new trial, it is unnecessary to express an opinion as to the issue of fact, so fully argued in the briefs. We think the judgment and order should be reversed, and a new trial had.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

(92 Cal. 632)

ROSS v. CONWAY *et al.* (No. 13,341.)

(*Supreme Court of California.* Jan. 6, 1892.)

CANCELLATION OF DEED—UNDUE INFLUENCE—EVIDENCE.

1. A trust-deed by one in weak mind and a dying condition, made principally for the benefit of one in whom the grantor had for many years imposed great confidence as her spiritual adviser, and for which there was no consideration, will be canceled on the ground of undue influence.

2. In a suit to annul a trust-deed, made by a woman but a few days before her death, for the benefit of her spiritual adviser, on the ground of undue influence, a finding that the grantor had no independent advice on making the deed is sustained by the evidence that the scrivener was employed and introduced to her by the *cestui que trust* at a hospital where no one else was present; that her last will was destroyed, and the deed made at the suggestion of the *cestui que trust*, who was present, with the exception of a few minutes, while directions for the deed were given.

Department 2. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge.

Suit by James E. Ross against John M. Conway et al. to annul, on the ground of undue influence, a trust-deed made by his mother, Elizabeth G. Ross, for the benefit of defendants. Plaintiff had judgment, and defendants appeal. Affirmed.

George D. Collins and *George A. Johnson*, (*D. M. Delmas*, of counsel,) for appellants. *John A. Wright*, for respondent.

HARRISON, J. The plaintiff, as the sole heir of his mother, Elizabeth G. Ross, brought this action to cancel and annul two certain deeds of trust conveying certain real estate in Santa Rosa, executed by his mother, August 11, 1888, and August 18, 1888, respectively, alleging that at the time of their execution his mother was weak in body, and that her mind was impaired, and that the defendant Conway, who was the pastor of the Roman Catholic church of Santa Rosa, of which she had been for many years a member, and who was also her spiritual adviser, had thereby acquired great influence over her, and, taking advantage of such influence and of her mental weakness, had caused her to execute the said deeds of trust for the benefit of himself and of the church of which he was the pastor. The defendants denied these allegations, and the cause was tried by the court, a jury having been called in as advisory to the court upon certain issues. The verdict of the jury and the findings of the court were in support of the allegations of the complaint, and judgment was rendered in favor of the plaintiff. A motion for a new trial having been made and denied, an appeal has been taken from both the judgment and the order denying a new trial.

The two deeds of trust are substantially the same, the last one having been executed merely for the purpose of correcting an erroneous description in the first. Under the trust created by the deeds the trustees are directed to sell one of the parcels of land "as soon as practicable," and out of the proceeds thereof apply $8,000 in the improvement of the other parcel, and pay the remainder of the proceeds to the defendant Conway. Out of the income to be derived from the parcel to be improved, $75 per month was to be paid to the plaintiff, and the remainder monthly "to the pastor of the Roman Catholic church in Santa Rosa, to be disbursed by him in such manner as he may deem charitable." Other provisions contingent upon the death or change in circumstances of the plaintiff are unnecessary to be repeated here. The issues before the court were, in substance, whether Mrs. Ross was, at the respective dates on which the deeds of trust were executed, of weak mind, or able to comprehend the provisions of the instruments; and whether the defendant Conway used the influence which he had acquired over her, by virtue of being her spiritual adviser, for the purpose of procuring her to make such disposition of her property. Upon these issues there was much conflicting evidence before the court, both in the testimony of the witnesses who were examined, as well as in the circumstances under which the instruments were executed, and the purposes held by Mrs. Ross with reference to her son and to the church. Upon the evidence before it the court found in favor of the plaintiff. This finding was in accordance with the verdict of the jury, and upon a motion for a new trial, in which the evidence was again brought before the court for consideration, it adhered to its former conclusion. Under these circumstances we cannot disregard its finding. Inasmuch, however, as counsel have elaborately argued the facts, we have examined the record, and are of the opinion that the evidence fully justifies the findings of the court.

The court finds that at the dates of the execution of the deeds of trust Mrs. Ross was of weak mind, and in a dying condition, and that she died on the 20th of August; that the defendant Conway was, and had for a long time previously been, the pastor of the Roman Catholic church at Santa Rosa, and the spiritual adviser of Mrs. Ross; that a confidence was reposed in him by her, and that there existed on his part an influence and apparent authority over her arising out of his relation to her as her spiritual adviser, and that he took an unfair advantage of this influence, and used this confidence and authority for the purpose of procuring her to execute the two deeds of trust. The court also finds that Mrs. Ross had in December, 1887, executed a will of all her estate, with the exception of some minor legacies, in favor of the plaintiff herein, and that the provision in the deeds of trust for the defendants, other than the defendant Conway, were without any consideration from them, but were made solely through the influence of Conway.

The rule is inflexible that no one who holds a confidential relation towards another shall take advantage of that relation in favor of himself, or deal with the other upon terms of his own making; that in every such transaction between persons standing in that relation the law will presume that he who held an influence over the other exercised it unduly to his own advantage; or, in the words of Lord Langdale in Casborne v. Barsham, 2 Beav. 78, the inequality between the transacting parties is so great "that, without proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this court will impute an exercise of undue influence;" that the transaction will not be upheld unless it shall be shown that such other had independent advice, and that his act was not only the result of his own volition, but that he both understood the act he was doing and comprehended its result and effect. This rule finds its application with peculiar force in a case where the effect of the transaction is to divert an estate from those who, by the ties of nature, would be its natural recipients, to the person through whose influence the diversion is made, whether such diversion be for his own personal advantage, or for the advantage of some interest of which he is the representative. It has been more frequently applied to transactions between attorney and client or guardian and ward than to any other relation between the parties, but the rule itself has its source in principles which underlie and govern all confidential relations, and is to be applied to all transactions arising out of any relation in which the principle is applicable. It is termed by Lord Eldon "that great rule of the court that he who bargains in any matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence." Gibson v. Jeyes, 6 Ves. 278. It was said by Sir Samuel Romilly in his argument in Huguenin v. Baseley, 14 Ves. 300, that "the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another,"—a principle which was afterwards affirmed by Lord Cottenham in Dent v. Bennett, 4 Mylne & C. 277, saying that he had received so much pleasure from hearing it that the recollection of it had not been diminished by the lapse of more than 30 years.

That the influence which the spiritual adviser of one who is about to die has over such person is one of the most powerful that can be exercised upon the human mind, especially if such mind is impaired by physical weakness, is so consonant with human experience as to need no more than its statement; and in any transaction between them, wherein the adviser receives any advantage, a court of equity will not enter into an investigation of the extent to which such influence has been exercised. Any dealing between them, under such circumstances, will be set aside as contrary to all principles of equity, whether the benefit accrue to the adviser, or to some other recipient who, through such influence, may have been made the beneficiary of the transaction. These principles have been so invariably announced whenever the question has arisen that a mere reference to the authorities will suffice. Norton v. Relly, 2 Eden, 286; Huguenin v. Baseley, 14 Ves. 273; Thompson v. Heffernan, 4 Dru. & War. 291; Dent v. Bennett, 4 Mylne & C. 269; In re Welsh, 1 Redf. Sur. 246; Richmond's Appeal, 59 Conn. 226, 22 Atl. Rep. 82; Ford v. Hennessy, 70 Mo. 580; Pironi v. Corrigan, 47 N. J. Eq. 135, 20 Atl. Rep. 218; Connor v. Stanley, 72 Cal. 556, 14 Pac. Rep. 306; 1 Bigelow, Fraud, 352; Story, Eq. Jur. § 311.

The finding of the court that Mrs. Ross did not have any independent advice upon the subject of making the deeds of trust is fully sustained by the evidence. It appears from the record that the attorney who prepared the instruments was introduced to her by Conway, and that the only persons with whom she had any interview, or from whom she could receive any advice respecting the same, were this attorney and the defendant Conway. On the 9th of August she had expressed to Conway a desire to make a testamentary disposition of her property, and, upon his suggestion that Mr. Collins was a suitable person, she requested that he would send him to her at the hospital where she was lying. He thereupon sought Collins, and, telling him the wish of Mrs. Ross, accompanied him to the hospital. On their way he told Collins of the mode in which she proposed to dispose of her property, and, after their arrival, remained in the room with them while she was giving directions about the will, going out, however, occasionally, for short intervals to visit other people in the hospital, and leaving the building before the will was formally executed. Two days later he visited Collins at his office, and, after hearing the will read, he made to Collins a suggestion of some changes, and whether a deed of trust would not be preferable to a will. An appointment was then made between him and Collins to meet that afternoon in the room of Mrs. Ross at the hospital. After their arrival at the hospital, Conway made a suggestion to her that she execute a deed of trust instead of a will, and also other suggestions in reference to her disposition of the property. Only himself and Collins were in the room during this consultation, he, however, leaving it temporarily a few times during the period over which the interview extended, but remaining until Collins had received all the directions that she gave. Assuming that, by virtue of his relation to her, he had acquired an influence over her, it must be held that in the transaction under investigation there was an undue exercise of such influence; that by not insisting that she should have independent advice, and by continuing to remain in her presence during the interview with the only other person whom he permitted to see her, he exercised an influence over her actions which, though unseen and inaudible, was none the less effective in its results. "The question is," said Lord ELDON in Huguenin v. Baseley, 14 Ves. 300, "not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed round her, as against those who advised her, which from their situation and relation with respect to her they were bound to exert on her behalf." While the contract of purchase made between the defendant Conway and the trustees under the instruments sought to be annulled was irrelevant to any material issue before the court, and would have been properly excluded from evidence, we are unable to see that its admission could in any way have been prejudicial to the rights of the appellants. The judgment and order denying a new trial are affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

(92 Cal. 653)

LUCK v. LUCK. (No. 13,567.)

(*Supreme Court of California*. Jan. 12, 1892.)

DIVORCE—CUSTODY OF CHILDREN.

1. Although a mother is naturally and presumptively entitled to the custody of minor children, especially girls of tender age, it is for the trial court to say upon all the evidence, in divorce, whether she is in fact more worthy of their custody than the father.

2. Where a wife, having left her husband without cause, and taken with her the minor children, applies for a divorce, the court may, although it denies the application, direct that the children be given to the custody of the husband; and the fact that the husband lives in an adjoining county can make no difference, since, under Civil Code, § 156, he is the head of the family, and may choose any reasonable place or mode of living.

Department 1. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Petition by Minnie Luck against William Luck for divorce. There was a judgment denying the petition, and defendant appeals. Affirmed.

F. J. Kierce, for appellant. *Chase & Chase*, for respondent.

PATERSON, J. This is an action for a divorce on the ground of extreme cruelty, and for the custody of two minor children on the ground that defendant is not a fit and proper person to have the care, custody, or control of them. The answer denied specifically the charges of cruelty and defendant's unfitness to care for the children, and alleged that the plaintiff abandoned defendant, and took with her the children, without cause, and against his will and consent. Findings were waived, and judgment was entered in favor of the defendant, denying the prayer of the plaintiff, and giving to him the custody and control of the children. As the case is before us on the judgment roll alone, we must presume that the evidence was of such a character as to warrant the court in finding that the defendant was better qualified than the plaintiff to care for the children. Naturally and presumptively the mother is entitled to the custody and care of minor children—girls—of tender years; but it is for the trial court to say, upon all the evidence adduced at the trial, whether she is in fact more worthy of such a trust than the father. It is claimed by appellant that the court below—the superior court of Alameda county—had no power, after it denied the plaintiff's application, to direct that the children be cared for by defendant at Martinez, which is in an adjoining county. There is no merit in this contention. "The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto." Section 156, Civil Code. It appears that the husband lives at Martinez, and that the wife has no just or legal cause for not living with him, nor for taking the children away. His home is the legal domicile of the family, and, if he is entitled to the custody of the children at all, he has the right to name any reasonable place in which they shall abide with him. So long as the husband is satisfied with the decree, and is without fault, the wife cannot complain. The order giving to defendant the custody of the children is one within the control and subject to the discretion of the court below. If circumstances occurring hereafter should render it desirable that the order should be revoked or modified, the learned judge who decided the controversy will no doubt act for the best interests of all the parties, and make the proper order with respect thereto. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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92 Cal. 590

PEOPLE v. MITCHELL. (No. 20,787.)

(*Supreme Court of California.* Jan. 13, 1892.)

On rehearing. For former report, see 28 Pac. Rep. 597.

PER CURIAM. In this case the order of the court is hereby modified so as to read: "For the foregoing reasons, let the judgment and order be reversed, and the cause remanded, with directions to the court below to allow a new information to be filed, if the court is so advised."

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93 Cal. 17

WICKERSHAM v. CRITTENDEN *et al.* (No. 14,507.)

(*Supreme Court of California.* Jan. 20, 1892.)

BANKS—ACTION BY STOCKHOLDER—MISAPPROPRIATION OF FUNDS BY DIRECTORS—SALARIES—PLEADING—PARTIES—RIGHT TO SUE.

1. A complaint for injunction to restrain the misappropriation of money alleged that plaintiff and defendants were stockholders of a bank corporation; that defendant C. was a director and the president, and at a meeting of himself and two other directors voted to appropriate to himself a salary of $400 per month, and also a loan of $40,000 of the bank funds, and gave his unsecured demand note at 4 per cent. for the money received; that at a subsequent meeting he voted to loan another stockholder the sum of $45,000 for one year on an unsecured note; that his loan was made for the benefit of C., whose demand note was thereupon canceled, and the difference between the two notes immediately turned over to him and used for his own purpose. *Held*, that the complaint stated a cause of action, under Civil Code, § 2229, which provides that no trustee shall use the trust property for his own profit, and for purposes unconnected with the trust.

2. In the absence of an agreement that the directors, before their election as such, should receive such salary, a resolution to pay C. $400 per month was unauthorized.

3. A regular meeting of the directors was had on January 14th, and an adjournment taken until February 14th. On January 20th C. and two other defendants held a meeting, at which such $45,000 loan was made and such salary voted to C. *Held*, that the action taken at such a meeting was not binding on the stockholders.

4. Where the resignation of one of defendants as a director had been accepted at the meeting on January 14th, he could not take part in such meeting.

5. Though the complaint alleged but one cause of action,—the misappropriation of the funds,—it was not objectionable that the relief sought was not single, but was for an injunction and for restitution.

6. Where each of the other defendants was alleged to have been in some way connected with the transactions complained of, they were properly joined as defendants.

7. Where the action, though in the name of plaintiff, was in behalf of the bank, it was a proper party to the action.

8. Plaintiff's allegations in reference to actions brought by another stockholder and himself to determine the rights of certain of defendants to hold the offices of directors were not separate causes of action in behalf of plaintiff, but were immaterial, and did not vitiate the cause of action alleged.

9. The facts alleged in the complaint were sufficient to obviate the necessity of making any previous demand on the corporation or defendants that they institute an action to secure the relief which plaintiff sought.

10. Where plaintiff had the right to bring the action in his own name and for his individual account, as well as on behalf of the other stockholders, if his allegations were not sufficient to entitle the action to be considered as brought in behalf of others than himself, its sufficiency as an action in his own behalf was not impaired by his averment that he brought it for them as well as for himself.

In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Action by I. G. Wickersham against James L. Crittenden and others to enjoin the misappropriation of certain funds and for the restitution of funds misappropriated. From an order sustaining defendants' demurrer to his complaint, plaintiff appeals. Reversed.

Henley & Swift, Lippitt & Lippitt, and *Wilcoxon & Bondlin*, (*Crittenden Thornton* and *F. H. Merzbach*, of counsel,) for appellant. *James L. Crittenden* and *Graves & Graves*, for respondent.

HARRISON, J. The plaintiff, as a stockholder in the Bank of San Luis Obispo, brought this action against certain individuals assuming to be directors of the corporation, making the corporation also a defendant, for the purpose of protecting his interests in the corporation against certain acts of the defendants alleged by him to be unauthorized and done with the purpose and effect of injuring his stock therein. To this complaint the defendants demurred upon several grounds, and, their demurrer having been sustained, judgment was entered dismissing the complaint, from which the plaintiff has appealed. It is alleged in the complaint that the Bank of San Luis Obispo is a corporation incorporated under the laws of this state, having 1,000 shares of capital stock, and that the defendant Crittenden is the owner and in the control of a majority of the shares of said stock; that on the 16th day of October, 1890, at the annual election for directors of the corporation, the defendants Crittenden, Murphy, and Stewart, together with J. W. Smith and C. A. Pitkin, were, by the unanimous vote of the stockholders, elected as such directors for the year next ensuing, and that thereafter they organized as a board by electing Crittenden as president and Stewart as secretary and cashier of the corporation, and at the same time fixed the salary of the president at $200 per month, and required him to give a bond, with satisfactory sureties, in the sum of $15,000. The complaint further alleges that on the 12th day of December, 1890, at a regular meeting of the directors, at which only Crittenden, Stewart, and Smith were present, Crittenden called Smith to the chair, and then offered certain resolutions, releasing the president from the necessity of giving a bond, increasing his salary to $400 per month, and authorizing the president and cashier of the bank to make a loan to himself (Crittenden) of the moneys of the bank to the amount of $40,000 upon call, at the rate of 4 per cent. per annum; that only Crittenden and Stewart voted in favor of these resolutions; that thereupon Crittenden, on the same day, received from Stewart $37,120 of the money of the bank, for which he gave his note without security, payable on demand, with interest at the rate of 4 per cent. per annum, payable quarterly; and that he thereafter received $400 per month as his salary as president. It is also alleged that the regular rate of interest upon loans made by the bank, and the usual and customary value of money, was at that time from 10 to 12 per cent. per annum, and that the money received by Crittenden was used to pay a debt then due from him, which was secured and bore interest at the rate of 7 per cent. per annum; and that the salary of $400 per month is greatly excessive, and beyond the value of any services rendered by said Crittenden. The complaint then alleges that at the next regular meeting of the directors, viz., January 14, 1891, at which all except Crittenden were present, the board rescinded the resolution increasing the salary of the president to $400; fixed the amount of the bond to be given by him at $20,000; disapproved of the aforesaid loan to Crittenden, and directed the cashier to notify him to return the money to the bank, or give a new note with security, and bearing interest at 10 per cent. per annum. At this meeting the defendant Murphy handed in his resignation as a director, which was accepted by the board, and the plaintiff was elected a director in his place, and thereupon the board, having directed notice of his election to be given to the plaintiff, adjourned until Monday, the 19th day of January. The plaintiff arrived at San Luis Obispo on Monday night, the 19th of January, but prior to his arrival the directors Crittenden and Stewart met as a board and adjourned the meeting until the next regular meeting in February, 1891. Thereupon the plaintiff, finding that no business could be done, left San Luis Obispo for San Francisco about noon of Tuesday, the 20th of January. Immediately after he left the defendants Crittenden and Stewart induced the defendant Murphy to meet with them as a director of said corporation, and thereupon these three defendants assumed to act as a board of directors of said corporation, and the following proceedings took place: Murphy moved that his resignation, which had been offered and accepted on the 14th of January, be withdrawn, and the three then present assented thereto, and declared the same withdrawn. Thereupon, upon motion of Murphy, the resolutions and proceedings passed by the board of directors on January 14, 1891, were annulled and rescinded by the vote of the three then present, and ordered stricken from the minutes. The resignation in writing of Director Pitkin was then presented, and upon the motion of Murphy was accepted, and the defendant Brittan was thereupon elected director in his place by the votes of Murphy, Stewart, and Crittenden. The office of director, held by Joseph W. Smith, was then declared vacant by the vote of the defendants Brittan, Murphy, Stewart, and Crittenden, and by the same vote the defendant Graves was declared elected as a director in his place. Thereupon Murphy assumed to act as president of said meeting, and upon the motion of Crittenden the following resolutions were adopted and declared carried by the votes of Crittenden, Stewart, Brittan, and Graves: "Resolved that each and all the resolutions and proceedings purported to have been adopted at the pretended meeting of the board on January 14, 1891, be, and are hereby, vacated, set aside, and annulled and rescinded, and declared null and void, and that the same be stricken from the minutes of this board; resolved, that the pretended acceptance of the resignation of P. W. Murphy, entered on the minutes of January 14, 1891, be, and is hereby, vacated, set aside, rescinded, and annulled, and declared null and void; resolved, that the pretended election of I. G. Wickersham as a director of this corporation, entered on the minutes of January 14, 1891, be, and is hereby, vacated and set aside, rescinded, and annulled, and declared to be null and void; resolved, that there has been only three directors of this corporation since the election of directors on October 14, 1890, viz., James L. Crittenden, C. A. Pitkin, and P. W. Murphy, and that said Crittenden, Pitkin, and Murphy were on the 14th day of this month the only persons authorized or entitled to act as directors of the corporation; and that, as the by-laws of this corporation, section 4, provides and declares that three directors constitute a quorum of the board of directors, there was not a quorum of said board present at or during the meeting of said board purported to have been held on the 14th day of January, 1891, and that no act or proceeding or resolution had, done, or adopted at said meeting was valid or binding upon this corporation, or upon its board of directors, or upon its officers." Crittenden, Murphy, Brittan, and Graves then proceeded to elect a director in place of Stewart, who by the last of these resolutions was declared never to have been a director, and elected Stewart to fill said vacancy, and also re-elected him as secretary, cashier, and treasurer of the corporation; and at this meeting the salary of the president was again fixed at $400 per month, from December 15, 1890. It is also alleged that on the 17th of January, 1891, the defendants Crittenden and Stewart loaned to the defendant Brittan of the money of the bank the sum of $45,000, without security, upon his note, payable in one year thereafter; that the said loan was made, and said note taken, for the benefit of Crittenden, and with the express purpose of applying the money so loaned for his benefit, and to obtain the use of that amount of the money of the bank for a year; that upon making the loan the aforesaid note of Crittenden to the bank was canceled, and the difference between the amount of that note and the $45,000 was immediately turned over to Crittenden, and used by him for his own purposes. The complaint alleges that after the election in October the defendants, Crittenden and Stewart, willfully and fraudulently conspired and combined to injure the business of the bank, destroy its credit, and depreciate the value of its stock; that the other defendants have been but the instruments in their hands and under their control for this purpose; that the foregoing acts and transactions were had and done in furtherance of such purpose, and in order to carry out the same in the interests of the defendant Crittenden, and that said acts and transactions have in fact greatly injured the business and credit of the bank and the value of its stock; and that the defendants, unless restrained, will make further misappropriations of the funds of the bank, to the injury of the plaintiff.

Upon the facts thus alleged, which by their demurrer the defendants admit to be as stated in the complaint, the plaintiff has shown a cause of action, and the demurrer should have been overruled. Divested of all circumstances of narration, the complaint alleges that the defendant Crittenden, who is trustee of the plaintiff and other stockholders for the management of the funds of the bank, has violated his trust by diverting $45,000 of those funds from the purpose for which he was intrusted with their management, to his own use and benefit, and has also without authority appropriated to himself the sum of $400 per month as a salary for his services as such trustee. The other allegations merely set forth the persons with whom he has combined, and the means adopted by him for the purpose of effecting this result. It is one of the peculiar functions of a court of equity to protect a *cestui que trust* against any violation by his trustee of his obligation, and to prevent any impairment of the trust fund, and, in case of diversion or misappropriation of such fund by the trustee, to direct a restitution thereof, and to enforce such direction by some process appropriate to the exercise of its jurisdiction. The directors of a corporation hold a fiduciary relation to the stockholders, and have been intrusted by them with the management of the corporate property for the common benefit and advantage of each and every stockholder, and by their acceptance of this office they preclude themselves from doing any act, or engaging in any transaction, in which their private interest will conflict with the duty they owe to the stockholders, and from making any use of their power or of the corporate property for their own advantage. Cook, Stocks, § 648; Mor. Corp. § 516; Coal Co. v. Sherman, 30 Barb. 571; Hoyle v. Railroad Co., 54 N. Y. 328; Barnes v. Brown, 80 N. Y. 535; San Diego v. Railroad Co., 44 Cal. 106; Wilbur v. Lynde, 49 Cal. 290; Bank v. Downey, 53 Cal. 466. For the reason that it is against public policy to permit persons occupying fiduciary relations to be placed in such a position that the influence of selfish motives may be a temptation so great as to overpower their duty and lead to a betrayal of their trust, the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings in the trust property with himself, or acquire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary, but will set the transaction aside at the mere option of the *cestui que trust*. Story, Eq. Jur. § 322; Davoue v. Fanning, 2 Johns. Ch. 252; Taussig v. Hart, 58 N. Y. 428; Elevated R. Case, 11 Daly, 486; Michoud v. Girod, 4 How. 503; Davis v. Rock Creek Co., 55 Cal. 364. "So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is or may be impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could be obtained from any other person; they may even at the time have been better, but still so inflexible is the rule that no inquiry on that subject is permitted." Railway v. Blakie, 1 Macq. 461. It is declared in Civil Code, § 2229: "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust in any manner."

The transaction of January 17, 1891, by which Crittenden and Stewart loaned to the defendant Brittan the sum of $45,000 of the money of the bank, must be regarded, under the allegations of the complaint, as a violation of their trust. The money was loaned for an unusual term, and without security, contrary to the rules and customs of banking, and for the benefit of the defendant Crittenden. His own promissory note for the sum previously received by him from Stewart was canceled, and the difference between that sum and the $45,000 was turned over to him and used for his own interests and purposes. The transaction was had by them without any previous authorization from the board, and as president and cashier they had no authority to thus dispose of the funds of the bank. The president of a bank has no more power of management or disposal over the property of the corporation than any other single member of the board. He is not the executive officer who has charge of its moneyed operations, and it is not among his functions to withdraw or remove its funds, or to use them for any purpose whatsoever. Morse, Bank. § 144. The cashier is the executive officer of a bank, and the one who transacts its financial operations, but his office is purely executive, and his power is limited to transacting such business as the board of directors have authorized. Morse, Bank. § 152. It hence results that, as alleged in the complaint, Crittenden and Stewart, without any authority therefor, took of the moneys of the bank the sum of $45,000, and loaned it to the defendant Brittan with the intent and purpose to apply it to the benefit of Crittenden.

Whether the transactions objected to

could have been avoided by the plaintiff if Crittenden had taken no part in them, or if they had been had under the authority of a majority of the board of directors who were competent to act, need not be considered, since in each of these transactions the act was done either at the instance of Crittenden or by his vote.

The meeting of January 20th may be laid out of consideration, as the doings at that meeting could neither be binding upon the corporation or its stockholders, nor give authority to the parties engaged therein. Whether or in what manner it was called is not alleged. It was, at most, but a special meeting,—the regular meeting having been adjourned until February 14th. There were only two directors present,—Crittenden and Stewart,—for Murphy, whose resignation had been accepted by the board on the 14th of January, was as devoid of authority to form a component part of the board as would have been any other by-stander. Upon the basis, however, of this unauthoritative meeting was built all the structure by which the defendants herein claimed to represent the corporation, and to have authorized the transactions in question; but, as the stream can never rise higher than its source, the meeting could gain no authority beyond what the two directors could give it, nor could these two directors, by adopting any resolutions, even though they were spread upon the records of the corporation, give to themselves any greater authority than they had without them.

The attempted resolution to increase the salary of the president from $200 to $400 per month conferred no authority to withdraw that money from the bank. A director in a corporation is not entitled to compensation for his service as director, in the absence of any agreement in advance that he shall receive such compensation. If, in the course of his office, he render to the corporation any unusual services, that may be the basis of a *quantum meruit*; but the directors have not the authority to vote salaries to themselves after their election as directors, (Cook, Stocks, § 657,) nor can they in any instance vote a salary to one of their number as president when he takes part in the proceeding, or his vote is essential to the adoption of the resolution. Butts v. Wood, 37 N. Y. 317; Kelsey v. Sargent, 40 Hun, 155; Copeland v. Manufacturing Co., 47 Hun, 235; Gardner v. Butler, 30 N. J. Eq. 702; Ward v. Davidson, 89 Mo. 445, 1 S. W. Rep. 846; Chamberlain v. Wool Co., 54 Cal. 103. The right of Crittenden to withdraw the money of the bank as compensation for such services was not increased by his causing to be spread upon its records a resolution that he might receive that amount as his salary.

The other grounds of the demurrer are untenable. There is only one cause of action set forth in the complaint, viz., the fraudulent misappropriation by the trustee of the funds with which he had been intrusted; the other matters alleged being merely averments of the facts constituting the fraud, and the means and instruments by which it was accomplished. The relief that is sought has reference only to this cause of action. It is no objection to the complaint that the relief sought is not single. It is often necessary, in order that the plaintiff may obtain full justice, that the relief granted him be as varied and diversified as the means that have been employed by the defendant to produce the grievance complained of. If a trustee is shown to have been unfaithful, the court may not only compel restitution, but may also restrain him by injunction from similar acts, or, if deemed necessary, may remove him from his trust. If he has called to his aid other confederates, they also may be enjoined from further participation in the acts which infringe upon the rights of the plaintiff. A court of equity will always find the means of enforcing its decrees against a delinquent defendant, and its power, in this respect, is as extensive as the exigencies of the case.

The defendants are neither of them improperly joined in the action. Andrews v. Pratt, 44 Cal. 319. Each of them is alleged to have been in some way connected with the transactions complained of, and complete justice cannot be done in the absence of either of them.

Nor was it necessary that either Pitkin or Smith should have been made parties to the action. The plaintiff makes no complaint against the bank, or against any act in which they have participated, but seeks relief against the individuals who are diverting the funds of the bank from their legitimate channel. It was necessary that the bank should be a party to the action, as the action, though in the name of the plaintiff, is in reality in behalf of the corporation. Beach v. Cooper, 72 Cal. 99, 13 Pac. Rep. 161.

The allegations in reference to the actions brought by Smith and the plaintiff to determine the rights of the defendants Graves, Murphy, and Brittan to hold the office of director are not separate causes of action in behalf of the plaintiff herein. These allegations are in reality immaterial, and might have been struck out of the complaint on that ground, but they do not vitiate the cause of action which he has alleged.

The facts alleged in the complaint are sufficient to obviate the necessity of making any previous demand upon the corporation or the defendants that they institute an action to secure the relief which the plaintiff seeks herein. Beach v. Cooper, 72 Cal. 99, 13 Pac. Rep. 161; Moyle v. Landers' Adm'rs, 83 Cal. 579, 23 Pac. Rep. 798; Kelsey v. Sargent, 40 Hun, 150.

It was not necessary that the plaintiff should join with him the other stockholders as plaintiffs, or that he should make them defendants in the action. He had the right to bring the action in his own name and for his own individual account, as well as on behalf of the other stockholders. If his allegations are not sufficient to entitle the action to be considered as brought in behalf of others than himself, its sufficiency as an action in his own behalf is not impaired by his averment that he brings it for them as well as for himself. The judgment is reversed, and the court below is directed to enter an order overruling the demurrer, and granting to the defendants 20 days to answer the complaint.

We concur: De Haven, J.; McFarland, J.; Garoutte, J.; Sharpstein, J.; Paterson, J.

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93 Cal. 34

Wickersham v. Brittan. (No. 14,506.)

(*Supreme Court of California.* Jan. 20, 1892.)

Corporations—Elections—Remedy of Person Aggrieved.

An "appointment" by the board of directors of a corporation is not an "election" by the corporation, within Civil Code, § 315, authorizing the district court to inquire into "any election held by any corporate body" on the application of any person aggrieved by such election.

In bank. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by I. G. Wickersham against N. J. Brittan to determine the right of defendant to be a director in the Bank of San Luis Obispo. Defendant's demurrer was sustained. Plaintiff appeals. Affirmed.

Henley & Swift, Lippitt & Lippitt, Wilcoxon & Bouldin and *Crittenden Thornton*, (*F. H. Merzbach*, of counsel,) for appellant. *James L. Crittenden* and *Graves & Graves*, for respondent.

Harrison, J. The plaintiff commenced this action under the provisions of section 315 of the Civil Code for the purpose of determining the right of the defendant to be a director in the Bank of San Luis Obispo, a corporation organized under the laws of this state. In his petition he alleges the incorporation of the bank; that he is a stockholder therein; that at the annual election of directors, on October 15, 1890, J. L. Crittenden, J. W. Smith, P. W. Murphy, C. A. Pitkin, and W. E. Stewart, were elected directors for the year next ensuing; that on the 14th day of January, 1891, Pitkin tendered his resignation as such director; "that said resignation was handed to the said Crittenden, Stewart, and Murphy, who then and there assumed to be and act as members of the board of directors of said corporation, and to constitute a quorum thereof; that said Murphy was not then and there a member of said board, because he had resigned, and his resignation had been accepted, and his successor had been elected;" "that thereafter the said Crittenden, Stewart, and Murphy, assuming to act as a board of directors of said corporation, and as a quorum thereof, passed a pretended resolution, purporting to appoint the defendant, N. J. Brittan, a director of said bank, and since that time the said defendant, N. J. Brittan, has usurped and unlawfully exercised the office of a director of said bank;" and prayed "that the claim of said defendant, N. J. Brittan, to be a member of said board be adjudged to be utterly invalid and void." To this petition the defendant demurred, on the ground that the court had no jurisdiction of the subject-matter of the action, and that the petition did not state sufficient facts to entitle the petitioner to any relief. The court sustained the demurrer, and dismissed the petition, and from the judgment entered thereon the plaintiff has appealed.

Section 315 of the Civil Code provides: 'Upon the application of any person or body corporate aggrieved by any election held by any corporate body, the district court of the district in which such election is held must proceed forthwith to hear the allegations and proofs of the parties, or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice." Section 302, Civil Code, provides that the directors of a corporation must be elected annually by the stockholders or members; and sections 307 and 312 provide the manner in which such elections may be held; and in section 305 it is declared that, "whenever a vacancy occurs in the office of director, unless the by-laws of the corporation otherwise provide, such vacancy must be filled by an appointee of the board." It is maintained by the respondent that the provisions of section 315 apply only to the annual elections by the stockholders, while the appellant contends that they are applicable as well to the appointment of a director to fill a vacancy. There is a marked distinction of meaning between the words "election" and "appointment," which is recognized in legal as well as in political nomenclature. Each of the words, indeed, signifies choice or designation of some person to fill an office or discharge a duty, but the manner in which the selection or designation is to be made determines the word which should be used; and, as words are but a symbolical expression of the act which they represent, the word which is used in any instance must be construed to signify the act which it is intended to represent, rather than in accordance with its strict etymological meaning. In Sturgis v. Spofford, 45 N. Y. 446, an act of the legislature provided that three of the commissioners of pilots should be "elected" by the members of the chamber of commerce, and the other two by the presidents and vice-presidents of the marine insurance companies of the city of New York, and it was contended that this act conflicted with the provision of the constitution which required that all officers whose election or appointment was not provided for by the constitution should be elected by the people, or appointed as the legislature might direct. The court, however, said: "Although the word 'election' is used in the statute, it cannot be supposed that the legislature intended it in any such sense as that word is used in the constitution, or as the result of a choice by the ordinary mode of voting by the people. The mode prescribed by the statute for selecting these officers is, in legal effect, an appointment, and comes within the meaning of that word as used in the constitution; and the misnomer of the legislature cannot change the real character of the act provided for."

The term "election" carries with it the idea of a choice in which all who are to be affected with the choice participate; whereas, from the word "appointment" we understand that the duties of the appointee are for others than those by whom he is appointed. As distinguished from an election, an appointment is generally made by one person, or by a limited number, acting with delegated powers, while an election is the direct choice of all the members of the body from whom the choice can be made. Bouvier, under the word "Election," says: "Etymologically, 'election' denotes choice, selection out of the number of those choosing. In common use, however, it has come to denote such a selection made by a distinctly defined body." In Amer. & Eng. Enc. Law, under the heading "Appointment," it is said: "The 'appointment' to a public office is made by one or more possessing delegated powers, as distinguished from 'election,' where the right is exercised by many;" and the term "elect" is therein defined: "To select or choose by the popular voice or vote, as distinguished from 'appoint,' which is by an individual." In Rap. & L. Law Dict., under the term "Appointment," it is said: "'Appointment' to an office or trust implies the conferring of the dignity by the act of one or more individuals having power to select the person appointed. 'Election' is the selection of the person by the votes of an entire class." "No latitude of construction can justify the reading of 'elected' as the synonym of 'appointed.'" Magruder v. Swann, 25 Md. 214. See, also, State v. Irwin, 5 Nev. 111; Commissioners v. Louisville, 3 Bush, 602; Speed v. Crawford, 3 Metc. (Ky.) 207; State v. Barbour, 53 Conn. 76; Conger v. Gilmer, 32 Cal. 75. The fact that the selection of the officer is made by ballot is not controlling. This is but a means that the appointing body may adopt for making its choice of the individual to be appointed; nor does a direction to the appointing body to "elect" the one whom it will designate for the office require such election to be made by ballot, or render its act any the less an "appointment." Conger v. Gilmer, supra. Although the words are sometimes used interchangeably in statutes, yet, for the purpose of giving construction to the statute, courts must give to the word used a meaning according to the connection in which it is found. Section 308 of the Civil Code provides that "immediately after their election the directors must organize by the election of a president,—who must be one of their number,—a secretary and treasurer." Here the word "election," as first used, refers to the election by the stockholders, and is the proper term to signify the choice by the votes of the entire body; whereas, in its subsequent use it signifies only the appointment by the board of its own officers. In section 303 authority is given to a corporation to provide by its by-laws for "the manner of election and the tenure of office of all officers other than directors." This provision also has reference technically to the appointment of such officers, rather than to an election of them in the mode provided by statute for the election of directors. We are of the opinion that the provisions of section 315 have application only to the elections which are by the statute authorized to be made by the stockholders, and that it would violate recognized rules of construction to include under that term an appointment made by the board of directors to fill a vacancy. It cannot have been intended by the legislature that the courts should supervise the appointment of all subordinate officers and employes of a corporation that may be made by the board of directors; but, if the contention of the appellant in the present case is correct, we see no good reason for not holding that the term "election," as found in section 315, is applicable also to such appointments as are made under the provisions of sections 303 and 308. This construction is also sustained by the fact that it is only when some one is aggrieved by an election held by "any corporate body" that section 315 authorizes the court to take any action. The "corporate body" here referred to is the corporation itself, and not the board of directors. Mor. Priv. Corp. § 33. "The persons signing the articles, and their associates and successors," are by the statute declared to be a "body politic and corporate," (Civil Code, § 296;) while the board of directors are only the persons by whom "the corporate powers, business, and property" of the corporation are to be "exercised, conducted, and controlled," (Civil Code, § 305;) and the elections which the statute authorizes to be held by the corporate body are those at which only the stockholders or members vote. The judgment is affirmed.

We concur: DE HAVEN, J.; MCFARLAND, J.; GAROUTTE, J.; SHARPSTEIN, J.; PATERSON, J.

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93 Cal. 41

WICKERSHAM v. MURPHY. (No. 14,508.)

(*Supreme Court of California.* Jan. 20, 1892.)

CORPORATIONS—ELECTIONS—PERSON AGGRIEVED.

In an action to determine the right of defendant to continue to act as a director of a corporation, after his resignation has been accepted, and plaintiff regularly appointed by the board of directors to fill the vacancy, plaintiff is not a "person aggrieved by any election," within Civil Code, § 315, providing that on the application of any "person aggrieved by any election held by any corporate body" the district court must inquire into such election.

In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Action by I. G. Wickersham against P. W. Murphy to determine the right of defendant to be a director in the Bank of San Luis Obispo. Defendant's demurrer was sustained. Plaintiff appeals. Affirmed.

Henley & Swift, Lippitt & Lippitt, Wilcoxon & Bouldin, and *Crittenden Thornton,* (*F. H. Merzbach,* of counsel,) for appellant. *James L. Crittenden* and *Graves & Graves,* for respondent.

HARRISON, J. The present case involves a consideration of the same facts as the case of Wickersham v. Brittan, 28 Pac. Rep. 792, (No. 14,506, just decided.) In addition to the facts in that case the petition herein alleges that on the 14th of January, 1891, the defendant, Murphy, who had been elected a director at the annual meeting in October, resigned his office as such director, and, his resignation having been accepted by the board, the plaintiff was thereafter on the same day chosen a director in his place by the unanimous vote of the remaining members of the board. The petition then alleges that "the said P. W. Murphy claims and pretends still to be a director of said corporation, and he and the said James L. Crittenden and W. E. Stewart have refused to acknowledge your petitioner as a member of said board, or to meet with him as a member thereof, and have excluded and threatened to exclude your petitioner from all participation in the acts of said board or the government of said corporation, in the interest of and in support of the claim of said P. W. Murphy." We do not think that the provisions of section 315 of the Civil Code are intended to apply to this case. The plaintiff does not claim to be aggrieved by any "election" of any corporate body, but rather by the fact that, after he had been regularly and properly chosen as a director, some of the remaining members of the board refused to recognize his right to the office. For such a grievance his remedy must be sought in a different proceeding. The judgment is affirmed.

We concur: De Haven, J.; McFarland, J.; Garoutte, J.; Sharpstein, J.; Paterson, J.

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93 Cal. 73

Frankel v. Deidesheimer *et al.* (No. 13,412.)

(*Supreme Court of California.* Jan. 22, 1892.)

Appeal—Divided Court—Affirmance.

Const. Cal. art. 6, § 2, provides that the supreme court shall consist of a chief justice and six associate justices, and the concurrence of four justices present at the argument shall be necessary to pronounce a judgment in bank, but, if four justices so present do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment a concurrence of four judges shall be necessary. On an appeal it appeared that one of the justices was disqualified from participating, and the six others were equally divided as to the disposal of the case, and there was no probability of any change in the opinions or *personnel* of the court. *Held*, that the judgment of the court below would be affirmed.

In bank. Appeal from superior court, Sierra county; G. G. Clough, Judge.

Action by Frankel against Deidesheimer and others. Judgment for defendants. Plaintiff appeals. Affirmed. For former report, see 23 Pac. Rep. 136.

Const. Cal. art. 6, § 2, provides that the supreme court shall consist of a chief justice and six associate justices, and the concurrence of four justices present at the argument shall be necessary to pronounce a judgment in bank, but, if four justices so present do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment a concurrence of four judges shall be necessary.

W. F. Herrin and *H. L. Gear*, for appellant. *Hunley & Gale, S. B. Davidson*, and *Smith & Ford*, for respondents.

Per Curiam. This cause has been long pending in this court, and has been reargued twice. One of the justices is disqualified from participating in its decision; and of the six other justices three are of opinion that the judgment should be affirmed, and three are of opinion that the judgment should be reversed. Repeated consultations have ended in the same disagreement; and there is no probability of any change in the opinions of those now constituting the court, or of any immediate change in the *personnel* of the court. Under these circumstances, we think that the judgment should be affirmed, for the reasons stated in Luco v. De Toro, 88 Cal. 26, 25 Pac. Rep. 983. The judgment and order are affirmed.

Harrison, J., being disqualified, did not participate in the foregoing.

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93 Cal. 74

People v. Krusick. (No. 20,847.)

(*Supreme Court of California.* Jan. 22, 1892.)

Seduction—Burden of Proof—Instructions.

1. In an action under Pen. Code, § 266, imposing a penalty for the seduction of "an unmarried female of previous chaste character," the fact that the woman alleged to have been seduced was unmarried must be proven by direct evidence.

2. On trial for seduction it was error to charge that previous chaste character could be established by showing association with reputable families, and that, when the prosecution named the people with whom the prosecutrix had associated, the presumption of law is that they were reputable, and that the burden of showing that they were otherwise was on defendant.

In bank. Appeal from superior court, Butte county; John C. Gray, Judge.

One Krusick was convicted of seduction, and appeals. Reversed.

Hundley & Lloyd, (*John Gale*, of counsel,) for appellant. *Atty. Gen. Hart, Lewis Frees*, and *J. D. Sproul*, for respondent.

Harrison, J. The defendant was tried and convicted upon an information charging him with the crime of seducing an unmarried female of previously chaste character under the promise of marriage. Section 266 of the Penal Code, under which the information was filed, provides: "Every person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment in the state-prison for not more than five years, or by a fine of not more than $5,000, or by both such fine and imprisonment."

1. In order to convict the defendant of the crime defined in this section it is necessary for the state to prove that the person seduced was an "unmarried female of previous chaste character," and that she consented to sexual intercourse with the defendant upon the sole consideration of his promise to marry her. Unless all of these elements are established by competent evidence the crime is not proved. It is as essential for the prosecution to show

that the person against whom the offense was committed is of the character named in the statute as it is to show that the sexual intercourse was had under a promise of marriage. The statute does not attempt to punish the seduction of a married woman, or of one whose character was not previously chaste; nor does it attempt to punish illicit cohabitation, or the seduction of an unmarried woman, whose character was previously chaste, which is accomplished either in whole or in part by any other means, or from any other motive, than a promise of marriage. This construction of the statute was taken by the court below. It instructed the jury: "To convict the defendant in this case of seduction the jury must find from the evidence in the case that the prosecuting witness was at the time of and prior to the 15th day of April, 1889, of previous chaste character and unmarried." And also: "You have no right to infer or presume that the prosecuting witness was an unmarried female. It devolved upon the prosecution to establish that fact, if it be a fact, by the evidence, to the entire satisfaction of the jury; and, if the prosecution has failed to do so, it is your duty to acquit the defendant." The record, however, fails to show that there was any evidence before the jury that the prosecuting witness was unmarried. She did not herself so state, nor did any witness give evidence upon this point. The fact that some of the witnesses in their testimony, when referring to her, called her "girl," "young lady," "Miss," does not furnish any evidence of this fact. Such statements were no more than the opinions of the witnesses, given without having their attention called directly to this issue, and would not have been admissible as direct evidence to prove the issue. The jury were not authorized to found an inference thereon that she was unmarried; nor can the defendant be convicted upon a mere inference of this fact, any more than upon an inference of the other facts which are necessary to constitute the crime. State v. Carr, 60 Iowa, 453, 15 N. W. Rep. 271. Nor does the fact that she stated that the defendant promised to marry her, or that he made arrangements to marry her, furnish any evidence that she was unmarried. Whether she was unmarried was a fact peculiarly within her own knowledge; and in a case like the present, where the proof of the offense of necessity depends very materially upon the testimony of the prosecuting witness, it is incumbent upon the state to establish all the elements of the crime by as satisfactory evidence as it is within its power to produce, and upon those points of which the prosecutrix can herself give direct testimony not to allow the jury to draw an inference from less satisfactory evidence. The cases cited on behalf of the people in which it has been held that direct proof of the venue was unnecessary have no application here. In this case the fact that she was unmarried is an essential element of the crime, and until it is shown the presumption of innocence prevails in favor of the defendant; whereas, the proof of venue has reference only to the jurisdiction of the court to try the offense, and may be shown by evidence of a less direct character. For the reason that there was no evidence before the jury that the prosecuting witness was unmarried, their conviction of the defendant was unauthorized.

2. The court gave to the jury the following instruction: "Previous chaste character is established by showing that the party lives with respectable and reputable families, and that her daily associations were with such people; and when the prosecution gave the names of the persons with whom the complaining witness had lived and associated the presumption of law is that they were respectable and reputable people, and the burden of showing that they were otherwise was upon the defendant." The effect of this instruction was to say to the jury that by her testifying that she lived and associated with certain people, whose names she stated, she thereby "established" her previous chaste character, because the presumption of law is that those persons were respectable and reputable people. Even if it had been shown at the trial that the persons whose names she gave were respectable and reputable people, the fact that she had lived and associated with them would be only evidence from which the jury might infer her character; but it would not "establish" it. Her previous chaste character was an essential element to be shown by the prosecution before the crime could be established, and was a fact to be determined by the jury from all the evidence before it. The effect of the above instruction was, however, to take from the jury all consideration of any other evidence than that referred to in it. For these errors the judgment and order of the court below are reversed.

We concur: Sharpstein, J.; McFarland, J.; De Haven, J.; Garoutte, J.; Paterson, J.

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93 Cal. 55

Hurlbutt *et al.* v. N. W. Spaulding Saw Co. *et al.* (No. 14,175.)

(*Supreme Court of California.* Jan. 22, 1892.)

Form of Action—Appeal—Bill of Exceptions—Parties.

1. Under Code Civil Proc. §§ 307, 426, which provide that there shall be but one form of civil action, and that the facts constituting the cause of action shall be stated in ordinary and concise language, where plaintiff sues for money expended in the operation of defendant's mill, and the complaint is in clear, intelligible language, defendant cannot complain that plaintiff has mistaken his remedy, and that the action should have been for an accounting, instead of in *assumpsit;* but the court is authorized to try the case as made, and to grant any relief embraced in the issues.

2. Where a bill of exceptions makes no specification of the particulars wherein a finding is not justified by the evidence, the finding must be deemed conclusive.

3. Where suit is brought on a contract, a person who is not a party to the contract, and has no interest therein, is not a necessary or proper party to the suit.

4. Where a number of persons sign a contract binding themselves "jointly and severally," they are within Code Civil Proc. § 383, which allows suit to be brought, at the option of the plaintiff,

against one or all of the persons severally liable upon the same obligation.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

This was an action by Nathaniel Hurlbutt and others against the N. W. Spaulding Saw Company and others to recover upon a contract. There was judgment for plaintiffs and defendants appeal. Affirmed.

Buck & Wheeler and *E. W. Wilson*, (*Galpin & Zeigler*, of counsel,) for appellants. *H. L. Smith*, for respondents.

BELCHER, C. The plaintiffs brought this action to recover judgment for moneys alleged to have been paid out and expended by them at the special instance and request of the defendants, and under and in pursuance of a written contract made by the parties. A copy of the contract is set out in the complaint, and its execution is not denied. The case was tried by the court without a jury, and judgment given for the plaintiffs. From that judgment the defendants appealed, and have brought the case here on a bill of exceptions.

1. It is claimed for appellants that the plaintiffs have mistaken their remedy; that the action should have been for an accounting, and not in *assumpsit*. The moneys sought to be recovered were expended by plaintiffs in taking charge of and operating a saw-mill; and they alleged that, after applying all the proceeds of the business and all payments made to the discharge of their claim, the sum for which judgment was asked remained due and unpaid, though payment thereof had been demanded. The court found that certain other sums should be deducted from the amount claimed, but that the balance remaining was due and owing by the defendants, and plaintiffs were entitled to a judgment therefor. There is in this state but one form of civil actions for the enforcement or protection of private rights, and the redress or prevention of private wrongs, (section 307, Code Civil Proc.;) and the facts constituting the cause of action are required to be stated in ordinary and concise language, (section 426, Code Civil Proc.) Here the plaintiffs stated in their complaint their cause of action in clear and intelligible language, and the defendants answered thereto. The court was therefore authorized to try the case as made, and to grant any relief embraced in the issues.

2. It is claimed that no right of action accrued against the defendants until "the trust-estate was exhausted." But the court found that all of the trust property and estate had been exhausted; and there are, in the bill of exceptions, no attempted specifications of the particulars wherein it is claimed that this finding was not justified by the evidence. As the correctness of the finding is not questioned, it must be treated as conclusively settling this point against appellants.

3. It is claimed that one Damon should have been joined as a party plaintiff in the action, and certain other persons as defendants. But Damon was not a party to the contract relied on, and, so far as appears, had no interest in the moneys expended and paid out by the plaintiffs under the contract. He was, therefore, not a necessary, and would not have been a proper, party to the action. The other persons referred to signed the contract with the defendants, and they all bound themselves "jointly and severally" to pay, etc. The Code provides that persons severally liable upon the same obligation or instrument may, all or any of them, be included in the same action, at the option of the plaintiff, (section 383, Code Civil Proc.;) and the rule is well settled in this state that "a plaintiff may, at his election, sue one or more or all the persons severally liable upon the same obligation or instrument," (People v. Love, 25 Cal. 521.)

4. The other points made by appellants do not require special notice. They all relate to matters considered and disposed of by the findings, which were very full and specific. It is true the evidence was in some respects conflicting; but we think it sufficient to justify each of the findings, and hence that there is no good ground for a reversal. We advise, therefore, that the judgment be affirmed.

We concur: FITZGERALD, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

BEATTY, C. J. Justice HARRISON is assigned to department 2 for the purpose of determining this cause, in place of Justice DE HAVEN, who is disqualified.

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93 Cal. 80

ROBINSON *et al.* v. EASTON, ELDRIDGE & Co.

(No. 13,619.)

(*Supreme Court of California.* Jan. 23, 1892.)

VENDOR AND VENDEE—OPTION CONTRACT—PRINCIPAL AND AGENT.

1. Plaintiffs authorized defendant to sell land for them, no terms being stated in the agreement, at a certain price, within five days, agreeing to pay as commission whatever the land brought over the price fixed. Defendant found a purchaser, who paid down a bonus on condition that, if the title was not insured by a certain title insurance company, the bonus was to be refunded. The title was not insured, and defendant refunded the money paid. Plaintiffs then sued defendant, claiming that it had received this money as plaintiffs' agent. *Held*, that defendant was more than a mere agent of plaintiffs, the agreement being in the nature of an option for five days, and defendant was not liable for such money.

2. Conceding that defendant was nothing more than an agent, plaintiffs could not recover, for, if the agreement was not within the agent's authority, they were not bound by it until they ratified it, and a ratification of it would have subjected them to all its terms.

Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Action by C. H. Robinson and C. B. Hobson against Easton, Eldridge & Co. to recover money. Judgment for defendant. Plaintiffs appeal. Affirmed.

J. T. Rogers, for appellants. *A. C. Ellis*, for respondent.

HARRISON, J. The plaintiffs executed to the defendant the following instrument: "We hereby authorize Easton & Eldridge for us, and within five days from date hereof, and until this authority is canceled in writing by us, to sell for the sum of $10,000—net dollars—the following described property, situated in the city and county of San Francisco, state of California, to-wit: All of block 935, outside lands,—and we will pay said Easton & Eldridge a commission of all over said sum of $10,000, net, for which they may sell said property with our consent. Witness our hand and seal this 24th day of August, A. D. 1887. C. B. HOBSON. C. H. ROBINSON." Thereafter, on the same day, the defendant bargained with one Z. S. Eldridge for the sale of the land at the price of $10,500, upon the condition that the title to the property would be insured by the Title Insurance Company, and received from him $1,050 as a deposit, agreeing to return the same in case the insurance company would not insure the title, giving to him the following receipt: "San Francisco, August 24, 1887. Received of Z. S. Eldridge the sum of $100, being deposit on purchase of block 935, outside lands. Price agreed upon, ten thousand five hundred dollars ($10,500) in gold coin. Thirty days allowed for search of title, and, if title is found imperfect and cannot be made good, said deposit will be returned. EASTON, ELDRIDGE & CO., Agents." A similar receipt for $950 was given the next day. The Title Insurance Company refused to insure the title, and thereupon, before the expiration of the 30 days, viz., September 6th, the defendant repaid the deposit to Eldridge. The plaintiffs commenced this action to recover from the defendant the money paid it by Eldridge, upon the theory that the money so paid was received by the defendant in its capacity as agent of the plaintiffs, and was their money in its hands the moment it was received from Eldridge. The court rendered judgment in favor of the defendant, from which and an order denying a new trial an appeal has been taken.

The relation of the defendant to the plaintiffs was not that of a mere agent. While its authority to sell the land was derived from the plaintiffs, yet the sale was to be made for its own account and benefit, as well as for that of the plaintiffs. Although the authority to sell was not so coupled with an interest as to create in the defendant an interest in the land, or to prevent the plaintiffs from revoking the authority, yet by the terms of the authorization the defendant acquired such a right to a portion of the proceeds of sale as to enable it to make a contract of sale upon terms of its own choosing. The plaintiffs, in effect, gave to the defendant an option for five days to endeavor to sell the block of land for whatever sum it could obtain, and upon whatever terms it might make, provided they should receive therefor the sum of $10,000, and agreed that defendant should have whatever sum it could realize therefor above that amount. The relation thus created between them was rather that of a vendor and purchaser under a contract of sale than one of principal and agent, and a sale by the defendant thereunder was in the capacity of a vendor upon its own account, and not for the account of the plaintiffs. Inasmuch as the defendant was entitled to all the proceeds of the sale in excess of $10,000, it had the right to make the sale upon such terms as in its judgment would enable it to realize the highest price for the land. Upon a sale by it the plaintiffs were entitled to the immediate payment of the $10,000, but the defendant could sell the land either for cash or upon time, as it might choose, and its terms of sale did not require ratification by the plaintiffs.

Even if it be conceded that the defendant was but the agent of the plaintiffs, their right to recover from it the money paid by Eldridge was no higher than the right of the defendant to retain the money from Eldridge; and its right to refund the money to him was co-extensive with the obligation created by the agreement under which it had been paid. If the agreement with him was contrary to the terms of the authority conferred by the plaintiffs, it could not be enforced against them, and they could enforce it against Eldridge only in case they ratified the act of the defendant; but a ratification of that act subjected them to all the terms of the agreement. The agreement between the defendant and Eldridge was conditioned upon the approval of the title by the Title Insurance Company, and by the terms of that agreement the money received from him was to be refunded in case the Title Insurance Company did not approve the title. Upon the disapproval of the title by that company Eldridge had the right to demand, and the defendant had the right to refund, the money that had been received by it as a deposit upon the sale. Ex parte White, (In re Nevill,) L. R. 6 Ch. App. 397, is illustrative of the principles applicable to the present case. Goods had been consigned by Towle & Co. to Nevill for sale, and if sold to be accounted for at a fixed price. Nevill sold the goods upon such terms and at such prices as he chose, and it was held that the moneys received by him upon such sales, and standing to his credit upon the books of his banker, were his own moneys, and did not belong to Towle & Co.; that the contracts of sale made by Nevill were made by him on his own account, and not as agent for Towle & Co., the court saying: "The business which Nevill carried on with the goods of Towle & Co. has been called a cotton agency business, and the word 'agency,' in its *prima facie* sense, seems to imply the relation of principal and agent, and not of vendor and purchaser. But it has been admitted in the course of the argument that there is no magic in the word 'agency.' It is often used in commercial matters where the real relationship is that of vendor and purchaser, and the question is whether the dealings between Mr. Nevill and Messrs. Towle & Co. with reference to these goods resulted in the relationship of vendor and purchaser, or in the relationship of principal and agent." "If the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but is to be bound if he sells the goods to pay the consignor for them at a fixed price and a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, for he is to pay a price which may be different, and at a time which may be different, from those fixed by the contract." Id. 403. We think that the rule there laid down should control the present case. The objection of the plaintiffs to the letter from Grimwood was properly overruled. It had already been received in evidence without objection during the testimony of the plaintiff Hobson. Neither did the court err in refusing to admit the evidence offered by the plaintiffs that subsequent to the repayment to Eldridge of the deposit the Title Insurance Company did insure to the plaintiffs the title to the land. It was not controverted that the agreement on the 24th of August between Eldridge and the defendant was made upon the condition that that company would insure the title, or that the company did thereafter refuse to insure it. Its subsequent agreement to insure the title to the plaintiffs would not defeat the effect of its prior refusal to insure it to Eldridge. The judgment and order denying a new trial are affirmed.

We concur: Paterson, J.; Garoutte, J.

Matthews v. Jones *et al.* (No. 14,227.)

(*Supreme Court of California.* Jan. 25, 1892.)

In bank. For former report, see 28 Pac. Rep. 597.

Per Curiam. The judgment heretofore entered herein is modified by striking therefrom the words, "with two hundred dollars damages."

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93 Cal. 85

Priet v. Reis, Treasurer. (No. 14,043.)

(*Supreme Court of California.* Jan. 25, 1892.)

Mandamus to City Treasurer—Application of Funds—Payment of Warrant.

St. 1875–76, p. 439, relating to widening Dupont street, in San Francisco, provides for the sale of bonds, and that the proceeds be held to pay damages awarded to property holders. Section 9 provides that the treasurer of the city and county shall hold such money, to be known as the "Dupont-Street Fund." Section 13 provides for the levy and collection of a tax for the payment of the interest on the bonds, and for a tax for redeeming the bonds. In an application for a mandate to the treasurer to pay the balance of a certain warrant for damages under said act, it appeared that the fund derived from the sale of bonds had been illegally used in paying interest on the same, and with the fund collected for the interest bonds had been redeemed, leaving the fund derived from the sale of bonds exhausted. *Held*, that under Code Civil Proc. § 1085, which provides for the issuance of a mandate to enforce an act specially enjoined by law, plaintiff was not entitled to the writ to compel the treasurer to divert the fund collected for payment of interest or to redeem the bonds, to the payment of damage. Bates v. Porter, 15 Pac. Rep. 732, 74 Cal. 224, followed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Application of Pierre Priet for a mandate to Christian Reis, treasurer of the city and county of San Francisco, to pay a certain warrant for damage in widening Dupont street, in the city of San Francisco. The writ was denied, and petitioner appeals. Affirmed.

D. H. Whittemore, for appellant. *Geo. Flournoy, Jr.*, and *John H. Durst*, for respondent.

Temple, C. This is an application for a writ of mandate to compel the defendant, as treasurer of the city and county of San Francisco, to pay a warrant for damages, under the act of the legislature for widening of Dupont street. That act (St. 1875–76, p. 439) provided for the sale of bonds, and that the proceeds should be held to pay expenses and damages awarded to property holders. In case of a dispute as to whom the damages should be paid, the commissioners were to place a warrant for the amount in the hands of the clerk, and the claimants could sue the treasurer, joining other claimants, and the treasurer was to pay in accordance with the determination. Among the awards was that mentioned in the complaint for $10,932, the warrant for which was deposited with the county clerk, because the claimants could not agree. Judgment was entered in a suit to determine the rights of the claimants in 1883. Section 9 of the act provides for the payment of the money realized from the sale of the bonds to the treasurer, to be devoted to paying expenses and damages, the fund to be called the "Dupont-Street Fund." Section 13 provides for the levying of a tax, and that "when collected the said moneys shall be paid over to the treasurer of the said city and county, and constitute a part of the Dupont-Street fund, and to be paid out by said treasurer only in payment of the coupons attached to said bonds as the same from time to time become due." The same section provides for a tax to create a similar fund, and that the moneys so realized "shall constitute a part of the Dupont-Street fund, and shall only be paid out in redeeming bonds issued in pursuance of the act." The Dupont-Street fund then consisted of three parts, each derived from a specified source, and devoted to specific purposes; in short, three distinct funds. The moneys derived from any specific source could not be legally used in discharge of obligations other than specified as payable from such moneys; and, as we have seen, it was expressly enacted that the moneys raised by taxation should be expended only in payment of coupons and bonds. After paying all the damages awarded, except the claim herein question, and all expenses of the commissions, there was in the Dupont-Street fund more than $55,000 derived from the sale of bonds; but on or about the 1st day of December, 1878, the then treasurer illegally used $55,000 of said money to pay interest on the bonds, and thereafter used of the money collected from taxes to pay interest $50,000 to redeem 50 of the bonds, leaving in the fund $1,869.18, which has been paid upon the warrant. No taxes were collected for this fund after the determination of the suit to settle the rights of the claimants to the award in question, until 1888, since which time there had been collected the sum of $152,199.84, which was there at the time this proceeding was commenced, March 1, 1889. It is averred that from the 6th day of January, 1883, when the partial payment mentioned was made on the warrant, until the 17th day of May, 1888, there was no money in the Dupont-Street fund. Nor does it appear that there has been at all, since that date, any money in the fund which was derived from the sale of bonds. There is still due upon the warrant $9,062.82, for which due demand has been made, but the treasurer refuses to pay, on the ground that he has no funds in his hands properly applicable thereto. These facts appear in the petition, and the case went against the plaintiff on demurrer. He appeals from the judgment.

The writ is issued to enforce an act specially enjoined by law, as a duty resulting from an office, trust, or station. Section 1085, Code Civil Proc. Is there money in the Dupont-Street fund which the law makes it the duty of respondent to pay upon this warrant? To answer this question in the affirmative would be to hold that the money collected from taxation for the specific purpose of paying coupons, and expressly made payable only for their redemption, by operation of law, as soon as collected, passed to the damage fund, to replace that illegally taken therefrom. The statute only authorizes a tax levy sufficient to pay the maturing coupons. It would seem, therefore, that some coupons must remain unpaid if this money can be diverted to replace the misappropriated funds. The petition does not show whether the money in the treasury was collected on the tax levy to pay interest or the bonds. The petition states that, although the money in the damage fund was at first used to pay interest on the 1,000 bonds, yet, when the money was collected from taxes to pay this interest, $50,000 of it was used to redeem 50 of the bonds. If the theory be correct, that the first money collected to pay interest, after the misappropriation of the damage fund for the benefit of the interest fund, would by operation of law replace the money wrongly diverted for its benefit, it was then replaced, and again misappropriated. Even on that theory, this fund could not again be drawn upon to supply the deficiency. But all the money in the Dupont-Street fund may be money collected to pay interest. But the whole contention is fallacious. The act provides a tax for 20 years to pay interest and principal. A tax levy each year sufficient to pay the interest and one-twentieth part of the bonds is authorized, and it is especially enjoined that the money so raised shall be used for no other purpose. Evidently it cannot be so diverted without to some extent impairing the rights of the bondholders. It is said that the bondholders have had the benefit of the misappropriation, and will not be injured by the payment. The bondholders are presumably many. It does not appear that those who held the 50 bonds, wrongly paid, own any others. The present bondholders were not benefited by the illegal payment, and the fact that others were paid furnishes no ground for depriving them of their interest when due. Probably the same reason would be applicable if it had appeared that all the money in the general Dupont-Street fund was collected for the payment of bonds, but such fact does not appear. This question seems to have been decided in Bates v. Porter, 74 Cal. 224, 15 Pac. Rep. 732. In this state, under our Code, the writ of mandate can perform no such function as was allowed in People v. Comptroller, 77 N. Y. 45. We think the judgment should be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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92 Cal. 475

COFFEY v. QUINT *et al.* (No. 13,786.)

(*Supreme Court of California.* Jan. 26, 1892.)

In bank. Appeal from superior court, city and county of San Francisco.

Action by John J. Coffey against L. Quint and J. Diemer. Judgment for defendants. Plaintiff appeals. Petition for a hearing in bank ordered stricken from the files. For prior report, see 28 Pac. Rep. 494.

John J. Coffey, in pro. per. L. Quint, R. H. Taylor, and *W. H. Payson,* for respondents.

PER CURIAM. The petition herein filed for a hearing of this cause in bank is not of a character which entitles it to be considered by the court, and it is ordered that the same be stricken from the files. Further ordered, that the *remittitur*, upon the decision heretofore rendered in this case by department 1, issue forthwith.

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92 Cal. 209

BOARD OF EDUCATION OF THE CITY AND COUNTY OF SAN FRANCISCO v. MARTIN *et al.* (No. 13,413.)

(*Supreme Court of California.* Dec. 11, 1891.)

FINDINGS OF FACT—ABSENCE OF—POWER OF SUPREME COURT TO MAKE—LANDS DEDICATED TO SCHOOLS—ACQUISITION BY ADVERSE POSSESSION—RES JUDICATA.

1. By the Van Ness ordinance, passed June 20, 1855, the city of San Francisco granted all its right to the lands within its limits to the parties in the actual possession thereof during a certain period, reserving certain lands for "public" purposes, to be determined by ordinance. *Held,* that where, in an action by the board of education to recover lands, alleged to have been reserved by the city for public purposes, from persons claiming an adverse possession thereof for over 30 years under the ordinance, the trial court makes no findings on the essential issue as to whether the lands were reserved, the supreme court, on appeal on the judgment roll alone, must reverse the judgment for lack of findings, though the record presents evidence from which a reservation might be inferred; since the supreme court cannot assume original functions, and deduce findings from the evidence.

2. On appeal from a judgment upon the judgment roll alone, the sole question is whether the findings of fact sustain the judgment.

3. The use of the reserved lands for schools was a "public" purpose, within ordinance of June 20, 1855.

4. Land dedicated to a public use cannot by adverse possession be acquired by individuals, though the title is held by a municipal corporation. Yolo Co. v. Barney, 21 Pac. Rep. 833, 79 Cal. 375, followed.

5. St. 1863, p. 601, creating the board of education of the city and county of San Francisco, gave it sole power to prosecute and defend all actions relative to land belonging to the school department, which power had previously to such act been in the city and county of San Francisco. *Held*, that a subsequent judgment against the city and county, to which the board was not a party, quieting title in a third person to lands dedicated to school purposes, was not binding on the board.

Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Action by the board of education of the city and county of San Francisco against Wheeler Martin and others to recover land. Judgment for defendants. Plaintiff appeals. Reversed.

C. H. Parker and *Parker & Eells*, for appellant. *T. B. Bishop*, for respondents.

HARRISON, J. The plaintiff brought this action for the recovery from the defendants of a parcel of land in San Francisco, claimed by it to have been reserved as a school lot, under the provisions of the Van Ness ordinance, and to belong to the school department of that city. The defendants in their answer, in addition to denying the title of the plaintiff, alleged title in themselves, and pleaded as a special defense to the action the statute of limitations, and also pleaded a former judgment recovered by their predecessors against the city and county of San Francisco, as a bar to the plaintiff's right of action. The cause was tried by the court, and upon its findings of fact the court found, as a conclusion of law, that the plaintiff's right of action was barred by the statute of limitations, and ordered judgment in favor of the defendants. From the judgment entered thereon the plaintiff has appealed upon the judgment roll alone.

The land in question is a portion of the pueblo lands which were confirmed to the city of San Francisco by the decree of the circuit court of the United States, May 18, 1865, and are within the charter line of 1851 of the city of San Francisco, being east of said charter line, and west of Larkin and Johnston streets, and are a part of the lands relinquished to said city by the act of congress of July 1, 1864. The rights of the respective parties to the land are derived under the Van Ness ordinance. By that ordinance, passed June 20, 1855, the city of San Francisco granted all its right and claim to the lands within its corporate limits, as defined by the charter of 1851, "to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. 1855, * * * provided such possession has been continued up to the time of the introduction of this ordinance in the common council." By section 4 of said ordinance the city, however, as a consideration for said grant, "reserves to itself * * * such lots and lands as may be selected and reserved for streets and other public purposes, under the provisions of the next succeeding sections;" and in section 6 provided, further, that it should have "the right to select and set apart from the lands west of Larkin street, and south-west of Johnston street, as many lots, not exceeding 137½ feet square each, as the mayor and common council may by ordinance determine to be necessary for sites for school-houses, hospitals, fire-engine houses, and other public establishments necessary and proper for the use of the corporation." The court finds that the predecessors and grantors of the defendants were in the actual possession of the land in question on and prior to January 1, 1855, and continued to remain in such possession up to and including the 20th day of June, 1855; and that the defendants and their predecessors and grantors had ever since, and up to the commencement of this action, held and remained in the actual, open, and exclusive possession of said land, claiming to hold and own the same in their own right and adversely to the plaintiff and the whole world. This finding is sufficient to sustain the judgment, if the land in question is not included within the lands which were reserved to the city under the provisions of the aforesaid ordinance. If the land was so reserved, it was not granted to the predecessors of the defendants by the ordinance, and they obtained no title thereto by virtue of any of its provisions. "These lots, so set apart or reserved by the corporation for its own use, did not pass under the Van Ness ordinance to a person who might have been in the actual possession of the lots in 1855. To suppose that the city so intended would convict its officers of the inconsistency of declaring by its two boards that the lots should be reserved to the uses of the schools, and then making by ordinance a gratuitous disposition of them in favor of third persons." Board v. Fowler, 19 Cal. 25.

The court has made no finding upon the issue of title presented by the pleadings, but has included in its findings certain evidence which was introduced at the trial. Neither has it found the probative facts from which the ultimate fact of title can be determined. It has been stated in several cases in this court that, when the findings of the court below contain such probative facts that the ultimate fact in issue necessarily results therefrom, this court will make the deduction of such ultimate fact; but that, unless such ultimate fact necessarily follows from the facts found, the findings are insufficient, and the judgment must be reversed for want of findings. It has never been held, however, or even stated, that findings of the court below, which consist either in whole or in part of evidence presented at the trial, and do not purport to be probative facts involved in the issue, are a sufficient compliance with the requirements of the Code. The jurisdiction of this court is appellate, and not original, and it is the function of a court of original jurisdiction to determine in the first instance whether the evidence offered in support of an issue is sufficient to sustain that issue. This court cannot pass upon that question until after the trial court has determined it, and then only in a proceeding to set aside such determination. When an appeal from a judgment is heard upon the judgment roll alone, the only question to be considered is whether the findings of fact sustain the judgment. Whether the evidence is sufficient to sustain the findings cannot be considered upon such appeal, except in the single instance when it is brought here upon a bill of exceptions on an appeal taken within 60 days after the rendition of the judgment. In no case can this court determine whether the evidence, irrespective of findings, is sufficient to support the judgment; and, when the findings are merely of evidence, this court cannot make the findings of fact from that evidence which it was incumbent upon the trial court to make.

The title of the plaintiff to the land in question depended upon the fact that it had been reserved by the city under the provisions of the ordinance aforesaid, and the title of the defendants, as derived under the ordinance, depended upon the fact that it had not been so reserved. Whether or not there had been such reservation was therefore an essential fact to be found by the court. If there had been no such reservation, the possession of the land by the defendants was sufficient to defeat the claim of the plaintiff; but, if the land had been reserved for a public use, such fact was a material finding, and would overcome the effect of a finding of adverse possession to such an extent as to prevent the defendants from availing themselves of the statute of limitations to defeat the right of the plaintiff. This issue was directly presented to the court for decision. Instead, however, of finding whether the land in question had been reserved under the ordinance, it incorporated into its findings evidence upon that subject which would support a finding that such reservation had been made, but which, as we have shown, cannot be assumed by this court as equivalent to a finding by the trial court upon that issue. In its finding it has set out the various steps taken by the city for the purpose of making the reservation authorized under the ordinance, —the appointment of commissioners therefor; their preparation of a map or plan of the city; its presentation to the common council with their report accompanying it; the character of the map; the delineation thereon of certain spaces colored brown, corresponding in number with the numbers named in the report as selected for school lots; the size of the respective lots so colored; the effect of the testimony of the draughtsman in reference thereto; and many other circumstances connected with said map; but, instead of making the inference from this evidence that thereby a reservation was or was not made by the city,—an inference which, as we have shown, was to be made by that court, (Carpentier v. Mendenhall, 28 Cal. 487,)—it has only set out the evidence from which the inference should have been drawn. That such inference of fact should have been found by the trial court appears to have been felt by the respondents, inasmuch as in their brief they urge that the facts found are insufficient to show any reservation, whereas the insufficiency of evidence to justify a finding cannot be considered upon an appeal on the judgment roll, but only upon an attack on the finding through a motion for a new trial. That a finding upon this issue is material to such an extent as to require a reversal of the judgment for failure to make it is evident from the fact that, if the court had found that the land in question had been reserved by the city, its conclusion of law that the plaintiff's right of action is barred by the statute of limitations would have been unauthorized.

The reservations to be made under the provisions of the ordinance were for "public purposes," and the purpose for which the lots were reserved was none the less "public" because it was to be "for the use of the corporation." The corporation was a public corporation, and had been established as an appropriate means of subserving the needs of the people in matters of government and social administration. For purposes of convenience the state is divided into counties, which are clothed with certain functions of local government, and invested with the management of public property within their respective boundaries. For the same reason, and with the same purpose, municipal corporations have been established, and whether their territories and jurisdiction are coextensive with the county within which they are organized, or are limited to a portion thereof, the public functions which they exercise and the public property which they manage is not alone for that limited portion of the public which may be within their boundaries, but is also for and in behalf of the whole public by which such management has been intrusted to them, although the exercise of such functions and the use of such property may be chiefly enjoyed by those who constitute the limited public within such corporations. The fact that in matters not pertaining to their governmental functions such corporations may have private property, as well as incur private obligations, does not deprive them of this public characteristic. In all matters relating to such government and management they are but agencies of the state, with an authority limited to the territory designated in their organization. The property which is intrusted to their management is not divested of its public character, nor is it any the less subject to the control of the state, or to the rules which are applicable to other property of the state, because it is situated within the boundaries of such corporation. The jails, court-houses, hospitals, school-houses, engine lots of such corporation are as much public property, and to be governed by the same rules and limitations, as are the streets and highways and public squares which such corporation may have caused to be opened or set apart for public use. Their public character is not taken away because they are subject to local regulations in their management and use. The proprietary interest in all such property belongs to the public, and, whether the legal title to such property be in the municipality or any of its officers or departments, it is at all times held by it or them for the benefit of the whole public, and without any real proprietary interest therein. The legislature, unless restrained by constitutional limitations, can dissolve the corporation at any time, and upon such dissolution the whole of such property would revert to the state, and may be by it transferred to another similar corporation, or the legislature may, without dissolving the corporation, at any time transfer the management of such property to different bodies or commissions. A municipal corporation is for all purposes of government, or the exercise of public duties, or the administration of public trusts, made by the state one of its instruments or the local depository of certain limited and prescribed political powers, to be exercised for the public good in behalf of the state, and not merely for itself, or for its own inhabitants. "The school department of the municipality is only a part of its government. A reservation of property for school purposes is not a disposition of it for the benefit of third persons, but a keeping of it for its own purposes. The resolution amounts only to a setting apart of the property of the town for a particular town purpose, and in this respect is not different from a similar act, if such had been done, declaring that the plaza should be reserved as a public garden, or a lot for a jail, or a house for the holding of courts." Board v. Fowler, 19 Cal. 27.

The lands in question were originally held by the pueblo in trust for the public, and subject to the control of the Mexican government. After the cession of California to the United States the management of this trust was subject, in the first place, to the control of the general government, and became vested in the state of California upon its establishment as a sovereign member of the Union. Upon the organization of the city of San Francisco, its boundaries embraced a portion of these lands, but their title continued to remain impressed with the same trust. The property, as well as the trust upon which it was held, and the corporation to whose management it was intrusted, was municipal, and therefore subject, as all political institutions, trusts, and property, to the direction and control of the superior authority of the sovereign. By the act of March 11, 1858, ratifying and confirming the Van Ness ordinance, it was declared by the state that the lands that had been reserved under that ordinance were reserved for public purposes, and this reservation was afterwards confirmed by congress by the act of July 1, 1864. These principles have so often been affirmed by the courts of this country that it is only necessary to refer to a few leading cases in which they may be found: Hart v. Burnett, 15 Cal. 530; Payne v. Treadwell, 16 Cal. 224; San Francisco v. Canavan, 42 Cal. 541; Townsend v. Greeley, 5 Wall. 326; San Francisco v. Leroy, 138 U. S. 656, 11 Sup. Ct. Rep. 364.

If the land was reserved by the city from the operation of the grant contained in the ordinance, it was reserved for public use, and the confirmation of the ordinance in 1858, as well as the grant by congress in 1864, had the effect to affirm the reservations contained in the ordinance, and the lands so reserved could not thereafter have been divested by any adverse possession. Counsel for respondents urge that this rule is applicable only when the property is reserved for the entire public, like streets, squares, or highways, in which not only the people of the municipality, but those of the state at large, have an interest. In our opinion there is no reason for not applying the same rule to property which is dedicated or reserved to a public use, when the title is held by the municipality, as is applicable when it is held by the state. The same principles which prevent an adverse possession from ripening into a title when the title to the property belongs to the public, and is held for public use, apply in the one case as in the other. It is immaterial where the title, that is, the record title, is held, whether by the state at large, or by a county, or by some municipal department or other official body. There can be no adverse holding of such land which will deprive the public of the right thereto, or give title to the adverse claimant, or create a title by virtue of the statute of limitations. This rule is universal in its application to all property set apart or reserved for public use, and the public use for which it is appropriated is immaterial. The same principles which govern in the adverse holding of a street, a public square, a quay, a wharf, a common, apply to the adverse holding of a court-house, a jail, or school-house. The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights. This question has been determined, and these principles have already been established in this state in the case of County of Yolo v. Barney, 79 Cal. 375, 21 Pac. Rep. 833.

Upon the issue relating to the former judgment which is set up in the answer as a bar to the action, the court did not find whether that judgment was a bar, but merely found the facts connected with the rendition of the judgment, and made the judgment roll in that action a part of its findings. The court finds that on the 29th day of August, A. D. 1862, one Edward W. Jones, who was then in the actual possession of a tract of land including the premises in controversy, commenced an action in the late fourth district court against the city and county of San Francisco to quiet his title to said land, and that the defendant therein appeared and answered in said action by the city and county attorney, and thereafter said action was tried upon its merits, and a finding and decree entered therein in favor of the plaintiff, and against the said city and county. The court also finds that the plaintiff herein "derives and obtains" its title to and right of possession of the demanded premises under and through the city and county of San Francisco, the defendant in that action, and that the defendants herein "had long before the commencement of this action" acquired and still hold all the right, title, and interest in said premises which said Jones had at the time of the commencement of that action and the entry of judgment therein. The court does not find, nor does it appear from the judgment roll, that any summons was ever issued in said action, or served upon the defendant therein. It appears therefrom, however, that on the 31st of July, 1863, the defendant therein by its attorney filed a general denial to the allegations of the complaint upon a stipulation of the plaintiff's attorneys to the effect that said answer should be regarded as a specific denial of the said allegations, (the complaint being verified,) and that on the same day the case was tried by the court, and findings and a decree signed by the judge thereof were filed, wherein it is "ordered, adjudged, and decreed that the said plaintiff was at the time of the commencement of this action the owner in fee of the lands described in his said complaint, and that all claims of the said defendants to any right, title, estate, or interest in the said lands, or any part thereof, adverse to the said title of the said plaintiff, are wholly unfounded, illegal, and void, both at law and in equity." By an act of the legislature passed April 27, 1863, (St. 1863, p. 601,) which took effect immediately, the plaintiff herein was created, and its powers and duties defined. By section 2 of that act it is declared: "Sec. 2. The board of education shall have sole power: * * * *Eleventh.* To sue for any and all lots, lands, and property belonging to or claimed by the said school department, and to prosecute and defend all actions at law or in equity necessary to recover and maintain the full enjoyment and possession of said lots, lands, and property." By another act of the legislature, passed on the same day, (St. 1863, p. 771,) defining the powers of the attorney and counselor of said city and county, that officer was authorized to "perform such duties as attorney and counselor, in and for the said city and county, as the board of supervisors of said city and county shall from time to time prescribe." The question presented here does not, however, so much involve the authority of the city and county attorney to appear in the action without any request therefor from the board of supervisors, as it does the effect of a judgment against the city and county after the state had conferred upon the plaintiff herein the sole power to defend all actions necessary to maintain the full enjoyment and possession of the land in question. The court does not find at what time or by what means the plaintiff herein "derives and obtains" its title to the premises in question from the defendant in that action, and its finding in this respect is somewhat at variance with its other findings, since, if the land had been reserved as public property, it was at all times thereafter subject to the control of the state, and, its management having been merely transferred by the state from the city and county to the plaintiff herein, the plaintiff cannot properly be said to have derived any title whatever, but has merely assumed the management of property the title to which has at all times remained in the public. If the plaintiff, however, obtained and derived such title prior to the commencement of that action, or even prior to the time when the court obtained jurisdiction of the defendant therein, the judgment therein would not affect its title, or be a bar to the present action. If the land in question was one of the lots reserved for public use under the provisions of the Van Ness ordinance, the management and control thereof were at all times subject to the direction of the legislature, and it alone was authorized to determine whether such management and control, including the right to sue for and defend the same, should be intrusted to the city and county, or to the board of education, or to any other public body or officer. After having once given such management and control to the city and county, it had the same right to transfer them to the plaintiff herein that an individual has to remove his agent and clothe another with the same power. After such transfer of authority the city and county, or its attorney in her behalf, had no authority to submit to any court the determination of the rights of the plaintiff herein to the ownership or right of possession of the land in question, and any judgment rendered against the city and county would have no effect upon the right of the plaintiff herein to assert its title or right of possession for the same land. For the reasons contained in the foregoing opinion the judgment is reversed.

We concur: GAROUTTE, J.; DE HAVEN, J.

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92 Cal. 414

CITY AND COUNTY OF SAN FRANCISCO v. BRADBURY *et al.* (No. 13,004.)

(*Supreme Court of California.* Dec. 18, 1891.)

EJECTMENT—EVIDENCE OF LOCATION—REVIEW ON APPEAL—ADVERSE POSSESSION.

1. In ejectment for a lot claimed to have been reserved for a fire-engine lot, plaintiff city introduced the ordinance reserving the lots, and a map prepared in pursuance thereof, the report accompanying the map of the commissioners under whose direction the same was prepared, and the testimony of two of the commissioners. The evidence showed that the map was prepared on a scale of 300 feet to the inch, and on it block 56, within which the lot in question is located, is delineated with six subdivisions, which, as the map was originally prepared, were designed to represent 50-vara lots; that within the middle one of three of these subdivisions are two parallel lines, running through the lot; that one of the streets on which block 56 abuts was afterwards widened from the outer lots, leaving the middle 50-vara lot of its original dimensions; that the number of lots reserved for fire purposes were 25, in size 30x137½ feet and 30x100 feet; that there appears on the map 25 spaces included within parallel lines similar to those on block 56; that the original color of the lot on block 56 within small parallel lines was red, and there were 25 lots on the map colored red, including the lot on block 56; that the selection of the lot by the commissioners was in the middle of the block. *Held,* that the evidence authorized the

finding that the spaces within the parallel lines on the map were reserved for engine lots.

2. In ejectment, where the witnesses were before the court to assist in examining maps and making measurements, the evidence being conflicting, the finding in relation to the location of the lot in question will not be disturbed on appeal.

3. Where land was reserved by a municipal corporation for public purposes, it cannot be divested thereof by adverse possession. Yolo Co. v. Barney, 21 Pac. Rep. 833, 79 Cal. 375, and Board v. Martin, (Cal.) 28 Pac. Rep. 799, followed.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Ejectment by the city and county of San Francisco against W. B. Bradbury and another, for a certain lot reserved for public purposes. Plaintiff had judgment, and defendant Bradbury appeals. Affirmed.

Joseph R. Brandon, for appellant. *Craig & Meredith* and *Lloyd & Wood*, for respondent.

HARRISON, J. Action of ejectment to recover possession of an engine lot reserved to the city of San Francisco by virtue of the Van Ness ordinance. The case was tried by the court without a jury, and judgment rendered for the plaintiff for a portion of the land sued for, and in favor of the intervener for the remainder. A motion for a new trial was made by the defendant Bradbury, and denied, and from this order, as well as the judgment, he has appealed.

The court finds as facts in the case that the land sued for had been reserved for public use as a fire-engine lot, and that the defendant Bradbury unlawfully entered into possession of it in the year 1874, and had ever since deprived the plaintiff of its possession. The appellant assails the findings upon the ground that the evidence before the court was insufficient to justify it in finding that the lot had been reserved for public use, and insists that upon the finding of an adverse possession in favor of the appellant he was entitled to judgment in his favor. The objection to the finding that the lot in question had been reserved for public use is two-fold, viz., it is claimed that the evidence was insufficient to show that by virtue of the ordinance there had been a reservation of any engine lots whatever, and further, that there was no sufficient evidence that the lot in question was one of those attempted to be reserved. For the purpose of establishing the reservation the plaintiff offered in evidence the several ordinances of the common council, and the map prepared in pursuance thereof, known as the "Van Ness Map." These ordinances and the map were validated by the legislature in 1858 (St. 1858, p. 52) by an act in which the ordinances are set forth at length, and all courts are directed to take judicial knowledge of them "without further proof, as if they were public acts of the state legislature." And in Sawyer v. San Francisco, 50 Cal. 370, it was held that "the act of the legislature of 1858 operated to impart validity to the reservations as defined and delineated on the map reported by the commission." In addition to this, there was in evidence before the court the report accompanying the map, made by the commissioners who had been appointed by the common council to make the selection of lots to be reserved, and under whose directions the map had been prepared, and also the testimony of two of the commissioners. The map was prepared upon a scale of 300 feet to the inch, and upon it block 56, within which the lot in question is located, is delineated with six subdivisions, which, as the map was originally prepared, were designed to represent 50-vara lots. Within the middle one of the three of these subdivisions which front on Bush street are two parallel lines apparently in or near the middle of the lot, and running northerly from Bush street through the lot. After the map had been prepared, Van Ness avenue was widened by taking portions of the adjacent blocks, and the portion taken from block 56 was taken from the outer lots in the block, leaving the middle 50-vara lot of its original dimensions. There was nothing upon the map to indicate specifically that the lot in question was one of those reserved. The commissioners, however, who had been appointed under the provisions of section 8 of the Van Ness ordinance to make selection of "sites for school-houses, hospitals, fire-engine houses, and other public establishments necessary and proper for the use of the corporation," as provided in section 6 of the ordinance, stated in their report aforesaid that they had adopted the map then presented by them, (the Van Ness map above named,) and (with other recitals) that "the number of lots selected for fire purposes is twenty-five, (25;) their size thirty feet by one hundred and thirty-seven and a half feet, (30 ft. by 137½ ft,) except those located on the Potrero, which are thirty feet by one hundred feet, (30 by 100 ft.)" The map contained an inscription signed by the commissioners to the effect that it had been prepared by them in pursuance of said ordinance "for the location and dimensions of the streets, with the lots or grounds selected or set apart for the several public uses, as herein designated;" and upon the map itself, which by stipulation is made a part of the record herein, there appear 25 spaces included within parallel lines similar to those delineated in block 56. It was also in evidence before the court that the original tint or color of the lot in block 56 within the small parallel lines was carmine or red, and that there were 25 lots on the map colored red, of which this was one; and also that the selection by the commissioners had been made in the middle of the block previous to the widening of Van Ness avenue. There were no figures to indicate the dimensions of the space within the parallel lines in block 56, but on the lines of some of the spaces south of Market street the figures "30" and "137.6" are inscribed, and on others the figures "30" and "100" are found.

This evidence, we think, fully authorized the court to find that the spaces within the parallel lines referred to were reserved for engine lots. There is no appreciable distinction between the evidence thus presented to the court and that which was before the court in the case of Board v. Donahue, 53 Cal. 190. While the mere fact that within block 56 the two parallel lines referred to would not, taken by themselves, indicate any reservation, yet when that fact is considered in connection with the object for which the map was prepared, the report of the commissioners who prepared the map that they had made selection of 25 lots for fire purposes, and designating their size; that upon the map are to be found 25 spaces within parallel lines similar to the one in block 56; that upon some of those spaces are found the figures indicating the size of the lots to correspond with the report of the commissioners; that from other portions of the map those figures are intended to represent feet and inches; that the map was originally white, and that the spaces within these parallel lines were originally colored,—the conclusion is irresistible that those 25 spaces of which this is one were reserved under the provisions of the ordinance for public use for engine lots. For the purpose of showing that the lot described in the complaint is within the parallel lines above named in block 56, witnesses were called to assist the court in the examination of the map, and gave testimony in reference thereto. This testimony was quite conflicting, some of the witnesses declaring that on a map prepared upon so small a scale it is impossible to define so small a lot within 10 or 20 feet, while other witnesses had no hesitation in placing the lot in the middle of the block. Under this conflict of testimony we must accept the finding of the court as correct. The map was before it for examination with all the aid which it could derive from the various figures of reference upon it, and the testimony of witnesses with reference thereto. The court had the opportunity to make a personal examination and measurement, and we cannot say that its conclusion is not justified by the evidence in the case. In the case of Board v. Martin, (No. 13,413,) 28 Pac. Rep. 799, we have recently had occasion to consider the character of the reservations for public purposes made by virtue of the Van Ness ordinance, and the effect of an adverse possession upon the title to the lots so reserved. We held in that case that, inasmuch as the reservation was for a public use, the title to the land remained in the public, irrespective of the particular municipal agency which was charged with its custody and management, and that an individual could not by mere adverse possession acquire any title to such land, or invoke the aid of the statute of limitations as a defense to its recovery. The principles there laid down apply as fully, if not more forcibly, to the present case; and upon the authority of that case we affirm the judgment of the court below upon this point. The plaintiff has not appealed from the judgment in favor of the intervener, Stone, and it is therefore unnecessary to consider their respective rights to the land adjudged to him. We find nothing in the record, however, showing that the rights of the appellant are in any respect impaired by this portion of the judgment. The judgment and order of the court below are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

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92 Cal. 625

LEWIS v. ROTHCHILD. (No. 13,678.)

(*Supreme Court of California.* Jan. 2, 1892.)

LIEN FOR TAXES—LIMITATION—APPLICABILITY OF STATUTE.

Pol. Code, § 3716, declares that a tax shall have the effect of a lien against all the property of a person, and that the lien shall not be removed "until the taxes are paid or the property sold for the payment thereof." Section 3717 declares that every tax due upon personal property shall be a lien upon the real property of the owner. Code Civil Proc. § 312, declares that civil actions shall only be commenced within certain periods, "except where, in special cases, a different limitation is prescribed." *Held*, that the latter section does not apply to the liens created by sections 3716, 3717. San Francisco v. Jones, 20 Fed. Rep. 188, and San Francisco v. Luning, 15 Pac. Rep. 311, 73 Cal. 610, distinguished.

Department 2. Appeal from superior court, city and county of San Francisco.

This was an action by Lewis against Rothchild to recover a sum of money under a contract for the purchase of land. There was judgment for defendant, and plaintiff appeals. Reversed.

Jones & O'Donnell, for appellant. *Brewton A. Hayne*, for respondent.

SHARPSTEIN, J Appeal from a judgment in an action brought to recover from the defendant the sum of $350, alleged to have been deposited by plaintiff with defendant on the purchase by plaintiff of defendant of certain real estate described in the complaint. The written contract of purchase is copied into the complaint, and it stipulates that said deposit shall be returned to plaintiff if any valid liens for taxes be found to exist upon said premises, unless removed within five days after plaintiff shall give defendant notice in writing of the existence thereof. Plaintiff alleges that during the fiscal years 1878–79, and for many years prior thereto, one H. Cummings was the owner of said premises, and was assessed for said fiscal years for his personal property, situated in the city and county of San Francisco, $7.30 for state, city, and county purposes, which plaintiff alleges has not been paid, and constitutes a valid lien upon said premises. And plaintiff further alleges that one Elizabeth Mitchell was the owner of said premises during the fiscal years 1884–85, and for many years prior thereto, and that she was assessed for said fiscal years for her personal property, situated in said city and county, $2.72 for state, city, and county purposes, which has never been paid, and constitutes a valid lien upon said premises. And plaintiff further alleges that 10 days before the commencement of this action he notified defendant in writing of the existence of said liens, and requested him to remove the same, which he refused and neglected, and still refuses and neglects, to do, and that said taxes remain wholly unpaid and unsatisfied, and the premises unsold for the payment thereof. And on the 2d day of November, 1889, plaintiff demanded the return of said $350 deposited by him with defendant, but defendant refused and neglected, and still refuses and neglects, to return the same, and that the same, or any part thereof, has never been returned; wherefore he brings this action to recover the same. The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action, because it appears that the alleged liens are barred by the provisions of subdivision 1 of section 338 of the Code of Civil Procedure, and by subdivision 1 of section 339 of said Code, and by the provisions of section 343 of said Code. The demurrer was sustained. Plaintiff declined to amend his complaint, and judgment was entered in favor of defendant, and plaintiff appeals therefrom. The provisions of the Code of Civil Procedure relied on to justify the ruling of the court in sustaining the demurrer are the following: "An action upon a liability created by statute, other than a penalty or forfeiture." Subdivision 1, § 338, Code Civil Proc. "An action upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state." Subdivison 1, § 339, Id. "An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued." Section 343, Id. The appellant relies upon sections 3716 and 3717 of the Political Code, and section 312 of the Code of Civil Procedure, which read as follows: "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent. The judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof." Section 3716, Pol. Code. "Every tax due upon personal property is a lien upon the real property of the owner thereof from and after 12 o'clock M. of the first Monday in March in each year." Section 3717, Id. "Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute." Section 312, Code Civil Proc.

The main contention of appellant's counsel is that section 312 of the Code of Civil Procedure shows that it was not the intention of the legislature to apply the statute of limitations to sections 3716 and 3717 of the Political Code, as those sections prescribe a different limitation as to liens created by the title to which those sections belong. The provision that the lien shall not be removed until the taxes are paid or the property sold for the payment thereof is certainly inconsistent with a provision that the lien is extinguished by the lapse of a certain number of years after it attaches to the property. We think a different limitation is prescribed by section 3716 of the Political Code, as to liens created by title 9 of that Code, from that prescribed anywhere in title 2 of the Code of Civil Procedure.

It has been held that an action to recover city and county and state taxes, under an act entitled "An act to legalize the assessment of taxes in the city and county of San Francisco, and to ratify and confirm a resolution of the board of supervisors of the city and county of San Francisco," (approved March 19, 1878,) cannot be maintained unless commenced within three years after the tax becomes delinquent. San Francisco v. Jones, 20 Fed. Rep. 188. The court, SAWYER, J., in that case said that the suit was not one to enforce a lien at all. And in San Francisco v. Luning, 73 Cal. 610, 15 Pac. Rep. 311,—an action to recover delinquent taxes under the act of April 23, 1880,—the action was commenced more than seven years after the cause of action accrued, and the court held that it was barred by the statute of limitations, but said that it was not an action upon a judgment or to enforce a lien, and that it was possible that there was a subsisting judgment or lien for the taxes sued for, which the tax collector might enforce by sale in the usual way. "It is possible," said the court, "an action might lie upon the tax as a judgment, or to enforce the lien." Neither of these cases supports the contention that a lien on real property for a delinquent tax can be extinguished without paying the taxes, or selling the property for the payment thereof. By implication, at least, both of them favor the contention of appellant's counsel,—that the liens for unpaid taxes upon the real estate which defendant agreed to sell to plaintiff were subsisting liens upon said property at the date of said agreement, and have never been removed. Respondent does not claim that the demurrer to the complaint could be sustained upon any other ground than that of the bar of the statute of limitations, and we are satisfied that it was improperly sustained on that ground. Therefore the judgment must be reversed. Judgment reversed, and cause remanded, with directions to the court below to overrule the defendant's demurrer to plaintiff's complaint, with leave to defendant to answer said complaint, if he shall be so advised, within 10 days after being notified of the overruling of said demurrer.

We concur: MCFARLAND, J.; DE HAVEN, J.

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3 Cal. Unrep. 475

In re KREISS. (No. 13,320.)[1]

(*Supreme Court of California.* Jan. 28, 1892.)

ARBITRATION AND AWARD — STAY OF JUDGMENT.

On motion of one of the parties to an arbitration to vacate the award, the court below, concluding that the submission to arbitration was not a statutory submission, refused to entertain the motion, and ordered the judgment entered, and all proceedings under it to be perpetually stayed. *Held*, that the ruling was proper, it appearing that the judgment on the award was void.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

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[1] Rehearing granted.

Action by L. Kreiss against A. P. Hotaling. On submission to arbitration an award was rendered, on which judgment was entered and perpetually stayed. Defendant appeals. Affirmed.

A. N. Drown, for appellant. *Henry E. Highton*, for respondent.

TEMPLE, C. This appeal is from an order perpetually staying a judgment of award and all proceedings under it. It appears that a motion was made by the respondent to vacate the award. The learned judge of the court concluded that the submission to arbitration was not a statutory submission, and therefore refused to entertain the motion, but ordered the judgment entered in form, and all proceedings under it to be perpetually stayed. This appeal is from that order, and there is no bill of exceptions, nor are the papers used on the hearing identified. It is claimed that the order is erroneous on various grounds, and among them, that there was no notice or showing, or even motion, before the court at the time. But, in the absence of a bill of exceptions, how do we know that? The order does not show this. On the contrary, it seems to imply that some showing was made. It is as follows: "In this cause, the motion of L. Kreiss, one of the parties above named, made June 11, A. D. 1888, for the purpose of vacating and setting aside the award in this proceeding, coming on regularly this day for hearing, the said L. Kreiss being represented by Henry E. Highton, Esq., his attorney, and A. P. Hotaling, the remaining party to said alleged arbitration, being represented by A. N. Drown, Esq., his attorney, it appearing to the court that the submission to arbitration filed herein on April 17, A. D. 1888, is not a statutory submission under title 10, sections 1281 to 1290, inclusive, of the Code of Civil Procedure of this state, it is hereby ordered that upon this ground, and for this cause, and for want of jurisdiction thereof, the said motion is now dismissed; and it is further ordered that the judgment entered in form in the said proceeding by the clerk of this court be, and all proceedings thereunder be, and the same hereby are, perpetually stayed. Affidavits of A. P. Hotaling, M. E. Knoph, Augustus Laver, and R. Blum read and filed in opposition to said motion." The appellant claims that this contains two orders. How do we know, then, that there was not a motion and showing, in pursuance of which the second order was made, from which he appeals? However, we think the proper construction of the whole order is that the court denied the specific relief asked for by the moving party, and, in lieu of it, made the order of which appellant now complains. The statement that the motion is dismissed means no more, under the circumstances, than that the application is denied. The judge, therefore, had before him whatever showing was made on the motion, and both parties were present in court. It may be conceded that the order of perpetual stay cannot be justified unless it appeared to the court that the award was wholly void as a judgment. For instance, it may have been made to appear affirmatively that the affidavit and notice required by section 1286, Code Civil Proc., were not filed or given. The clerk is a mere ministerial officer, and could enter such a judgment only when the necessary showing was made, and presumptions, if they are to be indulged in favor of such a judgment, may have been overcome. As the respondent's only remedy was by motion made before the entry of the judgment, this notice was of vital importance. Unless given or waived, the judgment would not be valid. It was not waived in the submission,—conceding that it could have been,—but the importance of the notice was emphasized by the stipulation that, when entered upon the judgment book, the parties would ask for no reduction, new trial, or appeal. In the transcript there is copied what purports to be a judgment roll, and among the papers so designated is an affidavit of respondent which seems to show that he had some kind of notice. If there be any such thing as a judgment roll in cases of arbitration,—which is not conceded,—we still know of no rule which would make this affidavit, made to obtain a stay of proceedings, a part of it. And the same is true of respondent's exceptions, which purport to be a part of his affidavit. We think there can be no doubt of the propriety of an order directing the clerk not to issue execution upon what in form may appear to be a judgment, but which in fact is void. We think the order should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

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92 Cal. 611

PEOPLE *ex rel.* ADAMS, Attorney General, v. CITY OF OAKLAND. (No. 14,468.)

(*Supreme Court of California.* Dec. 31, 1891.)

CITY CHARTER — ANNEXATION OF TERRITORY—AMENDMENT—REINCORPORATION—QUO WARRANTO.

1. Code Civil Proc. § 803, declares that an action may be brought by the attorney general in the name of the people against any "person" who usurps or unlawfully exercises any franchise. Pol. Code, § 17, declares that the word "person" shall include a corporation, as well as a natural person. *Held*, that a municipal corporation is a person, within the meaning of said section; and that, where such a corporation claims the right to govern and tax the inhabitants of territory other than that described in its charter, the right thus claimed is a franchise in addition to and distinct from that of being a corporation, and the exercise of such right is a usurpation, for which the attorney general is authorized to bring an action.

2. Const. art. 11, § 8, provides that when a city charter has been presented to the legislature and approved it shall become the charter and organic law of such city, and shall supersede any existing charter, and all amendments thereof, and all special laws inconsistent therewith. *Held* that, as a description of the territory, whose inhabitants are incorporated, is an essential part of the charter, an amendment of such description by proceedings to annex additional territory is an amendment of the charter, which is wholly superseded by a new charter.

Commissioners' decision. In bank. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

This is an action in the nature of *quo warranto*, brought by the attorney general against the city of Oakland. There was judgment for plaintiff, and defendant appeals. Affirmed.

James A. Johnson, *Wm. R. Davis*, and *Olney, Chickering & Thomas*, for appellant. *H. S. Brown*, *George Leviston*, *W. W. Foote*, and *George A. Johnson*, for respondent.

VANCLIEF, C. This is an action in the nature of *quo warranto*, brought by the attorney general of the state for the purpose of ousting the defendant from municipal jurisdiction over certain territory alleged to be outside of its charter limits. The city of Oakland was incorporated by a special act of the legislature, passed March 25, 1854, (St. 1854, p. 183;) and by a special act of February 19, 1876, it was divided into seven wards, described in the act, (St. 1876, p. 62.) On December 10, 1887, a board of freeholders was elected to prepare and propose a new charter for the city of Oakland, as authorized by section 8 of article 11 of the constitution. This board reported the draft of a new charter, March 8, 1888, which was ratified by a vote of the people at an election held on November 6, 1888, and was approved by a majority vote of each house of the legislature on February 14, 1889. On September 5, 1888, the requisite number of electors petitioned the common council, in accordance with section 7 of the general act of the legislature of March 13, 1883, (St. 1883, p. 93,) to include within the boundaries of the city the territory which is the subject of dispute in this action. For this purpose the council ordered an election, which was held on October 27, 1888, in accordance with section 7 of the said act of 1883, and the result of which was in favor of the annexation petitioned for; and this result was duly reported to the secretary of state, and filed in his office November 21, 1888. The findings of the court, according to the stipulation of the parties, show that the proceedings to adopt a new charter were such as are required by the constitution, and that the proceedings to annex additional territory were strictly in accordance with section 7 of the general act of March 13, 1883. It will be observed that the proceedings to annex additional territory were commenced after the board of freeholders had prepared and reported their draft of the new charter, but were completed more than two months before the new charter was adopted by the legislature, and that the election ratifying the new charter was held 10 days later than the annexation election. The new charter contains a definite description of the territory of the city of Oakland, which does not include any part of the annexed territory, but corresponds with the original charter boundaries. Upon the stipulated findings of fact judgment was rendered in favor of the plaintiff, ousting the defendant of all jurisdiction and control of the territory in question. From this judgment the defendant appeals upon the judgment roll, and contends that, upon the facts found, the judgment should have been for the defendant.

1. The first point made for appellant is that *quo warranto* is not the proper remedy. Section 803 of the Code of Civil Procedure provides: "An action may be brought by the attorney general, in the name of the people of this state, upon his own information, or upon the complaint of a private party, against any person who usurps * * * or unlawfully holds or exercises * * * any franchise within this state." No doubt a municipal corporation is a person in the same sense in which the word is used in this section. Pol. Code, § 17. The facts found according to stipulation of the parties show that the city of Oakland is a municipal corporation, and as such claims and exercises the right and power to govern and tax the inhabitants of certain territory in addition to that described in its charter. The right and power thus claimed and exercised is a franchise in addition to and distinct from that of being a corporation, (Gas Co. v. January, 57 Cal. 616; Spring Valley W. W. v. Schottler, 62 Cal. 106–109; Memphis & L. R. Co. v. Commissioners, 112 U. S. 619, 5 Sup. Ct. Rep. 299; Pierce v. Emery, 32 N. H. 507; Willamette Woolen Manuf'g. Co. v. Bank of British Columbia, 119 U. S. 191, 7 Sup. Ct. Rep. 187;) and the exercise of such power by a municipal corporation over the inhabitants of territory outside of its charter limits is the usurpation of a franchise, for which the attorney general is authorized to bring an action in the name of the people.

2. It is insisted that the territory in question was lawfully annexed to the city of Oakland by the proceedings above stated, which were completed November 21, 1888; and that the annexed territory was not detached by the new charter, adopted February 14, 1889. Admitting, for the purposes of the argument only, that the territory became lawfully annexed on November 21, 1888, I think the effect of the new charter, adopted February 14, 1889, was to detach it. Section 8 of article 11 of the constitution, by the authority of which the new charter was adopted, provides that, when approved by a majority of each house of the legislature, "it shall become the charter of such city, * * * and shall become the organic law thereof, and shall supersede any existing charter, and all amendments thereof, and all special laws inconsistent with such charter." It is not questioned that the new charter was regularly adopted, nor that it became the charter and organic law of the city, on the 14th day of February, 1889; but counsel for appellant contend that a description of the territory of a municipal corporation is no part of its charter, and therefore is not superseded by the new charter, containing a different description from that contained in the original charter. The charter of a municipal corporation being a grant of privileges and powers to a perpetual succession of inhabitants of a particular place or district, how are such inhabitants to be identified without a definite description in the grant

(charter) of such place or district? Dill. Mun. Corp. (4th Ed.) § 20. In his outlines of an ordinary municipal charter, after enumerating several features thereof, the same author (section 39) says: "The charter then defines the territorial boundaries of the town or city thus incorporated." At section 171 he says: "The name of an incorporated place may be changed, and its boundaries enlarged or diminished, and its mode of government altered, and yet the corporation not be dissolved, but in law remain the same." Again, (section 182,) he says: "Since the leading object of an American municipal corporation is to invest the inhabitants of a defined locality or place with a corporate existence, chiefly for purposes of local government, it is obvious that the geographical limits or boundaries of the corporation ought to be defined and certain. These boundaries are usually described in the charter or constituent act, or a method is prescribed therein by which they may be ascertained and settled. Because residence within the corporation confers rights and imposes duties upon the residents, and the local jurisdiction of the incorporated place is, in most cases, confined to the limits of the corporation, it is necessary that these limits be definitely fixed. They are established by legislative authority. The power to incorporate a place necessarily includes power to fix its boundaries." None of the questions that have arisen in some of the cases as to what extent, and for what purpose, a municipal corporation may exercise authority beyond its corporate boundaries,—as to abate a nuisance or to obtain water, etc.,—are involved in this case. Here the sole question is, what have been the corporate boundaries of the city of Oakland since the adoption of the new charter? since it is not claimed that the city has power to govern or tax the inhabitants of territory outside of its charter boundaries. As a description of the territory whose inhabitants are incorporated as a municipal corporation is an essential part of the charter, an amendment of such description of the territory of the city of Oakland by the proceedings to annex additional territory was an amendment of its charter, which was wholly superseded by the new charter framed and adopted under and in accordance with section 8 of article 11 of the constitution. I think the judgment should be affirmed.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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92 Cal. 600

CONBOY *et al.* v. DICKINSON. (No. 13,719.)

(*Supreme Court of California.* Dec. 31, 1891.)

ADJOINING OWNERS—EXCAVATIONS—LAND-SLIDES—DAMAGES—REASONABLE PRECAUTIONS.

1. Where plaintiff contends that defendant so carelessly and malicously excavated his lot as to cause a part of plaintiff's lot to slide into it, and defendant proves that his motive for making the excavation was not malicious, but for a useful purpose, the question of malice becomes immaterial, and an inquiry as to what use the lot could be put to if not excavated is immaterial.

2. Plaintiff sued for damages to his house and lot occasioned by the caving of the lot into an excavation which defendant made on an adjoining lot. Defendant testified that the caving did not injure plaintiff's lot. Plaintiff testified that the house and lot cost him about $2,300, and another witness testified that the value of the property before the excavation was about $3,000, and that afterwards it was about $1,300. The highest estimate of the damage to the house was $350. The court instructed that, if the jury found for plaintiff, he could only recover for the damage to the lot, and not for the damage to the house. *Held*, that a verdict for $500 was not contrary to the instruction, on the ground that there was no evidence of damage to the lot.

3. Civil Code, § 832, provides that each coterminous owner is entitled to the lateral support which his land receives from adjoining land, subject to the right of the owner of said land to make usual excavations for purposes of construction, on using ordinary care and taking reasonable precautions to sustain the land of the other. *Held* that, where the surface of land consists of 12 or 14 feet of earth, and the owner makes an excavation through this to the depth of 40 feet, leaving a bank which slopes to a point at the bottom 20 feet from a perpendicular, and the only precaution taken to sustain the adjoining land is the beginning of the excavation 4 feet from the boundary, it cannot be said that reasonable precautions were taken.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

This was an action by M. J. Conboy and others against Harvey Dickinson, to recover damages occasioned by the caving of his lot into an excavation which the defendant was making on an adjoining lot. There was judgment for plaintiffs, and defendant appeals. Affirmed.

J. F. Cowdery, for appellant. *Wm. & Geo. Leviston* and *Thomas D. Riordan*, for respondents.

BELCHER, C. The plaintiffs owned a lot fronting on the south side of Vallejo street, in the city of San Francisco. On the lot was a one-story dwelling-house, which covered the whole of it, except a yard at the rear end, about seven feet deep. The lot was on a level with the grade on the street in front of it. The defendant owned a lot fronting on the west side of Montgomery street, which adjoined the south end of plaintiff's lot. For the purpose of building on his lot, defendant commenced excavating it in 1888, and continued the work until one of the first days in March, 1889. At the front end of the lot he excavated it to a depth of 8 or 10 feet below the grade of Montgomery street, and at the rear end to a depth of 40 feet below its natural surface. Adjacent to the rear end of plaintiff's lot he left undisturbed a strip about 4 feet wide, from which there was a slope extending out at its base about 20 feet from a perpendicular line from the top. On the surface the earth was about 12 or 14 feet deep, and underneath was a sandy rock, with seams running back through it. On the 11th of March, 1889, a heavy rain fell, and there was a slide into defendant's excavation, which extended back for some distance under the south-east corner of plaintiffs' house. Plaintiffs brought this action to recover damages, caused by this slide to their property, in the sum of $3,000; and they alleged that defendant "carelessly, negligently, and maliciously excavated his lot close up to the south line and southeastern corner of plaintiffs' lot to a depth of about 40 feet below the surface of plaintiffs' lot, and without taking any precaution to sustain the land of plaintiffs;" that by reason of such excavation a large quantity of earth slid off the south-east corner of plaintiffs' lot, destroying, etc. The defendant denied these averments, and denied that by reason of any excavation made by him on his lot plaintiffs had been damaged in the sum sued for, or in any sum whatever. The case was tried by a jury, and a verdict returned in favor of plaintiffs for $500, on which judgment was entered. The defendant moved for a new trial, which was denied, and then appealed from the judgment and order. At the trial "it was admitted by stipulation that the slide of land from plaintiffs' premises was not caused or assisted in any respect by the plaintiffs' house, which covered the entire lot except the rear seven feet, nor by any structure on said lot, nor by the weight of the house or structures." And at the conclusion of the evidence "the court, among other things, instructed the jury that in case they found for the plaintiffs the plaintiffs were only entitled to recover for the damage done the land, and not for damage done the house."

1. When the defendant was on the stand as a witness in his own behalf, he was asked by his counsel: "Do you know of any use that lot of yours could be put to if it had not been excavated?" The question was objected to by plaintiffs as irrelevant and immateral, and the objection sustained. It is now urged that this ruling was erroneous, because the question was asked to meet the plaintiffs' charge that defendant made his excavation for a malicious purpose; and counsel says: "Defendant proposed to show absence of malice by showing that his excavations were made for a useful purpose." But defendant did testify, without any objection: "I was engaged in excavating my lot for the purpose of building on it;" and his counsel say that "all the evidence showed that the defendant was grading his lot for a useful purpose." It must be admitted, therefore, that it was proved, without conflict, that his motive in making the excavations was proper, and not malicious. Besides, it does not appear that any exemplary damages were awarded by the jury, and hence the question of malice becomes immaterial.

2. It is also urged that the verdict was contrary to the instructions of the court, because there was no evidence as to the damage done to the land as distinguished from the proved damages done to the house. And it is said: "The evidence was all one way respecting damage to the land. It was positively shown that the land had not been injured at all." It is true defendant testified: "This caving did not hurt it at all; it did it good. Conboy ought to pay me something for it, because it forced upon Conboy to fix his house when it might tumble down. It is now well supported; infinitely better than it ever was." But the plaintiff Conboy testified that the house and lot cost him about $2,300, and another witness testified that the value of the property before the excavation was about $3,000, and at the time of the trial (September, 1889) about $1,200 or $1,300. It was also proved that the premises were in the same condition at the time of the trial as at the time of the slide, except that the house had been braced up; and the highest estimate of the damage done to the house was $350. Moreover, by consent of both parties, the jury, during the trial, visited and inspected the premises. The question as to what damage was done to the lot was a question of fact for the jury, and, looking at all the evidence, we cannot say that the verdict was contrary to the instructions of the court and not justified.

3. It is further claimed that defendant had a right to excavate his lot for the purpose of building on it, and he used ordinary care and skill in making his excavations, and took reasonable precautions to sustain plaintiffs' land, and hence was not responsible for any damage done thereto. This position is rested upon section 832 of the Civil Code, which reads: "Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations." In Aston v. Nolan, 63 Cal. 269, the court, speaking of the law as it existed before the enactment of this section, said, quoting from Washburn on Real Property: "Every one has so far the right to have his own soil sustained by that of his neighbor that the latter may not dig so near to the land of the former as to cause the same to fall into the excavation by its own natural weight. He ought to guard against such a consequence by proper care, and the application of proper means of support. The right of lateral support in such case is an incident to the land itself. In the language of Rolle: 'It seems that a man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into the pit, and for this, if an action were brought it would lie.'" And, speaking of the notice provided for, it was said: "It is apparent that by giving the notice a person excavating cannot relieve himself of any portion of the prudent care with which he must have conducted the work in the absence of the statutory provision requiring notice. His excavation must be such as would not have caused the soil of the adjacent lot to tumble in had it remained in its natural state, not built upon. * * * The object of the notice is that the owner of the building may have his attention called to the work, and, if necessary, shore up his wall or strengthen his foundation."

And, again: "Since the enactment of the Code the rights and duties of adjoining proprietors, with reference to the matter in hand, are substantially the same as they were before, provided notice is given by the party intending to excavate." As to whether reasonable notice of his intention to excavate was given by defendant need not be considered, since it was stipulated that the slide which did the damage was in no way caused by the weight of the plaintiffs' house.

The only question, then, is: Did the defendant take "reasonable precautions to sustain the land" of plaintiffs. He testified, "I used every precaution to sustain plaintiffs' land," but the only precaution specified is that he stopped his excavations 4 feet from their line. In view of the fact that he was excavating to a depth of 40 feet below the surface, can it be said that this was a reasonable precaution? The answer must be in the negative. The work was completed early in March, and heavy rains at that season of the year might be expected. The bank was left with a steep slope, and the earth at the top was 12 or 14 feet deep. Under such circumstances, it would seem that any reasonable man would naturally anticipate just what occurred as the result of the excavation. In our opinion, the motion for a new trial was properly denied, and we advise that the judgment and order be affirmed.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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93 Cal. 126

DAVIS v. LEZINSKY. (No. 13,950.)

(*Supreme Court of California.* Jan. 30, 1892.)

JUDGMENT—INCONSISTENT RECITALS—PRESUMPTION.

Where a judgment recites that the cause was tried on the papers and records on file, with statements made by the parties, and adds, "There being no evidence, the cause was thereupon submitted," etc., and judgment rendered for plaintiff, such apparent inconsistency does not rebut the presumption of the correctness of the judgment, it being as susceptible of a construction that will sustain the judgment as of a construction that will defeat it.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Joseph Davis against George Lezinsky. Judgment for plaintiff. Defendant appeals. Affirmed.

Franklin P. Bull and *Wm. A. Beatty*, for appellant. *M. J. McGrath*, for respondent.

VANCLIEF, C. Action on a promissory note payable to A. Davis & Son or order, by whom it was alleged to have been assigned to the plaintiff. The note is set out in the complaint. The complaint not being verified, the unverified answer of the defendant denies generally each and every allegation of the complaint; and for a further answer alleges that A. Davis & Son "has never complied with the provisions of sections 2466 and 2468 of the Civil Code of this state," and "that Joseph Davis, the plaintiff abovenamed, is the sole member of the said firm of A. Davis & Son." The plaintiff had judgment, from which the defendant brings this appeal on the judgment roll, without a bill of exceptions. The judgment is preceded by the following recitals: "This cause came on regularly for trial this day before the court, sitting without a jury; M. J. McGrath appearing as counsel for the plaintiff, and the defendant appearing in person. The cause was tried upon the papers and records on file herein, together with the statements made by the respective parties. There being no evidence offered, the cause was thereupon submitted to the court for consideration and decision; and now, the court having fully considered the same, it is ordered that judgment be, and the same is hereby, entered herein in favor of the plaintiff, and against the defendant, for $500, and interest in accordance with the prayer of the complaint. Findings are hereby waived." It is contended by appellant that the recitals in the judgment show that it was a judgment on the pleadings merely, without any proof of the assignment or non-payment of the note. The recitals show that the cause was tried upon the papers and records on file, together with the statements made by the respective parties, the defendant appearing in person. If nothing more than this had been recited, there would be no doubt that the judgment is correct. It is true that the further recital, viz., "There being no evidence offered," taken in its technical sense, seems inconsistent with the recital preceding it; but the meaning intended may have been only that there was no sworn testimony, or that there was no other evidence than the statements of the parties and the papers on file, since it is possible that the court intended to distinguish the statements and admissions of the parties, not made under oath, from evidence. However this may be, the presumption is that the judgment is correct until proved otherwise, and the burden of overcoming this presumption is upon the appellant. He does not shift or discharge the burden by merely showing an apparent inconsistency in the recitals which may as well be reconciled in favor of the judgment as against it. In other words, if the recitals, read together, are as susceptible of a construction which will sustain the judgment as of a construction which will defeat it, the presumption in favor of the judgment requires that the former construction be adopted. The real point made by the appellant is that the evidence was insufficient to justify the findings of fact implied in the judgment, express findings having been waived. This question might have been raised and presented on its true merits, by motion for new trial or bill of exceptions containing a statement of the evidence or want of evidence. I think the judgment should be affirmed.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

93 Cal. 120

Dorland v. Smith. (No. 14,067.)

(*Supreme Court of California.* Jan. 30, 1892.)

Street Assessment Lien—Foreclosure—Setting Aside Sale.

1. An order made in 1887, that execution issue on a decree foreclosing a street assessment lien entered in 1881, was unauthorized, being more than five years after the decree, and a sale under such execution is void.

2. Where a decree foreclosing a street assessment lien was entered, and the premises afterwards sold before execution issued, the vendor could not afterwards waive the right of his vendee to object to a sale of the property under a void execution.

3. Where the attorney for plaintiff in a suit to foreclose a street assessment lien purchased the property at the sale on execution, and had notice of a motion to set aside the order for execution and the sale thereon, and appeared at the hearing, he cannot complain on appeal that plaintiff was not served with notice of the motion on the ground that his relation of attorney was severed by the sale of the property to himself and the payment of the purchase money to plaintiff, and that notice to him was not notice to plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. McM. Shafter, Judge.

Action by Alice Dorland against Joseph Smith to foreclose a street assessment lien. After decree defendant sold the premises to Romain C. De Boom, who, after a sale of the premises to J. M. Wood on execution of the decree, moved to set aside the execution sale. The motion was granted, and J. M. Wood appeals. Affirmed.

J. C. Bates, for appellant. *Gordon & Young*, for respondent.

Vanclief, C. This action was commenced May 13, 1879, in the late district court of the twenty-third judicial district for the city and county of San Francisco, to enforce the lien of a street assessment on a lot on Mission street, then the property of the defendant. A decree enforcing the lien by sale of the lot was entered January 11, 1881. On July 11, 1883, and before the issuing of an execution upon this decree, the defendant conveyed the lot to Romain C. De Boom. On February 28, 1887, the superior court, on motion of plaintiff's attorney, without notice to De Boom or defendant, made an order directing that execution issue on the decree. An execution (order of sale) was accordingly issued on March 1, 1887, and on March 26, 1887, the sheriff sold the lot at public auction to plaintiff's attorney, J. M. Wood, for the sum of $834.43, which was applied to the satisfaction of the assessment and costs. On April 25, 1890, pursuant to previous notice served on J. M. Wood, Esq., De Boom moved the court to vacate and set aside the order of February 28, 1887, directing that execution issue; and also to set aside the sheriff's sale of the lot to J. M. Wood, on the grounds that the order was unauthorized and illegal, for the reason that more than five years had elapsed between the date of the entry of the judgment and the date of the order; and that the execution and the sheriff's sale under it were unauthorized and void for the same reason. This motion was granted. The order of February 28, 1887, was vacated, and the sheriff's sale to J. M. Wood was set aside. From this order J. M. Wood alone brings this appeal upon the judgment roll, including a bill of exceptions. The motion was heard upon the judgment roll, the order of sale and sheriff's return thereon, the papers on file in the case, and the affidavits of De Boom and J. M. Wood. The order of February 28, 1887, does not appear in the record, and there is nothing tending to show the ground upon which it was made, except the affidavits of the parties, which state that it was made on the ground that plaintiff had been restrained from enforcing the decree from September 2, 1882, until January 6, 1886. But as to the fact of such restraint, the affidavits are contradictory; that of De Boom denying that plaintiff was restrained at all for any period of time, while that of appellant simply states that plaintiff was so restrained "by order of court," without specifying any particular order. The affidavit of De Boom states that for nine years last past he resided in Napa county, and had no notice of the order of February 28, 1887, nor of the sheriff's sale to J. M. Wood, until within the last three weeks, and this is not denied. The court had no power to make the order of February 28, 1887, directing the issuance of execution after the expiration of five years from the entry of the judgment, even though the plaintiff had been restrained by order of court from executing the judgment, as claimed by appellant. Therefore the order, the execution, and the sheriff's sale under the execution were void. Dorland v. Hanson, 81 Cal. 203, 22 Pac. Rep. 552; Buell v. Buell, (Cal.) 28 Pac. Rep. 443; Stout v. Macy, 22 Cal. 647; Bowers v. Crary, 30 Cal. 622. It follows that the court properly vacated the order of February 28, 1887, and set aside the unauthorized sale by the sheriff, upon motion of De Boom, the purchaser from the defendant of the property attempted to be sold. People v. Mullan, 65 Cal. 396, 4 Pac. Rep. 348.

It is contended for appellant, however, that, as it does not appear that defendant has complained of the order of February 28, 1887, it must be presumed that he waived the right to complain of it; and that De Boom is bound by defendant's waiver. In the first place, it appears by the uncontradicted affidavit of De Boom that defendant had no notice of the application for that order; and, in the second place, it is not perceived that defendant could have waived the right of his vendee to object to a sale of his property under a void execution. It is also claimed for appellant that the order appealed from is erroneous, because no notice of the application for it was served upon the plaintiff. A written notice of the application, addressed to plaintiff and her attorney in the action, (J. M. Wood,) was duly served upon the latter, who claims, however, that his relation of attorney for the plaintiff in the action was severed by the sale of the property to himself and the payment of the purchase money to the plaintiff, after which notice to him was not notice to the plaintiff. Perhaps this objection might have been taken by the plaintiff had she appealed from the order; but I think it is not available to the appellant, who had notice, and who appeared and resisted the motion. So far as the merits or demerits of the motion were concerned, the appellant was at liberty to oppose it on any ground which could have been urged by the plaintiff. The only ground upon which the motion rested was that the order directing execution to issue was made more than five years after the entry of the judgment. Appellant was at liberty to show, if he could, that such was not the fact. But he did not dispute it, and the record which he has brought here shows that it was indisputable. It therefore appears that he was not injured by want of notice to plaintiff of the motion to vacate the order of February 28, 1887. I think the order should be affirmed.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

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93 Cal. 139

76 LAND & WATER CO. v. SUPERIOR COURT OF FRESNO COUNTY. (No. 14,569.)

(*Supreme Court of California.* Feb. 1, 1892.)

SPECIFIC PERFORMANCE — DECREE—LACHES—CONTEMPT—REVIEW ON APPEAL.

1. A decree for specific performance of a land contract found that plaintiff was entitled to such performance by a payment on or before October 1, 1890, and that on such payment on or before that date defendant should execute to plaintiff a deed of the premises. Plaintiff tendered payment, January 3, 1891, when the decree was affirmed on appeal. *Held*, that under Civil Code, § 1492, which provides that, where delay in performance is capable of exact compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, with an offer of such compensation, may be made at any time after it is due, plaintiff's right to performance did not depend on payment by the day named.

2. Under Code Civil Proc. § 684, relating to the enforcement of judgment, where defendant refuses to make a deed as directed by a decree for specific performance of a land contract, he is guilty of contempt of court.

3. On review of contempt proceedings, it is presumed that the court, having jurisdiction, properly considered all matters offered in defense or extenuation, and its judgment is conclusive.

Certiorari to review the proceedings.

W. S. Goodfellow, for petitioner. *Thompson & Thompson*, for respondent.

DE HAVEN, J. This is a proceeding upon *certiorari*, for the purpose of reviewing the action of the superior court of the county of Fresno in adjudging the petitioner guilty of contempt. On February 21, 1890, that court, in an action therein pending for specific performance of an agreement to convey land, in which one Abbott was plaintiff, and the petitioner here the defendant, entered a judgment in favor of the plaintiff, Abbott, the material part of which is as follows: "It is hereby ordered, adjudged, and decreed that the plaintiff herein, O. L. Abbott, have judgment as prayed for herein against the defendant, the 76 Land & Water Company, (a corporation,) that as to all that certain tract or parcel of land, situated in the said county of Fresno, * * * described as follows, to-wit: * * * The said defendant, the 76 Land & Water Company, (a corporation,) is the trustee of said plaintiff, O. L. Abbott, and, as such trustee, said defendant holds the legal title to said property in trust for plaintiff, the said legal title to be by defendant conveyed unto plaintiff by defendant on payment therefor as herein provided; that said plaintiff is the owner of the right to buy the said 320-acre parcel of land * * * of and from defendant for the sum of forty-eight hundred ($4,800) dollars, payable one-fourth in cash, and the remainder on or before the 1st day of October, A. D. 1890, with interest on the deferred payment, the remaining three-fourths ($3,600) at the rate of eight per cent. per annum, payable annually in advance, from October 1, A. D. 1887; * * * and upon said payment of one-fourth of the purchase price and interest on the balance thereof as above mentioned, * * * and upon full payment of the balance, the remaining three-fourths, to-wit, $1,600, and all accrued interest thereon, on or before the 1st day of October, A. D. 1890, defendant do make, execute, acknowledge, and deliver unto plaintiff a full and sufficient deed of grant and conveyance of all of said above-described 320-acre parcel of land." The petitioner took an appeal from said judgment to this court, but the execution thereof, except as to costs, was not stayed by any undertaking, and upon January 3, 1891, the judgment was affirmed. The amount named in the judgment, upon the payment of which the petitioner was thereby required to convey to plaintiff in that action the land described in the judgment, was not tendered to the petitioner until after January 3, 1891, and when so tendered the petitioner refused to accept the same or make the conveyance directed by the judgment. It was for the refusal to make such conveyance, after the service upon it on June 9, 1891, of a certified copy of the judgment above set out, and the tender of the money therein required to be paid it upon the execution of such conveyance, that the petitioner was adjudged guilty of contempt of court.

1. It is claimed by the petitioner that the judgment in the action for specific performance only gave to the plaintiff therein a mere option to purchase and pay for the land mentioned on or before October 1, 1890, which was lost to him by his failure to tender the purchase price therein named until after that date, and that the court was for this reason without jurisdiction to punish it for its refusal to make a conveyance upon the tender of payment made after that date. But in placing this construction upon that judgment petitioner has entirely misconceived its scope and effect. On the contrary, it was a judicial determination of the existence and validity of the contract named in the complaint in that action, and is to be construed as being in substance and effect a judgment for the specific performance of that con-

tract by the parties thereto, and could be enforced as such by proper proceedings upon the part of either the plaintiff or the defendant in the action. Clark v. Hall, 7 Paige, 382. The fact that the judgment fixes the date when, according to the contract to be enforced, the plaintiff was to make such payment, does not make his right to the enforcement of such judgment depend upon payment by the day named. In an action by a vendee to enforce specific performance of a contract to convey, the court may, if the vendor asks it, make a decree, as in the case of a strict foreclosure, that, if the vendee does not pay the purchase money within such time as may be limited by the court for that purpose, he shall be barred of his right to insist upon a specific performance afterwards. Clark v. Hall, supra; Connecticut v. Sheridan, Clarke Ch. 534. But, in the absence of an explicit declaration to that effect in the decree, it cannot be construed as giving to the defendant any such relief; and the equitable rule embodied in section 1492 of the Civil Code, that "where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due," is as applicable to such a judgment as to the contract upon which it is based.

2. The affidavits upon which the petitioner was cited to appear before the superior court and show cause why he should not be punished for contempt were sufficient to give the court jurisdiction in that proceeding. There can be no doubt that the willful refusal of a party to comply with the decree of a court of competent jurisdiction, directing him to execute a conveyance, constitutes a contempt of such court, and may be punished as such. Rap. Contempt, § 35. And section 684 of the Code of Civil Procedure contemplates that the court may resort to proceedings in contempt for the purpose of enforcing obedience to a judgment which requires the execution of a conveyance by a party thereto.

3. It may be conceded that if the superior court had been satisfied that the defendant in its refusal to make the conveyance acted in good faith, under the belief that the judgment had expired by its own limitation, and under the advice of counsel, it would have been a wise exercise of its discretion to have made the execution of the judgment for contempt conditional upon the failure of the petitioner to execute such conveyance within a reasonable time thereafter, but there is a conclusive presumption that the court properly considered all matters offered by the petitioner in defense or extenuation, and, having jurisdiction in the proceeding, its judgment is conclusive, and must be affirmed.

Judgment affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; SHARPSTEIN, J.; PATERSON, J.

HARRISON, J., being disqualified, did not participate in the foregoing opinion.

76 LAND & WATER Co. v. SUPERIOR COURT OF FRESNO COUNTY. (No. 14,570.)

(*Supreme Court of California.* Feb. 1, 1892.)

In bank.

W. S. Goodfellow, for petitioner. *Thompson & Thompson*, for respondent.

DE HAVEN, J. Application for a writ of prohibition to be directed to the superior court of the county of Fresno. It appears that the petitioner has been cited to appear before that court to show cause why he should not be punished as for a contempt, for its refusal to execute certain conveyances, as directed by the judgment of that court in certain actions severally commenced by J. B. Shipe and S. B. Abbott, and in each of which the petitioner was a defendant. The facts made to appear to the superior court, and upon which its said order to petitioner to show cause is based, are substantially the same as in the case of Water Co. v. Superior Court, (No. 14,569,) 28 Pac. Rep. 813, the opinion in which has been this day filed; and upon the authority of that case we hold that the superior court has jurisdiction of the said proceeding against petitioner, and the alternative writ of prohibition heretofore issued herein is discharged, and the application for a peremptory writ denied. So ordered.

We concur: McFARLAND, J.; GAROUTTE, J.; SHARPSTEIN, J.; PATERSON, J.

HARRISON, J., being disqualified, did not participate in the foregoing decision.

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93 Cal. 172

MORTIMER v. MARDER *et al.* (No. 13,836.)

(*Supreme Court of California.* Feb. 3, 1892.)

CONVERSION—VALUE OF GOODS—WIFE'S SEPARATE PROPERTY—PROOF OF FOREIGN LAWS—HARMLESS ERROR—CERTIFICATE OF PARTNERSHIP.

1. In an action for the conversion of goods the evidence showed that the goods were second-hand, and of no market value, and that they had been converted by defendants. Further evidence by plaintiff, not objected to by defendants, showed when and at what price the property had been purchased, how it had been used, its condition and depreciation, and both plaintiff and her husband testified that it was worth $2,000. *Held*, that such evidence was sufficient to sustain a verdict for that amount.

2. Where plaintiff and her husband, in an action for the conversion of goods, both testify that the goods were plaintiff's separate property, purchased with her money, it is sufficient evidence that the goods were her separate property.

3. Where it is contended that the law of a foreign state should govern in a certain case, but there is no evidence as to what that law is, it will be presumed it is the same as the law of the tribunal.

4. Where plaintiff in an action for the conversion of goods sought to recover for the time she had spent in pursuit thereof, and the jury returned a verdict which the court reduced to the actual value of the goods as testified to by plaintiff, there was no error prejudicial to defendant in admitting evidence of the value of plaintiff's time spent in such pursuit.

5. Civil Code, §§ 2469–2471, provide that on every change in the members of a partnership transacting business under a fictitious name or a designation which does not show the partners' names, a new certificate of partnership must be filed with the proper officer, certified copies of which are presumptive evidence of the facts therein stated. *Held*, that such certified copy was competent evidence to prove a partnership, there being nothing to show that any later certificate had been filed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Elizabeth H. Mortimer against John Marder and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Campbell & Wright, for appellants. *E. W. McGraw*, for respondent.

FOOTE, C. This action was brought to recover of the defendants damages for their having caused the personal property of the plaintiff to be seized in attachment in an action in the state of Oregon, brought against the plaintiff's husband, J. D. Mortimer, by the defendants, and for their having caused the same to be sold under execution, bought in by a third party, and wholly lost to the plaintiff, and thereby converted wrongfully to the use of defendants. It is alleged that the value of the property thus converted was $2,000, and that the plaintiff spent three months of time and $500 in pursuit of the property. Judgment was prayed for $2,000 and interest from the date of the alleged conversion,—April 8, 1884,—and for the further sum of $1,000 and costs. The cause was tried before a jury, who rendered a verdict in favor of the plaintiff for the sum of $2,612.50, upon which judgment was duly given and made. A motion for a new trial being made, the trial court was of opinion that the verdict was excessive, and that the same should be reduced to the sum of $2,000, and accordingly directed that, unless the plaintiff remitted the excess, a new trial should be granted. The plaintiff entered an acceptance of the reduction thus ordered, and thereupon the motion for a new trial was denied. From the judgment above adverted to, and the order refusing a new trial, this appeal is taken.

One point which appears to be insisted on by the defendants for a reversal of the judgment and order is that there is no proper legal evidence to sustain the verdict. They seem to rest this assumption upon the idea that the evidence shows (1) that there was no value whatever of the converted property proven on the trial; (2) that the property was community property; (3) if not that, it was partnership property; (4) that the goods levied on were purchased with money which was community or partnership property. As to the evidence given in relation to the value of the property, it is to be said that it was shown that it had no market value; that it was second-hand property, and had been lost by the conversion of the defendants, which being so, and no objection being offered to the introduction of the further evidence which tended to show when the plaintiff purchased the property, what it then cost her in the market, how it had been used, and what its condition was, and what the depreciation was, if any,—both the plaintiff and her husband testifying that the property seized was worth at least $2,000, and that it was her separate property, purchased with her separate moneys,—it would seem that the evidence of value, unobjected to by the defendants, was a proper basis on which the jury might legitimately fix the value of the same in rendering their verdict. As remarked in Jones v. Morgan, 90 N. Y. 10, under a similar state of facts: "It was incumbent on the plaintiff to make the best proof she could. * * * There seems to have been no other feasible way to ascertain the value."

The plaintiff and her husband both testified, as heretofore stated, that the property seized was her separate property, purchased with her money. If the jury believed them, as was their right, we do not perceive that it can be said that it was community or partnership property, notwithstanding that ordinarily, where property is purchased at the time this was, and after the marriage of the parties, it would be presumed to belong to the community, and would require satisfactory proof to the contrary to rebut that presumption. Moore v. Jones, 63 Cal. 14, 15.

The contention is also made that, as the money originally was given the plaintiff in England, and then was invested in Nebraska, and from there taken to Oregon and invested in the property involved here, the law of California, where the action is brought, as to community property, should not prevail, but that of the common law, although there is no evidence in the case as to what the law of the foreign state is. This position, being in direct conflict with the decisions in this state, need not be further considered. Hickman v. Alpaugh, 21 Cal. 226; Hill v. Grigsby, 32 Cal. 60; Marsters v. Lash, 61 Cal. 624; Shumway v. Leakey, 67 Cal. 460, 8 Pac. Rep. 12.

It is said by the appellants that evidence was inadmissible to prove the value per week of the plaintiff's time while pursuing the property. But the court below reduced the verdict to the actual value of the property as testified to by the plaintiff, and there could be no prejudicial error, therefore, even if it be conceded, though not decided, that this evidence was inadmissible, and tha tthe answer of the defendants did not admit the value of her time to have been more than she testified to.

A certified copy of a certificate of partnership of the defendants Marder, Luse & Co., filed in San Francisco, Cal., was introduced by the plaintiff, and objected to by the defendants. It tended, as we think, to show that two of the defendants here were members of the firm,—that is, John Marder and A. P. Luse,—and was competent evidence, there being nothing to show that any new certificate had been filed. Civil Code, §§ 2469–2471. We think also that the nonsuit was not improperly denied as to John Marder and A. P. Luse We have examined with care and attention the other points made by the appellants as to the action of the court below in refusing to admit evidence proposed by the defendants, but do not perceive any prejudicial error, and we therefore advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

3 Cal. Unrep. 441

PEOPLE v. McNULTY. (No. 20,659.)[1]

(*Supreme Court of California.* Dec. 12, 1891.)

CONSTITUTIONAL LAW — EX POST FACTO LAWS — SENTENCE ON CONVICTION OF MURDER—STATUTE UNCONSTITUTIONAL IN PART—EFFECT.

1. Pen. Code, § 1217, provides that the warrant for the execution of a prisoner sentenced to death must appoint a day for the execution, "which must not be less than thirty or more than sixty days from the time of judgment." Section 1227 imposes on the sheriff the duty of executing criminals. Section 1229 directs that the execution must take place in the county where judgment is rendered. Laws 1891, p. 272, amended these sections by providing that the day of execution "must not be less than sixty or more than ninety days from the time of judgment," and that the warrant must also direct the sheriff to deliver the prisoner to the warden of one of the state-prisons, on which officer is imposed the duty of executing criminals, and directing that the execution take place in the prison to which the criminal is delivered. *Held ex post facto* as regards prisoners awaiting execution, because imposing greater punishments by the confinement in the state's prison than the acts repealed.

2. Where it is evident that the legislature in passing such statute intended it to apply the new punishment alike in all cases of murder, past as well as future, and would not have passed it except as an entirety, and that its partial enforcement would produce effects which the legislature would never have sanctioned, the whole act must be declared unconstitutional. HARRISON, DE HAVEN, and GAROUTTE, JJ., dissenting.

In bank. On rehearing. For former report, see 26 Pac. Rep. 597.

Wilson & Troutt, *Carroll Cook*, *J. E. Foulds*, and *Wm. Hoff Cook*, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

BEATTY, C. J. The defendant was accused by information of the crime of murder, alleged to have been committed in March, 1888. In August, 1888, he was convicted of murder in the first degree, and, in accordance with the law as it then stood, was sentenced to be hanged by the sheriff in the county jail. On appeal to this court the judgment of the superior court was affirmed. 26 Pac. Rep. 597. But before a *remittitur* had issued our attention was called to certain amendments to the Penal Code, enacted by the last legislature, pending the appeal, changing the method and time for executing capital sentences, which, it is contended, are inapplicable to the case of this appellant, because they are, as to him, *ex post facto*, but which at the same time have the effect of repealing the old law, under which alone he could have been executed, the result being, as claimed, that in consequence of a blunder of the legislature he and all others in his situation must go free of all punishment. For the purpose of considering and determining this important question the judgment of affirmance was vacated and a reargument ordered. The case having been again argued and submitted, we are now to decide upon the effect of the legislation referred to.

The question involved is no less than this: Whether, since the date fixed for the taking effect of the amendatory statute,—May 30, 1891,—capital punishment can be inflicted in any case of murder, however atrocious, committed prior to that date; and whether, in a case like this, where a judgment of death, free from error, had been entered, but not executed, prior to said date, any punishment whatever can be inflicted. The gravity of this question will be better appreciated when it is understood that there are, according to the statement of the attorney general, no less than 18 convicted murderers whose fate depends upon its solution, and who, if it is determined in favor of the contention of the appellant, must be turned loose upon society, unless this court shall, as his counsel suggests, reverse the judgments, with or without reason, and remand the cases for new trials, in the hope that the juries before whom they may be again tried will, as in their discretion they might, impose the lighter penalty of imprisonment for life, in order to prevent the most deliberate murderers from going absolutely unpunished. We do not, however, feel at liberty to resort to such an evasion, or to convey such a suggestion to the superior court. We have already determined that the judgment in this case is free from error; that the appellant was duly and legally convicted and sentenced to die, according to the law of the land as it existed at the date of the judgment and at the date of the murder. Other cases must be decided according to the same rule and the same law. If in such cases we find, as we have found in this case, that the judgments are regular and valid, we must so declare; and if it is true, as contended, that the sentence in this case cannot be executed by reason of the repeal of the only law under which it could have been executed, and that the appellant must go free, so must all others in his situation. With a thorough appreciation, therefore, of the consequences to flow from our decision, we proceed to consider the case.

It is to be premised that from an early period in the history of California the crime of murder—the unlawful killing of a human being with malice aforethought—has been divided into two degrees,—murder of the first and murder of the second degree. Without undertaking to state fully the distinction between the two crimes, it is sufficient for our purpose to say that the first degree includes those murders which are marked by deliberation or cruelty, or which are committed in the perpetration or attempt to perpetrate certain enumerated felonies of the gravest character. It has been the unvarying expression of the legislative will, sustained by the sentiment of the people of California, that such murders deserve the penalty of death by hanging, unless (according to a comparatively recent enactment) the jury trying the case, in their discretion, expressly determined by their verdict that the defendant may be punished by imprisonment in the state-prison for life. Pen. Code, § 190; People v. Welch, 49 Cal. 174. In this law there has been no change since the commission of the homicide of which the appellant was convicted. It remains, with the modification referred to, as it has remained for almost half a century, the settled policy of the state. There has never been manifested any intention on the part of the legislature or desire upon the part of the people that the death penalty in aggravated cases of murder should be abolished. On the contrary, the very latest expression of the legislative will is in favor of its continued infliction, with what counsel for appellant contends are added penalties and greater severity, resulting from the different manner prescribed for carrying it into execution. The recent amendments to the Penal Code, the effects of which we are to consider, do not present the first instance of changes made by the legislature in the manner of conducting the execution of capital sentences. Formerly, and for a long time, executions were public; but afterwards the law was so amended as to require the execution to be conducted within the jail, and with comparative privacy. It has never been contended, so far as we are aware, that this amendment was void with respect to previous offenses on the ground of being *ex post facto*, although we think it would be shown by reasoning no less logical, and upon grounds no more fanciful, than are contained in the argument of counsel here, that execution within the walls of a jail before sunrise, (Holden v. Minnesota, 137 U. S. 491, 11 Sup. Ct. Rep. 143,) and in presence of the few persons designated by statute, or invited by the sheriff, would to many convicts be vastly more terrible than execution in public, in the light of day, in the presence of all who choose to attend, including friends, relatives, and sympathizers. If this is so, or even if it may reasonably be supposed to be so, then, according to the argument, such an alteration of the law would be *ex post facto*, and void as to all previous offenses, though it was held otherwise in the case last referred to.

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[1] Modified on rehearing, 29 Pac. Rep. 61.

It must be admitted, however, that the supreme court of the United States found and declared a distinction, material in its view, between the statute of Minnesota—considered in the Holden Case—and the statute of Colorado, under which the Medley Case arose. Ex parte Medley, 134 U. S. 160, 10 Sup. Ct. Rep. 384. In that case Medley was convicted of murder, and sentenced to be hanged in the manner and at the time and place prescribed by a statute which did not go into effect, although passed, before he committed the murder. Pending the execution, and while in the custody of the warden of the penitentiary, he sued out a writ of *habeas corpus* in the supreme court of the United States, where it was held that the statute referred to prescribed a different and severer punishment than that provided in the statute existing at the date of the murder; that it was, therefore, as to him, an *ex post facto* law, such as the states are by the federal constitution forbidden to pass, (article 1, § 10,) and incapable of enforcement. It was also at the same time held that since, according to the decision of the Colorado courts, the amendatory act had gone into effect, and thereby necessarily repealed the former law regulating the execution of capital sentences, there remained no law under which the petitioner could be punished, and he was accordingly discharged. Evidently, if our amendatory statute makes, as is contended, substantially the same changes in our law as were effected by the statute of Colorado, the same results must follow; that is to say, the sheriff cannot execute the judgment against the appellant, for the law authorizing him to act has been repealed; and, if the judgment is modified so as to conform to the new regulation, the supreme court of the United States will, as soon as the appellant is committed to the custody of the warden of the penitentiary, discharge him upon *habeas corpus*. In other words, we have here a federal question; a question of the validity of a state law, depending upon its conformity to the behests of the constitution of the United States; a question upon which the decisions of the supreme court of the United States are of binding and conclusive authority. It becomes necessary, therefore, to carefully examine and compare the two laws,—that of Colorado and that of California,—in order to determine whether this case falls within the principle of the Colorado case, and is governed by it.

The Colorado statute, (Laws 1889, p. 118) is quoted at page 163, 134 U. S., and pages 384 and 385, 10 Sup. Ct. Rep. According to the contention of the petitioner in that case, there were no less than 20 variances between the statute in force at the date of the murder and that under which he was sentenced, all of which he claimed to be changes to his prejudice and injury, and therefore *ex post facto*. The court, however, found it unnecessary to examine all these specifications, being satisfied that in two important particulars the law was infected with the vice imputed to it. According to the old law, every person convicted of murder in the first degree was to suffer death by hanging, at such time as the court should direct, not less than 15 nor more than 25 days after sentence, unless for good cause the governor should prolong the time. Pending the execution the prisoner was to be kept in the county jail, under the control of the sheriff of the county, who was the officer charged with the execution of the sentence. Solitary confinement was neither authorized by the former statute nor was its practice in use in regard to prisoners awaiting the punishment of death. By the new statute the judge passing sentence of death was required to issue a warrant directed to the warden of the penitentiary, appointing and designating therein a week of time within which such sentence must be executed, such week so appointed to be not less than two nor more than four weeks from date of sentence, commanding said warden to do execution of the sentence imposed upon some day within the week of time designated in the warrant. This warrant was to be delivered to the sheriff of the county, whose duty it was made to proceed to the penitentiary within 24 hours, and there deliver the prisoner and warrant to the warden, who thereupon was required to keep the convict in solitary confinement until the infliction of the death penalty; "and" (the statute proceeded) "no person shall be allowed access to said convict, except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations." By section 3 of the act it was further provided that the warden should fix the particular day and hour of the week designated in the warrant for carrying out the sentence, and should invite to be present at the execution the sheriff of the county where the conviction was had, the chaplain and physician of the penitentiary, one practicing surgeon,—resident of the state,—the spiritual adviser of the convict, if any, and six reputable citizens of the state of full age. Besides these official witnesses no person was to be allowed at the execution, except the executioners necessary for the assistance of the sheriff; and all were forbidden, under heavy penalties, from divulging to any person, including the prisoner, the hour or day of his death. The court held that the provision for solitary confinement in the penitentiary between sentence and execution and the provision requiring the prisoner to be kept ignorant and in suspense as to the exact time within a whole week when he might be called upon to die were substantial additions to the punishment previously prescribed, and rendered the act invalid as an *ex post facto* law. As to other points upon which the court failed to express an opinion we can only conjecture what their decision would have been if they had deemed it necessary to discuss them.

For the purpose of comparing the law of this state existing at the time the appellant committed the murder of which he was convicted with the amendments made or attempted by the act of 1891, (Laws 1891, p. 272,) we shall quote sections 1217, 1227, and 1229 of the Penal Code, as they existed at the date of the crime, and in their amended form:

THE OLD LAW.

"Sec. 1217. When judgment of death is rendered, a warrant, signed by the judge and attested by the clerk under the seal of the court, must be drawn and delivered by the sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than thirty nor more than sixty days from the time of judgment."

"Sec. 1227. If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction was had, on the application of the district attorney, must order the defendant to be brought before it, or, if he is at large, a warrant for his apprehension may be issued. Upon the defendant being brought before the court, it must inquire into the facts, and, if no legal reasons exist against the execution of the judgment, must make an order that the sheriff execute the judgment at a specified time. The sheriff must execute the judgment accordingly."

"Sec. 1229. A judgment of death must be executed within the walls or yard of a jail, or some convenient private place in the county. The sheriff of the county must be present at the execution, and must invite the presence of a physician, the district attorney of the county, and at least twelve reputable citizens, to be selected by him; and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives, or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same."

THE ACT OF 1891.

"Sec. 1217. When judgment of death is rendered, a warrant, signed by the judge, and attested by the clerk, under the seal of the court, must be drawn and delivered to the sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than sixty nor more than ninety days from the time of judgment, and must direct the sheriff to deliver the defendant, within ten days from the time of judgment, to the warden of one of the state-prisons of this state for execution; such prison to be designated in the warrant."

"Sec. 1227. If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction is had, on the application of the district attorney of the county in which the conviction is had, must order the defendant to be brought before it, or, if he is at large, a warrant for apprehension may be issued. Upon the defendant being brought before the court, it must inquire into the facts, and, if no legal reasons exist against the execution of the judgment, must make an order that the warden of the state-prison to whom the sheriff is directed to deliver the defendant shall execute the judgment at a specified time. The warden must execute the judgment accordingly."

"Sec. 1229. A judgment of death must be executed within the walls of one of the state-prisons designated by the court by which judgment is rendered. The warden of the state-prison where the execution is to take place must be present at the execution, and must invite the presence of a physician, the attorney general of the state, and at least twelve reputable citizens, to be selected by him; and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives, or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same."

A comparison of these sections will demonstrate all the substantial changes—if there are any such—which the legislature has attempted to make in the old law. It will readily be seen that our statute differs materially from that of the state of Colorado. The day and hour of the execution are not to be kept secret from the prisoner under the new provisions any further than under the old; and the same persons, including those whom he is allowed to designate, are to be present at the execution. Neither is there any express provision for keeping him in solitary confinement during the time which is to elapse between the date of his delivery at the prison and the time of execution; and, if the opinion of the supreme court of the United States in Medley's Case had rested solely upon their construction of the meaning of the term "solitary confinement," we should have experienced no difficulty in distinguishing that case from the case before us. But in truth the context of the Colorado statute shows that the words "solitary confinement" were not used therein in their strict sense. The language of the act is as follows: "Who shall keep such convict in solitary confinement until infliction of the death penalty; and no person shall be allowed access to said convict, except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with the prison regulations." It is scarcely necessary to say that a prisoner who may be visited in prison by his counsel, physician, spiritual adviser, and the members of his family, subject only to prison regulations, (all prisons, including county jails, being governed by some reasonable regulations,) is not kept in solitary confinement in the strict or usual sense of that term. And this consideration was no doubt pressed upon the attention of the court, for in their opinion, delivered by Mr. Justice MILLER, they say: "The qualifying phrase in this statute is but a small mitigation of this solitary confinement, for it expressly declares that no one shall be allowed access to the convict except certain persons, and these are not admissible unless their access to the prisoner is in accordance with prison regulations, prescribed by the board of commissioners of the penitentiary under section 2553 of the General Statutes of Colorado, in force since 1877. This section declares that 'the board of commissioners of the penitentiary shall make such rules and regulations for the government, discipline, and police of the penitentiary, and for the punishment of prisoners confined, not inconsistent with law, as they deem expedient.' What these may be at any particular time is unknown. How far they may permit access of counsel, physicians, the spiritual adviser, and the members of his family, is a question in their discretion, which they exercise by general rules, which may be altered at any time so as to exclude all these persons, and thus the prisoner be left to the worst form of solitary confinement. Even the statutory amelioration is a very limited one. By the words 'his attendants,' in the statute, is evidently meant the officers of the prison and subordinates, who must necessarily furnish him with his food and his clothing, and make inspection every day that he still exists. They may be forbidden by prison regulations, however, from holding any conversation with him. The attendance of the counsel can only be casual, and a very few interviews,—one or two, perhaps, are all that he would have before his death; and that of the physician not at all, unless he was so sick as to require it; and the spiritual adviser of his own selection, and the members of his family, are all dependent for their opportunities of seeing the prisoner upon the regulations of the prison. The solitary confinement, then, which is meant by the statute, remains of the essential character of that mode of prison life as it originally was prescribed and carried out, to mark them as examples of the just punishment of the worst crimes of the human race." These extracts from the opinion of the court show that less importance was attached by the court to the punishment implied in the words "solitary confinement" than to the necessary or usual results of removing a prisoner from the county jail to the state-prison, viz., that he can there be visited by counsel and members of his family less frequently, and only at greater inconvenience, and subject to prison regulations. If we are correct in this construction of the opinion, it follows that this case falls within the principle decided, for in this state, as in any other state, it must inevitably happen that in most instances the counsel and family of a prisoner will have less convenient access to him in the state-prison than when confined in the county jail.

Besides this point of resemblance between the changes made in the Colorado law and that attempted in our own, there is another. By the old law, in Colorado, the convict was to be executed not less than 15 nor more than 25 days after sentence. By the amended law he was to be executed not less than 14 nor more than 28 days after sentence. In other words, his days of grace might be abridged one day, or his days of dread and apprehension might be prolonged for three days. No doubt these were among the 20 particulars in which the amendatory act was claimed to be in violation of the constitution of the United States; but the court did not express an opinion on this point, and we have no means of knowing how it would have been decided if the case had turned upon it.

By reference to section 1217 of the Penal Code above quoted, and the proposed amendment, it will be seen that the effect of the amendment, if valid, would be to change the period within which the execution must take place from not less than 30 nor more than 60 days to not less than 60 nor more than 90 days after judgment, the result of which is that under the amendment a convict might be kept alive and in dread and apprehension of a painful and ignominious death for 30 days longer than he could have been so kept under the old law. This change, also, it is strenuously argued, and apparently not without authority to sustain the contention, makes the law *ex post facto*. For, in the first place, it is said that, although by a vast majority of persons condemned to die on the scaffold any postponement of the date of execution would be eagerly welcomed as a boon, there may be some men to whom it would be an aggravation of their suffering. And, in the next place, it is contended that, even if this were not so, the principle that courts and legislatures may be allowed to change the punishment of crimes *ex post facto* in such manner as in their opinion renders the penalty lighter cannot be admitted without destroying the value of the constitutional guaranty, because there could be no certainty that the legislative or judicial discretion would always be wisely and mercifully exercised; and neither the legislator nor the judge is to be allowed to measure the feelings of the culprit by his own. In short, the cases have gone to the extent of holding that a law which changes the punishment of past offenses in any manner whatever except by remitting a separable portion of the penalty previously prescribed, *i. e.*, by reducing the amount of the fine, the number of stripes, the term of imprisonment, etc., is necessarily void as to all such offenses. It is unnecessary, however, to cite or to criticise the cases in which this matter has been considered by courts whose decisions do not bind us as authority, when we have a decision of the supreme court of the United States which is clearly in point.

We have seen that under the amendments of 1891 a person convicted of murder in the first degree and sentenced to death must within 10 days thereafter be delivered to the warden of the state-prison, and be confined by him for from 50 to 80 days in said prison. If it is in the power of the legislature to add to the penalty of death by hanging a previous imprisonment in the penitentiary for 80 days, the term might, under the same power, be extended to years. And even with respect to a short detention in the state-prison this is what is said in the Medley Case by the supreme court of the United States, (134 U. S. 168, 169, 10 Sup. Ct. Rep. 386, 387:) "Instead of confinement in the ordinary county prison of the place where he and his friends reside, where they may, under the control of the sheriff, see him and visit him, where the sheriff and his attendants must see him, where his religious adviser and his legal counsel may often visit him, without any hindrance of law on the subject, the convict is transferred to a place where imprisonment always implies disgrace, and which, as this court has judicially decided in Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. Rep. 935; Mackin v. U. S., 117 U. S. 348, 6 Sup. Ct. Rep. 777; Parkinson v. U. S., 121 U. S. 281, 7 Sup. Ct. Rep. 896; and U. S. v. De Walt, 128 U. S. 393, 9 Sup. Ct. Rep. 111,—is itself an infamous punishment, and is there to be kept in 'solitary confinement,' the primary meaning of which phrase we have already explained."

Various other grounds are insisted upon by counsel as being each in itself sufficient to render the amendments of 1891 unconstitutional; as, that a convict confined in the state-prison awaiting execution would, under the general law, as construed in the Arras Case, 78 Cal. 304, 20 Pac. Rep. 683, be compelled to do hard labor during his confinement; and that he would, under the operation of sections 673, 674, of the Penal Code, become civilly dead, and be deprived of all civil rights, etc. We do not think there is anything in these points. There is nothing in the doctrine of the Arras Case to sustain the conclusion that a prisoner confined in the penitentiary while awaiting execution could be compelled to labor, and sections 673, 674, could not be held applicable to such a case. But upon the other grounds above mentioned, and in conformity to the decision in the Medley Case, to the authority of which we are compelled to yield obedience, we feel constrained to hold that neither this appellant nor any other person in his situation can be punished under the amendments of 1891, because as to him and all such persons such amendments are *ex post facto* and void.

This conclusion, however, does not dispose of the case, for the appellant was not sentenced to be executed in the manner prescribed by the amendments of 1891, but in the manner provided by the law in force at the date of the murder,—that is to say, by the sheriff in the county jail; and the question is whether that sentence can be enforced. Clearly it cannot be enforced if the old law authorizing the sheriff to execute capital sentences has been repealed. Such was the conclusion reached in the Medley Case, and it is sustained by a long and unbroken line of decisions in the English and American courts as to the effect of the repeal of penal statutes. The exact question to be determined, therefore, is whether the old law has been repealed, and this depends upon the further question whether the amendments of 1891 are in force for any purpose, or to any extent; for, if they are not absolutely void as to all offenses, future as well as past, they took effect on the sixtieth day after the act was approved; and the moment they took effect the old law, at least in so far as it differed from the new, ceased to exist, for the mode of amending laws prescribed by our constitution was followed in this case by re-enacting the various sections of the Penal Code as amended, and under all the decisions of this court the moment such an amendment takes effect so much of the old law as is not re-enacted is repealed. There is, therefore, we repeat, no escape from the conclusion that, if the amendments of 1891 took effect on the 30th of May, 1891, for any purpose or to any extent, the old law at the same time ceased to exist. Upon this point the contention of the appellant is that, as to all offenses subsequently committed, the act is valid and free from objection, and that as to them it must be held to be in force, with the consequence necessarily involved that the old law stands repealed. The attorney general, on the contrary, contends that since, by the terms of the amendments, they include past as well as future offenses, and since it is for many reasons apparent that the legislature intended to apply the same punishment to past as to future offenses, and since, in short, the amendatory act cannot have the effect which the legislature intended it to have, but only a partial effect, followed by a consequence so plainly at variance with the legislative will that it cannot be supposed that the law in its existing form would have been passed if such consequence had been foreseen, the attempted amendments should be declared absolutely and wholly void, and the old law in force. There can be no doubt that it was the intention of the legislature to apply the new method of execution in all cases of murder, past as well as future. The terms of the act sufficiently indicate this intention, and there is nothing outside of its terms to suggest anything different; for it cannot be supposed that a legislature which makes no change in the definition of murder or its degrees, which preserves the penalty of death by hanging for murder of the first degree, merely designating a different officer, time, and place for executing the sentence, could possibly have intended to grant a complete amnesty to all persons standing convicted of murder in the first degree and awaiting execution. Still less can it be supposed that there was an intention to set apart the period of 60 days between the passing and the taking effect of the law during which murders might be perpetrated by means of torture, poison, lying in wait, or any other cruel and deliberate means, or in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary, with absolute certainty that the perpetrator could not be punished in the manner, and the only manner, which the people of California and their representatives have ever deemed proper and adequate to such offenses. There is nothing fanciful about this statement. We know that it was a legal impossibility under the law as it stood between March and May, 1891, to complete the process against a murderer within 60 days if he availed himself of his legal rights, and we know by reference to the Cases of Medley and Savage, 134 U. S. 160–177, 10 Sup. Ct. Rep. 384, 389, that in the state of Colorado two men at least, and we know not how many others, availed themselves of the opportunity presented by the interval between the passage and taking effect of the Colorado act to commit cruel and deliberate murders, which, as the law was subsequently construed, they must be presumed to have known could not be punished with death, nor punished at all, unless a jury, by paltering with their oaths, should find them guilty of a crime of lower grade than that which they had committed.

Proceeding, then, upon the assumption that it was the intention of the legislature to make the amendments of 1891 applicable to past as well as future offenses, and that they must have known that there were or might be past as well as future offenses to which they would apply, we come next to consider whether the law must be held valid as to one class of cases, though necessarily invalid as to the other. This is not a federal question, and, so far as it may have been involved in the conclusion reached in the Medley Case, we are not controlled by that decision. It clearly appears, however, that the question was not there considered, the only question argued being the construction of the Colorado act, whether *ex post facto* or not. 134 U. S. 162–169, 10 Sup. Ct. Rep. 384–387. The supreme court of Colorado had already decided that the new act was in force, and necessarily that the old act was repealed, and upon this purely state question the supreme court of the United States merely adopted the conclusion of the state court. We are therefore free to consider it, uncontrolled by any superior authority. The general doctrine upon this subject is clearly and briefly stated at pages 213 and 214 of the sixth edition of Cooley's Constitutional Limitations as follows: "A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. A general law for the punishment of offenses, which endeavors to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in the future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control. A law might be void as violating the obligation of existing contracts, but valid as to all contracts which should be entered into subsequent to its passage, and which, therefore, would have no legal force except such as the law itself would allow. In any such case the unconstitutional law must operate so far as it can, and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the constitution forbids. If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it should be held valid as to some cases and void as to others." It will be seen from the latter part of the above quotation that the learned author admits, or rather asserts by implication, that there may be cases in which a law which, as to part of its intended purpose, can have a constitutional operation, will nevertheless be held wholly void, when it is evident that it would not have been passed except as an entirety, and would, by being given a partial operation, defeat the general purpose of the legislature. It will also be observed that the proposition is stated in immediate connection with, and as an exception to, the doctrine as to the construction of statutes which, if allowed a retrospective operation, would impair the obligation of contracts, or would be *ex post facto* laws. The evident caution with which this rational exception to the general rule is announced by Judge Cooley is perhaps due to the fact that few, if any, adjudicated cases can be found in which it has been asserted or applied; but it is clear that he perceived the necessity that might arise for its application. And besides, the exception, as stated, is in substance precisely the same, and rests upon the same principle of statutory construction, as that applied in case of an act some sections or clauses of which are unconstitutional, while others are free from that objection. The rule in such cases is that if, when the unconstitutional clauses or sections are stricken out, that part of the act which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. Cooley, Const. Lim. (6th Ed.) p. 211. But if the different parts of the act are so mutually connected with and dependent upon each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and, if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, and connected must fall with them. Id. pp. 211, 212. These propositions are sustained by abundant authority cited in the notes under Judge Cooley's text. And there is no reason apparent why the admitted doctrine respecting statutes invalid as to connected conditional and dependent clauses and sections should not equally apply to a statute invalid as to connected, conditional, and dependent purposes and objects. The controlling consideration in both cases must be the same, viz., that the courts will not enforce a statute which cannot operate as it was intended by the legislature to operate, when it is apparent that its partial enforcement will produce effects which the legislature would never have sanctioned. That this is a sound, wholesome, and even necessary principle of construction, we cannot doubt. And we are equally satisfied that it is, as intimated by Judge Cooley, applicable to a statute prescribing or altering the penalties for criminal offenses.

Firmly as we are impressed with the soundness of these views, we are not deterred from applying them to the case before us by the fact that we have not found any decisions of other courts to the same effect, nor by the fact that we are cited to a number of cases in which an opposite conclusion seems to have been reached. It is to be observed, however, with respect to the cases referred to, that most of them differ very materially from this case. In many of the instances in which new enactments have been held to repeal by implication former laws, under which alone past offenses could be punished, the changes in the law with respect to the definition or classification of offenses, or by way of mitigating the penalties of the offense, were so marked and radical as to furnish substantial grounds for holding that the legislature had intended to declare that the former law was not fit to be enforced. A notable instance of this sort is found in the celebrated Hartung Case, (Hartung v. People, 22 N. Y. 95, 26 N. Y. 167.) Mrs. Hartung poisoned her husband at a time when the punishment prescribed by law for murder was death by hanging, to be inflicted within a short time after sentence. Subsequently the law was so altered as to prescribe as the penalty for the same offense imprisonment in the penitentiary at hard labor for one year, after which the convict was to be hanged only in case the governor should in his discretion issue his warrant directing the execution of the death sentence. The result of the various proceedings in the case and of the two appeals was that Mrs. Hartung was discharged upon the ground that as to her offense the new law was *ex post facto*, and the old law repealed without any saving clause as to past offenses. But besides the various special reasons impelling the court to that conclusion, which have no application to this case, there was this additional and sufficient reason why the court could not hold the new law wholly inoperative: Not only was the old law so changed by the amendatory act as practically to substitute life imprisonment for death by hanging as the penalty for murder, but the death penalty was absolutely abolished in some cases, where before it had been provided. Under such circumstances, the court might well say that the enactment of the new statute was equivalent to a legislative declaration that the old law was not fit to exist. And this, it seems, is the principle upon which repeals by implication, in case of the revision of the penal statutes, rests. By the revision the legislature is supposed to have declared that the former law is not fit to exist. Flaherty v. Thomas, 12 Allen, 435. The principle is intelligible enough and reasonable enough when applied to a revision which changes the classification or definition of offenses, or which sensibly mitigates the penalties formerly imposed upon the same offenses. But where, as in the case before us, the definition of the offense is in no wise changed; where the punishment, instead of being mitigated, is, according to the argument, enlarged; and where the manifest and only object of the legislature was to change the place, the time, and the officer for carrying out the sentence of death,—it sems little short of absurd to hold that this amounts to a legislative declaration that the former law is not fit to exist. We think, on the contrary, that there is here no such declaration, and that we may safely hold, as we do hold, that, since the act of 1891 cannot operate as it was intended to operate, and since the partial operation it might have would defeat the evident intention of the legislature, and produce consequences which, if foreseen, would have prevented the passage of the amendments, the whole act is unconstitutional and void; that it never took effect, and the old law remains in force. This conclusion is to some extent opposed to that reached by this court in People v. Tisdale, 57 Cal. 104; but the ground of our decision herein was not discussed or at all considered in that case, and, since no vested rights are dependent upon the former decision, it cannot be regarded a binding precedent. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

HARRISON, J., (*dissenting.*) I regret that I am unable to concur in the foregoing opinion and judgment. I concur in that portion thereof which holds that the effect of the amendments of 1891 is to make such a change in the punishment prescribed for murders committed prior to their enactment as to bring them within the definition of an *ex post facto* law, and, therefore, that the punishment therein prescribed cannot be inflicted upon the defendant. I do not, however, concur in the conclusion deduced therefrom that we must, for this reason, conclude that the legislature did not intend that such result should follow, or that, if it had known that such would have been the result, it would not have enacted the amendments. Neither do I concur in the construction given to the amendments that the punishment for offenses committed while the former law was in force is so connected with that prescribed for future offenses that we must hold that the legislature did not intend that offenses thereafter committed should be punished in the mode prescribed by the amendments, unless prior offenses could be also punished in the same manner. The rule which generally obtains in the construction of statutes is that when a statute is re-enacted with certain additions, then for the first time made a part of the law, the provisions of the new act which are reproduced from the old and re-enacted are deemed to be mere continuations of the former law, rather than a repeal and a re-enactment thereof, and that the portions of the former statute which are omitted from the new are repealed, and are from that time to be regarded as never having been a part of the law, while the new portions are to be regarded as then for the first time presenting the rule of conduct, and are limited in their operation and effect to acts thereafter to be done. It was held in Billings v. Harvey, 6 Cal. 381, that section 24, art. 4, of the constitution of this state, providing that "no law shall be revised or amended by reference to its title, but in such case the act revised or section amended shall be re-enacted and published at length," prescribed a different rule of construction, and that by virtue of this constitutional provision "the re-enactment creates anew the rule of action, and, even if there was not the slightest difference in the phraseology of the two, the latter alone can be referred to as the law, and the former stands to all intents as if absolutely and expressly repealed." This rule of construction was afterwards reaffirmed by the court in Billings v. Hall, 7 Cal. 3; Morton v. Folger, 15 Cal. 284; Clarke v. Huber, 25 Cal. 594; Bensley v. Ellis, 39 Cal. 313; People v. Tisdale, 57 Cal. 104. A similar ruling was made in Texas, (State v. Andrews, 20 Tex. 230,) and in Alabama, (Wilkinson v. Keller, 59 Ala. 306.)

Section 325 of the Political Code provides: "Where a section or part of a section is amended it is not to be considered as having been repealed and re-enacted in the amended form, but the portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment." If the rule of construction applied in the foregoing cases is derived from the constitution, as was held in Billings v. Harvey, it would seem that the legislature could not by statute change this rule. In Railroad Co. v. Shackelford, 63 Cal. 268, the decision appears to have been made in accordance with the rule laid down in this section of the Political Code, although it is not referred to in the opinion, nor is there any reference to the above decisions, with which it is apparently in conflict. It is, however, unnecessary for the purposes of this case to determine whether the rule laid down in Billings v. Harvey or that prescribed by the Political Code is to prevail, inasmuch as the portions of the statute which are retained in the amended sections do not call for so much consideration as does the effect of those portions then first enacted, compared with the portions of the sections omitted from the re-enactment. Under well-established rules of construction the portions of the original sections which are omitted from the amendments are deemed to have been thereby repealed, and the portions then for the first time enacted are held to constitute the rule of action in reference to the subject-matter therein expressed. All laws are prospective in their operation unless they contain express provision for making them retroactive; and laws prescribing punishment for crimes are essentially limited to future violations of the law creating the offense. Section 3 of the Penal Code declares that "no part of this Code is retroactive, unless expressly so declared."

The proposition contended for by the appellant is that by these amendments the punishment imposed for the offense has been changed to his disadvantage, as well as increased, and that, as the legislature provided no saving clause in the statute for offenses committed prior to its passage, as was done in the statute under consideration in People v. Gill, 7 Cal. 356, and as was provided in section 6 of the Penal Code at the time of the enactment of that Code, there can be no punishment inflicted upon him for his offense, either under the old statute, for the reason that the punishment thereby prescribed has been repealed, or under the new, as that prescribes a punishment different from and greater than was provided when the offense was committed, and, being *ex post facto*, is therefore unconstitutional and void. The effect of the repeal of a criminal law is to prevent any further action thereunder. By its removal from the statute-book the court is divested of all authority to try the accused, or, if tried, to pronounce judgment against him. It is immaterial at what stage of the proceeding the repeal takes place. If before trial, the defendant cannot be tried; if after conviction, and before judgment, he cannot be sentenced; if after judgment, and before sentence, he cannot be punished. Unless the proceedings have passed into final judgment, and beyond the necessity of any further action by the court, a repeal of the statute which makes the act an offense, or which defines the punishment for the offense, deprives the court of all further jurisdiction. Whenever the court is called upon to take any step or do any act which directly or in its consequences will have the effect to punish the defendant for any act done by him, it must find its authority therefor in a statute then existing and in force; and if, subsequent to the commission of the offense, the punishment prescribed therefor has been changed, without any saving clause for previous offenses, the court is divested of all authority to impose such punishment, and must punish the offender in conformity with the amended statute, unless restricted therefrom by constitutional provisions. "The repeal of a statute puts an end to all prosecutions under the statute repealed, and to all proceedings growing out of it, pending at the time of the repeal. There can be no legal conviction unless the act is contrary to law at the time it is committed, nor can there be a judgment unless the law is in force at the time of the indictment and of the judgment." Sedg. St. & Const. Law, p. 130. Mr. Bishop says: "No proceedings can be carried on under a law which, being repealed, is not existing to give authority to the court; consequently, if the common or statutory law which authorized a prosecution and conviction for a specific offense is repealed, or expired before final judgment, the court can go no further with the case. Even if a verdict has been rendered against the prisoner, sentence cannot be pronounced, and he must be discharged." Bish. St. Crimes, § 177. "When an act of parliament is repealed it must be considered, except as to transactions past and closed, as if it had never existed." Dwar. St. 160. The repeal of a penal statute takes away all right of action for the recovery of the penalty therefor. Norris v. Crocker, 13 How. 429; Breitung v. Lindauer, 37 Mich. 230. "The repeal obliterates the statute as if it had never been passed, and obliterates the penalties as if they had never existed." Rood v. Railroad Co., 43 Wis. 153. "The repeal of the law imposing the penalty is of itself a remission." Per TANEY, C. J., State v. Railroad Co., 3 How. 552. In Yeaton v. U. S., 5 Cranch, 281, Chief Justice MARSHALL said: "After the expiration or repeal of a law no penalty can be enforced or punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

In 1860 the legislature of New York passed an act changing the punishment for murder, and repealing the prior law for the punishment of that offense, by virtue of which it was held by the court of appeals of that state that the legislature had so interfered with the laws for the punishment of the crime of murder that a particular class of offenders, embracing the prisoner, could not be punished at all. The effect of this was that all murders which had been committed prior to the passage of that act, and for which the trial, conviction, and sentence had not taken place, escaped all punishment. Hartung v. People, 22 N. Y. 95, 26 N. Y. 167. In State v. Daley, 29 Conn. 272, the defendant was convicted in July, 1860, of manslaughter committed in May of that year. By an act passed by the legislature, which took effect after the commission of the offense, and prior to the trial and conviction of the defendant, a change was made in the punishment of manslaughter from imprisonment in the state-prison for a term not less than 2 nor more than 10 years, to imprisonment in the state-prison or county jail for a term not exceeding 10 years. The court held that, as the statute was prospective only, without any saving clause, the defendant could not be punished, for the reason that the effect of the repeal without any saving clause was to leave no sanction or punishment for that crime applicable to previous offenders. "The effect of such repeal was, for the most obvious reason, that the law as to any proceedings under it which were not past and closed must be considered as if it had never existed, and therefore furnishes no authority after its repeal for the commencement of any proceedings, or for the further prosecution of any which had been before commenced. Hence it has been often decided that, if a provision of either the statutory or common law, which authorizes a prosecution and conviction for a specific offense, is repealed before final judgment, the court can proceed no further with the case, and that sentence cannot be pronounced, even although a verdict has been rendered against the prisoner, and he must therefore be discharged." In State v. Campbell, 44 Wis. 529, the defendant was charged with the embezzlement of public funds committed in 1876. Before his trial under the charge the legislature revised the law of the state relative to embezzlement by an act which went into effect January 1, 1878. Upon a motion in arrest of judgment the court held that, inasmuch as the revising act contained no saving clause, authorizing a prosecution for offenses already committed, there is no law which would authorize or sustain a judgment on the verdict, saying: "It is true, by this construction all offenses committed by public officers under the Revised Statutes of 1858, which were not prosecuted to judgment prior to the new law taking effect, will go unpunished, but this consequence must rest upon the legislature, and not the courts. The legislature could easily have avoided such a result by enacting a proper saving clause in chapter 340. As the law now stands, we must hold that there is no statute under which it can be punished. We may deplore this, but it is beyond our power to help it without a violation of well-settled principles of law."

In U. S. v. Tynen, 11 Wall. 88, the defendant had been indicted for an offense committed against the naturalization laws, and while the matter was pending on appeal to the supreme court congress passed an act embracing the whole subject of frauds against the naturalization laws. The supreme court, in disposing of the question, held that, although there was no express repeal of the law under which the defendant was indicted, yet, as the provisions of the subsequent act were repugnant to those of the former, it operated as a repeal, saying: "There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed." In Flaherty v. Thomas, 12 Allen, 428, the statute imposing the penalty for an offense was changed after the commission of the act to such an extent that it was held by the court to be a repeal of the former statute, and that the defendant could not be punished, saying: "All criminal statutes are limited in effect, and usually in terms, to future offenses. The establishment of a new rule of punishment is of itself a legislative declaration that the previous rule is not fit to exist, and therefore shall not be applied to any case unless the legislature, in order to prevent offenses already committed from going unpunished, provides that such offenses shall continue to be punished according to the previous laws. It is clearly settled by authority that, in the absence of any such provision, the old law cannot be resorted to after the new law has taken effect for the punishment of an offense committed before the passage of the latter, even if the defendant has been already convicted by the verdict of a jury." In People v. Tisdale, 57 Cal. 104, it was held that an amendment in 1880 to section 607 of the Penal Code, by which the punishment for an offense was changed from a "fine not exceeding one thousand dollars, or imprisonment in the state-prison not exceeding two years," to a fine "not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail not exceeding two years, or by both," operated as a repeal of the former statute, and that, as the defendant was not charged with a violation of the statute as it stood after the amendment, he could not be punished under an information filed for a violation of the law before it was repealed. See, also, Com. v. Kimball, 21 Pick. 373; Com. v. McDonough, 13 Allen, 581; Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. Rep. 443; Garvey v. People, 6 Colo. 559; In re Petty, 22 Kan. 477; Lindzey v. State, 65 Miss. 544, 5 South. Rep. 99; Shepherd v. People, 25 N. Y. 406; Ratzky v. People, 29 N. Y. 124.

By omitting from the sections as amended the provisions authorizing the judgment to be executed by the sheriff, and within the county where the conviction was had, the legislature deprived the court of all power to authorize such execution by the sheriff, or within the county jail, and also took from the sheriff all capacity to execute the judgment. The amendments had the effect to obliterate from the statute all the provisions that were not re-enacted, as completely as if they had never formed a part thereof. The omitted portions became as if they had never existed, and the new portions are to be construed as if none had preceded them.

It is urged by the attorney general that, in case it shall be held that the sections as amended provide for a greater punishment than the original sections, such provision would be unconstitutional and void, and that, therefore, the amended sections are themselves unconstitutional and inoperative to effect a repeal of the former sections; and it is held in the prevailing opinion that, because it is unconstitutional to apply the punishment prescribed by the amendments to one convicted of an offense committed prior thereto, the amendments are thereby affected with such an unconstitutional element that it defeats their operation in reference to offenses subsequently committed. It is undoubtedly a correct proposition that the provisions of a statute will not be affected by a subsequent unconstitutional act of the legislature, and that a clause in such act, repealing all other acts which are inconsistent therewith, will not affect the prior statute. The unconstitutional act is to be regarded as wholly void and inoperative, even for the purpose of displacing or overruling that for which it is sought to be made a substitute. Ex parte Davis, 21 Fed. Rep. 396; Tims v. State, 26 Ala. 165; State v. Crozier, 12 Nev. 300; State v. Hallock, 14 Nev. 202; In re Petty, 22 Kan. 489; Campau v. Detroit, 14 Mich. 276. It is also a fundamental rule of construction that a statute is not to be declared unconstitutional unless it be clearly so, and also that, "if the statute is susceptible of two constructions, one of which is consistent and the other inconsistent with the restrictions of the constitution, it is the plain duty of the court to give it that construction which will make it harmonize with the constitution, and comport with the legitimate powers of the legislature." People v. Frisbie, 26 Cal. 139. The legislature is not presumed to have intended to pass an unconstitutional act, and, unless the act clearly falls within some express prohibition of the constitution, or is beyond the power of the legislature, it is the duty of the courts to uphold, rather than to set it aside. All laws are presumed to have been passed with deliberation, and with a knowledge on the part of the legislature of the existing laws, and any statute, purporting either expressly or impliedly to repeal an existing law, is deemed to have been passed with the intent on the part of the legislature to make such change.

There is nothing in the terms of the sections as amended in 1891 which is repugnant to any provision of the constitution, or beyond the powers of the legislature to adopt. It will not be disputed that it was entirely competent for the legislature, when originally defining crimes and their punishment, to provide that judgment of death should in all cases be carried into effect by the warden of a state-prison and within its walls. Its power in this respect was not exhausted by its first exercise. It has the same power to-day to prescribe a different punishment for any crime that it originally had to fix the punishment therefor. It was within the power of the legislature to abolish capital punishment. It could even grant an amnesty for all murderers by simply repealing the section providing for their punishment; and, however much we may conjecture that the legislature would not purposely free a criminal from punishment, or however much we may think that it did not in the present case intend to grant an amnesty for any offense, we can only determine its intent by what it has said. "The result may or may not be conformable to the actual intent of those who passed the latter statute. We can only ascertain the legal intent of the legislature by the language which they have used, applied, and expounded conformably to the settled and well-known rules of construction." Com. v. Kimball, 21 Pick. 376. "If the legislature by the act of 1860 carelessly or unintentionally repealed the law punishing the prisoner's crime, that is no reason why reasonable and well-settled principles of construction should be disregarded for the purpose of punishing it under that act." Shepherd v. People, 25 N. Y. 411. "It is not a sufficient answer to the difficulty to say that the members of the legislature did not probably intend to grant impunity to offenders in the situation of the prisoner. They did intend to abrogate as to her and as to all persons in the same situation the former punishment, and that design they effectually carried out. They intended also that such offenders should be punished in another way, but this they could not effect on account of the constitutional inhibition." Hartung v. People, 26 N. Y. 170. "The legislature might have inserted in the repealing act a saving clause, which would have prevented the defendant's escape, if they had seen fit to do so. If they omitted it through mistake, the court cannot correct the mistake. Nor have we a right to decide that the omission was by mistake." Com. v. McDonough, 13 Allen, 585. The legislature has done no act, nor has it given utterance to any expression, which authorizes the inference that it did not intend the amendments to be operative unless they applied to all offenders; and I know of no other mode of ascertaining the intention of the legislature in reference to what it has enacted than the language of its act. The rules for the construction of statutes are simple, and do not vary with the subjects to which the statutes are directed. While the statement of the attorney general respecting the number of persons charged with murder who will be affected by the statute would have been properly presented to the legislature when that body had the act under consideration, it can have no weight with this court in construing the effect of the statute. If we should assume that the legislature knew that those persons would be affected by its action, and passed the amendments with such knowledge, or that it enacted them in the belief that they would not affect such previous offenders, we must still concede that such legislation was within the powers of the legislature, and that we are not at liberty to set it aside because its effect is different from what we may infer that that body anticipated. If, on the other hand, we assume that the legislature enacted the amendments in the opinion or belief that there were no previous offenders to whom they could be made applicable, it merely results that the amendments were enacted without sufficient consideration or examination; and such has never been held a sufficient ground for disregarding the plain language of a statute. Whether we are to assume that the legislature acted advisedly or without consideration, I know of no rule of construction by which we are at liberty to investigate the extent of its knowledge, or the want of consideration it gave to its action, and therefore, in applying the well-settled rules of construction to the amendments under consideration, we are simply to determine whether the amendments themselves are by their terms inconsistent with the constitution. If an attempt is made to apply the law as found in these amendments to cases which are not within their terms, it results that in the instance in which such attempt is made there is but the not unusual case of an offense against society, for the punishment of which the law has not made adequate provision. It cannot be questioned that it was the intention of the legislature by the amendments under consideration to provide that all judgments of death should thereafter be executed within the walls of a state-prison. It has specifically declared this intent in express language, and, if there had been no murder committed in this state prior to the passage of the act of 1891, the intent of the legislature as to the place of punishment would have been undoubted. By thus amending these sections of the Penal Code, it has as effectually shown its intent to repeal the former provisions for the place in which the punishment of death should be executed, as if it had shown its intention by abrogating those provisions in express language.

It is conceded in the argument on behalf of the people that, if the amendatory statute had contained a saving clause for the punishment of crimes committed prior to its passage, there would have been no constitutional objection to its validity. The omission of such saving clause cannot, however, make invalid a law which would otherwise be valid. The constitutionality of its provisions is to be determined by their own harmony with the constitution, and not by the effect which additional provisions would have had upon the subject-matter to which the act is applied. The statute, as amended, is not in its terms unconstitutional. Its unconstitutionality does not spring from any provision which is contained therein, but arises only when it is sought to apply its provisions to cases which are not within its terms. This is not, however, a defect which is inherent in the statute, but is a want of power to apply the statute to cases for which it makes no provision, and results from the application of other principles of the constitution which are intended for the protection of individual rights, and which are equally sacred and potent as those which are made for maintaining government or for the punishment of crime. A law which it is within the power of the legislature to pass is constitutional, although it may be unconstitutional to apply it to acts or prosecutions had prior to its passage.

In the same clause of the constitution which prohibits the passage of *ex post facto* laws is the prohibition of laws impairing the obligation of contracts. The statute-books of the several states, as well as of this state, contain many laws of a general nature which violate this latter provision, and which have been held constitutional in their application to future transactions, although inoperative as to prior ones. Under the rule for amendment provided by the constitution, any section of the Codes is to be amended by its re-enactment as amended. In civil matters no saving clause is required. The former law is held to have entered into the contract to such an extent as to be beyond the power of the legislature to deprive the parties to the contract of the rights thereby acquired; but in matters of criminal legislation, unless the saving clause is contained in the amended section, the state, as represented by the legislature, is deemed to have remitted the penalty incurred in the commission of the offense. The amended section is not unconstitutional, but it is unconstitutional to apply it to transactions had prior to its passage. "A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. A general law for the punishment of offenses, which should endeavor to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void, as far as it was retrospective, but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control." Cooley, Const. Lim. p. 213; Jaehne v. New York, 128 U. S. 189, 9 Sup. Ct. Rep. 70; State v. Amery, 12 R. I. 64; U. S. v. Hall, 2 Wash. C. C. 373.

The principle contained in the prevailing opinion in this case leads necessarily to this result: either that any amendment to that portion of the Penal Code defining crimes and punishments which the legislature may enact without a saving clause for prior offenders is *ipso facto* unconstitutional, and without its power to enact, or that its validity is to depend upon the conjecture of the individuals who may be the members of this court respecting the intention of the individuals who may have been members of the legislature at the time the amendment was enacted. If the doctrine be correct that because a law which is prospective in its operation, and which in terms is consistent with the constitution, is unconstitutional as to future offenses because it cannot be applied to past offenses, it must follow that the court has imposed a restriction upon the legislature which is not found in the constitution. If, on the other hand, such law is to be declared unconstitutional whenever the members of this court shall be of the opinion that the legislature did not intend what it has expressly and unqualifiedly declared, the certainty of law is substituted by the conjecture or will of the court. *Misera est servitus ubi jus est vagum aut incertum.* In none of the instances wherein similar legislation has been construed by the courts of other states has it been even suggested that such legislation was unconstitutional for the reason that its effect could not have been anticipated by the legislature; and, although the decisions of those courts have no binding authority upon us, yet, in a matter which involves only the determination of the proper rules of construction in criminal law, the unanimity of decision in other states is an authority of the most persuasive character. And the rule of construction is the same whether the statute to be construed has reference to the punishment of the highest crime defined in the law or to the slightest misdemeanor. These rules are as uniform for all laws as is the constitutional prohibition against an *ex post facto* law.

The rule that a statute which is in part unconstitutional will be declared wholly so is applicable only when it can be seen from the act itself that the unconstitutional part is the "condition or consideration" upon which the other part was enacted, or that the two parts are so interdependent that one cannot exist without the other. If the different parts are separable, or if the subjects to which the act may have a constitutional application are separable from the others, it will not be declared unconstitutional. This rule was laid down with his usual clearness by Chief Justice Shaw in Warren v. Mayor, 2 Gray, 99, where he limits such result to a case where the parts of the statute "are so mutually connected with and dependent on each other as conditions and considerations or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently." In the case of Fisher v. McGirr, 1 Gray, 21, that able jurist had said "that, where a statute has been passed by the legislature under all the forms and sanctions requisite to the making of laws, some part of which is not within the competency of legislative power, or is repugnant to any provision of the constitution, such part thereof will be adjudged void and of no avail, whilst all other parts of the act not obnoxious to the same objection will be held valid, and have the force of law." There is nothing in the statute under consideration indicating that the punishment of previous offenders according to its terms was a condition or consideration for providing that subsequent offenders should be so punished, nor is the punishment of these classes in any respect so interdependent that the one cannot exist without the other. The statute presents the not infrequent case of a law applicable to certain acts, but inapplicable to others by reason of the paramount law. The intention of the legislature, as expressed in its language, is that it shall be applicable to all cases, but this intention cannot be carried out as to certain cases by reason of a constitutional inhibition.

In Telegraph Co. v. Texas, 105 U. S. 460, a statute of the state of Texas provided for a tax upon every telegraphic message sent by any company doing business within the state. The court held that the act was unconstitutional, in so far as it was applicable to messages sent out of the state, but valid as to those sent within the state, applying the same principles which had previously been held by it in the case of State Freight Tax, 15 Wall. 232. See, also, Steam-Ship Co. v. Pennsylvania, 122 U. S. 339, 7 Sup. Ct. Rep. 1118. In a similar case (Fargo v. Michigan, 121 U. S. 241, 7 Sup. Ct. Rep. 857) the court said: "The taxing law of the state was, therefore, valid as to the latter class of transportation, but with regard to the others it was invalid, because it was interstate commerce, and the state could lay no tax upon it."

In 1880 various acts were passed amending the sections of the Penal Code for the purpose of adapting them to the new constitution, many of which affected the punishment previously prescribed for offenses, but none of these acts contained any saving clause for prior offenses. In 1874 section 190 of the Penal Code was amended by giving to the jury the discretion to award punishment in the state-prison for life instead of death, as the penalty for murder in the first degree. Amend. Code, 1873-74, p. 457. In 1889 section 261 of the Penal Code, defining rape, was amended by making the age of consent 14 years, instead of 10. St. 1889, p. 223. In neither of these statutes was there any saving clause for prior offenses. Very many other sections of the Penal Code have been amended by the legislature without making provision for the effect of such amendments upon previous offenders. If I correctly apprehend the principles maintained in the prevailing opinion herein, any of these amendments to the Penal Code is unconstitutional if it can be shown that at the time of its enactment there were cases pending in court in which individuals charged with crime might have gone unpunished by reason of the statute in force when the crime was committed having been repealed by the amendment. The invalidity of the statute cannot depend upon the fact that the person then charged with the crime did not avail himself of such defense. The statute is to be tested by the conditions existing when it was passed; and, if it would at that time have been declared unconstitutional for that reason, it is equally so to-day, and its unconstitutionality can be invoked by any one against whom it is sought to be enforced. If the amendments of 1891 are unconstitutional for the reasons given in the prevailing opinion, they could not be enforced against one who committed murder after their enactment, even though those whose crimes were committed prior thereto did not assert such unconstitutionality. If at the time of the amendment of section 190 in 1874, there were persons charged with murder prior to that date, that act, as it now stands upon the statute-book, must be construed unconstitutional, for the reason that it provided such a possible change for the punishment of an offender as to be within the inhibition of an *ex post facto* law. I do not think that such a conclusion can be maintained, and for that reason I cannot concur in the conclusion reached by the majority of the court in the present case.

In reaching the conclusion that the amendments to the Penal Code in 1891 have so changed the punishment for the offense of which the defendant was convicted that it cannot be imposed upon him, and that there is no existing law for the punishment of his offense, I have not failed to consider that the crime committed by him must go unpunished, but, however much this result may be regretted, it is not for this court to prevent it. The criminal, as well as the upright, is entitled to be protected in the rights guarantied to him by the constitution. That instrument has been framed as the basis and limit of all legislation, and the lowest, as well as the highest, is entitled to its protection. It is one of the functions of this tribunal to prevent hasty or ill-considered legislation from infringing upon the limitations therein prescribed; and, however great might be our desire, we cannot avoid the responsibility of declaring such legislation inoperative, even though the effect of our decision be that crimes will go unwhipped of justice, or criminals be restored to society. "It is better that any criminal shall go unpunished than that any provision of the constitution shall be disregarded, or that the foundations of the criminal law shall be unsettled." Lindzey v. State, supra. "Though it is desirable that all offenders against our penal laws should be punished, yet it is better that one should occasionally escape than that the fundamental principles of the criminal law should be violated." Com. v. McDonough, supra. In my opinion, the judgment of the court below should be affirmed; but inasmuch as, since it was pronounced, the legislature has so changed the law as to deprive the court of the power to enforce its judgment, that court should be directed, upon the filing of the *remittitur* therein, to enter an order discharging the defendant from custody.

De Haven, J. I concur in the foregoing opinion of Mr. Justice Harrison.

Garoutte, J. I concur.

93 Cal. 263

SOUTHERN PAC. R. CO. v. FERRIS *et al.*

(No. 14,082.)

(*Supreme Court of California.* Feb. 5, 1892.)

DEDICATION OF HIGHWAY—NON-USER—RIGHTS OF GRANTEE—INJUNCTION.

1. Where one dedicated a strip of land in front of his premises to the public as a highway, and expressly excepted it as such in his deed of the land, the grantee cannot assume the ownership of the strip, though it was never actually used as a public highway.

2. Where a railroad company has built its road, in accordance with Civil Code, § 465, subd. 5, on such highway, it is entitled to an injunction to restrain the destruction of its track over such strip of land by such grantee.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. Towner, Judge.

Action by the Southern Pacific Railroad Company against Henrietta Ferris and another to restrain defendants from removing plaintiff's track from a certain strip of land. Defendants had judgment, and plaintiff appeals. Reversed.

John D. Bicknell, for appellant. *E. E. Keech*, for respondents.

FOOTE, C. This action was brought by the appellant, a railroad corporation, for the purpose of restraining the defendants here from continuing to tear up and remove its track from what was claimed by the plaintiff to be a public highway, and for such other and further relief as the facts of the case might warrant. The court below decided the case against the plaintiff, dissolved a preliminary injunction that had been granted, and gave judgment for the defendants for costs. From that and an order refusing a new trial the plaintiff has taken this appeal. From the evidence in the record it is clear that findings 1 and 3 are without legal support. It appears that Henrietta Ferris, one of the respondents here, bought, some years prior to this controversy, a piece of land from Mr. Irvine; that in the deed to that land there was specially excepted therefrom a strip of land in front thereof 60 feet wide, which had been offered for dedication as a public highway, and no title to that land ever vested in the said Ferris; that this strip of land so excepted was laid down upon a map properly filed for record in the proper office, as being reserved for a public road, and it does not appear that the person so offering it for dedication has ever in any way sought to revoke it. The idea of the lower court seems to have been that the public had never made use of the side of the road so offered for dedication next to the defendant's land, and therefore she had an appurtenant right of way over it. In this view of the matter we cannot concur. It seems that the persons who bought land from Mr. Irvine, including the defendant Mrs. Ferris, had conformed their fences and hedges to the line of the proposed highway as set out in the map recorded by Irvine describing the public roads he offered for dedication, among which was this one; that, according to the plan agreed upon for the location of this highway, it had a *zanja* or water ditch running through the middle of it lengthwise, and a double row of *eucalyptus* trees, one each side of the *zanja;* that the road as it now stands is so located, and has the *zanja* and rows of trees as intended. But because the travel along the public road has been, by the choice of the traveling public, almost exclusively, if not entirely, on the other side of the road, and on the 60-feet wide strip of it on the opposite side of the *zanja* from the defendants' land, the court seems to have concluded that the public never used the 60 feet of the located road as recognized by proprietors of adjoining lands in building their fences and hedges, and therefore as to it there was never any user. This we take to be a mistake. As well might it be said that, if the public travel had been down the center of a road offered for dedication as a public highway, there was never any user of that part which lay on each side of the track used, and between it and the fences of the adjoining proprietors; or where the travel might be diagonally across the located road, from one side to the other, and from one end to the other of it continuously, that the portion of the ground fenced out by adjoining proprietors over which there had been no travel had never been used. A similar view of an abandonment of a public road was urged in Watkins v. Lynch, 71 Cal. 26, 11 Pac. Rep. 808; but it will be seen from the language which we now quote no such want of user was considered any evidence of an abandonment of the public road: "Any ordinary observer traveling upon the public roads of the more thickly populated portions of this state will often perceive the land on one or both sides of a road-bed, that is fenced out, sowed in grain and pastured by the proprietors of adjoining land; and, while all the travel for many years has been confined to the center of the road-bed, yet we do not see that such acts would of themselves be held to show either an abandonment of the use of the road by the public, or its adverse possession by the person who has thus sowed, reaped, and pastured his stock thereon." So here there is no conflict in the evidence, properly considered, as to the offer of dedication and acceptance and user of this land as a public road. If this is a public road, then, according to the other findings and evidence, the railroad corporation had constructed its road as it had a right to do under section 465, subd. 5, Civil Code, and the defendants had no right to tear up its track. We think the judgment and order should be reversed, and so advise.

We concur: FITZGERALD, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

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93 Cal. 179

SWAIN v. FOURTEENTH ST. R. CO. (No. 13,792.)

(*Supreme Court of California.* Feb. 3, 1892.)

STREET RAILWAYS—COLLISION—NEGLIGENCE—QUESTION FOR JURY—DAMAGES.

1. In an action for personal injury sustained in a collision between plaintiff's wagon and defendant's street-car, it appeared that plaintiff was a police officer in charge of a patrol wagon carrying an injured man on a stretcher, and, while on defendant's track, his wagon was struck by the car coming from the opposite direction. Plaintiff's driver gave evidence, which was corroborated, that he saw the car, and tried to pull off of the track, doing so slowly, on account of the injured man; that, when about 60 feet from the car, he hallooed as loud as he could to stop the car; that an officer also hallooed several times to stop the car; that the car-driver was looking behind his car, and did not attempt to slacken the speed before the collision. *Held*, that defendant's motion for a nonsuit was properly denied, as driving a wagon on a street-car track is not negligence *per se*, and the evidence was sufficient to show the car-driver negligent in not looking ahead to observe whether the track was clear.

2. If by reason of inattention, carelessness,

or incompetency the car-driver failed to avoid the collision, defendant was liable, if there was no contributory negligence on the part of plaintiff or his driver.

3. In such case the statement in an instruction that "street-cars are easily and readily stopped" could not have prejudiced defendant, since the fact is one of common knowledge, which the jury might consider without evidence of its existence.

4. In actions for personal injury, fixing the amount of damage is within the discretion of the jury, and a verdict approved by the trial court will not be disturbed on appeal on the ground of being excessive, except in a plain abuse of discretion.

Department 2. Appeal from superior court, Alameda county; ELLSWORTH, Judge.

Action for personal injury by one Swain against the Fourteenth Street Railroad Company. Plaintiff had judgment, and defendant appeals. Affirmed.

Fox, Kellogg & King, for appellant. *James A. Johnson* and *A. A. Moore*, for respondent.

DE HAVEN, J. Action for damages alleged to have been sustained by plaintiff through the negligence of defendant in running its street-car against a wagon in which the plaintiff was riding, and thereby violently throwing him to the ground. The plaintiff recovered judgment for the sum of $7,500 damages, besides costs; and from this judgment, and an order denying its motion for a new trial, the defendant appeals.

1. The evidence upon the part of the plaintiff tended to show that between 7 and 8 o'clock in the evening of September 12th the plaintiff, who was a police officer of Oakland, went in charge of the police patrol wagon to a railroad station in that city for the purpose of conveying to the hospital a young man whose leg had been broken. The injured man was placed on a stretcher in the wagon, and the wagon was driven along the track of the defendant's street railroad, not far behind a street-car, and at about the same rate of speed. The car which the wagon was following turned off on a switch where the street-cars pass each other, and very soon thereafter a car coming from the opposite direction on the main track came in collision with the wagon, by reason of which plaintiff sustained the injuries complained of. As to what took place immediately after he saw the approaching car, and before the collision, the driver of the patrol wagon testified: "I started to pull my wagon out of the track. I had to do it slow, on account of the man, and I saw this fellow was coming up before I could get out; and I hollered and said, 'You stop your car until I can get out.' He paid no attention, and came on. It seemed as though he came faster. Then Officer Babb hollered. He took no notice of it at all. He was looking behind his car. When I first hollered to him, he was about sixty feet away. I hollered as loud as I could. Officer Babb sung out very loud,—as loud, I guess, as he could holler. I said: 'Stop that car. Stop that car.' When Babb hollered, he said: 'Stop the car. Stop the car.' The driver of the car was looking behind the car; turned away looking around the corner of the car, looking at the other car going on, I suppose. The other car had passed at that time." This testimony was corroborated by other witnesses, all tending to show that the driver of the wagon was endeavoring to avoid the collision in the manner stated by him, and that the driver of the car made no attempt to slacken its speed. The court did not, in view of this evidence, err in denying the motion of defendant for a nonsuit. It was not negligence *per se* for the driver of the patrol wagon to drive along and upon the track of the defendant's road. He had a right to do this, so long as he used ordinary care to avoid any collision with defendant's cars. Shea v. Railroad Co., 44 Cal. 414; Fleckenstein v. Railroad Co., 105 N. Y. 655, 11 N. E. Rep. 951; 1 Thomp. Neg. p. 396. And it was clearly a question for the jury whether the driver of the patrol wagon did use ordinary care in endeavoring to avoid the collision, or whether he ought not to have turned out of the track more quickly when he saw defendant's car approaching. This evidence was also sufficient to show that the driver of the car was negligent in omitting, without any apparent excuse, to look ahead, and observe whether the track was clear. It is the duty of such a driver, equally with the driver of any other vehicle, to observe what is in the road before him, so as to avoid inflicting injury upon others, if practicable.

2. The instructions of the court, taken as a whole, fully and fairly stated the law applicable to the case, and as to the respective rights of the parties to the use of that portion of the street in which defendant's track is laid, and as to the degree of care which each was required to exercise in order to avoid coming in collision with the other. In the introductory part of its instructions the court said: "You are the sole judges of the evidence given by all the witnesses here; and if you believe from the evidence that the plaintiff has sustained damage, under the circumstances he represented to you by the evidence, and under the law as now being given to you by the court, your verdict must be for plaintiff." The appellant contends that this statement took away from the jury the right to pass upon the questions of negligence and contributory negligence, and made the right of plaintiff to a verdict depend alone upon the fact that he had been injured. This language of the court was not as carefully expressed as it should have been; but we do not think, in view of the full and complete instructions which followed, that it could have been understood by the jury otherwise than as declaring that they should give a verdict for the plaintiff if, upon the evidence and under the law then about to be given, they were convinced that he was entitled to it.

3. There was no error in the instruction numbered 6. In substance, it told the jury that if, by reason of inattention, carelessness, or incompetency, the car-driver failed to avoid the collision, the defendant was liable, if there was no con-

tributory negligence on the part of the plaintiff or the driver of the wagon; and the statement in the preceding part of the instruction, that street-cars are easily and readily stopped, could not have prejudiced the appellant. The fact itself is one of common knowledge, and which the jury might properly consider without any other evidence of its existence. The instruction, as given, left the jury entirely free to draw from the fact alluded to such inferences as they thought proper, and contained no expression or intimation of the opinion of the court as to the weight which should be accorded to it in their deliberations.

4. The amount of the verdict in this case is large, but we cannot say that it is suggestive of either passion or prejudice on the part of the jury. In fixing damages in this class of cases, much is left to the discretion of the jury; and, when the verdict has been approved by the trial court, this court is not authorized to grant a new trial upon the ground of excessive damages, except in a case where it is plain that the verdict was not the result of the fair and honest judgment of the jury.

We find no error in the record. Judgment and order affirmed.

We concur: McFarland, J.; Sharpstein, J.

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93 Cal. 153

People *ex rel.* Parsons v. Edwards.

(No. 14,046.)

(*Supreme Court of California.* Feb. 2, 1892.)

Office and Officer—Appointment and Tenure—Holding Over.

1. Act March 28, 1878, provided for a board of five fire commissioners, three to be appointed by the board of supervisors, and two by the judges of certain courts therein named. The act further provided that the commissioners should hold office for four years, "and until their successors are appointed and qualified." In December, 1879, defendant was appointed a fire commissioner by one of the judges named in the act. The constitution which went into affect January 1, 1880, abolished the courts named in the act, but did not vest their power of appointing fire commissioners in any other person or tribunal. June 20, 1889, the governor, believing that defendant's term of office had expired, appointed the relator, who, having duly qualified, demanded of defendant his seat in the board, which was refused. *Held*, that there was no vacancy which called for an appointment by the governor, as such vacancy could be caused only by some event by which the duties of the office were no longer discharged at all. People v. Hammond, 6 Pac. Rep. 741, 66 Cal. 654, followed.

2. Const. art. 20, § 16, providing that the term of an officer or commissioner not therein provided for may be declared by law, but shall in no case exceed four years, merely limits an incumbent's term by election or appointment, but does not forbid a holding over until a successor has been chosen and qualfiied.

Department 1. Appeal from superior court, city and county of San Francisco; J. McM. Shafter, Judge.

Proceeding by the people on the relation of Thomas J. Parsons against one Edwards. Judgment for plaintiff. Defendant appeals. Reversed.

Spencer & McEnerney, for appellant. *George A. Johnson*, (*J. C. Bates*, of counsel,) for respondent.

Paterson, J. *Quo warranto ex relatione* T. J. Parsons to show by what warrant defendant exercises the office of fire commissioner. The facts—about which there is no dispute—are as follows: Prior to 1878 the board of fire commissioners of the city and county of San Francisco consisted of five persons, chosen by the qualified voters of said city and county at general elections. On March 28, 1878, an act was passed by the legislature, and approved by the governor, which provided for a board of fire commissioners consisting of five members, three of whom should be appointed by the board of supervisors, one by the judge of the municipal criminal court, and one by the judge of the county court. The terms of three of the five members of the board elected under the act of 1874 expired on the first Monday of December, 1879, and the terms of the other two members expired on the first Monday of December, 1881. The last-named act provided that the judge of the municipal court and the judge of the county court should each appoint one commissioner in place of one of the three commissioners elected under the act of 1874. On the first Monday in December, 1879, the defendant was appointed a member of the board by the judge of the county court, and on the same day Edward Flaherty was appointed a member of the board by the judge of the municipal court. On December 15, 1879, the board of supervisors appointed Edward B. Cotter, and on December 5, 1881, the board of supervisors appointed John Mason and F. C. Siebe members of the board of fire commissioners in place of the two remaining members of said board, who had been elected under the act of 1874, and whose terms expired on the first Monday in December, 1881. The act provides that the commissioners shall hold office "for the term of four years from and after the date of their appointment, and until their successors are appointed and qualified." The constitution which went into effect January 1, 1880, abolished the municipal criminal court and county court. On June 20, 1889, the governor, believing that the defendant's term of office had expired, and that there was a vacancy in said board, appointed the relator, Thomas J. Parsons, in the place and stead of said Edwards. After duly qualifying, the relator demanded of the defendant his seat in the board, but the defendant refused to surrender the same, or to recognize the validity of the relator's appointment. We are unable to tell from the respondent's brief whether he claims that the act of 1878 is still in force or not, but his action is based upon the assumption that it is still in force; if it is not, certainly he has no claim to the office,—the office fell with the act. Questions involving the same principles as those under discussion were determined in People v. Hammond, 66 Cal. 654, 6 Pac. Rep. 741. Under the act of April 1, 1878, the respondent in that case and two others were appointed by certain district court judges, named in the act, police commissioners for the city and county of San Francisco. By the constitution of 1879 the judges of the courts named were superseded, but the powers given to them by the act referred to were not vested in any other person or tribunal. It was claimed by the relator in that case, as it is by the relator here, that under section 8, art. 5, and section 16, art. 20, of the constitution, the office became vacant at the expiration of four years from the date of the defendant's appointment, and that the governor had the power to fill such vacancy. These contentions did not receive the sanction of the court; it was held that there was no vacancy which the governor was authorized to fill. Unless that case is to be overthrown, it is an authoritative adjudication against the claim of the relator herein, and entitles the defendant to hold the office until his successor has been appointed or elected and has qualified, or until the office has been abolished by the power which created it. It would be sufficient to rest the decision herein upon a reference to that and other cases involving similar questions, (see People v. Pond, 89 Cal. 141, 26 Pac. Rep. 648;) but we may add that the case at bar contains some elements which make the defendant's position stronger in this case than it was in the case referred to. The police commissioners referred to in People v. Hammond were all appointed by the judges superseded by the new constitution. In the case at bar a majority of the members of the board of fire commissioners are still appointed by the board of supervisors, and will continue to exercise the functions of the office unless the act be declared wholly void. The police commissioners had no fixed term of office; the term of the fire commissioners is fixed at four years. Where the term of office is fixed, determinate, a provision requiring the officer to continue "to discharge the duties of his office, although his term has expired, until his successor has qualified," (Pol. Code, § 879,) "adds an additional, contingent, and defeasible term to the original fixed term, and excludes the possibility of a vacancy, and consequently the power of appointment, except in case of death, resignation, ineligibility, or the like. * * * It is certain, therefore, that all offices to which the above constitutional provision applies are held by the same title, or by as high and lawful tenure, after the prescribed term, until the title of a duly elected and qualified successor at least, as before and during such term." State v. Harrison, 113 Ind. 434, 16 N. E. Rep. 384. Section 8, art. 5, of the constitution, provides that "when any office shall from any cause become vacant, and no mode is provided by the constitution and law for filling such vacancy, the governor shall have power to fill such vacancy," etc. The office must have become vacant before the executive function of appointment can be called into existence. The word "vacancy," as applied to an office, has no technical meaning. Section 8, art. 5, was copied from the old constitution, and the meaning of the term "vacancy" has been several times expounded by this court. People v. Tilton, 37 Cal. 614. In People v. Bissell, 49 Cal. 411, the court said: "So long as Bissell, therefore, continues to discharge the duties of the office pursuant to the requirements of section 879 of the Political Code, even though his term of office has expired, there is no vacancy in the office in the absolute sense, nor in any sense which would authorize the governor to fill it without the consent of the senate first had. Such a vacancy could only be caused by the resignation or death of the incumbent, or some other event by which the duties of the office were no longer discharged at all, in which case, and in order to prevent a failure of the public service, the governor might appoint during the recess of the senate." See, also, People v. Whitman, 10 Cal. 38; People v. Stratton, 28 Cal. 388; People v. Tyrrell, 87 Cal. 479, 25 Pac. Rep. 684; State v. Johns, 3 Or. 537; Rightmire v. Camden, 50 N. J. Law, 48, 13 Atl. Rep. 30; Stilsing v. Davis, 45 N. J. Law, 390. It has been held that an officer will hold over until his successor is qualified, although the constitution says he is ineligible for a second term. His holding over is simply a prolongation of the old term. Carr v. Wilson, 9 S. E. Rep. 31. It is in no sense a new term. During the time he holds over, his salary cannot be increased, and he and his sureties are liable on his official bond for all his acts until his successor is elected or appointed and qualified. State v. Smith, 87 Mo. 160. Of course, the language of the statute or constitution may show an intention to fix and limit precisely the tenure of an officer, so that at a particular time his authority will cease, although an absolute vacancy and absence of authority result therefrom, as in the case of Gosman v. State, 106 Ind. 203, 6 N. E. Rep. 349, where it is held that a constitutional provision that "no person shall be eligible to the office of clerk more than eight years in any period of twelve years" imposed an absolute disability upon Gosman to continue in the office of clerk for a longer period than eight consecutive years. Unless such intention appears, however, the officer is entitled to exercise the functions of his office until another person is qualified to assume them. Bunker v. Gouldsboro, 81 Me. 194, 16 Atl. Rep. 543.

It is claimed that section 16 of article 20 of the constitution makes it unlawful to occupy an office, created by the legislature, for a longer period than four years. That section provides that, "when the term of any officer or commissioner is not provided for in this constitution, the term of such officer or commissioner may be declared by law; * * * but in no case shall such term exceed four years." This question, also, was passed upon in People v. Hammond, and requires no further notice. See, also, State v. Harrison, supra, where the purpose and effect of a similar provision is discussed. This section is a re-enactment of section 7, art. 11, of the old constitution, which was held not to forbid a holding over until a successor has been chosen and has qualified, but merely to limit the incumbent's term by election or appointment. People v. Stratton, and People v. Tilton, supra. As the section is substantially the same as it was in the former constitution, it must be construed in the same way. Sharon v. Sharon, 67 Cal. 189, 7 Pac. Rep. 456, 635, and 8 Pac. Rep. 709. The judgment is reversed, with directions to the court below to enter judgment on the findings in favor of appellant.

We concur: HARRISON, J.; GAROUTTE, J.

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92 Cal. 669

WHALEN *et ux.* v. ARCATA & M. R. R. CO.
(No. 13,774.)

(*Supreme Court of California.* Jan. 16, 1892.)

RAILROAD COMPANIES—DEFECTIVE CROSSING—CONTRIBUTORY NEGLIGENCE.

1. A railroad crossed a highway at an oblique angle, on a level, and the crossing was filled in with planks, the rails projecting about an inch and a half above the planking. Plaintiffs, traveling along the highway in a cart, at five or six miles an hour, drove across without slackening their speed, and were upset by the wheel catching where a plank had been removed by the railroad company. *Held*, in an action against the company for the injuries sustained, that the question of contributory negligence was for the jury.

2. In such action it was for the jury to say whether plaintiffs were negligent if they crossed the track at a different angle from that at which it was usually crossed, and whether their doing so proximately contributed to the accident.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Action by William Whalen and wife against the Arcata & Mad River Railroad Company for personal injuries. Judgment for plaintiffs. Defendant appeals. Affirmed.

S. M. Buck and *C. M. Wheeler*, for appellant. *Frank McGowan*, for respondents.

TEMPLE, C. Appeal from judgment, and order refusing defendant a new trial. The plaintiffs are husband and wife, and bring this suit to recover damages for personal injuries received by the wife. They aver that defendant's road crosses the highway, and that defendant so negligently and carelessly kept and maintained the crossing that it was allowed to become grossly out of repair, and in an unsafe condition in this: "That said defendant allowed a space in said crossing, unnecessarily large, to be and remain between one rail of said road and said crossing at the point on said crossing on said road where vehicles were and are usually driven." That while plaintiffs were crossing with a cart, without fault on their part, but by reason of the unsafe condition of the crossing, "one of the wheels of said cart was caught in said large space between said crossing and said rail herein described, and the said cart was then and there overturned, and the plaintiffs violently thrown to the ground, whereby," etc. The court, in effect, charged the jury that the plaintiffs, in order to recover, must prove the allegations precisely as made; that it would not be sufficient to show that the crossing was defective in some other respect; as, that it crossed the highway at an angle, or that the rails were too high. The appellant claims that the evidence shows that the accident was not caused by the alleged defect. But we do not so understand the evidence. It seems to us that the very testimony so confidently referred to as sustaining the position of counsel, tends directly and plainly to show that the accident was caused in the precise manner alleged; and so it must have appeared to the jury which rendered the verdict, after an instruction so distinct and positive; and to the learned judge, who, of his own motion, gave the instruction, and refused a new trial. The natural effect of use would have been to deepen the impression near the rail, and, perhaps, to accumulate earth immediately against it, and it is easy to see how the removal of this earth, shortly before the accident, might, in the absence of the necessary plank, increase the liability to an accident precisely as charged in the complaint, and, as we think, some of the testimony tended to prove. That there was other testimony inconsistent with this can make no difference here. We find no evidence which tends to prove any other defect than that charge.

The only question, therefore, is whether plaintiffs were guilty of negligence which proximately contributed to the accident. That they were is claimed on two grounds: Plaintiffs were driving with reckless speed, and turned while on the track, instead of going directly across. Plaintiffs' evidence was to the effect that they were driving a steady horse, at the rate of five or six miles per hour, and did not slacken speed at the crossing. The crossing was quite oblique, was on a level with the highway, and the rails projected above the planking about one inch or an inch and one-half. The crossing was filled in with planks, except that defendant had removed one plank along the north rail, and had neglected to restore it. It was not shown that plaintiffs knew of the defect. We cannot say, as matter of law, that under such circumstances the failure to slacken speed at the crossing was negligence. Had the crossing been in good order, we do not know that such speed would have been dangerous. So far as affects the liability of defendant, the plaintiffs had a right to assume that it had performed its duty, and had maintained the crossing in good condition. Although the evidence may not be conflicting, the question of negligence is peculiarly one for the jury. Fernandez v. Railroad Co., 52 Cal. 48. Courts will not interfere with a verdict where the conclusion can fairly and reasonably be drawn from the evidence.

The evidence is not very clear that there was any turning on the crossing, or that plaintiffs crossed at a different angle from what travelers generally did. Minor was driving across at the same time, going in the same direction. He says that, having a fractious horse, he turned to the left as much as possible, to give them the road. He was asked: "Question. Did they keep on the traveled part of the road, or did they keep to the right? Answer. Well, I should think it was near the center of the road. It seemed so to me, because I had to push the wheel away with my hand to keep it from striking my buggy after they capsized. * * * Q. When they drove across, did they not turn to get in ahead of you on the left there?" A. Well, I think there was an effort to pull around me. They passed me right on the railroad track." And again: "Q. Did they turn to the left, to get in ahead of you, about the time the cart pitched? A. No, sir; I think they kept the middle of the road. I gave the road to them. They passed me, you understand, right on the track. Of course, they would naturally pull around a little as they passed. They upset to the east side. That is where they were thrown." Again, examined by defendant's counsel: "Q. And of course they approached the road at a different angle from this main traveled track? A. Well, I should naturally suppose so. * * * Q. Did the horse swing in towards you? A. Yes, sir. Q. Q. That is, it swung into the left? A. The moment they capsized, the horse swung almost immediately against me." The parties were going north. The acute angle of the crossing on the north side was on the right, and plaintiffs fell out on the right side, while the buggy and horse swung to the left. James Chaffey was the only other witness, besides plaintiffs and Minor, who testified for defendant as to this matter: "Question. When they came to the crossing, how did they manage? Answer. I wasn't looking. I was walking along. I didn't see what passed, but the cart-wheels caught in the rails, and tipped over." Afterwards he said, "They were going to pass Minor, and when they geed off was when they caught in the rail." We think the jury would be justified in thinking that this was not what the witness saw, but his conclusion. He was not asked if he could see whether the wheel caught in the rail or not. He said: "I just saw it slide. It slid along a little. I was about fifty yards away. I had passed the track, going to Arcata, and had to look around to see it." But here, too, even admitting that appellant is correct as to its construction of the evidence, it was still properly left to the jury to say whether it was culpable negligence for plaintiffs to cross at the angle they did, and whether it contributed proximately to the injury. Had the crossing been in repair, it is possible that it would not have increased the danger. We certainly cannot say, from the evidence, that, had such been the case, a person of ordinary prudence would not have crossed as plaintiffs did. It was therefore a proper matter to be left to the jury under the instructions of the court. We think the judgment and order should be affirmed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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94 Cal. 601

DOUGHERTY v. AUSTIN, Treasurer. (No. 13,323.)[1]

(*Supreme Court of California.* Jan. 20, 1892.)

COUNTY OFFICERS—COMPENSATION—CONSTITUTIONAL LAW.

1. Const. art. 11, § 5, provides that the legislature shall provide for county officers, and regulate their compensation; and by section 9 that such compensation should not be increased during their terms of office. St. 1883, p. 299, as amended by St. 1885, p. 178, fixed the salary of the county clerk of M. county, and made it full compensation for all services, including his deputy. *Held* that, where his term of office began January 7th, an order of the county board on the 10th, allowing him a deputy at a salary of $50 per month, to be paid by the county, was an increase of his compensation, within the meaning of the constitution.

2. By Laws 1887, p. 207, the statute relating to county officers was amended by providing that when, in the opinion of the board of supervisors, the salary of such officers in certain classes of counties was insufficient to pay a reasonable compensation, the board should allow such officer a deputy at a certain salary, to be paid for by the county. *Held,* that the provision was in violation of Const. art. 1, § 11, which required all laws of a general nature to have a uniform operation. Following Miller v. Kister, 8 Pac. Rep. 813, 68 Cal. 142.

3. The fact that the law under which the supervisors acted was in force prior to the election of the county clerk is immaterial, as it was the order and not the act of the legislature which increased the compensation.

MCFARLAND and PATERSON, JJ., dissenting.

In bank. Appeal from superior court, Marin county; J. F. SULLIVAN, Judge.

Application of Wilbur F. Dougherty for a writ of mandate to John L. Austin, treasurer of Marin county, to compel him to pay a certain warrant. Judgment for the applicant. From the judgment, and an order denying a new trial, Austin appeals. Reversed.

Smith & Pomeroy, for appellant. *Hepburn Wilkins,* for respondent.

GAROUTTE, J. This was an application for a writ of mandate to compel the defendant to pay a warrant for services rendered by plaintiff as deputy county clerk of Marin county. The trial court ordered the writ to issue, and this is an appeal from the judgment and order denying a new trial. The facts of the case are: One Bonneau was, at the commencement of this proceeding, and had been for more than four years next preceding thereto, the county clerk of Marin county. Said Bonneau was last elected in 1888, his term of office beginning January 7, 1889. Upon January 10, 1889, he filed an affidavit with the supervisors of said county by which he showed that a deputy was required by him in the proper discharge of his duties as such county clerk, and said board at that time made an order allowing him a deputy at a salary of $50 per month, to take effect from January 7, 1889. The order of the board of supervisors was made by authority of a provision of section 211 of the county government act as amended, found at page 207 of the Statutes of 1887, which reads: "Provided, further, that whenever, in the opinion of the board of supervisors, the salary of any county officer in the third, fourth, fifth, twelfth, twentieth [and several others] classes as fixed and provided in this act is insufficient to pay a reasonable compensation for the services required to be performed, then said board shall allow such officer a deputy, or such number of deputies as in their judgment may be required to do the business of such office, in connection with the principal, at a salary not to exceed one hundred dollars per month, to be paid at the times and in the manner said principal is paid: provided, that an affidavit shall be filed by such officer with the said board showing that such deputy or deputies are required by him in the proper discharge of his duties as such officer."

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[1] Rehearing granted.

It is insisted by appellant that the order of the board of supervisors made January 10, 1889, allowing the county clerk a deputy at a salary of $50 per month to be paid by the county, was an increase of the compensation of such county clerk after his election and during his term of office, and that such order for those reasons was void and of no effect, being in violation of the provisions of section 9, art. 11, of the constitution of this state, wherein it is provided that "the compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office." The order of the board under consideration was made after the election and during the term of office of said Bonneau, and the question presented is, did the order allowing the clerk a deputy, and ordering that his salary be paid from the county treasury, increase the compensation of the county clerk? If it did increase his compensation, it is violative of the provision of the constitution just quoted, and must give way for that reason. That part of the order wherein it is recited that "the clerk is allowed a deputy" of itself is practically of no effect and force, because the clerk by virtue of his office has the power to appoint one or more deputies to perform or assist him in the performance of the duties of such office, entirely regardless of the wishes or demands of the board of supervisors, and this order of the board, construed in connection with the statute, is substantially as follows: "In the opinion of the board of supervisors of Marin county, the salary of the county clerk of said county, as now provided by law, is insufficient to pay a reasonable compensation for the services required to be performed by him, and, it further appearing by the affidavit of the said clerk that a deputy is necessary to a proper performance of the duties of his office, it is ordered that such deputy be paid fifty dollars per month from the county treasury." The duties resting upon Bonneau when he qualified as county clerk and entered upon his office were plain and unmistakable, for they are enumerated in detail by the statute, and upon every principle he was bound to discharge those duties. The law would not even allow him to take a single step in the performance of them until he agreed under the solemnity of his oath that he would "perform all the duties of his office to the best of his ability." If his duties as county clerk during the life of his term of office become so burdensome and assume such proportions that he has not the ability, either mental or physical, to perform them, he is not thereby released from the obligations he assumed at the inception of his term of office. His services are purely ministerial, and if, through simple desire or actual necessity, assistance is wanted, the law allows him to call to his aid as many deputies as he may see fit to appoint. If unwilling to adopt this course, and unable to perform the duties of the office personally, he can resign; but as long as he remains in office he is bound to perform the duties of the office under his official oath, or remain and render himself amenable to charges and removal for neglect of official duty. In Evans v. City of Trenton, 24 N. J. Law, 766, it is said: "It is a well-settled rule that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services; nor does it alter the case that by subsequent statutes or ordinances his duties are increased, and not his salary. His undertaking is to perform the duties of his office, whatever they may be, from time to time during his continuance in office, for the compensation stipulated, whether these duties are diminished or increased; and whenever he considers the compensation inadequate he is at liberty to resign." The constitution provides that the legislature shall, by general and uniform laws, provide for the election or appointment of county officers, and that it shall regulate the compensation of all such officers in proportion to duties. Article 11, § 5. In pursuance of this provision the legislature, by an act entitled "An act to establish a uniform system of county and township governments," found at page 299, St. Cal. 1883, proceeded to carry into effect this provision of the constitution, and as amended by St. 1885, p. 178, fixed the salary of county clerks of counties of the twentieth class (of which Marin county was one) at two thousand and five hundred dollars per annum, which was to be for the "services required of them by law or by virtue of their office;" and section 211 of the same act (St. 1887, p. 207) further provided: "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers or *ex officio* officers, their deputies or assistants, unless in this act otherwise provided, and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided, unless in this act otherwise provided." It will thus be seen from the foregoing principles and provisions of the statute and constitution cited that a public officer accepts an office upon the condition that he will perform all the duties of the office, and while he remains in such office the public have the right to demand that he perform such duties. In accordance with the mandate of the constitution, the legislature fixed the salary of the county clerk of Marin county in proportion to the duties of the office, not in proportion to the duties of the office the county clerk could personally perform, for the statute itself expressly provided that it should be in full compensation for the performance of all the duties of the office; although such would be the necessary construction of the provision of the constitution, regardless of the statute.

The fact that the law under which the board of supervisors acted in making the order was in force prior to the election of the county clerk is immaterial to the question involved, for it is not the act of the legislature that increases the compensation, but the order of the board of supervisors, passed long after the act took effect, long after the election of the county clerk, and during his term of office. The provision of the statute is entirely ineffectual, save simply as a delegation of power to the board of supervisors to order these things to be done. The legislature had no power upon the 10th day of January, 1889, to increase the compensation of the county clerk of Marin county; and, not having the power itself so to do, much less could it authorize such board to do so. This provision of section 211 of the county government act applies to 20 classes of counties, and the county clerks in some of those classes of counties have salaries ranging from $10,000 to $13,000 per annum. Every reason that can be urged and every principle of law that can be invoked to sustain the validity of this order can be urged and invoked with the same force to sustain an order made by the various boards of supervisors of these counties, allowing their county clerks all the deputies necessary for the proper administration of their offices, the counties paying therefor, and thus leaving their entire salaries remaining as compensation for their personal services. If such is the law, all the deputies of all the county officers of 20 classes of counties, under the general election of 1888, by order of the various boards of supervisors, could have been paid out of the county treasury of the respective counties. The doctrine can only be sustained upon the theory that the word "compensation," as used in the constitution, refers simply to the personal services of the public officer, and not as compensation for the performance of all the duties of the office. The fact is directly to the contrary, and is so recognized by the legislature throughout these various provisions of the county government act. The board can only allow such deputy upon the request of the principal, and only when the principal insists that his services are necessary in the performance of the duties of the office. If not paid by order of the board from the county treasury, the principal, being bound to perform all the duties of his office, and a deputy being necessary, would be bound to employ the deputy and pay him from his own salary. The county, by order of the board, pays $600 per annum as part compensation for the performance of the duties of the clerk's office. From a pecuniary stand-point such course is a very substantial benefit to the county clerk. The deputy is under his control, is empowered by law to act in the place and stead of his principal in all matters, the principal is liable for his salary, and a payment by the county of such deputy's salary is for all practical purposes a payment to the principal, and in this case necessarily results in an increase of the principal's compensation to the extent of $600 per annum. It is perfectly immaterial to the clerk whether his salary is increased to $3,100 per annum, and from that sum he pays his deputy $600 per annum, or that it remains at $2,500 and the county pays the deputy the $600. The clerk reaps the full benefit of the $600 in both cases. To be sure, this reasoning concedes that the clerk must have the deputy, but such must be the fact, for the clerk is bound to perform all the duties of his office, and a deputy is a necessity to the performance of those duties, for, by his affidavit, he himself has so declared. To construe the provision of the constitution so that a county clerk's salary could not be increased during his term of office, but that an act of the legislature would be valid which provided that all of his deputies, men whom he was bound to employ and bound to pay, in the absence of such an act, should be paid by the county, independent of and in addition to the clerk's salary, would be to allow that to be done indirectly which could not be done directly, and would be establishing a medium for the practice of the very abuses which the constitutional provision was inserted to destroy. The provision of the statute appears to be a crude and ill-conceived effort to evade a very plain and very wholesome provision of the constitution of this state.

Let us take a broader view of this provision of the county government act, which authorizes the boards of supervisors of 20 classes of counties to pay the salaries of the deputies of all the county officers of the counties of those classes under certain conditions and contingencies, and estimate its true worth by another test. Article 1, § 11, of the constitution, requires that "all laws of a general nature shall have a uniform operation." The county government act is essentially a law of a "general nature." It must be so to have any validity whatever, and, with the provision under discussion before our eyes, can it be said the county government act has a uniform operation? In Ex parte Smith, Justice SANDERSON said, referring to the meaning of the constitution in the use of the words "uniform operation:" "Its meaning, as repeatedly declared by the highest judicial tribunal in the state, is not that general laws must act alike upon all subjects of legislation or upon all citizens or persons, but that they shall operate uniformly, or in the same manner, upon all persons who stand in the same category; that is to say, upon all persons who stand in the same relation to the law, in respect to the privileges and immunities conferred by it or the acts which it prohibits." 38 Cal. 702.

We must view this question in the light of the fact that the county government act was intended to establish a uniform system of county governments, and that the classification of counties and regulation of the compensation of county officers, in proportion to duties, were important elements in the formation of that act, and were material portions to which the principle of uniformity was to be applied. When amended in 1887 by the provision delegating these powers to the boards of supervisors in 20 classes of counties, that provision simply became a part of the whole,—a strand of the rope which formed the county government act. That provision certainly gained no additional strength or weight, simply by being a more recent creation of the legislature than the act of which it became a part, and its validity must be weighed and tested as if it were a provision placed in the act of 1883. Now, does it disturb the uniformity of the operation of that act? We find the act first classified the counties of the state according to population, for the sole and express purpose of regulating the compensation of county officers according to their duties. It then regulated the compensation of county officers according to their duties, but it did not stop there. It provided, further, that in 20 classes of counties, naming them, the supervisors of those counties might relieve the county officers of some of their official burdens, by ordering that their deputies be paid from the county treasury. By this provision the legislature destroyed the uniformity of the operation of the act. In 28 classes of counties the compensation of county officers is fixed at an amount certain and definite,—an amount that cannot be changed, save by an act of the legislature; but in the remaining 20 classes of counties the compensation for the performance of the duties by the various officers may fluctuate every month in the year, at the mere whim of the boards of supervisors. The county government act, upon the same matters and under the same state of circumstances, should operate equally upon all classes of counties; but the legislature has said that in 20 classes of counties only, whenever the salary of county officers is insufficient to pay a reasonable compensation for the services required to be performed, the board of supervisors may allow them deputies at the county's expense. Now, if the salaries should prove insufficient to pay a reasonable compensation to the county officers for the duties to be performed in the remaining 28 classes of counties of the state, why should they not be allowed the same relief? In 28 classes of counties the legislature fixed the salaries of county officers at a definite sum, in proportion to the duties of the office. In 20 classes of counties the minimum sum only is fixed, and the boards of supervisors have the power to fix the compensation for the performance of the duties of the various officers at any sum which the board may think is a proper proportion, as compared with the duties of the office. This certainly is a very unjust discrimination against 28 classes of counties, and, not acting alike upon all classes of counties, necessarily destroys the uniformity of the operation of the act.

Respondent's counsel insist that an amendment to the act of 1883 relating to the compensation of county officers of one class of counties is a law of a general nature in itself, and that consequently this provision of section 211, applying to 20 classes of counties, is no less a general law; and, purporting to deal with 20 classes of counties only, and having a uniform operation as to those classes, the provision complies with the test in both respects, and is therefore within the constitution. This contention is true to a limited extent, and was so held by this court in Cody v. Murphey, 89 Cal. 522, 26 Pac. Rep. 1081, wherein it was decided that legislation pertaining to the compensation of officers of one class of counties was a law of a general nature, and in that case uniform in its operation, it being directly in line with all other provisions of the county government act, pertaining to the same subject-matter. But there is a broad distinction between that provision of the act and the one under consideration in this case. If the legislature, as has been attempted here, can delegate the power to the supervisors to regulate the salaries of county officers of 20 classes of counties, it could provide a separate and distinct means for the regulation of the salaries of the county officers of each separate and distinct class of counties; and thus the uniformity of the operation of the county government act, upon the question of the regulation of salaries of county officers, would consist solely in the fact that the operation of the act was uniformly different in each class of counties. It would seem that the case of Miller v. Kister, 68 Cal. 142, 8 Pac. Rep. 813, is conclusive against respondent upon this question. In that case the section under consideration was section 4 of the act of 1885, amending the county government act as to salaries, (St. 1885, p. 195,) which section provided that in three classes of counties the salaries fixed in said amendment (all reductions, which were within the power of the legislature to make) should take effect on the first day of the following month, while the amendment provided that in all other classes the salaries should not take effect during the terms of the then officers. Held, (1) that the same was special legislation; and (2) that the operation of the law is exceptional and eccentric, and causative of discrimination between the officers upon whom it is to operate,—"the few are excluded from the privileges given to the many;" and the section was held to be void. We think this provision destroys the uniformity of the operation of the county government act in respect to the matters upon which it attempts to speak, and is a violation of a plain requirement of the constitution, which should be scrupulously guarded and upheld. Let the judgment be reversed and the cause remanded, with directions to dismiss the proceedings.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; HARRISON, J.

BEATTY, C. J. I concur in the judgment of reversal. If the amendment to the county government act under which the respondent claims applied equally to all the counties of the state; if, in other words, it was general, and not special and local, in its operation,—I think it is susceptible of the construction which would not bring it in conflict with section 9 of article 11 of the constitution forbidding the increase of a compensation of a county officer during his term. What I think the legislature really meant by the provision in question was to empower the boards of supervisors in those classes of counties to which it applies to allow deputies or additional deputies in county offices, and to pay their salaries whenever, from some unusual increase of population or other cause, the business of such offices was so increased as to require for the discharge of its duties a deputy or deputies in addition to the number employed at the date of the act fixing the salary of the office. I do not think it was the intention of the legislature to authorize the boards of supervisors in their discretion to relieve county officers of the payment of the deputies employed at the time their compensation was established by the county government act. To give the law in question such a construction would render it invalid as an attempt to delegate to the supervisors of the respecttive counties a power and a duty conferred and imposed by the constitution in express and mandatory terms upon the legislature itself. Article 11, § 5. Such a construction is, of course, to be avoided if possible. Giving to this law, then, the construction above indicated, it would not have the effect, if properly administered, of increasing the compensation of any county officer during his term, and the only constitutional objection to which it is exposed, in my opinion, is this: That it is special and local in a case where a general law could be made applicable, and perhaps in some of the specially enumerated cases in which special and local legislation is prohibited, (article 4, § 25,) or that it is an amendment to a general law which destroys the uniformity of its operation. To all these objections the respondent's answer is that the law is neither special nor local, because it applies to classes of counties created in pursuance of authority expressly conferred by the constitution itself, viz., the authority to classify counties by population for the purpose of regulating the compensation of county officers according to their duties. Article 11, § 5. But while this would be a sufficient answer to such objections in case of a law regulating the compensation of county officers, it is no answer to the same objections to a law passed for a wholly different purpose. In other words, a classification of counties made for a special purpose authorized by the constitution cannot be made the basis of discriminating legislation of any and every kind. Classification which is proper and rational and necessary for one purpose may be utterly arbitrary and unnecessary for another purpose, and is necessarily so with reference to a law with relation to which every county in the state stands upon the same plane. Such is the character of the law in question. If it is right that the supervisors should have the power to make allowance for the unexpected increase of business in the county offices, by authorizing the payment out of the county treasury of the salaries of such additional deputies as may be needed, then it is right that the supervisors of every county should have the same power. This law, however, selects certain classes of counties apparently at random, some large, some small, some of intermediate size, omitting others of every grade of population above, below, and intermediate, and confers upon the classes so arbitrarily selected a power and a privilege in the transaction of the county business which is denied to others standing in precisely the same relation to the subject of this enactment. This case is much stronger than that presented in Miller v. Kister, 68 Cal. 142, 8 Pac. Rep. 813, in which a similar law was held unconstitutional upon the ground that it was special legislation. But even if this law could be held a general law, in accordance with the contention of the respondent, I think his case is not within it. One deputy-clerk was employed in 1885, at the date when the salary of the office was fixed, and it must be presumed that the salary was fixed with reference to that fact. There has never been any increase in the number of deputies required, and the respondent is the only deputy that was employed by the clerk during the time for which a salary is claimed. As there was no increase in the number of deputies, the case did not arise in which, according to my construction of the law, the supervisors were empowered to make the allowance of a deputy's salary. Upon these grounds I concur in the judgment.

We dissent: McFarland, J.; Paterson, J.

92 Cal. 674

Maddox v. Wyman *et al.* (No. 13,269.)

(*Supreme Court of California.* Jan. 18, 1892.)

Chattel Mortgages — Default — Foreclosure.

1. A note providing for the payment of $2,400, the sum of $500 to be paid on the 15th of February, and $50 on the 15th of each month thereafter, was secured by a mortgage containing a provision that if the mortgagor should fail to make any payment the mortgagee should take possession of the property and sell the same, and from the proceeds pay the whole amount specified in the note. *Held*, that on the mortgagor's failure to pay a monthly installment the mortgagee could foreclose for the full amount of the unpaid installments, and was not limited to selling so much as was necessary to pay the past-due installments, under Code Civil Proc. § 728, declaring that if the debt for which a mortgage is held is not all due the sale must cease as soon as sufficient of the property has been sold to pay the amount due.

2. In such case a demand for payment of an installment was not necessary to put the mortgagor in default.

3. In a suit to foreclose the mortgage an issue as to the value of the property was immaterial.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by one Maddox against one Wyman and others to foreclose a chattel mortgage. Judgment for plaintiff. Defendants appeal. Affirmed.

Matt I. Sullivan, for appellants. *Whittemore & Sears*, (*Arthur Rogers*, of counsel,) for respondent. *Chas. F. Hanlon*, for interveners.

Vanclief, C. This is an action to foreclose a chattel mortgage on the furniture of a lodging-house to secure the payment of a promissory note, of which the following is a copy: "San Francisco, Jan. 1, 1887. For value, I promise to pay to the order of Mrs. M. H. McDonald twenty-four hundred dollars, in payments as follows: Five hundred dollars on the fifteenth day of February, 1887, and fifty dollars on the fifteenth day of March, 1887, and a like amount of fifty dollars on the fifteenth day of each and every month thereafter, till the full amount is paid, with interest at the rate of seven per cent. per annum. J. B. Wyman." The mortgage bears even date with the note, and contains the following provision: "It is also agreed that, if the mortgagor shall fail to make any payment as in the said promissory note provided, then the mortgagee may take possession of said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount in said note specified." The note and mortgage were assigned to the plaintiff. The defendant paid all the installments on the note up to and including that which became due on August 15, 1887, but failed to pay those which became due in September and October. This action was commenced November 11, 1887, to foreclose the mortgage for the full amount of the unpaid balance of the note, on the theory that the commencement of the action then was authorized by the provision of the mortgage above quoted, although by the terms of the note only the September and October installments were then due and unpaid. A judgment of foreclosure was rendered for a balance of $1,600, principal, with interest and costs. The defendants appeal from the judgment, and from an order denying their motion for a new trial.

1. It is contended by appellants that only two installments ($100) were due at the time the suit was commenced, and that according to section 728 of the Code of Civil Procedure[1] only so much of the mortgaged property should have been ordered sold as was necessary to pay the September and October installments. But, reading and construing the note and mortgage together, I think the plaintiff was entitled to foreclose for the full amount of the unpaid installments. Brickell v. Batchelder, 62 Cal. 624; Leonard v. Tyler, 60 Cal. 299; Beal v. Stevens, 72 Cal. 454, 14 Pac. Rep. 186.

2. It was not necessary, as contended by counsel for appellant, that, in order to put defendants in default as to the payment of any installment, a demand should have been made for such payment before the commencement of the action.

3. The issue as to the value of the mortgaged property is immaterial, and therefore it is of no consequence whether the finding upon that issue is justified by the evidence or not. I think the judgment and order should be affirmed.

We concur: Foote, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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93 Cal. 16

In re Kennedy's Estate. (No. 14,853.)

(*Supreme Court of California.* Jan. 20, 1892.)

Judgment against Executors—Filing Transcript.

Code Civil Proc. § 1504, provides that, where a judgment is rendered against an executor or administrator upon any claim for money against the estate of his decedent, a certified transcript of the original docket of the judgment must be filed among the papers of the estate in court. *Held* that, where such a judgment has been rendered, and the transcript filed, as required by the statute, it is not necessary, on the subsequent affirmance of the judgment on appeal, that a transcript of the judgment subsequent to the coming down of the *remittitur* should be filed.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Thomas E. Curran, as the administrator of Thomas Cushing, obtained a judgment against the estate of Philip Kennedy for the recovery of a sum of money. A certified transcript of the original docket of the judgment was filed among the papers of the estate in court. The judgment was subsequently affirmed on appeal. From an order directing the payment of the judgment the executor and executrix of the estate of Kennedy appeal, on the ground that a certified transcript of the original docket of the judgment on the *remittitur* from the supreme court should have been filed among the papers of the estate. Code Civil Proc. § 1504, provides that, where a judgment is rendered against the estate of a decedent for the payment of money, a certified transcript of the original docket of the judgment must be filed among the papers of the estate in court. The order was affirmed.

Charles F. Hanlon, for appellants. *James Gartlan*, for respondent.

Per Curiam. This appeal is without merit. The judgment against the executors, which was rendered in the superior court, February 11, 1889, "established the claim in the same manner as if it had been allowed by the executors and the judge." Code Civil Proc. § 1504. The subsequent affirmance of that judgment in this court did not create a new or different judgment, or impose upon the plaintiff therein the necessity of "filing among the papers of the estate in court" a certified copy of the transcript of the docket of the judgment on the *remittitur* from this court. The order is affirmed.

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93 Cal. 43

Archer v. Salinas City. (No. 13,040.)

(*Supreme Court of California.* Jan. 21, 1892.)

Dedication—What Constitutes—Acceptance—Adverse Possession—Purchase by Mortgagee—Title Acquired.

1. Where a land-owner files a map of a number of blocks owned by him, on which one block

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[1] Code Civil Proc. § 728, relating to mortgage foreclosures, declares: "If the debt for which the mortgage * * * is held is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due, * * * the court, may on motion, order more to be sold. * * *"

is marked "Central Park," circulates copies of the map, and states in an advertisement, and announces through an auctioneer, while selling the adjacent blocks, that such a block is reserved for a park, he dedicates the block to the public.

2. Under such circumstances, actual acceptance is not requisite to complete the dedication, since acceptance will be presumed from the benefit arising from the dedication. People v. Reed, 22 Pac. Rep. 474, 81 Cal. 70, distinguished.

3. Failure of the public to use the dedicated land for the purpose intended does not impair the dedication, nor authorize the prior owner to resume possession.

4. One who dedicates land to the public cannot subsequently acquire it by adverse possession.

5. A mortgagee, who, after dedication of the land to the public by the mortgagor, accepts from the latter a conveyance thereof in payment of the debt secured by the mortgage, acquires only the mortgagor's title.

In bank. Appeal from superior court, Monterey county; John K. Alexander, Judge.

Action to quiet title by E. Archer against Salinas City. Judgment for defendant. Plaintiff appeals. Affirmed.

S. P. Geil and *H. V. Morehouse*, for appellant. *W. M. R. Parker* and *B. V. Sargent*, for respondent.

Harrison, J. Action to quiet title to a block of land in Salinas City. Judgment was rendered for the defendant upon the ground that the land in question had been dedicated for use as a public park. From this judgment, and an order denying a new trial, the plaintiff has appealed.

The land in question is a portion of a larger tract of about 200 acres within the limits of Salinas City, of which the plaintiff was the owner on January 15, 1874, when he conveyed the same in fee to W. H. Stone for the sum of $25,000, and received from him $5,000 in money, and a mortgage on the same property to secure the remaining $20,000. This mortgage was renewed in 1878, and on December 24, 1880, Stone reconveyed a portion of the tract, including the block in question, in satisfaction of the mortgage debt, and other obligations of his to the plaintiff. In July, 1874, Stone caused the tract to be surveyed and subdivided into blocks, with streets connecting with other streets that had been laid out in Salinas City, marking the blocks with stakes set in the ground; and on the 12th of March, 1875, filed in the recorder's office of Monterey county a map of the tract, showing these streets and blocks, and the subdivisions of the blocks. Upon this map the block in question is laid down as bounded by Park street, Homestead avenue, Central avenue, and Villa street, and is itself marked "Central Park." Prior to the filing of the map, Stone had advertised in several newspapers that a sale of the tract would be held March 15, 1875, and had made and circulated copies of the map, and on the day of the sale he had an enlarged copy of the map upon the ground, and sold at public auction a very large number of the lots according to the map. In the advertisement of the sale it was stated that "in the center of this plat is located and held in reservation a block 580 feet square for a city park." At the sale it was represented that the square had been laid out for a city park, and the auctioneer made frequent references to this park as an inducement to pay advanced prices for lots in its vicinity, and the lots around it were sold at much higher prices than those remote from it. Stone was present at the sale, and made no objection to any of these representations. Nearly all of the lots upon the streets bounding the park and fronting thereon were sold at the sale, and during several years after the auction other lots were sold with reference to the map; and, after the conveyance to the plaintiff, deeds were executed by him with reference to the map as late as 1887. Previous to the auction sale, Stone had caused the land within this block to be laid out and planted with trees, and for several years thereafter he kept it fenced and had the trees cared for, and about 1884 the plaintiff cut some of the trees down, and hauled away the wood, under the claim that he was the owner of the land. It does not appear that the city ever made any improvements upon the park or took any steps with reference to it until some time in 1887, when it took possession of the block, and very soon thereafter the plaintiff commenced this action.

Upon the foregoing facts we are of the opinion that Stone dedicated the land in controversy for use as a public park, and that the finding of the court that the land was so dedicated is fully sustained by the evidence. When the owner of property which is within the limits of an incorporated city or town makes and records a map of such property, by which he subdivides the same into blocks and lots bounded by streets which are continuations of other streets already laid out by the city or town, and sells and conveys the lots abutting upon those streets, he thereby dedicates to the public the streets so laid out by him as prolongations of other streets, as well as the other streets which are laid out upon such map intersecting and connecting the same; and if, upon such map or plan, he has designated a space or block as a public park, such space or block is as fully dedicated to public use as are the streets delineated thereon. The purchasers of such lots have not merely an easement in the streets upon which the lots abut, but all of the streets are set apart for the purpose of enabling such purchasers to have reciprocal intercourse with the public outside of the subdivided tract, and are thus themselves dedicated to the entire public for all purposes to which streets can properly be applied. The same principles which are applicable to the dedication of public streets apply to the dedication of a public park or square. All dedications for public use are to be considered with reference to the purpose for which the dedication is made, or the use to which the property dedicated may be applied, and that purpose may be ascertained by the designation which the owner has affixed to the land upon the map, whether it be a street, a school lot, or a public park. The setting apart of a public park upon such map is for the convenience and enjoyment of the inhabitants of the place, and, as it enhances the value of the private property fronting thereon, so the owner who has dedicated it is presumed to have received, in the increased prices for which that property was sold, the compensation for its surrender to the public as a public park. The word "park," written upon a block of land designated upon a map, is as significant of a dedication, and of the use to which the land is dedicated, as is the word "street," written upon such map. The word carries with itself the idea of an open or inclosed tract of land for the comfort and enjoyment of the inhabitants of the city or town in which it is located, and is so defined by lexicographers. In England the word, when applied to an inclosed tract of land in the country, has a different signification, and signifies that the lands inclosed are the private grounds of the proprietor. In this country, too, a man may inclose his own land and style it a "park," or give that name to his place, without giving to the public any right to its use, for in such a case there would be no semblance of dedication; but the meaning of a word is to be determined by the circumstances connected with its use. In London, as well as in any city in this country, the term "park" signifies an open space intended for the recreation and enjoyment of the public, and this signification is the same whether the word be used alone, or with some qualifying term, as "Hyde Park," or "Regent's Park," or, as in the present case, "Central Park." Upon this point the authorities are uniform. Watertown v. Cowen, 4 Paige, 513; Price v. Plainfield, 40 N. J. Law, 608; Carter v. Portland, 4 Or. 339; Cincinnati v. White, 6 Pet. 431; Rowan's Ex'rs v. Portland, 8 B. Mon. 246; San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. Rep. 405; Dill. Mun. Corp. §§ 640, 644. Dedication is an ultimate fact dependent upon the establishment of other facts, and is to be found from the evidence presented to the court. Harding v. Jasper, 14 Cal. 648. It results from the acts of the owner of the land, coupled with the intent with which he does those acts. It may be express and completed by a single act, as when the land is dedicated by deed; or it may be implied from a series of acts, as when the owner subdivides a tract of land into blocks and streets, and causes a map of such subdivision to be recorded, and sells the several subdivisions which front upon those streets. Whenever the dedication is complete, the property thereby becomes public property, and the owner loses all control over it, or right to its use. Even though the acceptance presumed from an express dedication may not impose upon the public all the obligations that an express acceptance would impose, yet the owner is as much concluded by his dedication in the one case as in the other. If the dedication is complete by his act, whether express or implied, it is thereafter irrevocable by him, and the effect of such dedication cannot be qualified by any act or declaration thereafter made on his part. The property dedicated has become public property, impressed with the use for which it was dedicated, and neither can the public divert it from that use nor can it be lost by adverse possession. Nor is the effect of such dedication impaired by any delay in the use of the land for which it was set apart. Such failure to make use of the land does not authorize the owner to resume possession. The public can thereafter appropriate the land to the use for which it was dedicated, whenever convenience or necessity may suggest.

A distinction is to be observed between actual dedication and an offer to dedicate. In the latter case there must be an acceptance on behalf of the public before the dedication is complete, and the owner may at any time before such acceptance revoke the offer, while in the former case the acceptance will be presumed from the benefit arising from the dedication. The acceptance of an offer to dedicate may, moreover, be formal, as by resolution on the part of the city, or it may be implied, as by user or adaptation for use, as in the improvement of the streets. Merely recording a map of the subdivided tract, or simply designating the streets and blocks by stakes or monuments upon the ground, would constitute no more than an offer to dedicate. Whether the owner, by making sales according to such map or designation, has made the offer with reference to other streets than those by which the lots sold are bounded, is a fact that the court must determine from the circumstances of each case, such as the number of sales, their proximity to the street claimed to have been dedicated, the use to which the land has been put, and the means by which, or the extent to which, the streets have been brought into connection with other streets or highways. The owner, after selling some of the lots according to such map, might, either with the consent of the purchasers, or if he should himself repurchase all of the lots so sold, withdraw such offer at any time before the public had acquired any interest in the streets, either from formal acceptance or by actual user. Rowan's Ex'rs v. Portland, 8 B. Mon. 236. In San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. Rep. 405, it was held that the sale of the blocks opposite the space designated on the map as "Court Square," with other lots and blocks upon the map, effected such a dedication of that space that it could not afterwards be revoked by the owner. The principles relative to dedication and an offer to dedicate which are laid down in that case are in accord with the law upon that subject, as well as with previous decisions in this state, and should have controlling effect in the present case. The failure to observe this distinction between a dedication and an offer to dedicate explains the apparent discrepancy in the language used in various opinions, where it is said that a dedication is not complete until the city has given its acceptance. In this state, however, it has been the uniform rule, whenever the question has been presented for decision, that, whenever an actual dedication has been made, no acceptance is required, but will be presumed, even though there may not from such dedication be imposed upon the public an obligation to make expenditures upon the streets. Harding v. Jasper, 14

Cal. 642; Stone v. Brooks, 35 Cal. 497. In Hayward v. Manzer, 70 Cal. 476, 13 Pac. Rep. 141, Castro, the owner of the land, made and recorded a map of the town of San Lorenzo in 1856, on which the street in question was delineated, and made some sales of land according to that map. The street, however, was not opened to the public, or even used as a public road. Within less than a year after making the map he conveyed a portion of the tract so laid out, including the place marked for this street, and it was thereafter held in possession under said conveyance. The town was not incorporated until 1876, and after such incorporation its authorities accepted this alleged dedication. The court held that these acts of Castro were only an offer to dedicate, which was revoked by his conveyance of the tract before the actual acceptance. In Phillips v. Day, 82 Cal. 24, 22 Pac. Rep. 976, the owner had made a map of the tract, marked streets and subdivisions upon the ground, and made sales of a few of the lots according to such map and subdivisions. The land was not, however, within the limits of any city or town, and the streets were not traveled, but were kept from use by the public by fences inclosing the entire tract. The lots conveyed by the owner were afterwards repurchased by him, and a sale made of the entire tract, including the streets, before any map was recorded. The court held that these circumstances amounted to only an offer to dedicate the streets, and that the sale of the entire tract operated as a revocation of such offer. In City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. Rep. 693, the owner of the land made a conveyance in 1870, describing the tract conveyed with reference to certain streets as they would exist if projected through the tract, and about four months afterwards sold the portion covered by these streets. It was held that the first conveyance was no more than an offer to dedicate, which was revoked by the second conveyance; distinguishing the case from those in which the owner has himself platted the land into blocks and streets, and sold the lots with reference to such streets. In City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. Rep. 928 and 23 Pac. Rep. 1085, the dedication was held complete, for the reason that the offer had been formally accepted before any attempt at revocation was made. There is nothing decided in People v. Reed, 81 Cal. 70, 22 Pac. Rep. 474, inconsistent with the foregoing principles, although there are certain expressions in the opinion in that case that may seem at variance therewith, but they were *obiter dicta*, or side remarks and unauthoritative views of the justice who wrote the opinion. That the court did not intend to lay down any different rule from that which is given in Stone v. Brooks, supra, or to qualify or limit the authority of that case, is evident from the fact that that case and others are cited on page 78, 81 Cal., and page 476, 22 Pac. Rep., as authority for the proposition that "where the owner surveys and plats his property, and makes sales of lots with reference to such plat, the streets designated thereon are irrevocably dedicated to the public as streets." In fact, the question itself was not presented for decision, inasmuch as the facts in People v. Reed showed that there had never been more than an offer to dedicate. The map of the property was never recorded; the part of the alleged street in controversy was never opened as a street, but had for many years been fenced and occupied by substantial and permanent buildings; no sales of lots thereon were ever made; and it did not appear that any of the individuals who purchased property on other parts of the alleged street had ever seen the map of the property; and no action was taken by the city for more than 20 years after the map was made, and the property inclosed and permanently improved. Page 76, 81 Cal., and page 475, 22 Pac. Rep. When the plaintiff took the conveyance from Stone, in December, 1880, in satisfaction of Stone's indebtedness to him, the title thereby acquired was subject to the dedication in his hands as much as it would have been in the hands of any other grantee of Stone, and subject to this incumbrance as much as to any other incumbrance which Stone might have placed upon the land while he was the proprietor. While Stone might not have made any dedication of the tract that would impair the security of the mortgage that he had previously made thereon, or that would have prevented a purchaser under a foreclosure sale under such mortgage from acquiring a title free of such incumbrance, yet the acceptance by the mortgagee of a deed in satisfaction of the debt gave to him only such title as Stone had at the time when the deed was executed. The judgment and order denying a new trial are affirmed.

We concur: De Haven, J.; Paterson, J.; McFarland, J.; Sharpstein, J.; Garoutte, J.

93 Cal. 7

Pacific Fire Ins. Co. of New York v. Pacific Surety Co. of California *et al.*

(No. 14,061.)

(*Supreme Court of California.* Jan. 20, 1892.)

Principal and Surety—Notice to Surety of Default—False Representations.

1. Where an agent in California of an insurance company in New York, under a contract requiring him to remit payments within 50 days from the end of the month in which they are payable, fails, through tardiness and neglect, but with no wrongful intent, to remit the premiums until from 60 to 120 days after the end of such month, and this action is acquiesced in by the company as a substantial compliance with the contract, failure of the company to give notice of such delay to the surety on the agent's bond, indemnifying the company against losses caused by the agent's fraud or dishonesty, is not a breach of a condition of the bond that the company shall report to the surety "any act of omission or commission on the part of the" agent "that might involve a loss for which the" surety "is responsible hereunder."

2. Where the contract between the company and agent required the latter to remit the premiums of each month on or before the 20th of the second month afterwards, a certificate by the company to the agent's surety, made one day after the premiums were due and unpaid, stating that the agent was not in arrears, was not fraudulent.

3. Certificates furnished by the company to the surety, averring that the agent had never been in arrears or default, were not fraudulent, though the payment of premiums was sometimes delayed for two or three months, where such payment was accepted by the company as a substantial compliance with the contract.

Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Action on a bond by the Pacific Fire Insurance Company of New York against the Pacific Surety Company of California. Judgment for plaintiff. Defendant appeals. Affirmed.

William H. Jordan, for appellants. *Bishop & Watt*, for respondent.

GAROUTTE, J. Plaintiff is a fire insurance company, having its office in the city of New York. Defendant is a corporation organized for the purpose of issuing indemnifying bonds to employers, guarantying the honesty of employes occupying positions of trust. Smith & Moody were the general agents for plaintiff in the state of California, with an office in the city of San Francisco. Upon October 21, 1885, defendant issued its bond to plaintiff guarantying the payment of all losses suffered by plaintiff through the fraud and dishonesty of its agents Smith & Moody, and this bond was renewed for the year ending October 31, 1887. In March, 1887, Smith & Moody failed in business, and at that time were indebted to plaintiff in the sum of $2,819.25, moneys collected by them as agents of plaintiff, which amount they converted to their own use, and this action is brought to recover from the agents and their surety, the appellant herein, the amount of such defalcation. Judgment went for the plaintiff in the lower court, and this is an appeal by the defendant surety company from the judgment and order denying a new trial. The trial court substantially found, among other matters, that the contract of employment entered into between plaintiff and its agents provided that accounts should be rendered by said agents to the plaintiff, in New York, by the 15th day of each month, of the business done during the preceding month, and the premiums paid over to the company (plaintiff) by the 20th day of the second month thereafter. That this provision of the contract was ambiguous, but that both parties understood it to mean that the moneys collected for the business of any given month should be paid to plaintiff on or before the 20th day of the second month thereafter. That the agents made their reports as required by the contract, and, until the time of their defalcation, remitted the sums shown by their statements to be due, from 60 to 120 days after the end of the month during which said business was so transacted. That the delays in remitting the money resulted in part from the tardiness of sub-agents to properly collect and remit to them, and in part from their own negligence, but without any wrongful or fraudulent intent on their part; and that said delays were acquiesced in without objection on the part of plaintiff, and treated by both plaintiff and the said agents as a substantial compliance with their agreement in relation to such remittances. That on October 9, 1885, Smith & Moody made written applications to the defendant for a bond of indemnity to the plaintiff against acts of fraud or dishonesty upon their part. That in said applications they answered "No" to the following question: "Have you ever been in arrears or default in your present or previous employment?" That attached to these applications was an employer's certificate, signed by the secretary of plaintiff in its behalf, which stated: "I have read the foregoing declarations and answers made by Charles E. Moody, [A. D. Smith,] and believe them to be true. He has been in the employ of the company during one year, and to the best of my knowledge has always performed his duties in a faithful and satisfactory manner. His accounts were last examined on the 21st day of October, 1885, and found to be correct in every respect. He is not, to my knowledge, at present in arrears or default." It appears that the indemnifying bond issued in October, 1885, was in part based upon this employer's certificate, and the extension of the bond for the second year was based in part upon an employer's second certificate, containing substantially the matters set out in the one of the preceding year. It was provided in the bond that plaintiff should notify the surety company in writing, properly addressed, "of any act of omission or commission on the part of the employes which might involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer."

It is conceded that plaintiff's agents defaulted in a large sum of money during the life of the bond given by appellant; but, to defeat a recovery, appellant insists that the evidence establishes the fact that the bond was obtained by reason of false and fraudulent representations made by the plaintiff, and also that after its delivery plaintiff's agents were guilty of making many defaults in the settlement of their accounts, to the knowledge of plaintiff, and plaintiff failed and neglected to notify appellant of such facts, as required by the provision of the bond hereinbefore set out. There are preliminary objections made by respondent pertaining to the construction to be placed upon the bond, the order of renewal, employer's certificates, etc., that we will not pause to notice, but will examine the merits of the appeal upon the broad ground as above set forth by appellant.

Was the failure of plaintiff to give notice that Smith & Moody were not making their remittances at the time demanded by the contract a substantial violation of that condition of the bond wherein plaintiff agreed to notify appellant "of any act of omission or commission on the part of the employes that might involve a loss for which the company is responsible hereunder?" While the plaintiff had notice that its agents were not forwarding collections at the times required by the provisions of its contract, yet the trial court found: "Said delays resulted in part from the tardiness of sub-agents to properly collect and remit to said general agents, and in part from the negligence of said general agents, but without any wrongful or fraudulent intent on their part; and that said delays were acquiesced in without objection on the part of plaintiff's officers, and treated by both plaintiff and said agents as a substantial compliance with their agreement in relation to such remittances." In the face of the facts set out in this finding, it cannot be said that plaintiff was guilty of a violation of the covenant of the bond. Plaintiff considered the acts of its agents a substantial compliance with the terms of the contract; and, under the evidence, it would seem that, as a careful, prudent business corporation, it was justified in so doing. The explanations and reasons for the delay were entirely consistent with honesty and fair dealing. As a fact, the court found that such delays were occasioned by no wrongful or fraudulent intent of the agents. Under these conditions there was no act of "omission or commission" upon the part of the agents requiring notice to appellant. This identical provision of a similar bond was construed in the case of Ætna Life Ins. Co. v. American Surety Co., 34 Fed. Rep. 298; and the court there said: "It cannot be supposed that this provision calls upon the employer to notify the defendant of every act of laches or delay or inefficiency on the part of the agent which ultimately may create a loss to the employer. It means that the defendant shall be notified of acts which may create a loss for which it is responsible; that is, a loss arising from fraud or dishonesty. It is not necessary to undertake to define affirmatively what kind or class of acts must be communicated, and whether or not the obligation compels the employer to notify the defendant of that kind of conduct of the employe outside of his business which experience has shown may probably result in dishonesty. It is sufficient to say that mere laches or inefficiency of the employe in the business which is consistent with integrity was not required to be communicated." Measured by the rule laid down in the foregoing authority, it is entirely apparent that in this case, as the facts existed, plaintiff was not called upon, under the covenant of the bond, to give any notice to appellant. It is the business of the surety to see that his principal keeps within the guaranty of the bond, and not that of the employer. The employer is not called upon to be watchful and diligent, in order that the surety may suffer no loss. There is no question but that a correct principle of law is declared in Roberts v. Donovan, 70 Cal. 110, 11 Pac. Rep. 599, and other cases cited by appellant, viz., that "if the master discover that a servant has been guilty of dishonesty in the course of the service, and, instead of dismissing, continues him in his service without the knowledge of the guarantor, express or implied, he cannot afterwards have recourse to the guarantor to make good any loss which may arise from the dishonesty of the servant during the subsequent service;" but the principle is not applicable here, for there is no question of dishonesty involved in these delays of the agents to make the remittances, and the court so found. In the case of Insurance Co. v. Simmons, 131 Mass. 85, the plaintiff did not notify the sureties of his agent's default until after his death, and the defendants contended that they were discharged from their liability as sureties by these facts. After a review of the authorities bearing upon the question, there being no fraud or dishonesty shown, but simply a default or arrearage in the payment of the monthly collections of money, the court said: "We are of opinion that there is no rule of law which makes it a duty which the creditor, under the circumstances of this case, owes to the surety, to dismiss its agent, or to notify the surety of his default." See, also, McKecknie v. Ward, 58 N. Y. 541.

There is no evidence whatever in the record to support the allegation of the answer that the statements of the plaintiff contained in the certificates were made in pursuance of a conspiracy with its agents to defraud appellant. Let us consider these statements made by plaintiff in the renewal certificate, and also those found in the original certificate, such certificate being made a part of the said renewal, and forming, as it is claimed by appellant, a part consideration for the issuance of this bond, and see if they are so far from the truth as to justify a reversal of the judgment. Upon this subject the court found "that the plaintiff during said time [time of agency] believed said agents to be honest, and made the several statements and certificates hereinbefore referred to in good faith, believing them to be true, and without any intent to mislead or deceive the defendant company." Upon October 21, 1885, the secretary of the plaintiff, in its behalf, in the certificate to appellant said: "He [referring to the agent separately] is not, to my knowledge, at present in arrears or default." While the terms of the contract were ambiguous with reference to the time when payments should be made, yet the court found that they were payable on or before the 20th day of the month; and it appears that upon the 21st of October, when the statement was made, an amount of money was due and payable to plaintiff by its agents upon October 20th. Plaintiff resided in New York, and the agents resided in San Francisco; and, considered alone, taking into consideration the uncertainties of prompt communication for such a distance, to impute anything but fairness and honesty to the plaintiff in making the statement that upon October 21st the agents were not in default or arrears would not be justified by the facts. Appellant attacks the statement found in the certificate that these agents had always performed their duties in a faithful and satisfactory manner. Upon this matter the court found that "the dealings by and between said Smith and Moody, as such agents, and the plaintiff, from the commencement of the employment to within a short time before the withdrawal from such employment, were fair and honest, and in accordance with the usual course of business conducted by insurance agents in general." This finding, and other findings of the court already quoted, have ample support in the evidence, and dispose of appellant's contention in this regard.

With reference to the quotations from the certificates of plaintiff already noticed, and others of which appellant complains as being false and misleading, we find no just cause for complaint. It appears that Smith & Moody, during the period of their agency, had failed to make their remittances at the time demanded by the terms of the contract, but had made them within a reasonable and satisfactory time thereafter, and were conducting the business in the ordinary and regular way. It further appears that their delay in forwarding remittances was not attributable to dishonesty or lack of integrity, but was due to the wide field covered by the agency, and their inability to make collections. The plaintiff had knowledge of these facts, and recognized and treated its agents' acts, with the agents' knowledge, as a substantial compliance with the terms of the contract. Plaintiff certainly had the right to, and did practically, waive that provision of the contract, and extend the time in which its agents were entitled to forward these remittances. Under such circumstances, can it be said that the agents were in default or arrearage at any time, unless by failure to remit upon demand of plaintiff? It could only be a default under a provision of the contract, a provision which was waived, and such a technical, unsubstantial default that it could never have served any purpose in the final determination by appellant of the issuance or non-issuance of the bond of guaranty. The default or arrearage referred to in these certificates would seem to be such defaults and arrearages as would, to some extent at least, indicate dishonesty or want of integrity upon the part of the agents, and not such as were wholly innocent in themselves, and which might result to the most careful and honest of men. We have examined the errors of law relied upon by appellant, and do not consider them well taken. Let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

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93 Cal. 59

HARRIS v. ZANONE. (No. 13,075.)

(*Supreme Court of California.* Jan. 22, 1892.)

SLANDER—PLEADING—MALICE—EVIDENCE—PRIVILEGED COMMUNICATIONS—DAMAGES.

1. In an action for slander, an allegation in the complaint that defendant, at a certain time and place, in the presence and hearing of divers persons, "spoke the following words of and concerning plaintiff: 'She is a damned thief,'"—though there is no averment that the words were understood by those who heard them to refer to plaintiff, is sufficient under Code Civil Proc. § 460, providing that, in an action for libel or slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to plaintiff of the defamatory matter, but it is sufficient to state generally that the same was spoken or published concerning plaintiff. PATERSON, J., dissenting. De Witt v. Wright, 57 Cal. 576, disapproved.

2. Where a complaint for slander charges only a single utterance of the defamatory matter, and there is proof of that and other utterances, it is not error for the court to refuse to compel plaintiff to elect which of the utterances was the original, and which the repetitions, since plaintiff can only recover for the single utterance alleged and proved, evidence of the others being competent only to show malice.

3. In a complaint for slander in uttering words slanderous in themselves, an allegation that they were false implies malice, and plaintiff need not expressly allege malice, or prove it in the first instance.

4. In such case, where defendant in his answer alleges that the words were spoken in a privileged communication, he thereby tenders the issue of malice, and plaintiff is entitled to introduce any competent evidence of express malice as fully as if it had been alleged in her complaint.

5. In an action for slander, in uttering defamatory words concerning plaintiff, evidence of other utterances of words of similar import is admissible to show malice.

6. Though a complaint for slander may allege that the defamatory words were spoken in the presence and hearing of "divers persons," it is not necessary to show that they were uttered in the presence of more than one third person, the allegation being but a formal averment of a publication.

7. In an action for slander defendant pleaded that he uttered the defamatory words in a privileged communication to a third person, but there was evidence that he had repeated the words to others on different occasions, and there was other evidence tending to show that the words were false, and that defendant had expressed a determination to injure plaintiff's reputation. *Held*, that the jury were warranted in finding that defendant was actuated by express malice, and therefore was not entitled to the immunity of a privileged communication, under Civil Code, §§ 47, 48, declaring a communication "without malice," under certain circumstances, to be privileged, and that, under such circumstances, malice is not to be inferred from the communication, but must be established by extrinsic proof.

8. In an action for slander, evidence of threats by defendant to ruin plaintiff's reputation is admissible to show malice.

9. In an action for slander in saying that plaintiff was a thief, testimony that a third person represented to defendant that he had lost money from his pocket while plaintiff was employed in the house where he stayed is properly excluded as hearsay.

10. In an action for slander, evidence that plaintiff besought certain persons to endeavor to secure certain testimony in her behalf, which testimony is irrelevant, is properly excluded.

11. Nor is such evidence admissible because of its tendency to show the *animus* of plaintiff in bringing the suit, as it could have no weight in determining her right of recovery.

12. In an action for slander in charging plaintiff with being a thief, where express malice is shown, punitive damages may be awarded under Civil Code, § 3294, and a verdict will not be disturbed unless the amount of damages awarded is so great as to shock the moral sense, and raise the presumption that the jury were actuated by passion or prejudice.

13. In an action for slander an instruction asked by defendant respecting privileged communications, which omits the qualification that such a communication must be made without malice, is properly refused, since, under Civil Code, § 47, a communication made with malice is not privileged.

In bank. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

Action for slander. Judgment for plaintiff, and defendant appeals. Affirmed.

Ernest Sevier, *E. W. Wilson*, and *Wilson & Wilson*, for appellant. *S. M. Buck* and *N. L. Smith*, for respondent.

HARRISON, J. Action for slander. It is alleged in the complaint "that, on or about the 15th day of April, 1887, at the city of Eureka, in the county of Humboldt, and state of California, the defendant, in the presence and hearing of divers good and worthy persons, spoke the following words of and concerning the plaintiff: 'She is a damned thief.'" The appellant contends that this allegation is insufficient, and that the demurrer to the complaint should have been sustained for the reason that it is not alleged that the words charged to have been spoken were understood by those who heard them to refer to the plaintiff. Under the common law a declaration for slander had become so artificial and prolix, by reason of the technical objections to its form, that the courts were wont to sustain, in respect to the distinctions to be observed between the averment, the inducement, the colloquium, and the innuendo, and the requirements of strictly confining to each and elaborately presenting therein the matter that belonged to that head, that the action, instead of being the mode by which a plaintiff could obtain satisfaction for an injury he had sustained, was often made the means by which justice was herself smothered in her own robes. The case of Miller v. Maxwell, 16 Wend. 9, is an illustration of this, and is said to have been a potent factor in bringing about the radical change in the rules of pleading which were effected in the state of New York in 1848. When this reform in pleading was made, and all forms of action were merged in a complaint, in which the facts constituting the plaintiff's cause of action were to be stated in ordinary and concise language, so deeply had the form of pleading in actions of slander become rooted into the system that it was deemed necessary to make a special provision against the necessity of continuing that form. Accordingly it is provided in section 460, Code Civil Proc.: "In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff; and, if such allegation be controverted, the plaintiff must establish, on the trial, that it was so published or spoken." By this provision the inducement and colloquium are dispensed with, and, if the words charged are libelous in themselves, the plaintiff is only required to allege that the libelous words were spoken "of and concerning the plaintiff." This is an issuable fact, as was the colloquium under the former system, and, if denied, must be established at the trial. If the words used are not libelous in themselves, or if they have some occult meaning or local signification, and require proof to determine their meaning, or to show that they are libelous, or if they are words in a foreign language, it is necessary to make such allegation of their meaning as will show them to be actionable, and by averment "to ascertain that to the court which is generally or doubtfully expressed." Van Vechten v. Hopkins, 5 Johns. 220. "The statute dispenses with them [that is, the colloquium and innuendo] only so far as they show that the defamatory words applied to the plaintiff, and goes no further. The averments necessary in common-law pleading to show the meaning of the words must still be made." Bliss, Code Pl. § 305. See, also, Fry v. Bennett, 5 Sandf. 54; Petsch v. Printing Co., 40 Minn. 291, 41 N. W. Rep. 1034; McLaughlin v. Russell, 17 Ohio, 479; Wesley v. Bennett, 5 Abb. Pr. 498; Pike v. Van Wormer, 5 How. Pr. 171; Cook v. Rief, 52 N. Y. Super. Ct. 302. In such a case it is necessary to aver that the persons who heard the words understood that such meaning was intended. This, however, is only for the purpose of showing that to the minds of the hearers the words were libelous, and therefore injurious to the plaintiff. Whether those who heard the words understood that they had reference to the plaintiff is one of the "extrinsic facts" by which the application of the defamatory matter to the plaintiff, if controverted, must be established on the trial, but need not be alleged. Their application to the plaintiff is to be established by proof, and the understanding by the hearers that they were applicable to the plaintiff is included in the averment that they were spoken "concerning the plaintiff." The averment of the libelous character of the words places them in the same category as does the allegation of speaking libelous words in the English language. If the words charged to have been spoken are in the vernacular, and are libelous in themselves, then there need be no allegation that the hearers understood them to have reference to the plaintiff. In Russell v. Kelly, 44 Cal. 641, the rule was established in this state that it might be shown at the trial, by the testimony of witnesses, that they understood from the language of the libel that the plaintiff was the person intended thereby. "Where the language published is the vernacular of the place of publication, it requires no proof that those who heard or read it understood it. * * * Where the matter published is in a language which he who hears or reads it understands, it will be assumed he understood it in the sense which properly belongs to it." Townsh. Sland. & L. § 97.

In the present case the words used are libelous in themselves, and, being in the English language, are presumed to have been understood by the hearers to be libelous; and the allegation that they were spoken "of and concerning the plaintiff" imports that the hearers so understood them. It would violate all rules of construction of language to hold that when the defendant said concerning the plaintiff, "She is a thief," those who heard him did not understand that he said that the plaintiff is a thief. In De Witt v. Wright, 57 Cal. 576, the court held, in an action for a libel, that the allegations in the complaint, similar to those in the present case, were insufficient in not averring that those who read the libel understood that the plaintiff was intended thereby; saying: "To enable the plaintiff to maintain an action on it, it is essential, not only that it should have been written concerning the plaintiff, but also that it was so understood by at least some one third person;" and that section 460, Code Civil Proc., "does not do away with the necessity of the averment that the person or persons who read the writing, or heard the words, knew the plaintiff was meant." This construction of section 460 is at variance with the terms of the section itself, and is not supported by authority, and cannot, we think, be sustained upon principle. Upon a careful and extended examination of the authorities, we have not been able to find any other case in which it has been held that when the words charged to have been spoken are libelous in themselves, and were uttered in the vernacular of those to whom they were addressed, it is necessary to make any averment other than that they were spoken "of and concerning the plaintiff;" or to allege that they were understood by the hearers to apply to the plaintiff. None of the text-writers lays down such a rule, and the precedents of declarations found in Chitty do not contain such an allegation. The cases cited in De Witt v. Wright, in support of the proposition, were cases in which the words charged to have been uttered were not libelous in themselves, and the decisions thereon were only to the extent that it must be averred that the hearers understood the libelous sense in which the words were used, and that by those words a libelous charge was made; and not that the plaintiff was the person to whom they were applicable. The court, in that case, applied the rule which requires such averment when the words used are ambiguous, or innocent in themselves; but this rule, as we have seen, is inapplicable to a case in which there is no ambiguity or uncertainty in the words used. In the editions of Chitty published since the enactment in England of the Common-Law Procedure Act, corresponding to our Code of Civil Procedure, the precedent for a declaration in slander is given as follows: "For that the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say, 'He is a thief.'" 2 Chit. Pl. (16th Ed.) p. 547. In Robinson v. Keyser, 22 N. H. 323, the declaration alleged that the defendant "did speak and publish of and concerning the plaintiff the false, scandalous, and malicious words following, to-wit: 'He [meaning the said Robinson] is a thief and a liar, and I [meaning the defendant] can prove it.'" Upon demurrer to the sufficiency of this declaration, the court said: "Where the words, according to their usual acceptation, plainly import of themselves the charge of a crime, no colloquium or innuendo is necessary. It is sufficient if they are alleged to have been spoken of the plaintiff." In Ryckman v. Delavan, 25 Wend. 194, the court said: "In verbal slander the whole conversation is seldom set out, for, if that was required, it would generally be impossible to prove the whole conversation as laid in the declaration. It is, therefore, allowable in such cases to set out the actionable words, and merely to show that they were intended to be applied to the plaintiff, and must have been so understood by those who heard them, by averring that they were spoken in a conversation of and concerning him; and the declaration in such case will be good if the actionable words could have been applied personally to the plaintiff, leaving him to establish by proof upon the trial that the defendant did, in fact, apply them to him personally, and not merely to him and others as a class; and that those who heard the words understood them to be thus individually and personally applied."

The court did not err in refusing to compel the plaintiff, at the close of the testimony, to elect which of the publications was the original, and which the repetitions. The complaint charged a single publication, and of this the plaintiff made proof. It was for the damage sustained by this publication alone that the plaintiff was entitled to recover. For the purpose of showing malice in its publication it was competent for the plaintiff to offer proof that the defendant had on other occasions uttered the same or similar words, but for the damage sustained by the utterance of the words on those occasions the plaintiff was not entitled to recover in this action; consequently she could not be compelled to elect either of those publications as the basis of her recovery herein.

It was not necessary for the plaintiff to allege in her complaint, or to establish by proof in the first instance, that the defamatory words were spoken with malice. Her allegation that "the said words were false" implied malice on the part of the defendant. For the purpose of rebutting this presumption the defendant had pleaded that the words were spoken in a privileged communication, and, if so, it then became necessary for the plaintiff to prove express malice. The issue of malice was, therefore, tendered by the answer of the defendant, and the facts therein set forth were by the statute "deemed controverted," as fully as though spread upon the record. Upon this issue the plaintiff was at liberty to introduce any competent evidence of express malice, as fully as though it had been alleged in her original complaint, and denied in the answer of the defendant; and other utterances of words of similar import would be competent evidence for that purpose. Association v. McDermott, 44 N. J. Law, 430; Chamberlin v. Vance, 51 Cal. 84; 2 Greenl. Ev. § 418; Townsh. Sland. & L. § 392.

It was not necessary for the plaintiff to show that the words were uttered in the presence of more than one third person. The allegation that the defendant had spoken the words "in the presence and hearing of divers good and worthy persons" was but the formal averment of a publication, and proof of the publication in the presence of one person satisfied the averment without a literal proof as alleged.

Whether the utterance of the words by

the defendant to the witness Loheide was a privileged communication depended upon the circumstances under which they were uttered, and by which such claim would be qualified. The court could not determine, as a matter of law, that this was a privileged communication, unless the facts under which it was made were conceded; and, in the absence of such concession, it was necessary that the jury should determine those facts. Klinck v. Colby, 46 N. Y. 431. The court, however, fully instructed the jury upon the evidence introduced for the purpose of showing that the communication was privileged, and the facts necessary to establish such a relation between the witness and the defendant as would render it a privileged communication; and that, if they found such facts from the evidence, the communication would be privileged, and was to be disregarded, unless there was other evidence of malice than would be implied from the falsity of this communication. A privileged communication is defined in section 47 of the Civil Code to be one made "(3) in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information;" and in such a case, by section 48, "malice is not to be inferred from the communication or publication," but must be established by extrinsic proof. Evidence was offered, in behalf of the plaintiff, that the defendant had repeated the defamatory words to others upon different occasions, and there was other evidence before the jury tending to establish the falsity of the charge, and also that the defendant had expressed a purpose to injure her reputation. If the jury believed this evidence, they were authorized to find therefrom that the defendant was actuated by express malice in the utterance of the words to Loheide, and therefore was not entitled to the immunity of a privileged communication.

The evidence of the plaintiff respecting the threats of the defendant to ruin her reputation was admissible for the purpose of establishing malice. When this testimony was offered, the counsel for the defendant admitted the relevancy of a portion of it, but declined to point out the portion to which he objected as irrelevant, notwithstanding the offer of the court to rule thereon, and reject such as was inadmissible. The court, therefore, did not err in admitting the evidence offered. Board v. Keenan, 55 Cal. 642.

The offer on the part of the defendant to show by the testimony of Mrs. Zanone that one Antone Chisa had represented to the defendant that he had lost $10 from his vest pocket while the plaintiff was in the employ of the defendant was clearly inadmissible. It was but hearsay, and without any offer to show that Chisa had in fact lost any money.

The court also properly rejected the testimony offered to show that the plaintiff had besought Hildreth and Owens to endeavor to secure testimony in her behalf. The testimony offered to be shown had no relevancy to any issue before the jury, and its tendency to establish the *animus* of the plaintiff in bringing the suit, as claimed by counsel, would have no weight in determining her right of recovery. The relation of the witness Wallace to the defendant was not such as to preclude him from testifying to the conversation between them. It was not "any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." Code Civil Proc. § 1881, (4.)

The record does not disclose anything from which it can be said that the damages awarded by the jury appear to have been given under the influence of passion or prejudice. It is very difficult to determine the proper amount of damages in an action of this character, and the law has wisely left it to the just discretion of the jury, and has also given to them the right, upon proof that the defendant was guilty of malice, to give damages for the sake of example, and by way of punishing the defendant. Civil Code, § 3294. There can be no measure of compensation for the wrong done to a plaintiff by charging her with a crime, except the judgment of an impartial jury. Under the evidence before it the jury must have found that the defendant was guilty of malice in the utterance of the words charged, and it cannot be said that the amount awarded is so great as to "shock the moral sense." In Wilson v. Fitch, 41 Cal. 386, where there was no proof of express malice, and, as was held by the court, not a case of punitive damages, it was said, upon the claim that the damages awarded were excessive: "The court will not interfere in such cases unless the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice. In this case, while the sum awarded appears to be much larger than the facts demanded, the amount cannot be said to be so grossly excessive as to be reasonably imputed only to passion or prejudice in the jury. In such cases there is no accurate standard by which to compute the injury, and the jury must necessarily be left to the exercise of a wide discretion, to be restricted by the court only when the sum awarded is so large that the verdict shocks the moral sense, and raises the presumption that it must have proceeded from passion or prejudice."

The court did not err in refusing to give to the jury the instruction asked by the defendant respecting privileged communications. The jury were fully instructed upon that subject in other portions of the charge, and the instruction asked was faulty in omitting the qualification that the communication was not privileged unless it was made without malice. The judgment and order denying a new trial are affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; McFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.

PATERSON, J. I concur in the judgment, and in all that is said in the opinion of Mr. Justice HARRISON, except that relating to De Witt v. Wright, 57 Cal. 576. In that case the question as to the proper construction of section 460, Code Civil Proc., was determined after full argument and careful consideration, and I think it should be adhered to, whether it agrees with our views of the section or not. It is a matter of very little importance which of the two constructions is placed upon the statute, but it is desirable, for the information and guidance of the pleader, that a construction once made should be adhered to. The complaint, according to the rule laid down in De Witt v. Wright, is insufficient; but the defendant waived the objection and cured the defect by alleging in his answer that he, in speaking to Loheide for the purpose of informing him as to the true character of the plaintiff, said: "I believe she [meaning the plaintiff] is a thief." The answer leaves no doubt that whatever was said referred to plaintiff, and that Loheide so understood it.

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93 Cal. 90

WRIGHT v. LIESENFELD. (No. 12,773.)

(*Supreme Court of California.* Jan. 25, 1892.)

NEGOTIABLE INSTRUMENTS—LIABILITY OF INDORSER—WAIVER OF NOTICE—EVIDENCE.

Evidence that it was understood between the indorser and the indorsee of a note that if the latter could not collect it from the maker he would come back on the indorser, and that he took the note because he had better opportunities than the indorser to see the maker, does not tend to show that the indorser waived notice of the maker's refusal to pay.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by Will Wright against P. Liesenfeld as indorser on a note. Judgment for plaintiff. Defendant appeals. Reversed.

Jarboe, Harrison & Goodfellow, for appellant. *Estee & Boalt* and *Estee, Wilson & McCutcheon*, for respondent.

TEMPLE, C. Defendant appeals from an order denying him a new trial. Defendant is sued as the indorser of two promissory notes, made payable to himself, by one Hixon, and by him transferred, after maturity, to plaintiff. The complaint avers a demand upon Hixon, and due notice to defendant. A demand was proven, but no notice of the refusal to pay was given for several months after the refusal. No excuse for failure to notify the indorser is alleged or proven, but it is claimed that demand and notice were waived at the time of the transfer. Prior to the transfer, defendant had left the notes with his banker for collection, and had indorsed them for that purpose. Plaintiff had become the owner of the billiard tables, and agreed to return them to defendant for the notes, provided defendant would indorse them. The notes were procured from the bank and delivered to plaintiff, as they were. Plaintiff testified: "I asked him for the notes, duly indorsed, and they were produced. I told him then, if I should fail to collect the money from the other party, I would come back on him. * * * I stated at the time to Mr. Liesenfeld, if I could not make the money out of the other party, that I would come back to him,—come on him for it, because I did not want to give up my billiard tables on such an uncertainty, and his remark was that that was all right; that I could get the money out of the other man, because he belonged to the northern country where I was traveling,—that was up in Washington Territory, Oregon, and British Columbia,—and that I would have opportunities of seeing him, and could keep track of him. I said I would try, and I did try to get it. He said that he couldn't keep track of a man up in that territory so well as I could, and upon the strength of that, of course, I turned over my billiard tables, because I knew I was safe either way." The defendant denied having indorsed the notes to plaintiff, but claimed that the contract was that plaintiff should take the notes for the tables, without recourse upon the defendant. The evidence upon this issue was conflicting, and we cannot therefore disturb the finding. We do not find, however, in the record a *scintilla* of evidence tending to show that at the time of the transfer of the notes, or afterwards, demand or notice was waived. The gist of it is quoted above, and the effect is only to show that plaintiff intended to hold defendant as indorser. There is nothing which tends to prove that it was agreed, or that Liesenfeld could have understood, that he waived notice. That plaintiff would come back upon him, or look to him in case the maker did not pay, was but his right as indorsee. Liesenfeld could not have understood from this that he waived his rights as indorser. It is admitted that notice was necessary to charge the indorser, unless it was waived. As there is no evidence of such waiver, we think the finding to that effect cannot stand. We think the order should be reversed, and a new trial granted.

We concur: FITZGERALD, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is reversed, and a new trial granted. It is further ordered that this judgment be entered as of September 1, 1891. By direction of the chief justice, Mr. Justice SHARPSTEIN was assigned to department 1, to participate in the decision of this case, in place of Mr. Justice HARRISON, who is disqualified.

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93 Cal. 92

SEEGELKEN v. COREY. (No. 13,923.)

(*Supreme Court of California.* Jan. 25, 1892.)

ACTION TO REFORM DEED—PLEADING.

In a complaint seeking to reform a deed so as to make it include certain land, an allegation that it was the mutual understanding and intention of the parties that the land in controversy should be described in and conveyed by the deed is a sufficient averment of an agreement to convey the land, and that the failure to describe it in the deed was due to mutual mistake.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Ejectment by Henry Seegelken against Noah Corey. Judgment for defendant. Plaintiff appeals. Affirmed.

W. M. R. Parker and *Wm. H. Webb*, for appellant. *Alexander & Dougherty*, for respondent.

VANCLIEF, C. The action is ejectment to recover "lot 4 of section 30, in township 15 south, of range 3 east, M. D. M.," situate in the county of Monterey, the complaint being in the usual form, but not verified. The answer "denies generally and specifically each and every allegation in the said complaint." The defendant also filed a cross-complaint in which he alleged, substantially, the following facts: That on June 17, 1885, Frederick Egan executed to defendant a quitclaim deed for land therein described, as follows: "All that part of lot 5, in section 30, of township 15 south, of range 3 east, M. D. M., according to the public land surveys of the United States, which lies to the south and west of a certain ledge of rocks on the easterly side of and running along a ravine which crosses said lot 5 in a direction south-easterly and north-westerly." This deed was acknowledged and recorded on the day of its execution. It is then alleged "that the description therein [in the deed] given of the premises intended to be conveyed was erroneous, in this: that a portion of the land intended to have been conveyed by said Egan in said deed lay in lot 4 of the same section, but at the time said deed was made, viz., June 17, 1885, defendant, Corey, was informed and believed, and so it was mutually understood between the said parties thereto, that the land intended to be conveyed all lay in lot 5 of said section 30, as set forth in said deed; and under such belief said Corey accepted said deed, and immediately went into the possession of the land intended to be conveyed, and has since said June 17, 1885, possessed, owned, and occupied the same, all of which plaintiff herein well knew. That in order to make said deed pass the premises intended to have been conveyed by said Egan, and understood to have been conveyed by said defendant herein, Corey, and to make it conform to the actual intention of the parties, it is necessary that the said description should be amended so as to read as follows: All of lot five (5) of section thirty, (30,) in township fifteen (15) south, range three (3) east, M. D. M.; and all that part of lot four (4) of said section 30 which lies to the south and west of a precipitous ledge of rocks, which said precipitous ledge crosses said lot 4 in a direction north-westerly and south-easterly, and lies immediately along the north-easterly side of a gulch or ravine, which said gulch or ravine crosses said lot 4 in a direction south-easterly from where said gulch or ravine intersects the Toro ranch line on the westerly boundary of said lot 4, near where the north and south meridian line on the westerly boundary of said lot 4 intersects the said Toro ranch line. Said gulch or ravine, after crossing said lot 4 in a south-easterly direction from above-mentioned point, intersects the corner common to lots 3, 4, 5, and the north-east ¼ of the south-west ¼ of said section 30, and said precipitous ledge intersects the easterly boundary line of said lot 4, 300 feet, more or less, north of said common corner. That on the 19th day of November, 1888, said Egan executed a deed of sale to Henry Seegelken, the plaintiff herein, for lots 3 and 4 of section 30, (above described,) by virtue of which deed said Seegelken claims an interest in a portion of the land deeded to defendant by said Egan. That said Henry Seegelken well knew at the time when said deed was made and delivered to him by said Egan that said defendant, Corey, was in possession of and claimed all the land in said lot 4, lying south and west of said precipitous ledge hereinbefore described, by virtue of his (Corey's) said deed of June 17, 1885. That defendant herein did not know of said or any error in the description of the deed to him of June 17, 1885, until said Seegelken claimed an interest in said land by virtue of his said deed from said Egan." It is then alleged that, upon discovering the error, defendant demanded of plaintiff a deed of the land claimed by defendant as above described, and that plaintiff refused, etc. The prayer is that defendant have judgment against the plaintiff, reforming defendant's deed from Egan, and adjudging the defendant to be the owner of the land according to the amended description, and for such other and further relief as shall be just and equitable.

At the instance of plaintiff, a jury was called, to which special issues, tendered by the cross-complaint, were submitted. Upon each of these special issues the jury found for the defendant. The court adopted the verdict, and added findings of its own,—all in favor of the defendant,—whereupon it was adjudged and decreed that defendant is the owner of all that part of lot 4, lying south of ledge of rocks extending across the same as per defendant's proposed amendment of the description in his deed from Egan, and that plaintiff convey all his right and title to such part of lot 4 to the defendant within 10 days. The cross-complaint was demurred to generally, and also on special grounds not urged here.

While the cross-complaint is not to be commended as a precedent, I think it sufficient to stand the test of a general demurrer. All the facts necessary to entitle the defendant to the relief sought, not directly stated, are necessarily inferable from those stated. It is contended, however, that no agreement to convey any part of lot 4 nor any mutual mistake is alleged. It is alleged, substantially, that it was the mutual understanding and intention of the parties that the land in controversy should be described in and conveyed by the deed set out in the cross-complaint. This seems to be a sufficient averment of an agreement to convey; and, if the parties mutually intended to describe the land in that deed, how could it have happened, otherwise than by mutual mistake, that they did not describe it?

The mutual intention to describe it negatives the idea that the omission may have resulted from fraud. The findings are full and explicit upon all the issues, and support the judgment. There is some conflict in the evidence, but it seems to preponderate considerably in favor of the findings. The findings show that the defendant is the equitable owner of the land, and that plaintiff took the legal title from Egan with notice of defendant's rights; and there is no allegation nor proof that there was any consideration for the deed from Egan to plaintiff, nor that plaintiff ever made any improvement upon the land. The court did not err in overruling plaintiff's objection to the testimony of R. Corey as to the declaration and acts of Egan in relation to the land in controversy before he conveyed to plaintiff. Code Civil Proc. § 1849. I think the judgment and order should be affirmed.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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93 Cal. 96

REED *et al.* v. RING *et al.* (No. 14,187.)

(*Supreme Court of California.* Jan. 26, 1892.)

APPOINTMENT OF GUARDIAN—STARE DECISIS—LIMITATION OF ACTIONS.

1. Though, on the death of the owner of a Mexican grant in 1844, his property vested at once in his heirs, and there could be no administration on his estate after the acquisition of California and the organization of the state government, the appointment of a guardian for the minor children of such a decedent, which was authorized by Act April 19, 1850, was not void because the same order also appointed the guardian administrator of the decedent's estate, or because it was entitled "In the matter of the estate of" such decedent, and directed that letters of guardianship of the "heirs" be granted, without naming them, it appearing that the children were known.

2. The fact that, after a decision of the supreme court reversing and remanding a cause, the action is dismissed in the lower court, and no judgment is entered which could be pleaded in bar, or given in evidence, does not prevent such decision from being the law of the case, to be followed in a subsequent action between the same parties for the same relief.

3. In August, 1850, letters of administration on the estate of one R., who had died owning a Mexican grant, and of guardianship of his children, was granted to one G. In September following the court authorized G., as administrator and guardian, to sell the land, which he did. Subsequently, in a suit by the widow of R., and the children by their guardians, to set aside the sale, a judgment was rendered setting it aside as to part of the land and confirming it as to the balance. A patent from the government was, in 1885, issued to the children of R. for the whole tract. In 1890—more than 20 years after reaching their majority—they brought ejectment for that portion which had been sold in 1850, and confirmed in the purchaser. *Held* that, even if the sale was void, the action was barred by the guardians' act of 1850, section 34, which is substantially re-enacted in Code Civil Proc. § 1806, providing that no action for the recovery of any estate sold by a guardian can be maintained by the ward, unless it is commenced within three years next after the termination of the guardianship; or, when a legal disability to sue exists by reason of minority at the time when the cause of action accrues, within three years next after the removal thereof.

Commissioners' decision. Department 1. Appeal from superior court, Marin county; E. B. MAHON, Judge.

Action by John P. Reed and others against George E. Ring and others to recover land. Judgment for defendants. Plaintiffs appeal. Affirmed.

Wm. & Geo. Leviston, for appellants. *Hepburn Walkins*, for respondents.

BELCHER, C. In 1834, John Reed obtained a Mexican grant of a tract of land known as the "Rancho Corte Madera del Presidio," and situate in what is now Marin county, in this state. In 1844 he died intestate, leaving a widow and four minor children, one of whom died in 1853. In 1852 the widow and children presented their petition to the board of land commissioners created by the act of congress, approved March 3, 1851, for the confirmation to them of the said grant, and such proceedings were afterwards had that the same was duly confirmed, and a patent therefor issued to the surviving children on the 25th of February, 1885. On the 14th of August, 1850, letters of administration on the estate of Reed and of guardianship of his children were granted to John S. Gibbs by the probate court of Marin county. On the 16th of September, 1850, the same court, on petition of Gibbs, made an order authorizing him, as administrator of the estate and guardian of the minor children of Reed, to sell the said rancho with other property, after giving notice of the sale by posting and publication, for a sum not less than $30,000; and in pursuance of this order he sold the property to Benjamin R. Buckelew for the sum of $35,000. The sale was then reported to the court, and by it confirmed, and Gibbs was ordered to execute to the purchaser conveyances of the property sold, which he did. Subsequently Mrs. Reed, who had married again, and was then known as Ylaria Garcia, her husband, Bernardino Garcia, and the four Reed children, by their guardians, commenced an action in the district court of the seventh judicial district in and for Marin county against Buckelew and Gibbs to set aside the said sale, and such proceedings were had therein that on the 29th of September, 1851, judgment was rendered rescinding and setting aside the sale as to all of the rancho except 320 acres thereof, and, as to the last-named tract, confirming it. The language of the judgment, so far as it confirms the sale, is as follows: "Out of the rescinding of the said sale and conveyance of the said estate of the said John Reed, deceased, are to be wholly excepted and reserved three hundred and twenty acres of land, situate on that part of said estate known as 'California City,' [giving description by metes and bounds,] as to which said parcel of three hundred and twenty acres of land the said sale and conveyance so made by the said John S. Gibbs, as such guardian and administrator, is hereby confirmed, and shall forever stand good and valid, both against the said Juan Reed, Marie Reed, Eularia Reed, and Ricardo Reed, and the said Ylaria Garcia and Bernardino Garcia, and against them, and each and every of them, their heirs and assigns, and all persons claiming under them or any of them, the title of the said last-mentioned parcel of three hundred and twenty acres of land is confirmed to the said Benjamin R. Buckelew, his heirs and assigns, in fee-simple forever." This judgment was never appealed from, modified, or set aside.

In October, 1859, Edwin Gardner acquired all the right, title, and interest of Buckelew in and to the said 320 acres, confirmed to him as aforesaid, under a sheriff's deed of the property; and shortly after receiving the deed he entered into possession of the premises, inclosed them with a substantial fence, and continued to occupy them, under claim of title, and adversely to all other persons, until the 6th of December, 1879, when he conveyed the same to the defendant George E. Ring. In February, 1867, the children of Reed commenced an action of ejectment against Gardner and his tenants to recover possession of the said 320 acres of land. The case was tried in the district court in November of the same year, and judgment rendered in favor of the plaintiffs. From that judgment and an order denying them a new trial the defendants appealed to the supreme court, where, in November, 1870, the judgment was reversed, and the cause remanded for a new trial. The opinion of the court was delivered by RHODES, C. J., and concurred in by Justices WALLACE, TEMPLE, and CROCKETT. The case is not reported, and we therefore quote the opinion in full, so far as it relates to the points made here. It is as follows: "It is also urged that the court did not acquire jurisdiction of the infant plaintiffs in that action, [Garcia vs. Buckelew.] Infants sue by their guardians, who are appointed for that purpose by the court or the proper judge, and, when the action is brought by a guardian appointed in that manner, the court acquires jurisdiction of the infant plaintiffs. The infant plaintiffs in that case were represented by four guardians. The plaintiff introduced in evidence an order of the district judge appointing two of the persons named as guardians; and, if the other two persons acted in that capacity without having been duly appointed, it was erroneous, but that fact would not make the proceedings in the action void. It is further contended that the court had no jurisdiction of the subject-matter of that suit; or, to state the position of counsel in his own language, 'that the district court had no jurisdiction in any possible case to convey the property of these children to Buckelew or to confirm it to him, or to make any change whatever in the title of the property.' The principal purpose of the suit was to have the sale of the Reed rancho, [which included the lands in controversy in this action,] which had been made by the administrator of Reed's estate, set aside. The plaintiffs alleged the sale was illegal and void, and the defendant Buckelew alleged that the sale was valid, and that the deed executed in pursuance thereof vested in him the title to the lands. The court decreed that the sale and the deed as to all the lands, except the lands involved in this action, be rescinded and set aside; and as to the last-mentioned lands it was decreed that the sale and conveyance be confirmed, and remain valid as against the plaintiffs in this action. The question as to whether the court had jurisdiction to convey the property of the infant plaintiffs, or to make any change in the title thereto, does not arise; nor does the question arise as to whether the court had jurisdiction to confirm the sale or conveyance to Buckelew; that is to say, to confirm by direct action, as in case of a sale or conveyance made under the order of the court. The decree, although it is prefaced with the recital that 'it would be best and for the ultimate interest and satisfaction of all the parties to this suit' that the sale of the estate of Reed, (deceased,) except the premises in controversy in this suit, made under the order of the probate court by the administrator of the estate, and the guardian of the infant heirs of Reed, should be rescinded, yet it is a direct adjudication that the sale and conveyance of the premises in controversy was valid, and that as to the remainder of the estate of Reed it was invalid. However unsatisfactory and unstable to us the reasons and grounds might appear upon which the court acted in decreeing that the sale and conveyance of the rancho was valid as to one parcel and invalid as to another parcel of the general tract, they are beyond our reach in a collateral attack upon the decree. A judgment or decree, as we held in Joyce v. McAvoy, 31 Cal. 273, binds an infant equally with an adult, and it is not subject to an attack in any other mode in the one case than in the other. If the sale by the administrator did not divest the infants of their estate,—and the authorities cited by their counsel are ample to show that it did not have that effect,—then the decree was clearly erroneous, and for that reason might have been reversed on appeal; but it was not, for that cause, void. The entry in the judgment book that 'by the consent of parties the following decree was ordered by the court to be filed' did not have the effect to overcome the recital in the decree that it was rendered 'after hearing the proofs and allegations of the respective parties.' But, if it were entered by the consent of the parties, and without proof, there are no cases brought to our attention which hold that it was thereby rendered void. Judgment reversed, and cause remanded for a new trial." The *remittitur*, with a copy of the opinion of the supreme court, was filed in the trial court on the 10th of May, 1871, and thereafter, when the case was again called for trial, the action was dismissed by the plaintiffs without prejudice.

When defendant Ring purchased the 320 acres from Gardner in December, 1879, he paid for the property its full value, and supposed he obtained a good title to it. He at once took possession of the tract, and, by himself and tenants, continued in such possession, claiming title, and paying all taxes assessed against it, up to the time of the trial of this action. This action was commenced in February, 1890, to recover possession of the same 320 acres, and the plaintiffs alleged that they had title thereto under the patent issued to the Reed heirs in February, 1885. The defendants denied the plaintiffs' ownership of the demanded premises, and pleaded in bar of the action the statutes of limitation, and they also pleaded in defense of the action all the proceedings hereinbefore set forth. The case was tried by the court without a jury, and the findings and judgment were in favor of the defendants. From that judgment and an order denying them a new trial, the plaintiffs appeal. Counsel on both sides have filed elaborate briefs, and have ably and learnedly discussed all the questions of law and fact supposed to arise in the case. We do not, however, deem it necessary to follow their arguments, and review at length all the points presented.

1. While it is true that on the death of Reed his property vested at once in his heirs, and there could be no administration on his estate after the acquisition of California and the organization of our state government, still the probate court had jurisdiction to appoint a guardian of his minor children. This was authorized by an act of the legislature, passed April 19, 1850, entitled "An act to provide for the appointment and prescribe the duties of guardians." St. 1850, p. 268. And, though the order appointing Gibbs was dual, we do not think it void for that reason as to the guardianship. Nor do we think it void because it was entitled "In the matter of the estate of John Reed, deceased," and directed that letters of guardianship of the heirs be granted, without naming them. The statute authorized the appointment of guardians, and provided that "before appointing any person guardian of a minor the judge shall require of such person a bond," etc., but it did not require the actual issuance of letters. The order was preceded by a recital "that, whereas, John S. Gibbs had conformed to all the requirements of the law in his application, * * * proof of the same being before the court;" and it was followed by another order made on the same day in which Gibbs was spoken of as the "guardian of his [Reed's] minor children." From all this we think it appears that Gibbs was appointed and became the guardian of the four children, notwithstanding they were not individually named. They were known, and that was certain which could be made certain.

2. It is urged by counsel for appellants that the judgment in the case of Garcia et al. vs. Buckelew et al., confirming the sale, did not become a valid judgment, so as to operate as an estoppel, because it was never entered; that it was void, because not based on any issue in the case; that it was also void as to the infant plaintiffs, because the suit was not commenced by their guardian or next friend, appointed for that purpose; and, further, that it was void because it was given by consent. But the judgment was entered in a book entitled "Minute and Judgment Book," and it was proved that for the period beginning with and including the year 1850 down to July, 1857, all the judgments of the court were entered in that book, and that no other judgment book was to be found among the archives of the court. And as to the issues in the case the complaint alleged that the sale and all the proceedings leading up to it were illegal and void, and the defendant Buckelew alleged that the sale and proceedings were valid, and that the deed executed in pursuance thereof vested in him the title to the lands. So, as to the guardian, the record shows that two guardians *ad litem* of the infant plaintiffs were appointed by the court in December, 1850, and the same persons were named in the complaint as the guardians by whom the infants sued. And as to the last objection the minutes state that: "In the above case, the complaint and answer being read, by consent of parties the following decree was ordered by the court to be filed;" but the decree recites that "on reading the complaint and answer on file in this cause, and after hearing the proofs and allegations of the respective parties, and due deliberation being had thereupon, and it appearing to the court now here," etc. It will be observed that these matters were considered by the supreme court in Reed v. Gardner, and decided contrary to the theory of appellants. In that case the subject-matter involved, and the parties or their predecessors in interest, were the same as in this. The decision, therefore, after the lapse of 20 years, and after rights may have been acquired on the faith of it, we think, should be treated and followed as "the law of the case." It is suggested by counsel for appellants that that decision should not be considered the law of the case, for the reason, among others, that after the going down of the *remittitur* the action was dismissed, and no judgment was entered which could be pleaded in bar or given in evidence. A similar question was spoken of by Mr. Justice FIELD in his concurring opinion in the case of Knight v. Association, 12 Sup. Ct. Rep. 258, lately decided by the supreme court of the United States. Referring to the case of Tripp v. Spring, 5 Sawy. 209, 212, where, at the close of the trial, an oral opinion was rendered and subsequently written out, the case in the mean time, however, having been dismissed, the learned justice said: "The opinion of the court, pronounced at the close of the trial, and subsequently written out, was, notwithstanding the dismissal, as much authority on the questions of law presented as though a formal judgment had been entered, although the judgment ordered, because not entered on account of the dismissal, could not be pleaded in bar of a future action."

3. But, whatever view may be taken of the questions so far considered, we think the judgment and order appealed from should be affirmed, on the ground that the cause of action was barred. Section 1806 of the Code of Civil Procedure provides: "No action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is com-

menced within three years next after the termination of the guardianship; or, when a legal disability to sue exists, by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof." This section is a substantial reenactment of section 34 of the guardians' act of 1850. Here, as we have seen, Gibbs was appointed guardian of the Reed children, and as such sold the property in question; and more than 20 years were allowed to pass after they and each of them became of age, and after the termination of his guardianship, and more than 3 years after the issuance of the patent, before this action was commenced. Conceding, therefore, that the sale was void, still that fact did not save the case from the bar of the statute. Harlan v. Peck, 33 Cal. 515. We advise that the judgment and order are affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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93 Cal. 108

WELLER v. DICKINSON *et al.* (No. 13,697.)

(*Supreme Court of California.* Jan. 27, 1892.)

ACTION ON JUDGMENT—PLEADING.

1. In an action on a judgment of a court of general jurisdiction, the judgment is sufficiently pleaded by an allegation that it was recovered, without setting forth jurisdictional facts; the presumption being that the court acted within the authority conferred upon it by law.

2. Code Civil Proc. § 456, providing that a judgment of a court may be pleaded by stating that such judgment "was duly given or made," refers to judgments of courts of special jurisdiction only.

Department 1. Appeal from superior court, city and county of San Francisco; J. P. HOGE, Judge.

Action by Miranda Weller against Harvey Dickinson and others. Judgment for plaintiff. Defendants appeal. Affirmed.

H. H. Lowenthal, for appellants. *D. Wm. Douthitt*, for respondent.

GAROUTTE, J. The complaint substantially states that "section 23 of ordinance No. 1587, as amended by order No. 1923 of the city and county of San Francisco, provides: 'No person shall, within the limits of the city and county of San Francisco, explode any blast, or use powder or other explosive material for the purpose of blasting, unless he shall have first filed in the office of the clerk of the board of supervisors a good and sufficient bond, with two sureties, in the sum of twenty thousand dollars, that he will pay all damages occasioned thereby, and that said sureties are jointly and severally bound to pay any judgment which may be awarded in any of the courts of the city and county against said city and county, or against the person exploding such blasts, by reason of any damage resulting therefrom,' etc. In pursuance of such ordinance, one Tibbals filed his bond, with the defendants as sureties thereon. Upon May 18, 1889, plaintiff recovered a judgment in department No. 4 of the superior court of the city and county of San Francisco for the sum of $331.33 against Lizzie Tibbals, as executrix of the last will and testament of said Tibbals, deceased, on account of damages sustained to plaintiff's property by the blasting of said Tibbals. That said judgment is unsatisfied, and said estate is insolvent." It will be seen that this is an action against the sureties upon the bond given by Tibbals to the city and county, to recover the amount of the judgment rendered in the action against Lizzie Tibbals, as executrix, and is based upon that provision of the bond wherein defendants bound themselves to pay all judgments against the said Tibbals for damages caused as already stated. A special demurrer was interposed to the complaint, which was overruled. Defendants failed to answer, and judgment was entered as prayed for. This is an appeal from the judgment, and the only question involved is as to the sufficiency of the complaint.

The basis of plaintiff's cause of action was the fact that she had obtained a judgment against Lizzie Tibbals, as executrix of the estate of J. S. Tibbals, deceased. Does she sufficiently plead that judgment? We think the allegation sufficient, and that section 456 of the Code of Civil Procedure, providing that a judgment of a court may be pleaded by stating that such judgment "was duly given or made," has no reference to the judgments of courts of general jurisdiction. Section 59 of the former practice act, pertaining to the same subject-matter, was limited in terms to the judgments of courts of special jurisdiction. In transposing the provision to the Code the limitation is omitted, presumably because entirely unnecessary. The object of the section was not to place limitations and restrictions upon the manner of pleading judgments, but the intent of the legislative mind in formulating the provision was to simplify the manner of pleading judgments, by eliminating the necessity of setting out the jurisdictional facts upon which the judgments were based,—a task which in many cases demanded great care and labor. The words of the section itself directly indicate that such was the object and intent of the legislature; for the section says: "In pleading a judgment, it is not necessary to state the facts conferring jurisdiction," etc.; the section thus referring very clearly to that character of judgments which, prior to the enactment of the provision, required to be pleaded by setting out the jurisdictional facts. The object of the law being to simplify the pleading of a judgment by dispensing with the necessity of a showing of the jurisdictional facts, and the law, prior to the enactment of the section, not requiring the pleading of a judgment of a court of general jurisdiction to include the jurisdictional facts, the necessity of the provision as to such judgments was not present, and it is apparent that the section has no reference to the judgments of courts of general jurisdiction. Mr. Freeman, in his work on Judgments, (section 452,) says: "From the well-known rule that courts of superior or general jurisdiction are presumed to act by right, and within the authority conferred upon them by law, it follows that their judgments and decrees are, in all cases, of at least *prima facie* validity. In asserting such a judgment or decree as a cause of action or as a ground of defense, the plaintiff need state no jurisdictional facts;" and in referring to certain cases he says: "But, in so far as these cases indicate that it is essential to aver anything whatever to show the jurisdiction of courts of record, they are not sustained by the authorities." We see no defects in the complaint. Let the judgment be affirmed.

We concur: PATERSON, J.; HARRISON, J.

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93 Cal. 111

PEOPLE v. PHELAN. (No. 20,861.)

(*Supreme Court of California.* Jan. 27, 1892.)

BURGLARY—EVIDENCE OF INTOXICATION—INSTRUCTIONS.

On a prosecution for burglary, an instruction that evidence of drunkenness can only be considered for the purpose of determining the degree of the crime is error, since under Pen. Code, § 459, burglary is the entering a building with intent to commit grand or petit larceny, or any felony, and since section 22 declares that, "whenever the actual existence of any purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. HEBBARD, Judge.

Information against one Phelan for burglary. From a judgment of conviction, defendant appeals. Reversed.

Smith, Murasky, and *Louis E. Phillips*, for appellant. *Wm. S. Barnes* and *Atty. Gen. Hart*, for the People.

SHARPSTEIN, J. Appellant and two other persons were accused by information of feloniously and burglariously entering a building with the felonious intent of committing larceny therein. The defendants pleaded not guilty, and two of them demanded separate trials; and appellant was tried separately, and the jury found him guilty of burglary in the first degree. He moved for a new trial, which was denied, and from the order denying his motion for a new trial, and from the judgment, he appeals to this court.

The main contention of appellant here is that the court erred in giving the following instruction to the jury: "As to intoxication, I charge you that voluntary intoxication or drunkenness is no excuse for the commission of a crime. Intoxication is only permitted to be given in evidence for the purpose of throwing light upon the intent, motive, or purpose which the person may have had in doing the act complained of. *Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime, and for this purpose it must be received with great caution.*" The portion which we have italicized is repugnant to what precedes it, and likewise repugnant to section 22 of the Penal Code, which reads as follows: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition; but, whenever the actual existence of any purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." Entering a building with intent to commit grand or petit larceny, or any felony, constitutes burglary. Pen. Code, § 459. The intent with which a building is entered is a necessary element to constitute a particular species of crime, viz., the crime of burglary. Therefore the jury might have taken into consideration the fact—if such were the fact—that the accused was intoxicated at the time he entered the building, in determining the purpose, motive, or intent with which he committed the act. The jury, however, were instructed that the evidence of drunkenness in this case could only be considered by the jury for the purpose of determining the degree of the crime, about which there was no question; all the evidence, without conflict, being that the building was entered in the night-time. We are not at liberty to speculate as to what the verdict might have been if a proper, instead of an erroneous, instruction had been given. As given, the instruction withdrew from the consideration of the jury evidence which the Code says a jury may consider in determining the intent with which an act is committed. The evidence in this case tends to prove that appellant, before and at the time he entered the building, was intoxicated. Whether he was intoxicated to such a degree as to render him incapable of forming or entertaining an intent to commit grand or petit larceny, or any felony, in the building, was exclusively for the determination of the jury. The instruction that the jury could not consider that evidence for any other purpose than that of determining the degree of the crime is clearly erroneous, and for that error the judgment appealed from must be reversed. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; PATERSON, J.; MCFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.; HARRISON, J.

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93 Cal. 114

BURNETT v. LYFORD *et al.* (No. 14,229.)

(*Supreme Court of California.* Jan. 28, 1892.)

MORTGAGE—ASSIGNMENT—FORECLOSURE—PURCHASE BY MORTGAGOR'S ADMINISTRATOR.

1. In a suit to foreclose a mortgage given to a corporation, and by it assigned to plaintiff by indorsement, where the indorsement has been introduced in evidence without objection, the signature and corporate seal of the corporation must be assumed to be genuine, and to have been affixed by proper authority, and cannot be objected to as insufficient by defendant for the first time on appeal.

2. In a suit to foreclose a mortgage against the mortgagor's administrator and a third person claiming an interest in the mortgaged property, brought by an assignee of the mortgage, the introduction in evidence of the assignment

to plaintiff *prima facie* shows title in him, and the right to sue, and if such third person would question such right he should do so by his answer.

3. A husband and his wife executed mortgages on the latter's separate estate. The wife died before the husband, and L. was appointed administrator of both estates. The mortgages were assigned by the mortgagee to plaintiff, who brought a suit to foreclose against L. and one J., who claimed an interest in the property as purchaser at a sale under execution against the husband of the share inherited by him from his wife. At the trial J. showed that the assignment from the mortgagee to plaintiff was made at the instance of L., who furnished the money therefor, and claimed that, under Code Civil Proc. § 1617, forbidding an administrator to purchase a claim against the estate he represents, the effect of the transaction was to satisfy the mortgage. *Held*, that the defense, even if good, was not available to J., in the absence of an allegation in reference thereto in his answer.

4. Code Civil Proc. § 1617, forbidding an administrator to "purchase" a claim against the estate he represents, does not prevent him, for the purpose of protecting the estate against a sacrifice under the foreclosure of a mortgage, from advancing his own funds, and taking an assignment of the mortgage either to himself or a third person.

Department 1. Appeal from superior court, Marin county; E. B. Mahon, Judge.

Action by George G. Burnett against one Lyford and Egbert Judson, to foreclose mortgages. Judgment for plaintiff. Defendant Judson appeals. Affirmed.

E. W. McKinstry and *E. F. Swortfiguer*, for appellant. *D. I. Mahoney*, for respondent.

Harrison, J. Action for the foreclosure of three mortgages executed to the Hibernia Savings & Loan Society by Thomas B. Deffebach and his wife, Inez Reed Deffebach. The property mortgaged was the separate estate of the wife, and the moneys obtained by the mortgages were advanced by her to discharge the personal obligations of her husband. Inez died intestate, September 15, 1883, and Thomas died intestate, June 21, 1884. The defendant Lyford is the administrator of the estate of each of the said decedents, and the defendant Judson is alleged to have some interest in the mortgaged property, subject to the lien of the mortgages. The record does not disclose the extent or character of this interest, but in their brief his counsel state that it is an undivided one-third of the mortgaged lands, acquired by him through an execution sale upon a judgment against Thomas. Judson v. Lyford, 84 Cal. 505, 24 Pac. Rep. 286. This interest was derived by Thomas upon the death of his wife, as the heir to one-third of her estate. After the death of the mortgagors the Hibernia Bank made due presentation and proof of its claims upon the mortgages against their respective estates, which were allowed and filed, and thereafter the same were assigned to the plaintiff herein. An answer was filed by the defendant Lyford, as administrator of Inez, setting up that the property mortgaged was her separate estate; that the debts secured by the mortgages were the separate obligations of Thomas; that, as between them, she was only a surety for Thomas; and that upon her death one-third of her estate descended to Thomas, and the other two-thirds to her children. No answer was filed by Lyford, as administrator of the estate of Thomas. Judson, in his answer, did not set forth the character of his interest in the lands, or allege any affirmative matter, but merely denied the assignment to the plaintiff of the notes and mortgages sued on, and denied that they were unpaid. Judgment having been rendered in favor of the plaintiff, Judson moved for a new trial, which was denied. From this order he has appealed, but no appeal has been taken from the judgment itself. The plaintiff offered in evidence the several notes and mortgages sued on, upon each of which was the following indorsement: "For value received, the Hibernia Savings & Loan Society hereby sells, assigns, transfers, and sets over to George G. Burnett all its right, title, and interest in and to the within note. Hibernia Savings & Loan Society, by Miles D. Sweeny, President. [Corporate seal;]" and the said notes and mortgages, with the said indorsements, were admitted in evidence without objection. These indorsements were sufficient to vest in the plaintiff the title to the notes, and to enable him to bring the action in his own name. The assignment of the notes carried with them the mortgages, even if there had been no assignment of the security. Civil Code, § 2936. If the appellant had intended to question the sufficiency or genuineness of the indorsements, he should have done so at the time they were offered in evidence. Poorman v. Mills, 35 Cal. 121; Bullard v. Stone, 67 Cal. 482, 8 Pac. Rep. 17. The signature attached thereto, in the absence of any objection, must be assumed to be genuine. The failure to make an objection to the signature when the indorsement was offered in evidence was an admission of its genuineness, and equivalent to proo thereof; and, as the seal affixed thereto purported to be the corporate seal of the bank, it must also, in the absence of objection, be assumed to be genuine, as well as to have been affixed by proper authority. It was, therefore, evidence of the corporate act which it purported to authenticate. Ang. & A. Corp. § 224; Railroad Co. v. Morganstern, 103 Ill. 149; Trustees v. McKechnie, 90 N. Y. 629; Morris v. Keil, 20 Minn. 531, (Gil. 474;) Hutchins v. Byrnes, 9 Gray, 367; McCracken v. San Francisco, 16 Cal. 639. The burden of proving the contrary was upon the appellant, and it is not competent for him, after having allowed the evidence to be introduced without objection, and without attempting to impeach its genuineness or sufficiency, to make upon appeal an objection which was not presented at the trial, and which might have been obviated if objection had then been made. Chouquette v. Barada, 28 Mo. 497; Poorman v. Mills, supra; Bullard v. Stone, supra. The subsequent admission in evidence of what purported to be a formal assignment to the plaintiff of the notes and mortgages, even if erroneous, was a harmless error, as the assignment had already been sufficiently shown. The motion for a nonsuit was properly denied. The admission of the notes with their indorsements was evidence before the court of the plaintiff's title thereto, and right to maintain the action, and his production of the notes at the trial was evidence that they had not been paid.

At the trial it was shown by the appellant that the assignment from the bank to the plaintiff was made at the instance of the defendant Lyford, and that he (Lyford) furnished the money which was paid therefor to the bank. Upon these facts it is urged by the appellant that Lyford is the real party in interest, and that, inasmuch as by section 1617, Code Civil Proc., an administrator is forbidden to purchase a claim against the estate he represents, the legal effect of the transaction was to operate as a payment of the notes, and consequent release of the mortgage liens. Whether the plaintiff is the real party in interest, or whether the defendant Lyford is the beneficial owner of the notes and mortgages, is immaterial to the appellant, and is not available to him as a defense herein. No allegation in reference thereto was made by him, and, if he has any defense against Lyford which he would not have against the plaintiff, or if the assignment to Lyford would have given to the appellant greater rights than did the assignment to the plaintiff, it was incumbent upon him to make such allegation in his answer. Poorman v. Mills, 36 Cal. 121. The assignment of the notes to the plaintiff *prima facie* vested him with the title thereto, and the right to bring the action; and, if the appellant would question this right, it constituted matter of defense, which he should have alleged.

We do not think that the provisions of section 1617, Code Civil Proc., have any application to the facts of the present case, or can be invoked by the appellant to defeat the action for the foreclosure of the mortgages. If an administrator, with the desire of protecting the estate which he represents against a sacrifice of its property under the foreclosure of a mortgage, should, in case there were no funds of the estate in his hands, advance his own funds with which to relieve the property from such sacrifice, and take a transfer of the debt to himself, a probate court would be justified in allowing him, upon the settlement of his accounts, the amount so paid for the benefit of the estate; and the transaction would not be vitiated if, at his request, the transfer should be made to another instead of to himself. It might, for many reasons, be for the benefit of the estate, either for the purpose of maintaining some claim in its behalf, arising out of such debt, or for preserving some right in reference to the property affected by the debt, that the debt should not be extinguished. Such transaction of the administrator could always be questioned by the heir, or others who might have an interest in the estate, but not by a stranger. In the present case, inasmuch as the integrity of Lyford in procuring the assignment to Burnett is not questioned by Judson, either by allegation or by evidence, and as the court below sustained the transaction, we must hold that, if his acts could, under any state of facts, be sustained as valid, they must be referred to such facts, rather than be held invalid from the mere circumstance that he furnished the money with which the transfer was made to Burnett. His acts, in the absence of any evidence impeaching their character, must be held legal, rather than illegal. As the representative of the two estates, Lyford was justified in taking such steps for their protection from the enforcement of the mortgages against the property as would preserve the rights and obligations of the respective estates towards each other, and as would also compel Judson to discharge that portion of the incumbrance which, in equity, devolved upon him to discharge, by virtue of his having succeeded to the interest of Thomas. The advancement by Lyford of the money, and the procuring of the assignment to be made to Burnett for the purpose of enabling him to effect this result, was within the line of his authority as administrator of the two estates, and must be construed as within the exercise of his duties as such administrator, rather than as a "purchase" of the claim within the meaning of section 1617, Code Civil Proc. The case of Jones v. Hanna, 81 Cal. 507, 22 Pac. Rep. 883, invoked in support of the contention of appellant, is inapplicable. In that case the plaintiffs purchased the property of the estate of Hanna, under an express agreement with the administratrix that the purchase should be for her individual benefit, and the transaction was held to be invalid, for the reason that it was indirectly a purchase by the administratrix of the property of the estate she represented, and, therefore, in violation of the express terms of section 1576, Code Civil Proc. The order is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

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93 Cal. 144

SMITH v. SCHIELE. (No. 13,621.)

(*Supreme Court of California.* Feb. 2, 1892.)

REAL-ESTATE AGENTS—COMMISSIONS—GOOD TITLE—RATIFICATION.

1. Defendant contracted in writing with certain brokers, "solely, to sell" his land on a certain commission. They found a purchaser who contracted to purchase, but by reason of defects in the title refused to accept the land. In an action for such commissions, defendant claimed that the words "solely, to sell," made the right to commission contingent on the consummation of the sale. *Held*, that those words merely intended to give the brokers an exclusive agency for the sale of the land.

2. Where the contract of purchase provided for good title or no sale, the fact that there was an unpaid mortgage on the land, and also an action pending for the recovery of an interest in the land, justified the purchaser in refusing to accept title.

3. The tender of a deed with covenant of warranty did not release defendant from his obligation to convey a good title.

4. Though the brokers exceeded their authority in contracting that the title should prove good or that there should be no sale, yet defendant waived this objection by accepting the purchaser, and ratifying the conditions on which the sale was made.

5. Where such ratification, so far as it af-

fected the brokers, did not relate to an interest in the land, it was not necessary that it should be in writing.

6. The fact that defendant, at the time the contract of brokerage was made, had only an option on the property, was immaterial, where the brokers had no knowledge as to the condition of the title.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Action by C. C. Smith, Jr., administrator of the estate of B. Newman, against Charles M. Schiele, to recover brokers' commissions for negotiating a sale of lands. Judgment for plaintiff. New trial denied. Defendant appeals. Affirmed.

W. C. Kennedy, for appellant. *A. S. Kittredge*, for respondent.

FITZGERALD, C. Action to recover brokers' commissions for negotiating a sale of defendant's land. Phelps & Smith were the brokers, and plaintiff, who succeeded to their claim, had judgment. Defendant appeals from the judgment and the order denying his motion for a new trial. The questions presented by this appeal for decision arise out of the following state of facts: On February 14, 1887, defendant executed to Phelps & Smith the following contract of employment: "San Jose, February 14, 1887. I, the undersigned, do hereby authorize Phelps & Smith, solely, to sell the following real estate as herein described: 244 acres of land bounded north by Mabery road, east by Pyle road, south by land of Johnson and Hannay and Julian street road, west by the Coyote creek,—for the sum of $200 per acre, or as much less as I may take at any time of sale thereof; also agree to pay Phelps & Smith two per cent. commissions, commission on the full amount said property is sold for. This contract shall be in force for two months, and after that date until the said property is sold, unless withdrawn by me in writing. CHAS. M. SCHIELE." Phelps & Smith, who knew nothing at the time about the condition of the title of said property, accepted the employment to sell on the terms stated in the contract, and on March 10, 1887, found a purchaser for said property in one Cadwallader, on the terms expressed in the following receipt: "Received, San Jose, March 10, 1887, from N. Cadwallader, the sum of five thousand ($5,000) dollars in gold coin, being as a deposit and part payment on account of bargain and sale made to him this day to a certain lot, tract, or parcel of land lying, situate, and being in the county of Santa Clara, state of California, (describing the property,) containing about 244 acres of land, said Chas. M. Schiele having sold to said N. Cadwallader, this day, for the sum of two hundred dollars per acre, in gold coin, the balance to be paid sixty days from date, or this deposit to be forfeited, without recourse. Title to prove good or no sale, and this deposit to be returned. PHELPS & SMITH, for C. M. SCHIELE, Real-Estate Agents." They then introduced Cadwallader to defendant as the purchaser of said property, and, after informing him of the terms of the sale, delivered to him a copy of the foregoing receipt, which was agreed to and ratified by the defendant, and Cadwallader accepted by him as the purchaser thereof on said terms. The deposit of $5,000 was not in gold coin, as stated in the receipt, but was, by agreement of all parties, a bank check for that amount drawn by Cadwallader in favor of said brokers, and deposited with the cashier of the bank, with directions in writing not to deliver it up without the consent of all parties. An abstract of title was thereupon furnished by the defendant to Cadwallader for examination, and by him placed in the hands of a competent attorney for that purpose. At this time defendant had only a contract of sale of said property from one Metzger, the owner, who executed to him a grant deed thereof on March 15, 1887, and at the same time defendant executed to Metzger a mortgage thereon to secure the payment of his note to Metzger for $30,000, balance of purchase money therefor. On March 31, 1887, and before Cadwallader's attorney had completed his examination of the title of said property, one Bernhardt commenced an action against the defendant in the superior court of Santa Clara county, and on the same day filed *lis pendens* in the recorder's office of that county, claiming that he was a joint purchaser with defendant of said property, and was the owner of one undivided half thereof, and praying that defendant be declared a trustee for him of said undivided one-half, and compelling defendant to make a deed to him for the same. On July 15, 1887, the defendant had judgment against Bernhardt for costs, and on August 16, 1887, the judgment was satisfied. The time fixed by the terms of the contract for the consummation of the sale was not extended, and on May 9, 1887, the last day within which Cadwallader was to make payment of the balance of the purchase money, the defendant tendered to him a grant deed in due form containing a covenant of warranty, and demanded the payment of said purchase money. No satisfaction of the Metzger mortgage was ever tendered, nor was said mortgagee present to satisfy the same. Cadwallader declined to accept the deed, and pay the balance of the purchase money, solely on the ground that the title of said property was not good, and that it had been so reported to him by his attorney. Cadwallader was ready, willing, and able to pay the whole of said purchase money and consummate the sale, and would have done so had the title proved good. The check was, by mutual consent of all parties, returned to Cadwallader in August, 1887.

It is contended by appellant that the contract of employment was "solely to sell," and that the payment of the brokers' commissions was contingent upon the consummation of sale. Such is not our construction of the contract. The words "solely, to sell," as therein used, were simply intended to confer upon the brokers the exclusive right to sell the property; that is, constituting them the sole agents for that purpose. Nor was the payment of commissions contingent upon the consummation of sale; for all that the brokers were required to do by the terms of their employment, to entitle them to their commissions, was to produce a *bona fide* purchaser for the property on the vendor's terms, and such is the well-settled meaning, in this state, of a broker's authority to sell. Duffy v. Hobson, 40 Cal. 244; Rutenberg v. Main, 47 Cal. 219; Dolan v. Scanlan, 57 Cal. 266; Phelps v. Prusch, 83 Cal. 628, 23 Pac. Rep. 1111. If such a purchaser was produced, the brokers were entitled to their commissions, without reference to the consummation of the sale, unless the failure to consummate it, the title proving good, is chargeable to the purchaser. Middleton v. Findla, 25 Cal. 81; Blood v. Shannon, 29 Cal. 395; Phelan v. Gardner, 43 Cal. 311; Neilson v. Lee, 60 Cal. 555; Phelps v. Prusch, supra. If, on the other hand, the failure is caused by a defective title, the vendor alone is at fault, and the brokers are entitled to recover. Middleton v. Findla, supra; Gonzales v. Broad, 57 Cal. 225; Phelps v. Prusch, supra. It appears that Cadwallader was a ready, willing, and able purchaser, but that he declined to complete the purchase of the property because of a defective title, caused by the Bernhardt suit, and the incumbrance of the Metzger mortgage.

The defendant was bound by the terms of his contract to convey a good title, and, as it is evident from these causes that the title was not good, it devolved on him to make it so by curing the defect and removing the incumbrance within the time limited by the terms of the contract. This he failed to do, and, as the time was not extended, Cadwallader was discharged from his obligation to purchase, and was entitled to the return of his deposit.

It is true that on the last day of the period of time fixed by the terms of the contract, and within which Cadwallader was to make payment of the balance of the purchase money, Schiele tendered to him a grant deed, in due form, containing a covenant of warranty, and demanded payment, but there was no offer to remove the mortgage incumbrance, and, if there had been, neither Metzger nor any one representing him was present to receive the money, and satisfy the mortgage. Furthermore, the suit commenced by Bernhardt against the defendant for an undivided interest in the property was still pending and undetermined. The covenant of warranty contained in the deed tendered could not release the defendant of his obligation to convey a good title, for it was, at most, but a mere personal obligation, which Cadwallader was in no way obligated to accept.

But it is insisted that the brokers exceeded their authority in making the contract with Cadwallader by providing therein "title to prove good or no sale." Conceding, for the purpose of this case only, that a good title is not implied by law in an executory contract for the sale of land, and further that the brokers were not authorized to guaranty or insure title, still it appears that they informed the defendant of the terms of the sale, and delivered to him a copy of the receipt or contract containing the same, which he agreed to and ratified, and upon Cadwallader being introduced to him by the brokers, he accepted him as the purchaser of the property on said terms.

The ratification referred to was not in writing, nor was it necessary as between the defendant and the brokers that it should be, for the reason that in so far as it affected the brokers it related to no interest in the land, but only to defendant's obligation to pay them their commissions, when earned, in accordance with the terms contained in the contract of employment.

It is further contended that at the time defendant made the contract of employment with the brokers, he only had an option on the property, of which all parties were aware. This claim is disposed of by the finding of the court, and there is evidence to support it, that the brokers knew nothing about the condition of the title to the property. Counsel for appellant insists, with much earnestness, that Cadwallader was not a ready or willing purchaser, for the reason that the evidence shows that he had intimate personal and business relations with Bernhardt, and instigated Bernhardt to bring the suit referred to against the defendant, for the purpose of enabling Cadwallader to withdraw from what proved to be an unprofitable bargain. The only evidence on this point is that given by Cadwallader on his cross-examination, which is as follows: "Bernhardt and I were well acquainted; we were intimate at that time, and in several speculations together were very friendly. At that time I had purchased with him a tract of land. We paid $500 deposit; $15,000 to be paid in the fall. I told him he ought to bring his suit against Schiele for damages, and not for specific performance. We had several talks about his suit against Schiele. We were very friendly. Bernhardt told me he was going to bring suit against Schiele, and I requested him to bring it in such a way as not to interfere with my contract with Schiele. After the suit was brought, he told me his lawyers said that was the only way it could be brought." It may be true, as argued by counsel for appellant, "that it is not difficult to find a pretended purchaser, who does not and cannot make the purchase, if by so doing a broker can earn his commissions;" but the seller can always protect himself against such dishonest practices by stipulating in the contract of employment that no commissions are to be paid the broker unless the sale is consummated. The production of a *bona fide* purchaser on terms satisfactory to the defendant was all that the brokers were required to do by the terms of their employment. This they did, and as the failure to consummate the sale is shown to have been caused solely by a defective title, for which the defendant alone is responsible, it follows that the brokers are entitled to recover their commissions. The judgment and order should be affirmed, and we so advise.

We concur. VANCLIEF, C.; FOOTE, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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93 Cal. 159

Ede v. Knight. (No. 13,714.)

(*Supreme Court of California.* Feb. 2, 1892.)

Public Improvements—Contracts—Extension of Time—Recording—Assessment—Payment—Estoppel.

1. A valid contract made in 1879 for street improvement, under St. 1871–72, p. 809, which provided for extensions of time, could not be affected by Const. art. 11, § 19, which took effect in 1880, and provided that no contract for such improvement should be made, the cost of which was chargeable on private property, unless an assessment therefor be first levied, collected, and paid into the city treasury, though such extensions were made after the constitution took effect.

2. St. 1871–72, p. 809, § 7, provided that it should be the duty of the superintendent of streets, on the passage of a resolution extending the time of the contract, to record the same in the office of the city recorder; and, in issuing a certificate of such extension to be recorded, to specify therein the number of such resolution. *Held,* that an error in such certificate of extension as to the number of the resolution was immaterial.

3. The recording of such resolution being a ministerial act on the part of the superintendent, his failure to record it during the life of the contract would not prejudice the contractor. McVerry v. Boyd, 26 Pac. Rep. 885, 89 Cal. 304, followed.

4. The certificate of the city and county surveyor and deputy-superintendent, and the assessment, diagram, and warrant signed by such superintendent, and countersigned by the auditor, were *prima facie* evidence that the contract had been duly and fully performed.

5. The assessment for grading gave the number of the lot, the number of front feet, the amount assessed, and referred to the diagram thereto attached. The diagram showed the exterior lines of the property as described in the complaint, and the number of the lot given in the assessment. *Held,* in an action to foreclose the assessment lien, that the description of the lot was sufficient.

6. Where all the work called for in the contract was duly and fully performed, the fact that no diagram was made showing the amount due for work on the street crossing, and that no assessment was made on the lot therefor, did not prejudice defendant.

7. The verified return of the contractor that he went on the lot, and publicly demanded payment of the sum assessed thereon, being *prima facie* evidence of that fact, and not disputed, showed a proper demand.

8. The fact that the contractor afterwards, on the same lot, demanded, without authority, the sum due for grading the crossing, would not affect the validity of the prior demand for the amount assessed on the lot.

9. Though the diagram described two lots, one of which was smaller, and lying within the boundary of the other, yet, where the whole of the land designated in the diagram as "Lot 1" was liable for the amount assessed for work exclusive of such crossing, a demand was good, made by the contractor while standing on any part of the premises so designated as "Lot 1."

10. Where no issue was made as to the validity of the contract, and defendant treated it as valid, and introduced it in evidence, he could not thereafter claim that it and the assessment were invalid.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by William Ede against Thomas Knight to foreclose a street-assessment lien. Judgment for defendant. Plaintiff appeals. Reversed.

May 26, 1879, the board of supervisors of the city and county of San Francisco adopted and passed a resolution to, and thereafter did, order certain street work to be done, and entered into a written contract with A. E. Buckman to do such work. Buckman performed the work, and assigned his claim therefor to plaintiff. After the work was done, an assessment was levied to cover the expense thereof.

J. C. Bates, for appellant. *E. F. Preston,* (*Philip G. Galpin,* of counsel,) for respondent.

Paterson, J. This is an action to foreclose a street-assessment lien. The court found that the work was not completed within the time specified in the contract; that the time within which the work was to be completed was not extended; that no assessment was made to cover the sum due for the work named in the complaint, nor was any diagram ever made showing the particular lot or portion of lot with the number of feet frontage assessed for the work; that the lot described in the complaint was never assessed for the work; and that no public demand was made as required by law, nor was any return made upon the warrant by the contractor stating the nature of his demand. None of these findings is supported by the evidence.

The contract was entered into on November 28, 1879. The act under which the contract was made (St. 1871–72, p. 809) provided for extensions of time. These provisions entered into and became a part of the contract, and were not affected by the provisions of the new constitution. Section 19[1] of article 11 of the constitution applies only to contracts made after the constitution took effect. Ede v. Cogswell, 79 Cal. 278, 21 Pac. Rep. 767. A valid contract cannot be abrogated by the adoption of a new constitution, any more than it can be by the enactment of a law by the legislature. McCracken v. Hayward, 2 How. 613; Bank v. Skelly, 1 Black, 436; 3 Pars. Cont. § 555. McDonald v. Patterson, 54 Cal. 247, is not in point. That case holds simply that the superintendent of streets cannot be required to enter into a contract (under the act of April 1, 1872) which was awarded after January 1, 1880.

It is claimed by respondent that the attempt to extend the time was ineffectual because the resolution was not recorded, and because the certificate of extension did not state the number of the resolution. Section 7 of the act provides that it shall be the duty of the superintendent of streets, on the passage of such a resolution, "to cause the same to be recorded in the office of the city recorder; * * *

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[1] Section 19 provides that no public work shall be done on the streets, the cost of which shall be chargeable on private property, unless an estimate of the cost is made, and an assessment levied, collected, and paid into the city treasury, before any contract is made for such work. The constitution took effect January 1, 1880.

and, in issuing a certificate of an extension of time to be recorded, to specify in the same the number of the resolution of the board of supervisors." On February 24, 1880, the board, by resolution No. 14,519, granted the contractor 60 days' additional time, but in his certificate of extension the superintendent of streets states that the extension is granted in accordance with resolution No. 14,518, passed February 24, 1880. This variance as to the number of the resolution has been held to be immaterial. McVerry v. Hitchcock, (Cal., No. 7,981, Nov. 24, 1884,) 4 Pac. Rep. 1144.

The objection that one of the resolutions extending the time was not recorded during the life of the contract was considered in McVerry v. Boyd, 89 Cal. 304, 26 Pac. Rep. 885, where we held that the important and material thing was the fact that an extension of time had been granted by the board; and that the granting of the certificate and recordation of the resolution by the superintendent were mere ministerial acts, a failure to perform which could not operate to the prejudice of the contractor. This construction of section 7 is supported by Himmelmann v. Reay, 38 Cal. 165, and by other provisions of the act itself. Section 12 provides that, "after jurisdiction to order any work has been obtained, no irregularity in any of the subsequent proceedings shall render any assessment illegal;" and section 28 provides that "this act shall be liberally construed to carry out the intentions and purposes of this act." The failure of the superintendent to record the resolution, or to state the true number thereof in his certificate, was not jurisdictional. The equality and uniformity of the assessment was in no way affected by it, nor did it operate in any way to the prejudice of the lot-owner. Provisions of a statute like those under consideration are designed for the information of the various officers of the county, and are intended to promote system and dispatch in the prosecution of the proceedings. They are not of the essence of the thing required to be done, and are therefore merely directory. They are matters over which the parties affected by the proceedings have no control, and a failure to perform them should not operate to the prejudice of any one except the officer himself. This is true especially where the statute fixes no time in which the acts are required to be done. People v. Canal Co., 48 Cal. 146; Brady v. Bartlett, 56 Cal. 357; People v. Cole, 70 Cal. 60, 11 Pac. Rep. 481; In re Broadway, 63 Barb. 579; In re Upson, 89 N. Y. 73; Torrey v. Millbury, 21 Pick. 67. Beveridge v. Livingstone, 54 Cal. 56, and other cases cited by respondent, are not in point. There is no doubt that no extension of time can be granted after the time given the contractor has expired; or that an assessment is void unless the work has been performed within the time required; or that, where the statute expressly says certain things must be done before any lien attaches to the property, it is necessary to show performance of the acts required. These propositions are supported by the cases referred to, but they have little or no bearing upon the question just considered.

The certificate of the city and county surveyor and deputy-superintendent of streets, and the assessment, diagram, and warrant signed by the street superintendent, and countersigned by the auditor, are *prima facie* evidence of the fact that the contract has been duly and fully performed. Chambers v. Satterlee, 40 Cal. 519; Brady v. Bartlett, supra; Jennings v. Le Breton, 80 Cal. 12, 21 Pac. Rep. 1127.

The property described in the complaint was properly assessed for the amount due for work done on Seventh street. The assessment may give the number of the lot, and refer to the diagram for a further description. If the two documents, taken together, show a clear description of the property, the assessment will be held sufficient, so far as the designation of the property is concerned. Hewes v. Reis, 40 Cal. 261. The assessment for grading Seventh street gives the number of the lot, the number of front feet, the amount assessed, and it refers to the diagram attached for a further description of the lot. The diagram shows the exterior lines of the property as described in the complaint, and the number of the lot given in the assessment. Nothing more could reasonably be required.

It is claimed by respondent that there should have been but one assessment for the entire work called for in the contract, each lot being assessed for its proportionate share of the expense of the whole work. This is what was attempted; but to distribute the burdens it was necessary to have two diagrams, the lot charged with the expense of work on the crossing being a part of the lot charged with the work on Seventh street. Only one diagram, however, was made,—a diagram of the lot described in the complaint, and charged with the expense of the work done on Seventh street. No diagram showing the lot assessed for the amount due for work on the crossing was made; but we are unable to see how defendant is injured or prejudiced by the failure to make such a diagram. The contractor is the only person aggrieved thereby. He could have appealed, and had the assessment corrected, or a new one made. By his failure to do so a part of the defendant's land had been relieved of the burden which otherwise would have been put upon it in consequence of the improvements of the crossing. Defendant ought not to be heard to say that this has operated to his prejudice, when it appears that all the work called for in the contract has been duly and fully performed.

The evidence shows that a proper demand was made. The verified return of the contractor states that he went upon each of the lots exhibited on the diagram, and publicly demanded on each lot payment of the sum assessed to each; "that is to say, he so demanded at said time, on each of said lots of land above enumerated, separately, the payment of the sum or sums of money as assessed thereon, respectively, by said assessment, and, where more than one sum was assessed by said assessment on any one of said lots, he demanded payment of such several sums separately; so that each separate item assessed in such assessment was separately demanded by deponent upon the identical lot on which it was by said assessment imposed." This return is *prima facie* evidence of the facts stated, (Deady v. Townsend, 57 Cal. 299,) and was not disputed. It is true, there is but one lot designated on the diagram, *i. e.*, lot 1; and it is clear, therefore, that only one legal demand could be made. Lot 1 was assessed for the work on Seventh street, between King and Berry streets, and is liable for the amount assessed upon it.

If the contractor demanded the sum of $3,486.96 on lot 1, as the return shows he did, the fact that he afterwards, on the same lot, demanded, without authority, the sum of $89.78,—the cost of grading the crossing,—would not affect the validity of the demand for the $3,486.96, for which lot 1 was properly assessed.

Respondent says in his brief that "the diagram attached fails to show upon which lot 1 Buckman went when he made either demand. Dyer v. Harrison, 63 Cal. 449. He may have demanded the $3,486.96 on that part of lot 1 upon which it was not a lien, to-wit, upon a lot 1 outside of the 240 feet frontage upon which the $3,486.96 was a lien." The fault or weakness of this argument rests in the assumption that there are two lots described in the diagram, one of which is smaller, and lying within the boundary of the other. This is not the fact,—there is but one; but, if it were, the whole of the land designated in the diagram as "Lot 1" is liable for the amount assessed for work on Seventh street, exclusive of the work done on the crossing; and therefore, if the contractor at the time he made the demand stood upon any part of the premises lying within the exterior boundaries of the lot designated in the diagram, the demand was good. Dyer v. Harrison, cited by respondent, has no bearing upon this point. In Parker v. Reay, 76 Cal. 105, 18 Pac. Rep. 124, we held that where the assessments—one valid, the other void—were severed, and separate demands were made, the contractor was entitled to recover the amount of the valid assessment. See, also, Boyle v. Tibbey, 82 Cal. 11, 22 Pac. Rep. 1128.

It is claimed by respondent that the contract and assessment are invalid because no petition for grading was filed, as required by section 4 of the act, and because no notice of the award was given. This objection seems to have been raised here for the first time. No issue was made in the court below as to the validity of the contract; on the contrary, it was treated by the defendant in his answer as valid, and was introduced in evidence by him in connection with the extensions of time. Under these circumstances the objection comes too late.

The appellant's contentions with respect to the constitutionality and effect of the acts of 1872 and 1878 were considered and determined in Ede v. Cogswell, supra, and Jennings v. Le Roy, 63 Cal. 398. We are asked to reverse the judgment, with directions to enter judgment in favor of plaintiff. This cannot be done on the findings in the record. Dyer v. Brogan, 57 Cal. 235. The judgment and order appealed from are reversed, and the cause is remanded for a new trial.

We concur: Harrison, J.; Garoutte, J.

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93 Cal. 169

Gillespie v. Wright. (No. 13,895.)

(*Supreme Court of California.* Feb. 2, 1892.)

Presenting Claims against Decedent's Estate—Limitation—Amendment of Pleading.

1. After a claim against an estate had been presented and rejected by the executrix, plaintiff's attorney, deeming the claim not sufficiently formal, again presented it to the executrix's attorney, who simply took the claim and said it would be again rejected, and it was so rejected by the executrix. There was nothing said at the second presentation by defendant's attorney as to the informality of the first presentation, or that it would be considered as not having been before rejected. *Held*, that the statute (Code Civil Proc. § 1498) limiting the time of action on rejected claims, began to run from the first rejection.

2. Where an amended complaint was presented with proposed findings and plaintiff's brief without any formal motion, and it was conditioned to be allowed to be filed if the court should think the complaint needed amendment, there was no prejudicial error in the failure of the court to have the amended complaint filed.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; E. M. Gibson, Judge.

Action by E. A. Gillespie against Maria Louisa Wright, executrix, on a note. Judgment for defendant. Plaintiff appeals.

Scrivner & Boone and *Geo. W. Schell*, for appellant. *Welles Whitmore*, for respondent.

Foote, C. This action was brought on a note which had been presented to the executrix above mentioned for allowance, and been rejected by her. The appeal is from a judgment in favor of the defendant, and from an order refusing a new trial. The points made are numerous, but we think that, upon the decision of those hereafter mentioned, this case is determinable in favor of the respondent. The claim was twice presented, and twice indorsed "rejected" by the executrix. But it is claimed by appellant that there was no actual rejection on the first presentation, and therefore that the bar of the statute under section 1498, Code Civil Proc., does not attach. The finding of the trial court is opposed to this view, and, as we think, is supported by sufficient evidence. It appears that on the first presentation the claim was actually rejected and so indorsed, and that the plaintiff's attorney, deeming that it, as presented, was not perhaps sufficiently formal, again at a later day presented it to the attorney of the defendant for action by the executrix. The plaintiff's attorney was not then, nor was he ever, told by the defendant's attorney that the claim was informal, or that it would be considered as not having been before rejected, and formally presented for the first time. The attorney for the executrix said the claim would be again rejected, but that he would present it to her again for action. While this shows a disposition to accommodate the presenter of the claim, and give him the benefit of his own legal view of the matter, it did not amount to a formal or apparent consent that the former rejection should be held as naught, and that the time might be extended for bringing the action on the rejected claim as first indorsed. To determine the present contention in favor of the appellant, upon the point under discussion, would be to say "that when a creditor has presented his claim, and it has been rejected, he may again present his claim for the same demand, and thus avoid the bar, or prolong the time within which he may commence suit." TEMPLE, J., in concurring opinion in Steward v. Hinkel, 72 Cal. 191, 13 Pac. Rep. 494. It was no fault of the defendant executrix or her attorney that the claim was not presented in a form, in the first place, which, upon after-consideration by the plaintiff's attorney, was not thought sufficient by the presenter thereof. As first presented it was actually rejected; and there was no formal or apparent consent given that this rejection should be considered as not having been made by proper indorsement. We do not think that the conduct of the defendant or her attorney should be considered, under the facts here developed, as giving the plaintiff the right to suppose that the former rejection had been set aside. It still existed, and the effort to clinch the matter by another presentation was not suggested by them, nor was it apparently agreed in any way that the second should take the place of the first presentation. The responsibility in the premises rested solely with the plaintiff and his legal representative. They were at liberty to proceed upon the first rejection, of which there was no intimation that it would be held by the respondent as of no avail, or that the claim was informal in the statement thereof. There had been no refusal to inform the plaintiff of the rejection of the claim by the executrix or her attorney, and from the beginning to the end the plaintiff had no reason to believe but what it would be refused, as it was, and the indorsement made thereon in the first instance. The conduct of the attorney for the defendant was fair and open; he was apparently willing to accommodate the plaintiff by letting the executrix repeat her first rejection, but he did nothing, as we view the matter, to mislead the plaintiff's attorney into the belief that his second presentation would be treated as the only presentation made. Neither do we see any prejudicial error on the part of the court below in not causing the amended complaint to be filed. It was offered, after the case was tried, and presented with the proposed findings and plaintiff's brief without any formal motion, and conditioned to be allowed to be filed if the court should think that the complaint needed amendment. We do not think that upon this kind of practice the trial court should be held to have failed in its legal duty. We perceive no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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93 Cal. 166

TULLER v. ARNOLD *et al.* (No. 13,715.)

(*Supreme Court of California.* Feb. 2, 1892.)

ATTACHMENT—DISSOLUTION.

In an action for the price of goods purchased from Chicago firms, defendant moved to dissolve an attachment on the ground that the money due on the contract of sale was not made payable in the state, as required by the statute to authorize an attachment. Defendant made affidavit that he personally purchased the goods at Chicago; that they were to be paid for there; that upon one of the invoices was printed the words, "All bills payable in Chicago. Remit in par funds. No allowance can be made for exchange or express charges;" and that on the other invoice were printed the words, "Payable, with exchange, on Chicago or New York." An affidavit on behalf of plaintiff stated that the goods were to be paid for at and upon their arrival in San Francisco, and another affidavit stated that defendant represented to the selling corporation that defendant would pay for the goods in San Francisco; but neither of the affidavits for plaintiff stated that affiants were connected with the sales department of the selling corporation, or that they had any personal knowledge of the transaction, nor did they attempt to explain the statements on the invoices. *Held*, that an order refusing the motion to dissolve should be reversed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; EUGENE R. GARBER, Judge.

Action by W. N. Tuller against Charles S. Arnold and others. Defendants appeal from an order refusing to dissolve an attachment. Reversed.

Robert H. Countryman, for appellants. *John H. Dickinson*, for respondent.

TEMPLE, C. This appeal is from an order refusing to dissolve an attachment. Plaintiff is assignee of claims due two Chicago firms, from whom defendants had purchased goods. The motion was based upon affidavits made by each defendant to the effect that the goods were purchased in Chicago, and were to be paid for at Chiago, 30 days after the date of the invoices. The affidavit of defendant Louis E. Arnold states that neither of said firms, assignors of plaintiff, have agencies or branch houses at San Francisco; that he personally purchased the goods at Chicago, and ordered them shipped to San Francisco; that they were to be paid for at Chicago, 30 days after the date of invoice, and the bills were not to be payable at San Francisco. That upon the invoice of E. W. Blatchford & Co., one of the assignors, was printed the words, "All bills payable in Chicago. Remit in par funds. No allowance can be made for exchange or express charges;" and on the other invoice, from the L. Wolff Manufacturing Co., the words, "Payable, with exchange, on Chicago or New York." The invoices themselves were read at the hearing, and corroborated the affidavit in this respect. Opposed to these was the affidavit upon which the writ was issued, which conformed to the statute; and the affidavit of N. H. Blatchford of E. W. Blatchford & Co., and John Clifford of the L. Wolff Manufacturing Company, which is a corporation. Blatchford's affidavit states that the goods were to be paid for at and upon their arrival in San Francisco, "though we understood that said payment would be made within thirty days from the date of sale, that being a reasonable time within which said goods should arrive." The affidavit does not state that he was the salesman who sold the goods, or that he had personal knowledge of the transaction, nor does he give any explanation of the words on the invoice, which were in direct conflict with his affidavit. Clifford states that he is secretary of the corporation; that "L. E. Arnold acted for defendants in making said purchase, and represented to said corporation that said defendants were perfectly solvent, and that they would pay for said goods in San Francisco, in ten days from date of invoice, receiving two per cent. discount for such payment, or within thirty days," etc. This affiant does not state that he had personal knowledge of the transaction, or that he was connected with the sales department of the corporation, nor does he attempt an explanation of the inconsistent statement on the invoice. That these statements are inconsistent hardly admits of doubt. To require defendants to pay the difference in exchange is to compel them to deliver the money at Chicago, and is to prohibit them from making a tender at San Francisco. The contract, having been made in Illinois, was presumptively to be performed there, and an attachment could not be taken out here, even although it is true, in a general sense, that the money was payable wherever the defendants could be found. To authorize the issuance of an attachment, the money must have been made payable in this state by the contract itself. Dulton v. Shelton, 3 Cal. 207; Eck v. Hoffman, 55 Cal. 501. Here the preponderance is decidedly in favor of the proposition that the contract was that the money should be paid at Chicago and not at San Francisco. The rule that this court will not pass upon the evidence, when conflicting, does not apply where the evidence is all documentary. It is true this court will not interfere with the discretion of the trial court, except where it can plainly see that there has been an abuse of such discretion; but where, in a matter in reference to which this court has equal advantages with the lower court, it is beyond doubt that error has been committed to the prejudice of the appellant, it is the duty of the court to correct the error. Such error must be held to be an abuse of discretion. Every reversal goes upon this theory, and it should make no difference whether the mistake be as to a conclusion from the evidence, or in construing the law, provided it be made equally clear that error has occurred. I think the order should be reversed.

I concur. VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

93 Cal. 372

EBEL *et al.* v. CHANDLER. (No. 14,381.)

(*Supreme Court of California.* Feb. 10, 1892.)

VENDOR AND VENDEE—RIGHTS OF VENDEE.

Defendant conveyed to plaintiffs certain land, and agreed to pay a mortgage thereon, but failed to do so, and the land was sold under foreclosure. Subsequently, defendant agreed to redeem the land, which he also failed to do, and plaintiffs redeemed. *Held*, that plaintiffs could recover from defendant the money so expended.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Action by F. A. Ebel and J. H. Stehr against L. C. Chandler. Judgment for plaintiffs. Defendant appeals. Affirmed.

Geo. A. Blanchard, for appellant. *F. D. Ryan* and *Johnson, Johnson & Johnson*, for respondent.

FITZGERALD, C. This action was brought to recover the sum of $2,914, for money alleged to have been laid out and expended by plaintiffs for and on behalf of defendant at the defendant's special instance and request, and which he promised to repay to plaintiffs. A demurrer was interposed to the complaint, which was properly overruled, and thereupon defendant answered by a general denial. Plaintiffs had judgment, and defendant appeals from the judgment, and the order denying his motion for a new trial. The facts are substantially as follows: On December 29, 1884, plaintiffs purchased of defendant certain land, and received from him a grant deed therefor. The land was at the time incumbered by a mortgage executed by the defendant to one Margaret Poorman, which he agreed with plaintiffs to pay and discharge. This he failed to do, and the mortgage, which embraced other lands belonging to the defendant in the city and county of Sacramento, was subsequently foreclosed in an action brought by the mortgagee against the defendant, and upon the decree of foreclosure therein rendered an order of sale was duly issued, and the land advertised to be sold on the 26th day of November, 1887. The sale was afterwards postponed to December 10, 1887, by direction of the mortgagee's attorney, at the request of the defendant, and upon his agreeing, in writing, to the effect that, if the sale was postponed, "he would endeavor to raise the money and pay off the judgment." The defendant having failed to comply with his agreement, the land was sold on said last-mentioned date by the sheriff, under said order of sale, to one Edward McGary, a brother-in-law of Poorman. Plaintiffs, at different times subsequent to the day of sale, called on the defendant, and urged him to pay the money and redeem the property, which he agreed to do; and, on the day before the time for redemption expired, they called to see him, and told him that as he had not paid the money and redeemed the property, as he had agreed with them to do, they would have to protect themselves by raising the money and redeeming the property, to which he responded, "All right." The land, which was unimproved at the time of the purchase, was thereafter greatly enhanced in value by plaintiffs setting it out in orchard and vineyard and fencing it, and by the erection of a house and other improvements thereon. It was then understood and agreed between plaintiffs and McGary (who appears to have been merely the representative of and acting in the interest of the mortgagee) and their attorneys, upon whose advice it appears they acted, that plaintiffs would be best protected by the sheriff executing a deed to McGary, and for McGary to make a deed to them. Defendant, when informed by plaintiffs' attorney of the foregoing agreement, responded: "It will be all right. They shall not lose anything. I will make it good." Afterwards, in pursuance of said agreement, the sheriff executed a deed of said land to McGary; and thereafter McGary, upon the payment to him by plaintiffs of the sum of $2,914, executed a deed thereof to plaintiffs.

The contention that "plaintiffs paid their money to McGary for his use, and, as McGary had no claim on the defendant, it relieved the defendant from no liability, and could not be said to be money paid to his use," is not well founded, for the reason that the land was sold under the decree of foreclosure to pay the defendant's debt, and the payment of the money by plaintiffs to McGary under the agreement referred to was, in effect, a redemption of the property, and was a payment to that extent of said judgment or decree against the defendant; and as it was paid at the defendant's special instance and request, for his use and benefit, upon an express promise by him to repay it to plaintiffs, they are entitled to recover of defendant the money so laid out and expended. Nor is there any foundation for the claim made by appellant that defendant's liability to plaintiffs arose under the covenant of quiet enjoyment implied in his deed, and that his liability was only the purchase price received by him, which was $777. Upon the facts stated, there is nothing to justify the claim that this action was brought to recover damages for breach of the covenant implied in the deed, in which case the measure of damages would be the purchase price paid for the property, but was brought, as we have before stated, for the recovery of money laid out and expended by plaintiffs for the use and benefit of the defendant, at his special instance and request, which he promised to repay to plaintiffs. The purchase price paid by plaintiffs for the land is not sought to be recovered in this action. The judgment and order should be affirmed, and we so advise.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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93 Cal. 376

LOVEJOY v. CHANDLER. (No. 14,382.)

(*Supreme Court of California.* Feb. 10, 1892.)

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Action by Benjamin Lovejoy against L. C. Chandler to recover a certain sum of money and damages. Judgment for plaintiff. Defendant appeals. Affirmed.

Catlin & Blanchard, for appellant. *Johnson, Johnson & Johnson* and *F. D. Ryan*, for respondent.

FITZGERALD, C. This case and the case of Ebel v. Chandler, 28 Pac. Rep. 934, (No. 14,381,) just decided, were tried together in the court below, and the testimony, decision, and transcript, except the amount of the judgment and the plea in abatement set up in the answer, of the pendency of another cause of action between the same parties, and for the same cause, and the testimony on such plea, are in all respects the same. It appears that plaintiff, prior to the commencement of this action, brought an action against the defendant to recover the sum of $3,498 for damages for breach of the express covenant contained in the deed, "to warrant and defend the title to the same against all claims of Samuel and Margaret Poorman." This action was brought to recover the sum of $3,498 and the interest thereon, amounting to $265.26, for money laid out and expended for and on behalf of the defendant by the plaintiff at the defendant's special instance and request, and which defendant promised to repay to plaintiff. The finding of the court "that there was not, at the time of the commencement of this action, another action pending or undetermined in this court between the same parties for the same cause of action as stated in the plaintiff's complaint herein," is sustained by the evidence. We recommend that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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92 Cal. 221

MEADS *et al.* v. LASAR *et al.* (No. 14,226.)

(*Supreme Court of California.* Dec. 11, 1891.)

REPLEVIN—AMENDMENT OF JUDGMENT—CERTIFICATE OF PARTNERSHIP—NAMES OF MEMBERS.

1. In an action to recover possession of personal property the verdict for plaintiffs was "for the return to them of the property described in the complaint, or its value, to-wit, $1,000, and costs;" but the judgment entered thereon was simply that "plaintiffs recover from defendants $1,000, together with their costs." *Held*, that though the judgment was not in the alternative form, as required by Code Civil Proc. § 667, it could be amended so as to correspond to the verdict.

2. A certificate of partnership which states the names of the members with the initials by which they are generally known, is within Civil Code, § 2466, requiring a certificate of partnership to state "the names in full of the members of such partnership."

Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Action by Meads, Seaman & Co. against M. Lasar and J. E. Graves to recover the possession of personal property. From a judgment that "plaintiffs recover from defendants $1,000, together with their costs," defendants appeal. Amended.

S. F. Geil, *H. V. Morehouse*, and *J. M. Wilcoxen*, for appellants. *N. A. Dorn*, *W. M. R. Parker*, and *G. W. Webster*, for respondents.

HARRISON, J. Action of claim and delivery of certain personal property in the possession of the defendant Graves, as sheriff of Monterey county, under an attachment issued in an action by the defendant Lasar against certain vendors of the plaintiffs. The plaintiffs were creditors of the firm of S. Houghton & Sons to the amount of several thousand dollars, and on May 21, 1888, bought from them certain personal property, consisting of hogs, horses, and other cattle, including that described in the complaint, taking from them a bill of sale therefor, and crediting the agreed price upon their account against them. At the time of the purchase the property was delivered to the plaintiffs, and placed by them in the possession of one Worley as their agent, and was kept by him in the same pasture in which it had been previously kept by the Houghtons until taken by the sheriff as hereinafter stated. In July of that year the defendant Lasar sued out a writ of attachment in an action brought by him against the Houghtons, under which the sheriff took possession of the property described in the complaint; and in December following Lasar commenced another action against the same defendants, in which he sued out another attachment, under which the sheriff held the property at the time the present action was commenced. After the commencement of the present action judgment was rendered in favor of Lasar in his action against the Houghtons, and an execution thereon issued to the sheriff, by virtue of which the property was sold. The cause was tried before a jury, and a verdict rendered in favor of the plaintiff "for the return to them of the property described in the complaint, or its value, to-wit, the sum of $1,000, and costs." From the judgment entered thereon, and from an order denying a new trial, the defendants have appealed.

1. The judgment as entered is not in conformity with the statute. Section 667, Code Civil Proc., provides that, in an action to recover the possession of personal property, judgment is to be "for the possession, or the value thereof in case a delivery thereof cannot be had." There is nothing in the present record which shows that a delivery cannot be had, and the verdict of the jury would imply that the property is susceptible of delivery by the defendants. The plaintiffs are not entitled to recover from the defendants the value of the property unless they are unable to deliver it. The defendants are entitled to satisfy the plaintiff's claim by a delivery of the property sued for, and can be compelled to pay its value only in case such delivery cannot be had. Etchepare v. Aguirre, (Cal.) 27 Pac. Rep. 668. The defendants may have purchased the property at the execution sale for the express purpose of returning it to the plaintiffs, if they should be defeated in the present action. This error, however, can be corrected by an amendment of the judgment so that it may correspond with the verdict.

2. Whether the sale of the property by the Houghtons to the plaintiffs was "accompanied by an immediate delivery," which was "followed by an actual and continued change of possession," was a question of fact to be determined by the jury from the evidence before it. Godchaux v. Mulford, 26 Cal. 316; Claudius v. Aguirre, 89 Cal. 501, 26 Pac. Rep. 1077. There was evidence introduced at the trial which tended to show such delivery and change of possession, and the jury were properly instructed by the court in referring thereto. We cannot say that their verdict is not sustained by the evidence.

3. The objection to the admission in evidence of the certificate of partnership offered on behalf of the plaintiffs cannot be sustained. The requirement in section 2466 of the Civil Code that partnerships transacting business "under a fictitious name, or a designation not showing the names of the persons interested as partners in such business," must file and publish a certificate "stating the names in full of all the members of such partnership," shows that the object of the section is that public notice shall be given and a public record made of the individual members of such partnerships, with such definiteness and particularity that those dealing with them may at all times know who are the individuals with whom they are dealing, or to whom they are giving credit or becoming bound. The members of such partnership may be as fully identified and designated for this purpose by a certificate which states their names with the initials by which they are generally known as they would be if their names were written therein at length. The certificate in the present case is as follows: "We, the undersigned, L. H. Meads and J. D. Seaman, residents of San Miguel, San Luis Obispo county, California, and E. S. Doud, resident of Oakland, California, do hereby certify that we are a copartnership transacting business in San Luis Obispo county, California, under the name and style of Meads, Seaman & Co." (Signed by the partners in the same manner.) It is not shown or contended that the individual members of the partnership were not fully designated by their names as thus stated in the certificate, nor was there any evidence that their names are other than as stated therein. See Nelson v. Doble, 13 Cal. 74. The provision which requires a publication of the certificate "once a week for four successive weeks" is satisfied by one publication in each of four successive weeks. Any act that depends upon such publication can be performed at any time after the expiration of four weeks from the first of such publications. In the present case the record shows that the certificate was published "for four successive weeks, commencing on the 26th day of August, 1887, and ending on the 16th day of September, 1887, and on the following dates: August 26, September 2, September 9, and September 16, 1887." The action was not commenced until several months thereafter.

4. Appellants urge in their brief that the verdict is erroneous in finding for the plaintiffs for a return to them of the property described in the complaint, for the reason that it was shown at the trial that the sheriff did not take all of such property. As they did not, however, in their statement of the case, specify this as one of the particulars in which the evidence is insufficient to justify the verdict, we cannot consider it, the only specification being: "The evidence was insufficient to justify the jury in finding for the plaintiffs the amount found by their verdict;" but there is sufficient evidence to justify this part of the finding. It may be that if such

specification had been made, the plaintiffs would have caused certain evidence to be inserted in the statement in support of the verdict. Winterburn v. Chambers, (Cal.) 27 Pac. Rep. 658.

5. The statement contains certain specifications of errors of law in excluding answers to questions asked by the defendants, but the appellants have not shown in their brief wherein such answers would be material to any issue before the jury, and from an examination of the record we are unable to perceive their materiality. It was not error for the court to allow oral testimony for the purpose of showing who constituted the members of S. Houghton & Sons, or for the purpose of showing who were the owners of the property prior to its sale to the plaintiffs. The order denying a new trial is affirmed, but the court below is directed to correct the judgment as entered by making it conform to the verdict, and as so corrected it will stand affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

(93 Cal. 222)

BALL v. RAWLES. (No. 13,924.)

(*Supreme Court of California.* Feb. 4, 1892.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—INSTRUCTIONS—PRIVILEGED COMMUNICATIONS.

1. In an action for malicious prosecution the question of probable cause is for the court.

2. While probable cause is a question of law, to be determined upon the facts found by the jury, yet the jury may be instructed to render their verdict for or against the defendant, as they shall find the facts designated by the court as sufficient to constitute probable cause.

3. The court left to the jury the question of probable cause, and afterwards, at plaintiff's request, specially instructed them that if they should find that, when defendant swore out the complaint, he did not, from his knowledge on the subject as a prudent man, believe the plaintiff guilty of any crime, then, as a matter of law, there was no probable cause, and also that, if they should find certain facts enumerated, such facts would not constitute probable cause. *Held*, where there were other facts in the case than those referred to in the special instructions, of which evidence regarding probable cause was given to the jury, the error of leaving the question of probable cause to the jury was not cured by the special instructions.

4. An instruction that, if the facts were such as to create a reasonable belief in the mind of an impartial man that a crime had been committed by the person charged, it would justify an arrest on a criminal charge, though in fact no crime was committed, is erroneous in omitting to include the element that defendant believed the crime had been committed by the plaintiff.

5. If defendant, before instituting the prosecution, fully stated the facts to a justice of the peace, who advised him that he had reasonable cause to prosecute, and he acted on such advice in good faith, he is not liable.

6. Under Civil Code, § 47, subd. 2, providing that publications made in judicial proceedings are privileged, the complainant in an action in a court which has jurisdiction of the offense charged, if he makes a false accusation, is not liable in a civil action, but may be indicted for perjury.

Department 1. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

Action by E. B. Ball against Thomas E. Rawles; the first count being for malicious prosecution, and the second for libel. Judgment for defendant. Plaintiff appeals. Reversed.

J. T. Rogers, for appellant. *T. L. Carothers*, for respondent.

HARRISON, J. Action against the defendant for a malicious prosecution in causing the arrest of the plaintiff upon a criminal charge. At the request of the defendant the court instructed the jury: "If the jury believe from the evidence that the defendant had probable cause to believe that the plaintiff was guilty of the offense charged against him, then it is not material whether the defendant was actuated by proper motives or improper motives in instituting the criminal proceedings against the plaintiff. To authorize a recovery in this class of cases it must appear that the defendant was actuated by malice, but the jury must further believe from the testimony that the defendant had no probable cause or no reasonable ground to believe that the plaintiff was guilty of the offense charged against him; and the court further instructs the jury that 'probable cause' means reasonable ground of suspicion supported by circumstances in themselves sufficiently strong to warrant a reasonably cautious man in the belief that the person accused is guilty of the offense charged." "I instruct you that, to entitle the plaintiff to recover, you must find from the evidence that the prosecution complained of was commenced by the defendant through malice, and also that it was without probable cause; and if the plaintiff has failed to show by a preponderance of evidence either of these propositions the jury should find for the defendant."

In giving these instructions the court committed error, for which a new trial should have been granted. The error was not obviated by the fact that the court, at the request of the plaintiff, instructed the jury that if they should find from the evidence "that the defendant, in swearing out the warrant and causing the arrest of the plaintiff, did not believe that plaintiff was guilty of any crime, and that he did not have sufficient knowledge, as a cautious and prudent man, acting conscientiously and impartially, to believe the plaintiff guilty of any crime, then, as a matter of law, there was no probable cause for the arrest and prosecution of plaintiff," and also that if they should find from the evidence a certain state of facts, which were enumerated, those facts would not constitute a probable cause. These were not the only facts of which evidence regarding probable cause had been given to the jury; and the above instructions, given at the request of the defendant, left to the jury the function of determining this question. The court should have told the jury either that the evidence which was introduced was or was not sufficient to establish a probable cause, or that, as from the evidence they should find the facts which in the opinion of the court would or would not be sufficient to show a probable cause, their verdict should be for or against the defendant. In order to maintain an action for malicious prosecution the plaintiff must establish malice on the part of the defendant, and also a want of probable cause. Malice is always a question of fact, for the jury; but whether the defendant had or had not probable cause for instituting the prosecution is always a matter of law, to be determined by the court. If the facts upon which the defendant acted are undisputed the court, according as it shall be of the opinion that they constituted probable cause or not, either will order a nonsuit (or direct a verdict for the defendant) or it will submit the other issues to the jury; but, whether admitted or disputed, the question is still one of law, to be determined by the court from the facts established in the case. If the facts are controverted they must be passed upon by the jury before the court can determine the issue of probable cause, but the question of probable cause can never be left to the determination of the jury. "What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court, the latter for the jury." Stone v. Crocker, 24 Pick. 84. "When there is no dispute about the facts, the question of the want of probable cause is for the determination of the court. Where the facts are controverted or doubtful, whether they are proved or not belongs to the jury to decide. Or, in other words, whether the circumstances alleged are true is a question of fact; but, if true, whether they amount to probable cause is for the court." Bulkeley v. Keteltas, 6 N. Y. 387. Probable cause is in the nature of a judgment to be rendered by the court upon a special verdict of the jury, and is not to be rendered until after the jury has given its verdict upon the facts by which it is to be determined. It is not, however, necessary that the facts be found by the jury in the form of a special verdict. The court may instruct them to render their verdict for or against the defendant according as they shall find the facts designated to it which the court may deem sufficient to constitute probable cause. But it is necessary for the court in each instance to determine whether the facts that they may find from the evidence will or will not establish that issue. Neither is it competent for the court to give to the jury a definition of "probable cause," and instruct them to find for or against the defendant according as they may determine that the facts are within or without that definition. Such an instruction is only to leave to them, in another form, the function of determining whether there was probable cause. The court cannot divest itself of its duty to determine this question, however complicated or numerous may be the facts. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question; but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that, if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly.

Actions for malicious prosecution have never been favored in law, although they have always been readily upheld when the proper elements therefor have been presented. They are sustained, however, only when it is shown that the prosecution was in fact actuated by malice, and that the party instigating it had no reasonable ground for causing the prosecution. It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender. For the purpose of protecting him in so doing, it is the established rule that if he have reasonable grounds for his belief, and act thereon in good faith, in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. This rule is founded upon grounds of public policy, in order to encourage the exposure of crime; and when the acts of the citizen in making such exposure are challenged, as not being within the reason of the rule, the court, as in every other case involving considerations of public policy, must itself determine the question as a matter of law, and not leave it to the arbitrament of a jury. And, as a violation of law is never to be presumed from an act which is innocent in itself, and in accordance with public policy, even though injury result therefrom, it is incumbent on him who would impeach the good faith of such act to make proof of his charge before the other is called upon to defend his conduct.

Originally an action of this character was an action on the case, in the nature of a writ of conspiracy, in which the plaintiff in the declaration charged the defendant with having falsely and maliciously caused his arrest. The defendant in his plea set forth the grounds of his suspicion under which he caused the arrest, the sufficiency of which was determined by the court upon a demurrer to the plea. Chambers v. Taylor, Cro. Eliz. 900; Cox v. Wirrall, Cro. Jac. 193; Com. Dig. "Pleader, 2 K;" Weal v. Wells, 3 Bulst. 284. In process of time a change was effected in the manner of pleading the cause of action, by which the plaintiff anticipated this plea by averring in the declaration a want of probable cause, (Savil v. Roberts, 1 Salk. 13, 1 Ld. Raym. 374,) and the facts were presented under the general issue; "yet the rule of law that the question belongs to the judge only, and not to the jury, is not, by such alteration in the pleading, in any way impaired," (Panton v. Williams, 2 Q. B. 193.) In the argument of Kelly for plaintiff in error in this case will be found an interesting account of the history and development of the rule by which this question is held to be always a matter of law, and never to be determined by the jury. Johnstone v. Sutton 1 Term R. 518, is also a leading case on this subject, having been determined in the court of exchequer chamber, and afterwards affirmed in the house of lords. 1 Brown, Parl. Cas. The change in pleading by transferring to the declaration the averment of a want of probable cause, although it imposed upon the plaintiff the necessity of making proof of this negative averment as a part of his cause of action, did not, however, change the issue from one of law to one of fact; for, unless such want of probable cause was proved by him, it became the duty of the court to determine, as matter of law, that he had no cause of action against the defendant; and since such probable cause is a legal conclusion to be drawn from the facts, and its absence is an essential element to the plaintiff's right of action, it is at all times to be determined by the court whether the facts proved constituted such probable cause, just as under the original system the court determined upon the demurrer to the facts set up in the defendant's plea whether there were sufficient grounds for his suspicion.

In Panton v. Williams, supra, the question depended upon the consideration of a combination of circumstances and facts, together with inferences to be drawn from them, and Lord DENMAN left it to be determined by the jury, to which direction counsel for the defendant excepted, and insisted "that his lordship was bound to state to the jury what facts, if proved, would amount to probable cause, leaving to them only the question whether they believed the evidence adduced in order to prove such facts;" and the court in exchequer chamber sustained the exception, saying, (page 192:) "Upon this bill of exceptions we take the broad question between the parties to be this: Whether, in a case in which the question of reasonable or probable cause depends, not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury that if they find the facts proved and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge; and we are all of opinion that it is the duty of the judge to do so,"—and, after stating that such had always been held to be the rule of law in ordinary cases, said further: "And, such being the rule of law where the facts are few and the case simple, we cannot hold it to be otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law according as all or some only of the facts, and inferences from facts, are made out to their satisfaction; but it is equally certain that the task is not impracticable, and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view without having recourse to the less important circumstances that have been brought before them."

In Bulkeley v. Keteltas, supra, the court held that it was error to leave to the jury to determine whether the circumstances proved in evidence did or did not establish a want of probable cause. When this cause was again tried in the superior court the judge instructed the jury that, if they should find that the defendants had reasonable grounds for believing that the plaintiff swore as had been charged, (the plaintiff having been arrested upon a charge of perjury,) that would establish a want of probable cause; but the court at general term (Bulkeley v. Smith, 2 Duer, 261) held this instruction erroneous, saying that, "from the terms in which it was expressed, it necessarily involved the submission to the jury of the question of probable cause, and was not limited to the facts upon which the question depended. The judge instructed the jury that they were to consider and determine whether the facts and circumstances known to the defendants were reasonable grounds for their believing that the charge which they made against the plaintiff was true; and we are unable to make a distinction between the existence or non-existence of reasonable grounds of belief and the existence or want of a probable cause. There is a difference in the form of expression, but none in the meaning, since the existence of reasonable grounds for believing a charge to be true is in reality nothing more than a legal definition of a probable cause for making it. In deciding that there were no reasonable grounds of belief a jury of necessity decides that there was a want of probable cause. The charge of the judge, therefore, amounted to no more than the definition which the law gives of 'probable cause,' and permitted the jury, in the exercise of their own judgment, to apply the definition to the facts of the case; that is, permitted them to determine whether the facts which they might consider to be proved did or did not amount to a want of probable cause."

In Grant v. Moore, 29 Cal. 644, the court, (page 649,) upon the ground that the facts were controverted, conflicting evidence to be weighed, and credibility of witnesses to be passed upon, left to the jury to decide whether or not there was probable cause for the prosecution of the suit; and the supreme court, in holding that this action was erroneous, said, (page 653:) "The law makes it the duty of the judge who tries an action for malicious prosecution to instruct the jury that, as they may find and determine certain questions of fact properly submitted to them to be true or untrue, so must be their verdict for the plaintiff or the defendant; not that they should determine the question of the want of probable cause, or the contrary. It may sometimes be difficult to state to the jury what the testimony is, and what facts, if found to be true, establish the plaintiff's allegation of want of probable cause; but, difficult as it may be, this duty is cast on the judge in this kind of actions, because he is presumed to know much better than the jury can what facts show the existence of probable cause, or the want of it."

In Bulkeley v. Smith, supra, the court

said: "If the facts upon which the question of probable cause depends are rendered doubtful by the evidence, the court must instruct the jury that, if the facts shall be found by them in a certain manner, they do or do not amount, as the case may be, to a want of probable cause, and consequently will or will not entitle the plaintiff to the verdict which he seeks. If, instead of such a direction, he leaves it to the jury to determine, not only whether the facts alleged by the plaintiff are true, but whether, if true, they prove a want of probable cause, he abjures his own functions, and commits a fatal error."

In Harkrader v. Moore, 44 Cal. 152, the court said: "When the facts in reference to the alleged probable cause are admitted or established beyond controversy, then the determination of their legal effect is absolute, and the jury are to be told that there was or was not probable cause, as the case may be. When, however, the facts are controverted and the evidence is conflicting, then the determination of their legal effect by the court is necessarily hypothetical, and the jury are to be told that, if they find the facts in a designated way, then that such facts, when so found, do or do not amount to probable cause; but in neither case are the jury to determine whether or not the established facts do or do not amount to probable cause." See, also, Eastin v. Bank, 66 Cal. 125, 4 Pac. Rep. 1106; Fulton v. Onesti, 66 Cal. 575, 6 Pac. Rep. 491; Bacon v. Towne, 4 Cush. 217; 1 Saund. 230, note 4.

2. The court also, at the request of the defendant, gave the jury the following instruction: "I instruct you that, to justify an arrest on a criminal charge, it is not required that a crime shall in fact have been committed. If the facts which come to a person's knowledge are such as to create a belief that a crime has been committed by the person charged, in the mind of an impartial, reasonable man, this would be sufficient to constitute probable cause for making an arrest, although no crime had in fact been committed." Inasmuch as the question of probable cause is always to be determined by the court from the facts in each particular case, it would seem unnecessary to give to the jury any definition of the term, or any instruction upon abstract propositions relating to this subject. These abstract rules will guide the court in determining the question, but are apt to lead the jury away from their function of passing upon the effect of the evidence in support of the probative facts which the court may direct them to find in order to determine in which way their general verdict shall be rendered. As a principle of law this instruction was erroneous in omitting to include therein the further element that the defendant did in fact believe that a crime had been committed by the plaintiff. The circumstances in themselves might be such as ordinarily to create such belief in the mind of a person; yet the defendant might not have that belief, for the reason that he had knowledge of other facts or circumstances which would destroy such belief. While it is not necessary to show that the crime has in fact been committed, it is necessary to show, not only that the defendant had reasonable ground to believe, but that he did in fact believe, that the crime had been committed, and that the plaintiff had committed the crime. Although the question of probable cause, as we have seen above, is a question of law, yet the belief of the defendant in a state of facts is itself a fact which it is proper to submit to the jury for its consideration; and whenever the good faith of the defendant, or his knowledge or belief in an existing state of facts, is an element in determining whether there was probable cause, the court should submit that question to the jury, as well as the other facts which in its opinion bear upon that issue. "The prevailing law of reasonable and probable cause is that the jury are to ascertain certain facts, and the judge is to decide whether those facts amount to such cause; but among the facts to be ascertained is the knowledge of the defendant of the existence of those which tend to show reasonable and probable cause, because without knowing them he could not act upon them, and also the defendant's belief that the facts amounted to the offense which he charged, because otherwise he will have made them the pretext for prosecution without even entertaining the opinion that he had a right to prosecute. In other words, the reasonable and probable cause must appear, not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding." Turner v. Ambler, 10 Q. B. 260. See, also, Harkrader v. Moore, supra; Bacon v. Towne, 4 Cush. 239; Woodworth v. Mills, 61 Wis. 61, 20 N. W. Rep. 728; Fagnan v. Knox, 66 N. Y. 525; Delegal v. Highley, 3 Bing. N. C. 950; 2 Greenl. Ev. § 455; Starkie, Sland. & L. *p. 472.

3. It was not error for the court to instruct the jury that the plaintiff could not maintain the action if the defendant, before instituting the prosecution, fully and fairly stated the facts and circumstances to the justice of the peace, and was advised by him that they constituted reasonable cause for the arrest of the plaintiff, and he honestly and in good faith acted under such advice. Whatever may be the rule in other states, it was held in this state in Hahn v. Schmidt, 64 Cal. 284, that the advice of a justice of the peace, upon the facts stated to him by the complainant, that a crime had been committed, and upon which he issued a warrant of arrest, is sufficient to exonerate the complainant from liability for the arrest. Similar rulings have also been made in Sisk v. Hurst, 1 W. Va. 53; Teal v. Fissel, 28 Fed. Rep. 351; Newman v. Davis, 58 Iowa, 447, 10 N. W. Rep. 852; and in England in the cases cited in Hahn v. Schmidt.

4. The court properly excluded from evidence the lease from the defendant to Hunt. It was not relevant to any issue before the jury, and could not be considered by them for the purpose of determining the motive of the defendant in causing the arrest of the plaintiff. For the same reason the court properly excluded the offer on the part of the plaintiff to show

that the defendant was anxious to have the lease annulled. The reason which the plaintiff urges as grounds for its admission, viz., that the defendant was anxious to have the lease forfeited, and instituted this action for the purpose of ascertaining whether there were any grounds upon which such forfeiture could be shown, is only a conjecture, and in no wise connected with the arrest, and could not be considered by the jury.

5. The demurrer to the second count in the complaint was properly sustained. There can be no action for injury to character when the publication by which the injury is claimed to have been sustained is privileged. Section 47 of the Civil Code declares that "a privileged publication is one made * * * (2) in any legislative or judicial proceeding, or in any other official proceeding authorized by law." The effect of this provision is to make a complaint in a court of justice which has jurisdiction of the offense charged an absolute privilege, for which the complainant is not liable in a civil action. Hollis v. Meux, 69 Cal. 625, 11 Pac. Rep. 248. If the complainant in such proceeding makes a false accusation, the remedy therefor is to procure his indictment for perjury, but he cannot be made liable for damages in a civil action. The publication charged in this count of the complaint was a criminal complaint made by the defendant before a justice of the peace, and presented in the justice's court of Anderson township, county of Mendocino. If the matters set forth in that complaint constituted a crime, the justice's court had jurisdiction to entertain the complaint, (Code Civil Proc. § 115;) and it is only upon the theory that such facts did constitute a crime that the complaint can be held to be an injury to the plaintiff's character. The judgment and order denying a new trial are reversed.

We concur; PATERSON, J.; GAROUTTE, J.

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93 Cal. 215

LOWENBERG v. LEVINE. (No. 13,529.)

(*Supreme Court of California.* Feb. 4, 1892.)

INSOLVENCY—EFFECT OF DISCHARGE—FOREIGN CONTRACT.

Plaintiff obtained a judgment against defendant in Montana on a contract made and to be performed there. Subsequently both parties removed to California, where defendant was discharged under the insolvent act, (section 53,) providing that a discharge thereunder shall release the debtor from all debts and liabilities; but plaintiff in no wise participated in such insolvency proceedings. *Held*, under Const. U. S. art. 1, § 10, providing that no state can pass a law violating the obligation of a contract, that the discharge of defendant did not relieve him from payment of plaintiff's judgment.

Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Action by Lowenberg against Levine. Judgment for plaintiff. Affirmed.

Henry I. Kowalsky and *Reinstein & Eisner*, for appellant. *Geo. A. Rankin*, for respondent.

DE HAVEN, J. Action upon a money judgment recovered by plaintiff against defendant in a court of general jurisdiction in the territory of Montana, while plaintiff and defendant were residents of that territory, and upon a contract made and to be performed there. Subsequently to the rendition of this judgment the defendant filed in the superior court of the city and county of San Francisco his petition in insolvency; and such proceedings were thereafter had in the matter that upon August 14, 1888, the court duly made and entered its decree discharging defendant from all his debts and liabilities. At the date of this decree, and during the entire time of the pendency of these insolvency proceedings, both plaintiff and defendant were residents of this state. In his answer the defendant pleads this decree in insolvency as a bar to this action. The case was submitted to the court below upon an agreed statement of facts showing the matters hereinbefore stated, and in addition thereto the following facts: "That in the schedule of indebtedness of defendant, Levine, filed with said petition in insolvency, was set forth, as required by law, a statement of the judgment rendered against him and in favor of the plaintiff, Lowenberg, by the district court of the third judicial district of the territory of Montana in and for Lewis and Clarke county as set forth in plaintiff's complaint. That said plaintiff, Lowenberg, never filed a verified or other statement of his claim and demand in said proceedings in involuntary insolvency, or in any other manner whatever participated in any of the proceedings connected therewith; but such failure to participate therein was due to no neglect, default, or omission on the part of the defendant, Levine." The court below gave judgment for the plaintiff, and the defendant appeals.

The only question presented in the record before us is whether, in view of the facts as above stated, the decree discharging defendant from his debts and liabilities is a bar to this action. It is claimed by the appellant that as the parties hereto were resident citizens of this state at the time when the insolvency proceedings were begun, and until their completion, the decree therein discharging him from all his debts is conclusive upon the plaintiff, and is a bar to this action, and that the binding force of such decree is in no wise affected by the fact that the judgment sued upon was recovered in the territory of Montana, and is based upon a contract made and to be performed there. In support of this proposition counsel for appellant rely upon Felch v. Bugbee, 48 Me. 9; Hawley v. Hunt, 27 Iowa, 303; Bedell v. Scruton, 54 Vt. 493; Marsh v. Putnam, 3 Gray, 551. These cases, however, with the exception of Marsh v. Putnam, are not in point, as in each of them, with the one exception stated, the only matter before the court for decision was as to the effect of a discharge in insolvency upon debts held by non-residents of the state in which the discharge was granted, the creditor not having proved his claim in the insolvency proceedings, nor otherwise participating therein; and it was with reference to this question that it was said in those cases that the binding effect of the discharge in insolvency then before the court depended upon the citizenship of the parties, and not upon the place of the contract. Thus, in the case of Bedell v. Scruton, supra, it is said: "The debt attends the person of the creditor, and unless he is within the jurisdiction of the court, no discharge granted by it can affect his rights. It is a question of citizenship, and state courts and state laws are powerless to affect the rights of non-resident creditors by any jurisdiction they may have or exercise over the person of the debtor, or by any proceedings *in rem* affecting the debt itself." So, also, in Hawley v. Hunt, supra, the only matter before the court was whether a discharge in insolvency made by the courts of one state would affect non-residents not parties to it; and, in holding that it would not, Dillon, C. J., in delivering the opinion of the court, says: "I have said that the settled law now is that a non-resident and non-assenting creditor is not bound by the debtor's discharge under state insolvent laws, no matter where the debt originated or is made payable. In other words, the citizenship of the parties governs, and not the place where the contract was made or is to be performed." There can be no doubt of the correctness of this proposition, when considered in connection with the question which the court had before it. Indeed, it is only the statement of a very familiar principle, which is not at all peculiar to decrees in insolvency proceedings, that no court can render a valid personal judgment against a defendant, or one affecting property which attends or follows his person, without first obtaining jurisdiction of his person. But the rule itself has no application whatever to the facts of this case, as the question here is not whether the superior court, when it made the decree upon which appellant relies, had jurisdiction over the person of respondent, but whether the court was authorized to discharge, by its decree in insolvency, the obligation of the contract made in another state or territory.

Section 53 of the insolvent act of this state declares: "A discharge duly granted under this act shall * * * release the debtor from all claims, debts, liabilities, and demands set forth in his schedule, or which were or might have been proved against his estate in insolvency." This language is broad enough to include the debt sued upon in this action; but, if the state is without authority to pass an insolvent law affecting the obligations of contracts made without the state, then the general terms of the statute must be restricted, and the act construed as not intended to affect or apply to them. Danforth v. Robinson, 80 Me. 466.[1] So that after all the real question for decision in this case is as to the power of the state to enact a law having the effect to discharge the obligation of contracts made elsewhere, when the creditor in no wise participates in the proceedings in which the discharge is entered, although he may have been a resident of this state at the time of the insolvency proceedings. This precise question came before the supreme court of New York in the case of Witt v. Follett, 2 Wend. 457, and was there determined in the negative; and such seems to be the settled doctrine of the supreme court of the United States. In the case of Cook v. Moffat, 5 How. 308, that court, while conceding the authority of a state to pass an insolvent law in the absence of a law of congress establishing a uniform system of bankruptcy, nevertheless held that in view of section 10 of article 1 of the constitution of the United States, which denies to a state the power to pass any law impairing the obligation of contracts, the insolvent law of a state "could have no effect on contracts made before their enactment, or beyond their territory." And in the later case of Baldwin v. Hale, 1 Wall. 223, that court, after reviewing the previous cases decided by it as to the effect of state insolvent laws, takes occasion to again state upon what contracts such laws cannot operate, and in so doing uses this language: "Undoubtedly a state may pass a bankrupt or insolvent law under the conditions before mentioned, and such a law is operative and binding upon the citizens of the state; but we repeat what the court said in Cook v. Moffat, 5 How. 308, that such laws 'can have no effect on contracts made before their enactment, or beyond their territory.'"

The rule upon this subject, and the reason upon which it is founded, is thus stated in section 1390 of Story on the Constitution, as the result of all the cases: "The question is now understood to be finally at rest. The state insolvent laws, discharging the obligation of future contracts, are to be deemed constitutional. Still, a very important point remains to be examined; and that is, to what contracts such laws can rightfully apply. The result of the various decisions on this subject is (1) that they apply to all contracts made within the state between citizens of the state; (2) that they do not apply to contracts made within the state between a citizen of a state and a citizen of another state; (3) that they do not apply to contracts not made within the state. In all these cases it is considered that the state does not possess a jurisdiction, co-extensive with the contract, over the parties, and therefore that the constitution of the United States protects them from prospective as well as retrospective legislation. Still, however, if a creditor voluntarily makes himself a party to the proceedings under an insolvent law of a state which discharges the contract, and accepts a dividend declared under such law, he will be bound by his own act, and be deemed to have abandoned this extraterritorial immunity." In the case of Marsh v. Putnam, 3 Gray, 551, cited and relied upon by appellant, a contrary rule was declared. But this case stands alone, and, in our opinion, should not be followed.

The plaintiff not having in any manner participated in the insolvency proceedings had in this state, and relied upon as a bar, and the judgment sued upon having been recovered in Montana upon a contract made there, it results from the foregoing views that the plaintiff is entitled to recover in this action. Judgment affirmed.

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[1] 15 Atl. Rep. 27.

We concur: SHARPSTEIN, J.; McFARLAND, J.

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93 Cal. 253

FAY v. PACIFIC IMP. Co. (No. 13,350.)

(*Supreme Court of California.* Feb. 4, 1892.)

INNKEEPER'S LIABILITY—LOSS BY FIRE—GUESTS —BOARDERS.

1. Under Civil Code, § 1859, making an innkeeper liable for the loss of personal property placed by his guests under his care, "unless occasioned by an irresistible superhuman cause," a loss occurring by a fire which originated in the battery room of an hotel cannot be considered occasioned by an "irresistible superhuman cause."

2. One who keeps a house for the entertainment of all who choose to visit it, and extends a general invitation to the public to become guests, is an innkeeper, and liable as such, though the house is situated on inclosed grounds.

3. A guest at a public inn may retain personal custody of necessary wearing apparel; and jewelry worn daily by her need not be deposited with the innkeeper, when not in use, to make him liable for its loss by fire.

4. Where one went to a public inn, and was assigned a room, the fact that she inquired as to the price of room and board is not sufficient to show that she was received as a boarder, and not as a guest.

26 Pac. Rep. 1099, affirmed.

In bank. On rehearing. For decision on appeal, see 26 Pac. Rep. 1099.

S. F. Geil and *H. V. Morehouse*, and *A. B. Hotchkiss*, as *amicus curiæ*, for appellant. *D. M. Delmas*, for respondent.

PER CURIAM. Upon further consideration of this cause, after hearing in bank, we are satisfied with the conclusion reached in department, and with the opinion there rendered, (26 Pac. Rep. 1099;) and for the reasons stated in said opinion the judgment and order appealed from are affirmed.

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93 Cal. 186

FANNING v. LEVISTON *et al.* (No. 14,066.)

(*Supreme Court of California.* Feb. 4, 1892.)

STREET ASSESSMENTS—VALIDITY—RECOMMENDATION OF SUPERINTENDENT—EVIDENCE—APPEAL —WAIVER OF OBJECTIONS.

1. In an action on an assessment for street work done under Act April 1, 1872, the warrant, assessment, and diagram which section 12 provides shall be *prima facie* evidence of the regularity of the assessment, and of the "prior proceedings and acts" of the superintendent of public streets, are *prima facie* evidence that the work was done on the recommendation of the superintendent.

2. A person who fails to appeal to the board of supervisors from a street assessment under Act April 1, 1872, waives an objection that the street was not graded according to the official grade.

3. A person who fails to appeal to the board of supervisors from a street assessment under Act April 1, 1872, waives an objection that the assessment included a charge for work not authorized.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Fanning against Leviston and others to recover an assessment for street work. Judgment for plaintiff. Defendants appeal. Affirmed.

Wm. Leviston, for appellants. *J. M. Wood*, for respondent.

PATERSON, J. This is an action on an assessment for street work in the city and county of San Francisco, done under the act of April 1, 1872. Appellant relies for a reversal upon three grounds: (1) That there was no recommendation by the street superintendent, and therefore no jurisdiction in the board of supervisors to order the work done; (2) that the contractor did not grade the street to the official grade; (3) that the assessment and demand included a charge for work not authorized to be done.

It cannot be said there was no evidence that the work had been recommended by the superintendent of streets. Section 12 of the act provides that the warrant, assessment, and diagram shall be held *prima facie* evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent, and of the regularity of all the acts and proceedings of the board of supervisors upon which the warrant, assessment, and diagram are based. In Jennings v. Le Roy, 63 Cal. 401, it was held that this provision was not confined in its operation to the proceedings mentioned in section 12, but was applicable, in actions of this kind, to establish *prima facie* the facts that the resolution ordering the work had been published after its introduction and before final action thereon; that notice of the nature and character of the work to be done, with specifications, was posted in the office of the superintendent of streets; and that notice of the award was published. We see no reason why it should not be considered as of the same effect with respect to any other proceeding upon which the assessment, warrant, and diagram are based. If the provision of the section referred to above is not confined in its operation to appeals to the board of supervisors, but is to be observed as a rule of evidence in actions on the assessment, we think it is clearly applicable to establish *prima facie* any fact relating to the acts of the board of supervisors and superintendent of streets, whether the same be jurisdictional or not. The language of the provision is broad enough to cover everything: "Shall be *prima facie* evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the said superintendent of public streets, highways, and squares, and of the regularity of all the acts and proceedings of the board of supervisors upon which said warrant, assessment, and diagram are based." In the case at bar one of the acts upon which the warrant, assessment, and diagram were based was the recommendation of the superintendent of streets. The court below found that Vallejo street had been graded for a distance of two blocks on each side of the block between Montgomery and Kearny,—the block on which the work was done,—and that on October

9, 1876, the superintendent of public streets had recommended to the board of supervisors that the work of grading said block should be done. Conceding that the evidence is conflicting, the finding cannot be disturbed.

The objection that the street was not properly graded is one which should have been taken on an appeal to the board of supervisors. Emery v. Bradford, 29 Cal. 85; Shepard v. McNeil, 38 Cal. 75; Chambers v. Satterlee, 40 Cal. 497; Boyle v. Hitchcock, 66 Cal. 129, 4 Pac. Rep. 1143. And the same may be said of the contention that the assessment and demand included a charge for work not authorized to be done under the contract. Himmelmann v. Hoadley, 44 Cal. 279; Boyle v. Hitchcock, supra.

We are unable to see that the court erred in its ruling upon the motion to tax the costs. Some of the items referred to matters of which the court had actual knowledge; and, as the affidavits were conflicting, its ruling should not be disturbed. The act of February 9, 1866, (St. 1866, p. 66,) allowing the prevailing party 5 per cent. on the amount recovered, is still in force, (Whitaker v. Haynes, 49 Cal. 596,) and, we think, is applicable to cases of this kind. The judgment and the orders appealed from are affirmed.

We concur: Harrison, J.; Garoutte, J.

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93 Cal. 206

Smith v. Worn. (No. 13,653.)

(*Supreme Court of California.* Feb. 4, 1892.)

Right of Way—Acceptance—Pleading.

1. Under a deed expressly granting a right of way, and designating the exact piece of land over which the easement is to extend, no act is required of the grantee to show an acceptance by him.

2. Where a complaint in an action to restrain the obstruction of a right of way alleged that plaintiff was the owner of an open and unobstructed way, 66 feet wide, for all kinds of vehicles and at all times, and the allegation, though a mere conclusion of law, is denied, and the issue is treated by all parties as one of fact, a finding in favor of plaintiff, which is supported by the evidence, will not be disturbed.

Department 1. Appeal from superior court, Marin county; E. B. Mahon, Judge.

Action by Smith against Worn to restrain defendant from obstructing an easement claimed by plaintiff. Judgment for plaintiff. Defendant appeals. Affirmed.

Henry Thompson, for appellant. *Hepburn Wilkins*, for respondent.

Paterson, J. On September 14, 1871, David Porter conveyed to Sidney V. Smith, the father of plaintiff, a tract of land described in the first paragraph of the complaint. The deed contained this clause: "Also the right of way, to the said party of the second part, his heirs and assigns, at all times hereafter, over, upon, and through a road 66 feet wide, which shall be laid out by said party of the first part over the lands owned by him, and shall run westward from the Ross Landing road, and immediately south of, but adjacent to, the tract of land so sold and conveyed to said James Ross, and the land first hereinabove described; such road to be opened and laid out from said Ross Landing road, until it strikes the foot of the low spur mentioned in the first course of the description of the tract of land first hereinabove described." Porter, in 1872, conveyed the remainder of his ranch to one Walker by deed, which contained a stipulation to the effect that the land therein described was conveyed subject to the right of way over it created by the deed from Porter to Smith; and in 1874 Walker conveyed the same land to Annie S. E. Worn by deed, which contained a similar clause. In 1881 said Annie laid out the property into blocks and lots for the purposes of an auction sale, and filed a map thereof in the recorder's office, showing an avenue called "Linda Vista Avenue," 66 feet wide, on the line of the right of way named in the deed from Porter to Smith; and thereafter she conveyed the tract to appellant by a deed which included the strip in question. Smith, Sr., conveyed to plaintiff on January 13, 1880, referring in the deed to the road 66 feet wide described in the deed from Porter. All of the deeds referred to were recorded, respectively, soon after they were executed. At the time Smith received his deed from Porter there was a fence inclosing Porter's land along the Ross Landing road. The road referred to in the deed had not been laid out. There was a fence on the north side of the strip along the Tunstead tract. The fence which constituted the western boundary of the Ross Landing road ran across the end of the strip of land referred to. There was nothing on the surface of the land indicating in any way the existence of any road over it. The strip of land was a part of a large field, and it remained in this condition until the year 1874, when the track of the North Pacific Coast Railroad was laid across it at the eastern end, extending westward about 40 feet in breadth. The old fence on the western side of the Ross Landing road formed the eastern boundary of the railroad track, and a new fence was erected across the piece of land on the inside, which formed the western boundary of the railroad track. There were, therefore, two fences and a railroad across the strip of land over which the right of way is claimed. Nothing was done by either of the Smiths to indicate an intention to lay out the road until a short time before this action was commenced,—June, 1888. The lands have been used by the defendant and her tenants in the same manner as the rest of the land within the inclosure. Before the commencement of this action the railroad company, at the request of plaintiff, removed the fences inclosing their track where they crossed the 66-foot strip. The defendant rebuilt the inside fence, and announced her intention of keeping it up. Plaintiff removed the obstruction, and commenced this suit to enjoin the defendant from any further interruption of his right, and to restrain her from "putting up, constructing, or maintaining any gate, fence, or obstruction of any kind on any part of said way."

It is claimed by appellant that there was no grant of an easement to Smith by Porter, that there could be no easement until the road was laid out, and that the right to enforce the opening of the road has been lost by adverse occupation. But neither the evidence nor the authorities cited by her support her contention. The deed to Smith conveys a right of way in express terms. It defines with precision the exact piece of land over which the easement is to extend, namely, a strip 66 feet wide, running in front of Ross' land from the county road to a fixed point. Nothing whatever was required to be done to fix the right of way or its location. Nothing remained for either party to do in the premises. The lines of the road were determined, and the land to be burdened with the easement was clearly indicated. No act was required on the part of Smith to indicate an acceptance by him as the owner of the dominate tenement. The acceptance of the deed was an acceptance of all it conveyed. The right conveyed was not merely personal to Smith, but was an easement which he could convey. Randall v. Chase, 133 Mass. 210; Lide v. Hadley, 76 Amer. Dec. 338. There is no evidence whatever of any adverse claim on the part of Porter or his grantees. Plaintiff's title to the right of way has always been recognized. The only matter about which there seems to have been any dispute at all up to the time plaintiff removed the fence was the plaintiff's right to the use of the strip of land without any gate at either end; defendant being willing that he should use the land, provided gates were maintained. An easement acquired by deed is not lost by mere non-user. "It must be accompanied with the express or the implied intention of abandonment; and the owner of the servient estate, acting upon the intention of abandonment and the actual non-user, must have incurred expenses upon his own estate. The three elements—non-user, intention to abandon, and damage to the owner of the servient estate—must concur in order to extinguish the easement." Tied. Real Prop. § 605. "Nothing short of a use by the owner of the premises over which it was granted, which is adverse to the enjoyment of such easement by the owner thereof, for the space of time long enough to create a prescriptive right, will destroy the right granted." Washb. Easem. (2d Ed.) 640-642; Civil Code, § 811, subd. 4, (Commissioners' Ann. Ed.,) note. The defendant and her grantors, by word and by deed, have always recognized the existence and continuance of the plaintiff's right of way. The easterly fence remained the same as it was when the land was conveyed by Porter, and the owners of the servient tenement used the land just as it had always been used. Of course, the act of the railroad company in building its fence across the strip of land, even if considered a hostile act, cannot operate to the advantage of the defendant. One cannot be deprived of an incorporeal hereditament by the act of strangers to the title. Jewett v. Jewett, 16 Barb. 159. Where non-user is evidence of an abandonment of a right, the question is one of intention, depending upon the circumstances, and this is a question of fact, to be determined by the court or the jury. The appellant brings this case before us upon a finding which is against him as to that fact, and this finding is supported by the evidence. The acts of the owner of the dominant tenement in case of non-user, or to prevent him from claiming an easement acquired by grant, must be of a character so decisive and conclusive as to indicate a clear intent to abandon the easement. Hayford v. Spokesfield, 100 Mass. 494; Smyles v. Hastings, 22 N. Y. 224. Where the acts of the grantee have led other persons to treat the servient estate as free of the servitude, he will not be permitted to resume the easement, because he cannot do so without doing injustice to those who have acted upon the appearances of abandonment. In the case at bar, however, no one has been misled to his prejudice by the acts of the plaintiff.

It is claimed by appellant that the relief granted by the decree is too broad; that the decree substantially grants an open, public thoroughfare, whereas the covenant in the deed is for a mere private right of way. One of the questions in issue, however, was whether the plaintiff was entitled to the use of the road without any gate or any other obstruction thereon. It is alleged in the complaint that the plaintiff is the owner of an open and unobstructed way, 66 feet wide, "for the plaintiff, himself and his servants, agents and visitors, on foot and on horseback, with carriages and wagons and every kind of vehicles, to go, return, pass, and repass, every year and at all times of the year, and at his and their free will and pleasure, without passing through any gate on said road 66 feet wide, and without any obstruction thereon." This alleged right of the plaintiff was denied by the defendant. Although the allegation was a mere conclusion of law, it was denied, and the issue was treated by all parties as one of fact. The prayer of the complaint asked for the relief granted. The defendant had full notice of the claim made. The finding of the court is not attacked in the specifications of the insufficiency of the evidence, and for that reason alone is conclusive. We prefer, however, to put our decision upon the merits of the question. Appellant asks us to hold, as matter of law, that it appears upon the face of the grant that the grantee is not entitled to a way without gates or bars. If the question were one of law, based exclusively upon the language of the grant, we should be inclined to construe the grant to be one of an open road, 66 feet wide, unobstructed by gates or bars. The right of way granted is through a road 66 feet wide, and this road is "to be laid out by the party of the first part over the lands owned by him." The word "road," as used in our laws, is uniformly applied to open and unobstructed roads, unless qualified by some other word like the adjective "private;" and such is the common as well as legal acceptation of the word. Respublica v. Arnold, 3 Yeates, 421, 422; Kister v. Reeser, 98 Pa. St. 4. It is a term of greater significance than the term "way." Mining Co. v.

Kennedy, 3 Nev. 394; Sherman v. Buick, 32 Cal. 241. But the question has been uniformly regarded by the courts as one of fact, for the jury. The extent of the right and duty of the respective owners towards each other is to be determined by the language of the grant, and all the circumstances existing at the time the grant was made. "Nothing passes as incident to such a grant but that which is necessary for its reasonable and proper enjoyment." 3 Kent, Comm. 419, 420. "What is necessary for such reasonable and proper enjoyment of the way granted, and the limitations thereby imposed on the use of the land by the proprietor, depends upon the terms of the grant, and the purposes for which it was made, the nature and situation of the property subject to the easement, and the manner in which it has been used and occupied." Baker v. Frick, 45 Md. 340; Bean v. Coleman, 44 N. H. 541; Maxwell v. McAtee, 9 B. Mon. 20; Bakeman v. Talbot, 31 N. Y. 368; Garland v. Furber, 47 N. H. 302; Houpes v. Alderson, 22 Iowa, 162.

The court heard the evidence of the parties, and considered all the circumstances under which the grant was made, the nature and situation of the property, and the terms of the grant, and found in favor of the plaintiff. The finding is supported by evidence, and cannot be disturbed. The points made by appellant as to the remedy, we think, are not well taken.

Judgment and order affirmed.

We concur: Harrison, J.; Garoutte, J.

93 Cal. 277

People v. Winters. (No. 20,791.)

(*Supreme Court of California.* Feb. 5, 1892.)

Burglary—Evidence—Instructions.

1. On a trial for burglary, a witness testified that about midnight he heard a noise in the kitchen, and found defendant and a companion searching the drawers in the pantry, and witness asked what they wanted; that they said they wanted something to eat: that witness gave them some food; they bade witness good-night, and said that they were not burglars, but had been on a spree. Defendant stated that, seeing the door open, he entered the house to get a drink and something to eat. *Held*, that the evidence justified a conviction.

2. On a trial for burglary, the error of the court in charging that, "in every crime or public offense, there must exist a union or joint operation of act or intent or criminal negligence," is cured by a subsequent charge that the jury must believe from the evidence, beyond a reasonable doubt, that defendant entered the house with intent to commit larceny.

3. The court charged the jury that, "if there be any reasonable hypothesis, not a mere possible one,—any reasonable hypothesis upon which the conduct of the defendant [in entering the house] can be explained consistently with his innocence, —then the testimony is such as ought to leave a reasonable doubt upon your minds." *Held*, that the jury could not have understood the court to mean that it devolved on defendant to explain his conduct.

4. Where the definition of a "reasonable doubt," as given in the charge of the court, has been repeatedly approved, if a defendant wants a more satisfactory one he should ask for it.

Commissioners' decision. In bank. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Prosecution of Harry Winters for burglary. Verdict and judgment of conviction. Defendant appeals. Affirmed.

Nagle & Nagle, for appellant. *Atty. Gen. Hart*, for the People.

Fitzgerald, C. The defendant was accused, by information, of the crime of burglary, charged to have been committed by the entry of the defendant into the house of one John Gunn, with intent to commit larceny. He was convicted of burglary in the first degree, and sentenced to imprisonment in the state-prison for the term of six years. From the judgment of conviction and the order denying the defendant's motion for a new trial this appeal is taken. The evidence upon which the verdict was founded is substantially as follows: Vincent Brewer, a witness for the prosecution, testified that on the 4th day of July, 1890, he was in the employ of John Gunn, the owner and occupant of the house in question, as driver of a dairy wagon; that he had been in town that day, and returned to Gunn's house, where he lived, shortly before 12 o'clock that night; that he entered the house by the back door leading into the kitchen, which he shut and latched on entering, and after extinguishing the gaslight therein he went to his room adjoining the kitchen and lighted the gas; that he was in the act of turning off the gas before retiring, when he heard the outside kitchen door by which he entered opened; that he at first paid but little attention to it, thinking that it was opened by some one connected with the house, so he put out the gas and got into bed; but hearing nothing further he became suspicious, and got up and partly opened the door between his room and the kitchen, and saw the defendant in the act of opening the door of a small closet, which, after looking into and picking up one or two things, he, the defendant, passed to a small slide door between the kitchen and dining-room; that after lifting the slide, and looking into the dining-room, he went to a table, from which he picked up a parcel; that the defendant then opened the pantry door, and, while he was in the act of searching a drawer thereof, witness "yelled out to him, and asked him what he was doing;" that defendant "turned, shook his hand, and hissed at him, 'Don't make any noise.'" At this time the companion of the defendant appeared, and they started towards witness, who asked them what they wanted. After some hesitation, one of them answered that they wanted something to eat, and were looking for it. Witness, being frightened, started to the closet to get something for them to eat, but on turning saw that they were whispering to each other. Notwithstanding this he got some food, and set it out for them. One partook of a small piece of bread, and the other drank a little tea. They then shook hands with witness, and on bidding him good night said that they were not burglars, but had been on a spree. The defendant stated that he was an attorney residing on Montgomery street, in San Francisco, and that his name was Mullen. The other man stated that he resided on Washington street, in Oakland, and gave his name and the number of his residence, which witness failed to remember. Witness further testified that they did not drink any water from the faucet in the kitchen after they entered, and that it could not have been drawn by them without his hearing it. To the witness Rogers defendant admitted that he went into the house of Gunn on the night in question to get a drink of water, and to the witness Conrad he also admitted that he and his companion were looking for flowers that night, and that they went into Gunn's garden to get them; that they afterwards went to the back of the house to get a drink of water, and while there saw that the inside door was open, and, being hungry, they went in to get something to eat; that he was in the act of taking down a tin box with cake in it when the witness Brewer came in and asked what they wanted; they answered "something to eat," and he gave it to them; that the man who was with him was named Williams, but that he could not tell where he could be found. The defendant in his testimony admitted that he was in Gunn's house with his partner on the night in question, but stated that they went in through an open door to get a drink of water, and that they lighted the gas after they got in, and that they did not enter the house with the intention of stealing anything therein.

It is claimed that the court erred in charging the jury that "in every crime or public offense there must exist a union or joint operation of act or intent or criminal negligence." While it must be conceded that the use of the word "or" instead of "and" before the word "intent" was erroneous, still we do not see how it could possibly have resulted injuriously to the defendant, for the reason that the court, in further charging the jury upon the same subject, told them, in the language of the statute, that "every person who enters any house with intent to commit * * * larceny * * * is guilty of burglary;" and again, in substance, that, before they could convict the defendant of the crime charged, they must believe from the evidence, beyond a reasonable doubt, that he entered the house with intent to commit larceny. We do not think the jury could have been misled by the error complained of, to the prejudice of the defendant.

It is further claimed that the court erred in charging the jury that "if there be any reasonable hypothesis, not a mere possible one,—any reasonable hypothesis upon which the conduct of the defendant [in entering the house] can be explained consistently with his innocence,—then the testimony is such as ought to leave a reasonable doubt upon your minds." This charge is objected to on the ground that "the court here assumes the guilt of the defendant, and imposes on him the burden of proof to show that his conduct was reasonable and proper, and that he did not commit the crime he is charged with, instead of being upon the prosecution to show that all his acts and conduct have been inconsistent with his innocence." It must be presumed that the jury was composed of men of ordinary intelligence, and were capable of understanding the English language, and, being such, we do not think they could have understood the court to mean that it devolved on the defendant to explain his conduct; but that if the jury, after a full consideration of all the facts of the case, could reasonably explain or account for such conduct on any reasonable hypothesis consistent with his innocence, they should acquit him. People v. Hardisson, 61 Cal. 379.

It is further contended that the court erred in that part of its charge defining a "reasonable doubt." The charge of the court on this subject conforms substantially to the definition of a "reasonable doubt" given by Chief Justice SHAW in the Webster Case, 5 Cush. 296, and which has been repeatedly approved by this court; but "if the defendant wanted a more satisfactory definition of the term 'reasonable doubt,' he should have asked for it." People v. Ah Loy, 57 Cal. 566.

The contention that the verdict was not justified by the evidence, because it did not tend to show that the defendant entered the house with intent to commit larceny, is untenable. The question of intent was one of fact, to be determined by the jury, and the intent with which the defendant entered the house was properly inferred by them from the facts disclosed by the evidence.

It is lastly insisted that the court erred in overruling the defendant's objection to questions propounded by the prosecuting attorney to the defendant on cross-examination. Conceding that he was cross-examined as to matters about which he was not examined in chief, and that the court erred in making the rulings complained of, the rulings were upon immaterial matters, which could not by any conceivable possibility have operated to the prejudice of the defendant, but, on the contrary, we are rather inclined to the opinion that the tendency was in the opposite direction. Our conclusion is that the judgment and order should be affirmed, and we so advise.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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93 Cal. 270

STEWART v. SUTHERLAND. (No. 13,931.)

(*Supreme Court of California.* Feb. 5, 1892.)

CONTINUANCE — PUBLIC LANDS — LAND-OFFICE — CONCLUSIVENESS OF DECISIONS — MISTAKE IN DEED.

1. In an action to quiet title to land, defendant moved for a continuance until he could obtain certified copies of papers in a certain United States land-office, stating that the register was dead and the office vacant; that he needed the papers as evidence, and that he could not get them till a new register qualified; but no affidavit in support of the motion was presented, nor was there a statement as to what papers defendant wished to obtain, or what he expected to prove by them, or when the register died, or that defendant could not have obtained them before trial. *Held*, that the motion was properly denied.

2. Where it appears in an action to quiet title to land that certain soldiers' additional homestead rights to the land were assigned to plaintiffs, but there was nothing to show that the assignments were not made after the entries of the homesteads in the local land-office, and it further appears that the rights of the parties were contested before the commissioner of the general land-office and the secretary of the interior, the entries must be deemed authorized, and the assignments valid.

3. Where the grantor in one of two deeds was described as "of the county of Dunn, state of Wisconsin," and the grantees as "of the county of Alameda, said state," and in the other deed the grantor was described as "of the county of Green, state of Illinois," and the grantees as "of the county of Alameda, said state," and the lands are in Alameda county, Cal., and there is no such county in either of the other states, the mistake cannot affect the rights of one claiming under such deeds.

4. The decisions of the land department of the general government, as to the rights of parties to pre-emption of homestead claims, must be treated as final.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by William Stewart against James Sutherland. Judgment for plaintiff. Defendant appeals. Affirmed.

Geo. H. Hurlburt and *Manuel Eyre*, for appellant. *A. A. Moore*, for respondent.

Belcher, C. This is an action to quiet the plaintiff's title to a quarter section of land in Alameda county, the complaint being in the usual form. By his answer the defendant denies that the plaintiff is the owner or entitled to the possession of the land described, or any part thereof, and admits that he (defendant) claims an estate or interest therein. He then, "as new matter constituting a defense in equity" to the action, alleges that whatever right or title the plaintiff has to the land was obtained under and by mesne conveyances from J. F. Wachter and J. W. Campbell, to whom United States patents for the land, one for the N. ½ and the other for the S. ½, were issued in 1888; that the said patents were for additional soldiers' homesteads, and, for reasons stated, were issued in violation of the laws of the United States, and particularly of section 2306 of the Revised Statutes, and therefore did not pass any title to the patentees. He further alleges that in 1874 he was, and ever since has been, qualified to pre-empt land under the laws of the United States, and that in that year he settled upon the said quarter section with intent to preempt the same; that the township in which the quarter section is situated was surveyed in 1878, and the plat of the survey filed in the United States land-office on the 8th of July, in that year; that on the 7th of October, 1878, while he was residing in a house built by him on the premises, he filed with the register of the proper land-office his declaration of intention to claim the said quarter section under the pre-emption laws of the United States, and the same was numbered as one of the pre-emption claims on file, and was entered and noted upon the proper tract-book of the office; that on the 1st of October, 1884, having given due notice of his intention to do so, he appeared with his witnesses and attorney before the register and receiver of the land-office, and submitted to them competent proofs to establish his pre-emption claim to the land, but in violation of his just claim thereto, and by misinterpreting the additional homestead laws, the said officers denied his just and equitable claim of title, and awarded to him only 40 acres of the quarter section, and wrongfully awarded the balance thereof to the homestead claimants; that he duly appealed from that part of the decision which was against him to the commissioner of the general land-office, and the commissioner, in September, 1886, by the misconstruction and misinterpretation of the additional homestead laws, wrongfully, and in violation of his claim, awarded the land to the homestead claimants, and denied his better right and claim thereto; that from the decision of the commissioner he duly appealed to the secretary of the interior, and the secretary, in August, 1888, by misconstruction and misinterpretation of the additional homestead laws, awarded the quarter section to the homestead claimants; that Wachter and Campbell never settled upon, improved, or occupied any part of the said land; never lived in the state of California; never filed any additional homestead claim in person for any part of the said quarter section, and never personally prosecuted, in any way or manner, any claim to said land, but that prior to July, 1878, they sold, assigned, and transferred whatever additional homestead rights they may have had, and all the proceedings in the land-office and department of the interior to establish and locate their homesteads were conducted and prosecuted by their assignees; that the plaintiff, Stewart, had at all times, since the year 1874, full knowledge of defendant's claim to the said quarter section, and that, but for the wrongful presentation and assertion of the said homestead claims in the names of Wachter and Campbell, defendant could and would have obtained a United States patent for the said quarter section upon his full compliance with the pre-emption laws, which he has always been, and is, ready and willing to comply with. Wherefore he prays that it be adjudged that the plaintiff has no title, legal or equitable, in or to the said land, or any part thereof, etc. When the case was called for trial, defendant moved for a continuance until he could obtain certified copies of papers in the United States land-office in San Francisco, stating that the register was dead and the office vacant, and that such documentary evidence was necessary to prove the allegations of his answer, and that it could not be obtained until a new register had qualified. The motion was denied. The plaintiff then introduced in evidence a United States patent for the N. ½ of the quarter section in controversy, issued under the homestead laws to J. F. Wachter, and dated December 22, 1888, and a similar patent for the S. ½ of the same quarter section, issued to J. W. Campbell. The defendant objected to both patents as incompetent, irrelevant, and immaterial evidence, and his objections were overruled. Plaintiff next introduced in evidence powers of attorney made by Wachter and Campbell, authorizing and empowering F. A. Hyde to sell and convey any lands obtained by them as additional homesteads, and giving the same description of the parcels to be sold as are found in the patents afterwards issued, and to take possession of the lands, and to receive for his own use the proceeds of the sales. Both powers were declared to be irrevocable, and one of them also authorized the attorney, in the name of the principal, to locate and enter in the land-office at San Francisco his additional homestead on the land described. One power was dated August 24, 1877, and the other February 6, 1878. Defendant objected to the powers being received in evidence, upon the ground that they were incompetent, irrelevant, and immaterial, and also upon the ground that the lands claimed as additional homesteads could not be located by or under powers of attorney, and the objections were overruled. Plaintiff next offered in evidence deeds made by Wachter and Campbell, by Hyde, their attorney in fact, conveying to William Stewart the tracts of land described in their respective patents. Defendant objected to the deeds being received upon the grounds that they were irrelevant and immaterial, as the patents upon which they were based were invalid, and the objections were overruled. Plaintiff then introduced some oral testimony, which it is not necessary to notice, and rested his case. Thereupon defendant again moved for a continuance for 10 days to enable him to procure certified copies of certain papers from the land-office in San Francisco, stating that they could not be obtained until a new register had qualified, and that they were necessary to show that the patents which had been put in evidence had been issued contrary to law, and that the action of the commissioner of the land-office and the secretary of the interior was contrary to law and void. The court denied the motion, and thereupon the case was submitted without any evidence on the part of the defendant. The court then made its findings, and entered judgment in favor of the plaintiff as prayed for. From that judgment the defendant has appealed, and has brought the case here on a bill of exceptions. The defendant duly excepted to all the rulings above mentioned, and now assigns them as error.

1. It is urged that the court should have granted the continuance asked for, and that the refusal of the court to do so was erroneous and prejudicial to the appellant. But no affidavit in support of the motion was presented, and there was no statement or showing as to what papers defendant wished to obtain copies of, or what light, if any, they would throw upon the case, or when the register died, or that defendant could not have obtained the copies before the trial commenced, if he had desired to do so. Under these circumstances, we see no error in the rulings.

2. It is urged that soldiers' additional homestead rights are not assignable, and that the powers of attorney offered in evidence show that Wachter and Campbell thereby assigned their rights to Hyde before the issuance of the patents, and, this being so, the officers of the land department had no power to issue the patents. In support of the position that additional homestead rights are not assignable, counsel cite a very elaborate and able opinion of the secretary of the interior, rendered March 25, 1890, in which he so holds. It is unnecessary to consider the question whether such a right can be assigned before proper entry of the land is made, but we entertain no doubt that after the entry is made, and before the patent is issued, the soldier may sell his land, and pass a good title thereto. This seems to be admitted by the secretary, and was so held in Knight v. Leary, 54 Wis. 459, 11 N. W. Rep. 600; Rose v. Lumber Co., 73 Cal. 385, 15 Pac. Rep. 19; and Grant v. Oliver, 91 Cal. 158, 27 Pac. Rep. 596, 861. Here there is nothing to show that the assignments or sales were not made after the entries of the homesteads in the local land-office; and as the rights of the parties, as appears from the answer, were contested before the commissioner of the general land-office and the secretary of the interior, we must assume that the entries were authorized and proper, and the sales valid.

3. The plaintiff testified that he had lived on land adjoining that in controversy since 1859, and it is claimed that he is not, therefore, the William Stewart named as grantee in the deeds from Wachter and Campbell, and hence did not connect himself with the source of title. This point is rested upon the deeds, in one of which the grantor is named as "of the county of Dunn, state of Wisconsin," and the grantees as "of the county of Alameda, said state;" and in the other the grantor is named as "of the county of Green, state of Illinois," and the grantee as "of the county of Alameda, said state." We see nothing in this to aid the appellant. The plaintiff had possession of the deeds, and introduced them in evidence. The lands were in Alameda county, Cal., and the plaintiff resided in that county. It does not appear that there is any county of that name in either the state of Wisconsin or Illinois, and evidently there was a slight mistake in naming the grantee as of "said state." This mistake cannot, however, affect his rights.

4. Appellant further claims that he was in possession of the land, and had filed his declaration of intention to pre-empt the same, and hence that no lawful entry of the homestead claims could be made upon it; citing Atherton v. Fowler, 96 U. S. 513, and Hosmer v. Wallace, 97 U. S. 575. The cases cited only hold that pre-emption rights cannot be initiated by invasion of the possession of another. Now, whether appellant had possession of the land, and a pre-emption right to it, as he alleges, was a matter which must have been considered and determined against him by the land department of the government, where he so persistently contested the homestead rights. In our opinion, the decisions there rendered must be treated as final upon this point. We advise, therefore, that the judgment be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

93 Cal. 316

ROBINSON v. CRESCENT CITY MILL & TRANSP. Co., (WENGER, Intervener. No. 13,649.)

(*Supreme Court of California.* Feb. 9, 1892.)

INTERVENTION OF PARTIES—GRANT OF RIGHT OF WAY—TRESPASS—FINDINGS.

1. Code Civil Proc. § 387, provides that "any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both." *Held*, in an action for trespass on land, that a person could intervene where he claimed a grant of a right of way through the land, and alleged that the acts complained of were performed by defendant while employed by him to construct such way.

2. In an action for trespass on land, a written instrument was introduced, by which plaintiff sold intervener certain standing timber, to be removed within four years. Plaintiff then granted a right of way, for logging purposes, through a creek and over the premises then owned by plaintiff, for a term of 10 years. Finally the instrument provided that the party of the first part (plaintiff) "does hereby grant unto the said party of the second part the right of way, for logging purposes, over and through that certain tract of swamp and overflowed land" described in plaintiff's complaint. *Held*, that the last grant was not limited in time.

3. Where a person has a right of way for logging purposes, and defendant hauls logs over it for him, the fact that other persons have an interest in the logs does not make defendant a trespasser.

4. A judgment that "plaintiff has no right whatever in or to the possession of the strip of land" is inconsistent with the finding that plaintiff is the owner of the land, subject only to a right of way granted to intervener.

Department 2. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

Action by William Robinson against the Crescent City Mill & Transportation Company for trespass to land. Jacob Wenger, intervener. Judgment for defendant and intervener. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial. Order affirmed and judgment modified.

Lucas & Miller, for appellant. *L. F. Cooper*, for respondents.

PER CURIAM. This is an action to recover damages in the sum of $200 for trespasses alleged to have been committed by the defendant corporation in entering upon the plaintiff's land, and cutting ditches and trenches thereon, and constructing and using a road-way across the same. The defendant answered by a general denial. Jacob Wenger was permitted to intervene, and in his complaint he set up a written instrument executed in August, 1877, by the plaintiff, as party of the first part, and by himself, as party of the second part, which stated that the party of the first part "does hereby grant unto the said party of the second part the right of way, for logging purposes, over and through that certain tract of swamp and overflowed land [described in plaintiff's complaint;] and the said party of the first part does hereby further agree not to grant unto any other person a privilege, for logging purposes, over and across said premises last mentioned." He then goes on to allege that for 20 years he had been the owner of certain redwood, spruce, and fir timber situated east of and near the premises described in the complaint; that he had sold the said timber to the defendant corporation, and that he was to furnish a route of transportation for the logs to the waters of Lake Earl, on which defendant's mill was situated; that a strip of 75 feet in width was as small a width for his right of way for logging purposes as would give him the proper enjoyment and use of such right of way across the premises described; that, under and by virtue of the grant from plaintiff, he entered into possession of a strip 75 feet in width, running through the said premises from the east to the west side thereof, and employed the defendant to build for him over the strip a logging road; that the road had been built and was then used by him as a logging road to transport his logs from the lands where they were cut to Lake Earl, whence they were transported to defendant's mill; that the plaintiff's possession had not been disturbed in any other way than by the building of the said road by intervener, and that by the building of the road no wrongs or injuries whatever had been inflicted on the plaintiff; that plaintiff had denied, and did then deny, that intervener had a right of way over the premises described, and had refused, on demand, to designate and select a right of way, and that intervener had selected, designated, and used the said right of way with due regard to the interests of both parties; that plaintiff claimed that he was entitled to the possession of the said strip of land adversely to the intervener, but that he was not entitled to such possession, and his said claim was without any right whatever. Wherefore, intervener prayed that it be adjudged and determined by the court that his possession of the said strip of land was good and valid as against the plaintiff, and that the plaintiff be forever enjoined from disturbing such possession. The plaintiff moved to strike out, and also demurred to, the complaint in intervention, upon the ground that it did not state facts sufficient to entitle Wenger to intervene in the action, and did not show that he had any interest in the matter in litigation, or in the success of either of the parties thereto. The court denied the motion and overruled the demurrer, and thereupon the plaintiff answered to the complaint, denying most of its averments. After trial the court found against the plaintiff upon all the issues raised by the pleadings, and rendered judgment as prayed for by both defendant and intervener. From that judgment, and an order denying him a new trial, plaintiff appeals.

1. It is claimed that the court erred in refusing to strike out, and in overruling the demurrer to, the complaint in interven-

tion. The Code provides: "Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both." Section 387, Code Civil Proc. This section, it will be observed, does not limit the right to intervene to any particular kind or class of actions or proceedings, but is general. Here, Wenger's complaint shows that he was the real party in interest, and the one by whose order and in whose employment the acts were done of which the plaintiff complains. He was therefore clearly interested in the matter in litigation, and in the success of the defendant; and this being so the rulings were proper.

2. It is also claimed that Wenger's right of way was granted by the plaintiff for a limited time, which had expired before the alleged wrongful entry upon his land was made. This claim is rested upon the written instrument set up in the complaint in intervention. By that instrument the plaintiff sold to Wenger all the timber suitable for the manufacture of lumber standing on the lands then owned by him, provided the logs should be cut and removed within four years from date. He then granted a right of way through "Russell Creek" and over the premises then owned by him, for logging purposes, for the term of 10 years. Following this is an agreement by Wenger that he will not, while engaged in logging on the premises, graze any live-stock thereon; and then comes the grant of right of way relied upon here, and hereinbefore quoted. In all this we see nothing to indicate, and there was no attempt to prove, that the last grant was intended to have any connection with the timber sold, or with the first grant. On the contrary, it was proved that, at the time the instrument was executed, Wenger held and assigned to the plaintiff a swamp-land certificate of purchase for the land described in the complaint; and, referring to this land, Wenger testified that he and the plaintiff went together to one Peveler, who drew the instrument, and told him what they had agreed upon, and then says: "I told Mr. Peveler that I was to have the right of way over and through this land; that I had the land back of it, and before I signed the paper I wanted to know that I had an outlet. I told Mr. Peveler that I wanted a right of way over and across that piece of land before I signed the contract."

3. It is further claimed that, if Wenger had a still existing right of way, it was a personal right, a right in gross, which could not be assigned or transferred, and therefore he could not use it, or authorize the defendant to use it, for the purpose of transporting logs in which other parties were interested with him. The case cited in support of this claim (Wagner v. Hanna, 38 Cal. 111) is not in point. That action was brought to recover damages for the obstruction of an alleged right of way across the defendant's land, and the only question was whether the plaintiff had such a right of way or not. Here, as we have seen, Wenger had a right of way for logging purposes, and the defendant was hauling logs over it for him. It is true that other parties owned an interest in the logs which had been hauled up to the time of the trial, but we do not see how that fact can be said to have made his action wrongful, and his employe a trespasser; and, if it could, no damages are alleged or shown to have resulted from this use of the road.

4. The judgment given in favor of the intervener is expressed in broader terms than is justified by the findings of fact. The provision therein that "the plaintiff has no right whatever in or to the possession of the strip of land," and that the intervener is entitled to such possession, and that the plaintiff be perpetually enjoined from disturbing him in such possession, is inconsistent with the finding that the plaintiff is the owner of the land, subject to the right of way granted by him to the intervener. The rights of the intervener are limited to a right of way for logging purposes, and he is entitled to be undisturbed by the plaintiff in the enjoyment of such right of way; but, when he is not making use of the strip for such purposes, he has no right to its possession, or to have the plaintiff deprived thereof. The order denying a new trial is affirmed, but the court below is directed to modify its judgment in accordance with this opinion; and as so modified the judgment will stand affirmed.

DE HAVEN, J., did not participate in the foregoing opinion.

BEATTY, C. J. Justice HARRISON is assigned to department 2 for the purpose of considering and deciding this cause.

(93 Cal. 321)

BOURN v. HART *et al.*, State Board of Examiners. (No. 14,545.)

(*Supreme Court of California.* Feb. 9, 1892.)

LEGISLATIVE POWERS—GIFT OF PUBLIC MONEY.

A legislative appropriation made to an individual in payment of a claim for damages on account of personal injuries sustained by him while in its service, and for which the state is not responsible, either on general principles of law or by reason of any statute, is a "gift," within the meaning of Const. art. 4, § 31, which provides that the legislature shall have no power to make any gift of any public money. BEATTY, C. J., dissenting.

In bank.

Petition by A. J. Bourn for *mandamus* to compel one Hart and others, as members of the state board of examiners, to allow his claim against the state. Demurrer to the petition sustained, and judgment for defendants.

Robt. T. Devlin and *Jud. C. Brusie*, for petitioner. *Atty. Gen. Hart*, for respondents.

DE HAVEN, J. This is an original proceeding, wherein the petitioner asks this court to issue a writ of *mandamus* directed to the defendants, as members of the state board of examiners, commanding them to allow his claim against the state for the sum of $10,000, in accordance with the provisions of an act of the legislature, the first section of which, and the only one necessary to a proper understanding of this case, is as follows: "Section 1. The sum of ten thousand dollars ($10,000) is hereby appropriated, out of any moneys in the general fund of the state treasury not otherwise appropriated, to pay the claim of A. J. Bourn, a guard at the state-prison at San Quentin, in this state, for personal injuries, namely, the loss of his right arm while in the discharge of his duties, under the orders of his superior officers, and while in the service of the state of California." The petition sets forth the circumstances under which petitioner lost his arm, but which need not be referred to here; as we have held in the case of Stevenson v. Colgan, (Cal.) 27 Pac. Rep. 1089, that the constitutionality of a statute must be determined by the court from what appears on its face, when considered with reference to matters judicially noticed by the court. The defendants have demurred to the petition upon the general ground that the act under which petitioner claims is unconstitutional, under sections 31 and 32 of article 4 of the constitution. In the case of Stevenson v. Colgan, supra, we decided that it was the purpose of these sections of the constitution to prohibit the legislature from making direct "appropriations to individuals from general considerations of charity or gratitude, or because of some moral obligation resting upon the people of the state, and such as a just and generous man might be willing to recognize in his dealings with others less fortunate than himself." That such is the intention of the constitution we have no doubt, and it is equally clear to us that the act in question falls within the class of legislation thus prohibited. The petitioner was an officer or employe of the state. It is recited in the act that he met with the accident "while in the discharge of his duties under the orders of his superior officer," and, for the purpose of this decision, it may be conceded, as claimed by him, that the loss of his arm is to be attributed to the negligence of his superior officer. But whether it be attributed to negligence or misfeasance of such officer, or any other cause which can be suggested by the language of the act, the unconstitutionality of the statute is apparent. In entering the service of the state the petitioner assumed all the risks attending such employment, whether arising from its ordinary perils, or resulting from the negligence or misfeasance of other servants of the state, and the appropriation made by this act is a mere gratuity, as the state was under no legal liability to compensate him for any loss which he may have sustained while thus in the discharge of his duties. That a state is not liable for the negligence or misfeasance of its agents, except when such liability is voluntarily assumed by its legislature, is said by Danforth, J., in Lewis v. State, 96 N. Y. 74, to be so "well setted upon grounds of public policy, and the doctrine is so uniformly asserted by writers of approved authority and the courts, that fresh decisions would be superfluous." And the supreme court of the United States, in Gibbons v. U. S., 8 Wall 269, in an opinion delivered by Mr. Justice Miller, say: "No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized power of its officers and agents." In the case of Clodfelter v. State, 86 N. C. 51, the plaintiff presented a claim against the state for damages on account of the loss of his eyes, alleged to have been caused by the misconduct and negligence of officers and agents of the state, under whose authority and control he was placed. By the constitution of that state the court was empowered with authority "to hear claims against the state." But the court held that this provision only authorized it to hear such claims "as are legal, and could be enforced if the state, like one of its citizens, was amenable to process;" and added: "The only question then presented is whether the state, in administering the functions of government through its appointed agents and officers, is legally liable to a claim in compensatory damages for an injury resulting from their misconduct or negligence. That the doctrine of *respondeat superior*, applicable to the relations of principal and agent created between other persons, does not prevail against the sovereign in the necessary employment of public agents, is too well settled, upon authority and practice, to admit of controversy." The exemption of the state from paying damages for accidents of this nature does not depend upon its immunity from being sued without its consent, but rests upon grounds of public policy which deny its liability for such damages. It is argued, however, that the state has in this instance assumed and acknowledged its liability by the act under consideration. But this is precisely what the legislature is forbidden to do. A legislative appropriation made to an individual in payment of a claim for damages on account of personal injuries sustained by him while in its service, and for which the state is not responsible, either upon general principles of law or by reason of some previous statute creating such liability, is a gift, within the meaning of the constitution. The appropriation made to petitioner was a mere gratuitous assumption of an obligation from which the state was and is exempt, and is within the mischief which the framers of the constitution intended to remedy by the sections before referred to. If the state desires to make itself liable for such damages as may be sustained by those in its service, it must do so by a general law, which shall embrace all cases which may come within its provisions. The demurrer to the petition is sustained, and judgment ordered for the defendants.

We concur: Sharpstein, J.; Paterson, J.; McFarland, J.; Harrison, J.

Beatty, C. J. I dissent. In my opinion, the word "gift" was not used in section 31, art. 4, of the constitution, in a sense broad enough to include compensation to a servant of the state for loss of life or limb in the discharge of his duties; nor do I think such compensation is to be regarded as extra compensation for services, within the prohibition of the succeeding section of the same article.

(93 Cal. 362)

COHN v. BROWNSTONE. (No. 14,389.)

(*Supreme Court of California.* Feb. 10, 1892.)

CONTINUANCE—ABSENCE OF PARTY—AFFIDAVIT.

In an action for work and labor, defendant's attorney asked for a continuance, and made affidavit that defendant had been compelled to leave the county on account of an attempt to kill him. Affiant stated that defendant would testify in his own behalf that he never employed plaintiff, and that plaintiff never worked for him, whereas in his answer defendant did not deny that plaintiff worked for him at his request. Affiant alleged that, as soon as he heard of defendant's whereabouts, he telegraphed to him, and defendant replied that it was impossible for him to come; but the affidavit did not state when affiant first learned where defendant was, nor when he telegraphed, nor that any steps had been taken to procure a deposition. It was not shown that defendant remained away because of fear, nor why the law could not protect him. *Held*, that a continuance was properly refused.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action by D. S. Cohn against D. Brownstone for work and labor. Judgment for plaintiff. Defendant appeals from the judgment, and from an order denying his motion for a new trial. Affirmed.

Justin Jacobs, for appellant. *N. O. Bradley*, for respondent.

VANCLIEF, C. Action for work and labor, in which defendant denies his indebtedness to plaintiff, without denying the services alleged, and pleads a counterclaim. Judgment for plaintiff in the sum of $900, from which, and an order denying his motion for a new trial, the defendant appeals.

Did the court err in denying defendant's motion for a postponement of the trial? is the only question presented for decision. On the 6th day of January, 1890, the cause was set for trial on the 23d day of the same month, of which counsel for defendant had due notice. Accordingly the cause was called for trial on January 23, 1890, whereupon counsel for defendant moved for a postponement of the trial upon the following affidavit: "Justin Jacobs, being duly sworn, says: He is one of the attorneys for the defendant above named. That defendant cannot at this time safely proceed to trial for want of material testimony, which he expects to be able to produce if this case can be postponed for a reasonable time. That said testimony is the testimony of defendant himself, who, as affiant is informed and believes, will testify that he never employed plaintiff at all, and that plaintiff never worked for defendant. That defendant is and for some months has been absent from this county, and cannot at present, with safety to himself, return. That, as affiant is informed and believes, defendant was compelled to leave said county to save his life. That just prior to his leaving said county, as affiant is informed and believes, one Lucy A. Follett, of said county, attempted to kill said defendant by firing a pistol at his head; and she has since, as affiant is informed and believes, threatened to kill defendant, should he return to this county, and is continually watching for him for that purpose. That defendant, as affiant is informed and believes, is at Eureka, Humboldt county, in this state; but his attorneys have not known of his whereabouts long enough to procure his deposition to be used at this trial. That, as soon as affiant learned the whereabouts of defendant, he telegraphed him the day set for trial, and telling him to be here. That affiant received a telegram in response saying that it was impossible for him to be here. That, if a reasonable postponement can be had, defendant's deposition can be procured. That, as affiant is informed and believes, the facts he expects to prove by defendant cannot be proved by any other person. That this proposed continuance is not asked for delay, merely, but that justice may be done in the premises. That defendant has fully and fairly stated the facts constituting his defense to affiant, as affiant is informed and believes, and is advised by affiant that he has, in affiant's opinion, a good and valid defense to said action, on the merits thereof. JUSTIN JACOBS."

That there was no abuse of discretion in denying the motion seems too plain to require argument.

1. The proposed testimony of the witness is irrelevant to any issue, since the answer of the defendant does not deny that plaintiff worked for defendant at the latter's request.

2. The affidavit does not state, even on information or belief, that defendant remains absent from the county because he fears, or has reason to fear, that he will be killed or injured if he should return.

3. The affidavit does not state when affiant first learned the "whereabouts" of the defendant, nor when he telegraphed defendant, nor when defendant answered his telegram, nor that any steps have been taken to procure the deposition of the defendant.

4. The law, if executed, would have protected the defendant from the assaults of the woman named, and no reason is shown why the law would not have been executed at his instance.

I think the judgment and order should be affirmed.

We concur: FITZGERALD, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(93 Cal. 365)

CROOKER v. BENTON. (No. 14,270.)

(*Supreme Court of California.* Feb. 10, 1892.)

WATER-RIGHTS—WHEN APPURTENANT TO LAND.

Civil Code, § 662, provides that "a thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or water-course, or of a passage for light, air, or heat from or across the land of another." *Held* that, where a land-owner appropriated water, and brought it on his land, and the land could not be advantageously used without the water, the fact that the license to convey the water over the premises of another was revocable did not prevent the water-right from passing as appurtenant to the land.

Commissioners' decision. Department 1. Appeal from superior court, Tehama county; C. P. BRAYNARD, Judge.

Action by George A. Crooker against Thomas H. Benton to determine the right to one-third of the water flowing in a certain ditch. Judgment for plaintiff. Defendant appeals from the judgment, and from an order refusing a new trial. Affirmed.

L. V. Hitchcock, for appellant. *Chipman & Garter*, for respondent.

TEMPLE, C. This is defendant's appeal from the judgment and an order refusing a new trial. The action is to determine the right to one third of the water flowing in a certain ditch. The plaintiff claims the water as appurtenant to a certain tract of land purchased by him from one D. G. Miller. The defendant claims to have purchased from Miller his interest in the ditch, after Miller had conveyed the land to plaintiff. If the water-right was appurtenant to the land, plaintiff must prevail; otherwise the defendant.

It appears that in 1883 W. T. Hurtt, L. A. Crooker, and said D. G. Miller were each in possession of a quarter section of land in section 28, etc. An old flume ran through this section, formerly used to float lumber. Water continued to run there, and the owners of the flume, having no use for it, suffered it to be taken out by settlers for domestic and irrigation purposes, and it was so taken by Hurtt, L. A. Crooker, and Miller. The flume decaying, Hurtt, L. A. Crooker, and Miller agreed to appropriate a portion of the water of Digger creek, which had supplied the flume, and accordingly posted, at the point of intended diversion on Digger creek, a notice, as required by the Code, which was signed by each of the persons named, and contained certain declarations as to the rights and duties of the parties: (1) They should own equally; (2) each do one-third of the work, and furnish one-third of the money for construction; and, (3) failing to do this, their interest in the ditch should be held for payment; (4) each could take his share of water out at any place to suit his convenience; (5) each was compelled to cut ditches to carry his portion of water back to Digger creek; and (6) to pay an equal proportion to keep the ditch in repair. In the spring of 1884 the water was taken out and conducted by ditch and flume to a point 80 rods north-east of the south-east corner of the section. Hurtt then constructed a ditch, taking his share of the water upon his land, where, having used it, or what he wished, it ran upon the land of L. A. Crooker, and from thence, sometimes, upon the land of Miller, and was used by him for purposes of irrigation. Where the ditch constructed by the parties terminated, the old flume still remained, and the water flowed thence to a point near L. A. Crooker's land, whence some of it was taken and used by him, and the excess, not used by him, passed to Miller's land. The portion not taken by Hurtt or L. A. Crooker during 1884 passed to a point near Miller's land, and thence onto it; but in 1885 L. A. Crooker removed the old flume, and the water was dumped near Crooker's north line, and was sometimes used by Crooker, and sometimes, when not so used, ran down to Miller's land, where it was collected together with the water received through Crooker's ditch, and used by Miller. Subsequently, and a short time before Miller sold to plaintiff, in pursuance of an agreement with L. A. Crooker, he (Miller) received his share of the water through Crooker's ditch, above described, which was extended to his land. Miller had applied to Hurtt for permission to carry his portion of the water through Hurtt's land, but permission was refused; but, even getting it through the Crooker ditch, it all passed through a portion of Hurtt's land. Miller sold and conveyed the land with the appurtenances to plaintiff, May 3, 1886, and his interest in the ditch to defendant, March 14, 1887, plaintiff's deed being then on record. The water was necessary to the proper use of Miller's land. It is evident that the appropriation was made and the ditch constructed to bring the water there for that purpose, and for no other; and, further, that through these means the water had been so brought and actually used upon the land for some years, and was being so used at the time of the conveyance to plaintiff.

Appellant concedes that, had the ditch been continued by the parties to Miller's land, the water would have been appurtenant to it, but, inasmuch as this ditch is more than a half mile away, and Miller has received his share of the water through Hurt's land without any right at all, and through Crooker's by a license which may be retracted at any time, the water was not used on this land by right, and therefore did not and could not be appurtenant to it, under section 662 of the Civil Code, which reads: "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit; as in the case of a way, or water-course, or of a passage for light, air, or heat from or across the land of another." But that which is claimed as an appurtenant here is not the easement of a right of way over the lands of Hurtt and Crooker, but the water-right, which undoubtedly did belong to Miller, and was used by right as an incident to his land. At the time of his conveyance he got the water through Crooker's ditch, by his (Crooker's) consent. Hurtt had, presumptively, at least, licensed this use of his land for Crooker's ditch. If so, he could not object that it was made to carry additional water, unless this increased the burden to his land; that is, made the ditch in some respect more injurious to his estate. It does not appear that it did so. He was then using the water by right within the claim of appellant. But, in my opinion, the vendor cannot raise the question as against his vendee. The water belonged to Miller by appropriation. It was acquired for use upon this land, and the land could not be so advantageously used without it. It had been, and at the time of the sale was, being so used by the vendor. It had become an adjunct to this land, and the vendor cannot raise the question that he had not an indefeasible title to the right of way. Appellant states a case which he thinks will test this question in the strongest manner possible: A. owns a house, and on another tract of land a spring, from which he conducts water to his house over the lands of B., which separates his house from the tract of land on which the spring is. There is no other way in which the water could be brought. The right through B.'s land is by a revocable license. Is the right to take water from the spring appurtenant to the house, so that it would pass by deed conveying the house and appurtenances? My answer is: Yes; undoubtedly; and, so long as he is permitted to take the water through B.'s land, A. cannot object. He could not sell water flowing from the spring to C., so as to enable C. to plead the infirmity of the vendee's title to the right of way. But, if A.'s vendee could not get a right from B , and therefore could not use the water at his house, as his right to it was only as an appurtenant, he would then lose his right. We have only to change the illustration by supposing the water conducted in iron pipes, and that A. attempted to remove the pipe from B.'s land, to have the exact case of Philbrick v. Ewing, 97 Mass. 133. There the court said: "He had no more right to cut off a piece of the pipe because it ran into another's land than he would have had to cut off a piece of a spout which projected over the adjoining premises. If the owner of that land objected to its continuance, the plaintiff would be obliged to draw her pipe in; but until objection was made, or if she could obtain a license for it to continue, she could let it remain as her predecessor had done." It seems to me that the water-right itself is in the same position, as between the vendor and vendee, as the pipe was in the case of Philbrick v. Ewing. Some third person may possibly interfere with plaintiff's use of the water-right, which had become appurtenant to his farm; but, because they could do so, the vendor could not deny that it passed as an appurtenant. Nor can I think appellant has rightly construed the section of the Civil Code. If the phrase "by right" has reference to the owner's title to the incident, it seems to me it effects no purpose. Of course, a thing could not constitute a part of his estate if he did not own it. An appurtenance is something belonging to another thing, more important or worthy. However inapt the language, I think this the idea intended to be conveyed by the words, "by right used with the land." It had become an adjunct to the land. Construed otherwise, I see no reason why, within this definition, a plow used upon the land, or a mule team, might not be appurtenant. Farmer v. Water Co., 56 Cal. 11, and Fitzell v. Leaky, 72 Cal. 477, 14 Pac. Rep. 198, are authorities upon some of the questions which might be raised in this case. In each of those cases the right to water acquired by contract, and depending for its continuance upon contract obligations of third persons, was held to have passed as appurtenant to land. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(93 Cal. 411)

GRIESS v. STATE INV. & INS. CO. *et al.*
(No. 13,864.)

(*Supreme Court of California.* Feb. 17, 1892.)

APPEAL—FINAL ORDERS.

1. An order denying a motion to dismiss a motion for new trial is not a final order, and is not appealable.

2. An order denying a motion to correct the minutes of the court does not come within Code Civil Proc. § 963, which provides that an appeal may be taken from any special order made after final judgment.

Department 2. Appeal from superior court, city and county of San Francisco; E. R. GARBER, Judge.

Suit by Griess against the State Investment & Insurance Company and A. Meyer to recover on a policy of fire insurance. Verdict and judgment for plaintiff. Defendant insurance company moved for a new trial. Defendant Meyer moved to dismiss the motion for new trial, and moved also to have the court correct its minutes. From an order denying his motions he appeals. Appeal dismissed.

F. A. Meyer and *W. B. Haskell*, for appellant. *O'Brien, Morrison & Daingerfield* and *Fisher Ames*, for respondent.

DE HAVEN, J. The State Investment & Insurance Company executed to plaintiff, Griess, a policy insuring him against loss from fire of property therein described in the sum of $2,500, of which amount $1,500 was to be paid to defendant Meyer. The loss occurred, and plaintiff brought suit upon the policy to recover the amount thereby agreed to be paid; and, as defendant Meyer would not join as a plaintiff, he was made a defendant, so that his interest therein might be determined. Both defendants answered, the insurance company denying its liability, and the defendant Meyer setting forth his interest in the policy, with a demand for a judgment against his co-defendant for the amount alleged to be due him. The case was tried by a jury, and upon the trial it was orally agreed by all of the parties that the interest of Meyer in the policy sued upon was $1,202.75, and that the jury should find a verdict for the plaintiff or the defendant without any reference to defendant Meyer. This agreement was taken down by the reporter, but was not entered upon the minutes of the court. The case was submitted to the jury, the court saying to them: "So far as the defendant Meyer is concerned, it is stipulated by counsel that he is out of the case, and also so far as your deliberations are concerned." The jury returned a verdict in favor of plaintiff for the sum of $2,252.50, and judgment was thereupon entered in favor of the plantiff for that sum, and against the defendant insurance company, but no mention is made in the judgment of the rights of the defendant Meyer, or of any interest which he may have in the amount recovered by plaintiff. The defendant insurance company moved for a new trial, but did not serve a copy of its proposed statement upon its co-defendant, Meyer, and Meyer thereupon moved the court to amend its minutes by entering therein the oral agreement above referred to, and also to dismiss the defendant's motion for a new trial, because no statement on motion for new trial had been served upon him. Both motions were denied, and from the order denying them the defendant Meyer appeals.

1. The order from which this appeal is taken is not, as to either of its branches, an appealable one. The refusal to dismiss a motion for a new trial does not finally dispose of the motion itself; and, until some order is made by the trial court which has the effect to either grant or deny the motion for a new trial, neither party can be said to be aggrieved, and there is nothing to appeal from. The adverse party has the right to resist such a motion by a counter-motion to dismiss, and, if overruled, he may preserve his exception in the bill of exceptions, which becomes part of the record upon appeal from the final order of the court, and of which he may avail himself upon such appeal; but the refusal of the court to dismiss the motion for a new trial is not itself the subject of a distinct appeal, nor can the exception to such a ruling be considered unless it is made part of the record upon appeal from an order which grants, or one which in effect operates as, a denial of the motion for a new trial. In this view of the case, it is unnecessary to determine at this time whether the appellant was entitled to be served by his co-defendant with the proposed statement on motion for a new trial.

2. That part of the order denying the motion to amend the minutes of the court is also clearly not appealable. It was not a special order, made after final judgment, within the meaning of subdivision 2 of section 963 of the Code of Civil Procedure.[1] It in no manner affected the judgment or bore any relation to it, either by way of enforcing it or staying its operation, nor did it concern any pending motion in the case itself. It was only the determination of the court that its minutes did not require correction, and the action of a court of record in such a matter is not subject to review by the ordinary process of appeal. The oral statement or admission made by the attorneys upon the trial and to the court was evidently made for the purpose of obviating the necessity of introducing evidence to prove the fact admitted, and it was competent for the court to act upon such admission in giving its judgment, although the admission was not entered upon its minutes. The parties acted upon it in refraining to offer such proof, as did also the court in withdrawing such matter from the consideration of the jury. If the court did not give effect to this admission in the judgment rendered by it, the error cannot be corrected by merely causing the admission to be now spread upon the minutes of the court; nor would such entry in any way affect the pending motion for a new trial. The same matter, and with the same effect, can be shown in the statement or other

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[1] Section 963, subd. 2, provides that appeal may be taken from any special order made after final judgment.

record on motion for new trial. Appeal from the order dismissed.

We concur: SHARPSTEIN, J.; McFARLAND, J.

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93 Cal. 136

HOOWE v. KRELING *et al.* (No. 13,634.)

(*Supreme Court of California.* Feb. 1, 1892.)

CONVERSION—COMPLAINT.

A complaint alleged that on a certain day plaintiff was the owner of a saloon, and was at that time in debt; that defendant induced him to execute a bill of sale of the property, on the representations that defendant would sell it for a sum largely in excess of plaintiff's indebtedness, and that out of the proceeds defendant would pay plaintiff's debts, and turn over the balance; that defendant caused the name of another person and the consideration of $750 to be inserted in the bill of sale, without the knowledge of plaintiff; that when plaintiff signed the bill of sale he was financially embarrassed, sick, and in such mental state as to be unable to attend to business; that he executed the instrument without reading it, relying on defendant's statements; that plaintiff never received the $750; that defendant converted the property to his own use, and refused, and still refuses, to account or pay plaintiff therefor; that, at the time of the transfer, the saloon, merchandise, fixtures, etc., were worth about $1,500. *Held*, that the trial court properly treated the action as one of conversion.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Timothy Hoowe against John Kreling and John F. Kolbe. Judgment for plaintiff. Defendants appeal. Affirmed.

H. H. Lowenthal, for appellants. *F. J. Castelhun*, *W. T. Barton*, and *Joseph D. Redding*, for respondent.

FITZGERALD, C. The complaint in this action, in substance, alleges that on the 5th day of May, 1887, plaintiff was the owner and in possession of a saloon and its contents, situated in the city of San Francisco. That on said date he was indebted to various persons, amounting in the aggregate to about $1,029.40. That on that date he was induced to execute a bill of sale of said property upon representations made to him by the defendant Kreling that, if he (plaintiff) would transfer to Kreling said property, he could and would effect a sale of the same for a sum largely in excess of plaintiff's indebtedness, and that out of the proceeds of such sale Kreling would pay said indebtedness, and turn over the balance to plaintiff. That plaintiff, relying wholly upon these representations, executed the bill of sale, and transferred the property in question with the understanding and acting under the belief that he had executed the sale and transferred the property to Kreling. That Kreling caused the name of defendant Kolbe and the consideration of $750 to be inserted in the bill of sale without the knowledge or consent of plaintiff. That when he executed said instrument he was embarrassed financially, sick, and in such a condition mentally as to be unable to attend to business, and that at the time of its execution he relied wholly upon said representations, without reading it or having any knowledge of its contents. That he never intended to and did not transfer the property to Kolbe, but to Kreling, who received it from plaintiff, and thereafter continued to claim and exercise acts of ownership over the same. That Kolbe never owned or claimed any interest therein, but "was simply the creature and tool of the said Kreling, for the sole purpose of enabling the said Kreling to obtain the said property for his sole use and benefit, to the loss and damage of plaintiff." That the consideration expressed in the bill of sale was not received by plaintiff. That Kreling has converted said property to his own use, "and refused, and still refuses, to account or make any payment to plaintiff therefor." "That at the time of said transfer the said saloon contained merchandise, fixtures, and furniture of the value of about $1,500." There was a demurrer interposed to the amended complaint, which, upon the grounds therein stated, was properly overruled.

It is admitted by defendant Kreling, in his answer, that plaintiff was the owner of the property, and that he executed the bill of sale at the time mentioned in the complaint, but he specifically denies each and every other material allegation thereof. The case was tried by the court, without a jury, and judgment given in favor of plaintiff for the sum of $300, from which judgment, and an order denying his motion for a new trial, the defendant appeals. It is claimed by appellant that this is an action to enforce a trust against personal property, and for an accounting; and, further, that the relief granted by the judgment herein was not prayed for, and is inconsistent with the issues raised by the pleadings. The court below, upon the facts stated, very properly, as we think, treated the action as one for a conversion, and the judgment, which was given for a sum several hundred dollars less than the value of the property was shown to be, was clearly within the issues. The evidence shows, and the court so finds, that Kreling was one of the various unnamed persons to whom the plaintiff was indebted as alleged at the time of the transfer of the property, and that the value thereof, together with the money received by Kreling from the business after the transfer was made, exceeded plaintiff's indebtedness to Kreling in the sum of $300. The difference between the sum awarded by the judgment and the value of the property, as shown at the time of the conversion, is thus accounted for, and shows the result to be more favorable to the defendant than he was entitled to. The findings, which are objected to on the ground of insufficiency of the evidence to justify them, are in line with and follow the allegations of the pleadings, and, as they are sustained by the evidence, they will not, under the well-established rule of this court, be disturbed. The remaining errors complained of are not necessary to be considered, as they are either unimportant or untenable. We recommend that the judgment and order be affirmed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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93 Cal. 252

DONOHUE *et al.* v. SUPERIOR COURT *et al.* (No. 14,646.)

(*Supreme Court of California.* Feb. 4, 1892.)

MANDAMUS TO JUDGE—REMEDY BY APPEAL.

Mandamus will not lie to compel a judge of a superior court to award a jury trial in an action to quiet title, since whether a jury should be granted is a question of law which the superior court has jurisdiction to determine; and, if error is committed, petitioners have a sufficient remedy by appeal.

In bank. Petition for a writ of *mandamus* by Patrick Donohue and Mary Donohue against the superior court of San Francisco county and Hon. John Hunt, judge. Dismissed.

Mich. Mullany, for petitioners.

PER CURIAM. Petitioners aver that they are defendants in an action pending in the court of respondents in which one Hinkel is plaintiff; that said action is an action to quiet title to certain described lands; that petitioners have answered in said action, setting up certain defenses; that petitioners have demanded a jury trial of said action; that their demand has been refused, and that the respondents are about to try said action without a jury; wherefore petitioners pray for a writ of mandate commanding respondents to comply with petitioners' demand for a jury, and "not to undertake to try or to set said action for trial without a jury." Whether or not the petitioners should have a jury trial of said action is a question of law which the superior court has jurisdiction to hear and determine; and, if any error has been, or shall be, committed in determining that question, the petitioners have a sufficient remedy in the ordinary course of law by appeal. The prayer of petitioners is denied, and the proceeding dismissed.

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93 Cal. 189

GRIMMER v. CARLTON. (No. 13,550.)

(*Supreme Court of California.* Feb. 4, 1892.)

CANCELING DEED—ADMISSIONS IN PLEADINGS—CONTRACTS—CONSIDERATION.

1. In an action to cancel a deed on the ground of fraud and misrepresentation, and on the further ground that the true consideration was not set out in the deed and was insufficient to support it, the court found in favor of defendant as to the issue of fraud and misrepresentation, but found, for plaintiff, that the consideration was based on a verbal agreement of defendant to support her mother (the plaintiff) during her natural life, and that such consideration, not being enforceable, was no consideration. *Held*, that there was no conflict in the findings, and no error in canceling the deed.

2. Where an answer sets up an agreement entered into to maintain and support plaintiff, and the cross-complaint denies such agreement, but avers that plaintiff was supported by defendant, such averment is not an admission that the support was in pursuance of the agreement, the existence of which is denied.

3. Where a proper performance of a verbal contract by a daughter for the support and maintenance of an aged mother during her life involves the personal service of the daughter, the contract is not enforceable.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Action by E. M. Grimmer against M. L. Carlton. Judgment for plaintiff. Defendant appeals. Affirmed.

W. H. L. Barnes and *W. H. Layson*, for appellant. *Wm. B. Hardy*, for respondent.

FOOTE, C. This action was brought to cancel a deed made by Mrs. Grimmer, the plaintiff, to her daughter, Mrs. Carlton. The case comes here upon the judgment roll alone. From the pleadings it appears that the main issues are two: *First.* Whether or not the deed had been obtained by the fraud and misrepresentations of the defendant. *Second.* Whether or not the true consideration for the making and delivery thereof was expressed in the deed; and, if not so expressed, if it, a set out in the pleadings, was an enforceable contract, and sufficient to suppor the deed. The court found in favor of the defendant as to the issue of fraud and misrepresentations, but found, for the plaintiff, that the true consideration was not stated in the deed; that it was a consideration based upon a verbal agreement that the defendant, in consideration of the making and delivery of the deed, would support and maintain her mother (the plaintiff) for the balance of her natural life; and, in effect, that such a proposed consideration, not being enforceable, was no consideration at all,—and adjudged, therefore, that the deed should be canceled, and the defendant enjoined from selling the property described in the deed, which it is alleged she intended to do. From that judgment this appeal is taken.

Taken all together, we see no conflict in the findings, and no error in that respect. Nor do we perceive that the court erred in giving judgment upon the findings for the plaintiff. The proposed consideration, as the true and only consideration, if any existed, mentioned therein, is found to be no consideration, in the sense, as we understand the findings, that the agreement upon which it was based was not an enforceable contract, and therefore the deed should be canceled. The findings also negative, by finding what the true consideration was, the existence of any other to support the deed.

But it claimed that, by the admissions of the answer to the cross-complaint, it is shown that the contract to maintain and support the plaintiff was partially performed. We do not think this position correct. The answer to the cross-complaint specifically denies that there was any such agreement made as the latter pleading sets up; and if that is denied, the fact set out in it, that the plaintiff was supported by the defendant, if admitted by the pleadings, is not an admission that it was in pursuance of the agreement, the existence of which is denied.

Conceding, without deciding, that the agreement may not be within the statute of frauds, because it appears that the time for the performance of the defendant's contract to maintain and support depends upon the contingency of the death of the plaintiff, which might or might not happen within a year, under the rule laid down in Swift v. Swift, 46 Cal. 269, nevertheless we do not think the contract an enforceable one, because, from the very nature of it, a proper performance thereof involved the personal services of the defendant. The findings show that the plaintiff is a person 84 years of age, feeble in health, subject to the ailments and disorders incident to old age, and her memory seriously impaired. The proper maintenance and support of the mother by her daughter ought, necessarily, to involve the personal care and attention of the latter to such a sick, ailing, and feeble-memoried parent. It would doubtless be also the most important and necessary part of the proposed maintenance and support of an almost helpless parent,—a female, too,—peculiarly to be attended to by a loving and devoted daughter; and it would be strange, indeed, if, in addition to a house and lot worth $6,000,—almost all the mother possessed in the way of property,—the filial affection of the child would not stimulate and cause her to consider such services as included in the contract, and so intended by the party to be charged, and that the same would be so understood by the party with whom it was made. The validity of the deed depends upon the power to enforce the specific performance of the defendant's mutual and dependent contract. As it could not be enforced, under the rule laid down in Cooper v. Pena, 21 Cal. 409, and King v. Gildersleeve, 79 Cal. 509, 21 Pac. Rep. 961, we think the court below was warranted in giving its judgment on the findings made; and we advise that the judgment be affirmed,—there being no prejudicial error disclosed by the record.

We concur: Vanclief, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

(93 Cal. 237)

Brown v. Rouse. (No. 13,827.)

(*Supreme Court of California.* Feb. 4, 1892.)

Action on a Note—Pleading and Proof—Consideration.

In an action on a note for $1,200 the complaint alleged that it was executed by defendant through her attorney for money loaned, but the power of attorney attached to the complaint did not purport to confer authority to borrow money or execute the note. The complaint also alleged that on the day the note was dated plaintiff paid out, for and at the request of defendant, $580, and that said sum formed part of the consideration of the $1,200 note. There was no other consideration alleged. *Held*, that plaintiff could recover the $580, but that under the complaint he could not recover the balance of the $1,200 note, though it may have appeared from the evidence that the balance of the amount of the note was, on the day the note was dated, paid to defendant's attorney, and that the loan was afterwards ratified by defendant.

Department 1. Appeal from superior court, Santa Clara county; F. E. Spencer, Judge.

Action by one Brown against one Rouse. Judgment for plaintiff, and defendant appeals. Reversed.

John H. Durst and *W. A. Nygh*, for appellant. *W. C. Kennedy*, for respondent.

Harrison, J. The complaint in this case is not to be commended as a model of pleading. It alleges that the appellant, though her attorney, executed to the plaintiff a promissory note for the sum of $1,200, and a mortgage to secure its payment, and that the power of attorney under which the same were executed, although properly acknowledged, in fact did not have a sufficient certificate of acknowledgment; and asked, as a part of the relief, that the certificate of acknowledgment be corrected according to the facts. The power of attorney was annexed to the complaint, but, as it did not purport to confer any authority, either to borrow money or to execute a note or mortgage, the sufficiency and correctness of the certificate became immaterial. For the same reason the plaintiff could have no relief upon either the note or mortgage. The plaintiff, however, alleged in his complaint that on the 18th day of November, 1887, (the day on which the note was dated,) he "did pay, for and at the request of the defendant, the sum of $580, in full release and discharge of a certain note and mortgage" that had been executed by the defendant, and "said sum of $580 forms a part of the consideration of the note and mortgage of $1,200" set forth in the complaint. There is no other consideration for the note sued on alleged, and, as the note was made without any authority from the appellant, it did not in itself import any consideration against the defendant, and the plaintiff was limited to a recovery upon the actual consideration which he had alleged, viz., the amount of money paid by him at the request of the appellant. The appeal is simply from the judgment, and we are not informed of the evidence introduced at the trial. The court, however, found that on the 18th day of November, 1887, the attorney of the appellant "borrowed from the plaintiff the sum of $1,198," and gave to the plaintiff therefor the note and mortgage set forth in the complaint; and thereafter the plaintiff, at the request of said attorney, paid the sum of $470 in satisfaction of a note and mortgage previously executed by the appellant, and that this sum of $470 was a part of the consideration for the note and mortgage set forth in the complaint. The court also found that the appellant subsequently received from her attorney "the residue of said $1,198 paid by plaintiff after deducting said $470," and ratified and confirmed the loan made by the plaintiff. We must assume that there was evidence before the court sufficient to sustain these findings, and, if the facts therein contained had been alleged in the complaint, the judgment should be affirmed. The finding that the appellant ratified the loan would be sufficient to sustain a judgment against her for the full amount of the loan, if such a cause of action had been alleged in the complaint. The only cause of action which the plaintiff has stated in his complaint is for the sum of $580, paid out by him at the request of the appellant, and he has not alleged that he loaned any sum of money to her. The fact that the court received evidence of another cause of action than that alleged in the complaint, even though it was for money loaned upon the same day as was the payment for the account of the appellant, did not justify the court in rendering judgment upon such cause of action. Finding 6, made by the court, is contradictory in itself. The court finds that the plaintiff did, at the request of the appellant's attorney, who was acting as her agent, pay the $470 in satisfaction of a note that had been executed by her; and it also finds that said payment was purely voluntary on the part of the plaintiff. The motion to dismiss the appeal is denied. The judgment dismissing Durst from the action left the plaintiff and the appellant as the only parties who could be affected by any reversal thereof. The judgment is reversed, and a new trial ordered.

We concur: PATERSON, J.; GAROUTTE, J.

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93 Cal. 283

WETHERLY v. STRAUS. Feb. 6, 1892.)

(*Supreme Court of California.* Feb. 6, 1892.)

BAILMENT—FAILURE TO DELIVER—ACTION FOR—PLEADING AND PROOF—HUSBAND AND WIFE—GIFTS BETWEEN.

1. In an action by a bailor against a bailee for failure to surrender on demand a certificate of deposit, after it had been attached by creditors of the bailor's husband, the bailee, under allegations that the money represented by the certificate belonged to bailor's husband, and was deposited by her as his agent, cannot maintain that the money was given to the bailor by her husband to defraud his creditors; since, under Civil Code, § 3442, providing that the question of fraudulent intent is one of fact, and not of law, fraud must be pleaded.

2. A voluntary gift by a husband to his wife of the proceeds of a sale of their homestead is not *per se* fraudulent, as against his creditors.

3. Where, under Civil Code, § 1822, providing that a depositary must deliver the thing to the person for whose benefit it was deposited, on demand, unless he has been forbidden or prevented from doing so by the real owner, or by act of the law, a deposit is attached by creditors of the bailor's husband, the depositary, claiming that the deposit was held by the bailor only as agent for her husband, can justify his retention of the deposit only by proof that it actually belonged to the husband.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Wetherly against Straus for failure to deliver a certificate of deposit. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Estee, Wilson & McCutcheon, for appellant. *J. T. Rogers*, for respondent.

HARRISON, J. The plaintiff deposited with the defendant on the 3d of September, 1888, for safe-keeping, a certificate of deposit that had been issued to her own order. On the next day an action was commenced by one Haviland, representing certain assigned claims, (of which one was assigned by the defendant,) against the firm of Bannister & Wetherly, and under a writ of attachment issued in said action a garnishment was served upon the defendant against the certificate of deposit that had been left with him by the plaintiff. The defendant gave no notice to the plaintiff of these proceedings until after she had demanded the certificate, on the 14th of September, when he told her that it had been attached, and that he could not give it to her. Thereupon she brought this action for damages sustained by his conduct. The defendant in his answer alleged that the money represented by the certificate was the property of the plaintiff's husband, defendant in the above suit, and that the deposit was made and the certificate issued to her only as the agent and trustee of her husband, and that after it had been deposited with him the garnishment above named had been served upon him, and that he had ever since the 4th of September held the certificate under and pursuant to said writ of attachment and garnishment. At the trial the plaintiff testified that the money represented by the certificate was a portion of the proceeds derived from the sale of the homestead of herself and her husband at Winnemucca, which she had negotiated and conveyed upon the consideration that she was to have the money for which it was sold, with which to buy a less expensive home, and that after its sale her husband had given her the money, and that with it she had procured drafts upon San Francisco, for which the certificate of deposit was issued. The defendant offered evidence in support of the defense that the certificate had been attached as the property of the plaintiff's husband in the suit of Haviland agains the firm of Bannister & Wetherly. The jury rendered a verdict in favor of the plaintiff, and from the judgment entered thereon, and an order denying a new trial, the defendant has appealed.

The claim on the part of the appellant that the money represented by the certificate of deposit had been transferred to the plaintiff by her husband with intent to defraud his creditors, and, being for that reason fraudulent and void, was subject to attachment at the instance of his creditors, cannot, under the issues presented by his answer, be maintained. Such a claim concedes the validity and completeness of the transfer as between the parties, but seeks to set it aside in favor of creditors, upon the ground that it was made with a fraudulent intent; and inasmuch as such fraudulent intent is "one of fact, and not of law," (Civil Code, § 3442,) it is necessary for one who would avail himself of this fact to aver it in his pleading as one of the elements of his cause of action or defense. The appellant made no averment of this fact in his answer, but relied therein upon the ground that the money was at all times the property of the husband, and was never the separate property of the plaintiff, as she had alleged in her complaint, and that its deposit by her in the bank was, "as the agent" of her husband, and that the certificate of deposit was issued to her "as the agent and trustee" of her husband, and "not otherwise." Upon this issue there was evidence before the jury from which it could find that the money had been given to the plaintiff by her husband, and was her separate estate. If the appellant had intended to avoid such gift, he should have made proper averments therefor in his answer in order that the plaintiff might meet them at the trial. Fraud is never to be presumed, and whenever it constitutes an element of a cause of action or of a defense which is of an affirmative nature, and invoked as conferring a right against the plaintiff, it must be alleged. The necessity of such averment in the present case is apparent from the facts shown at the trial. The homestead from which the money was derived was not subject to the claim of any creditor of the plaintiff's husband, and a transfer of it by the husband to her could not, under any circumstances, be held, as a matter of fact, to be with the intent to defraud his creditors. His creditors could not, by any legal process, take the property covered by the homestead, and its voluntary transfer to the wife would not "obstruct the enforcement by legal process" of any right to take the property affected by the transfer, (Civil Code, § 3441;) neither would such transfer of its proceeds.

The defendant, having received the certificate as a mere depositary for safekeeping, was bound to deliver it to the plaintiff on demand, unless he had a lien upon it, or was forbidden or prevented from doing so by the real owner or by the act of the law, and had given the notice required by section 1825, Civil Code; Id. § 1822.[1] The only excuse given for not delivering it was the garnishment served upon him in the suit against her husband. It is not claimed that the appellant gave, or attempted to give, the plaintiff any notice of such garnishment until after she had made the demand, and her testimony that at the time of depositing the certificate with him she informed him of her place of residence was not disputed by him. A bailee can assert a *jus tertii* in an action by the bailor only when he defends on such title and by the authority of such third person. Palmtag v. Doutrick, 59 Cal. 168; Dodge v. Meyer, 61 Cal. 423. When the bailor has obtained the property by some fraud practiced upon the true owner, the bailee can, upon the authority of such true owner, or when he has been forbidden to make delivery of the property, defend upon such true owner's title; but he always assumes such defense at his peril, and takes upon himself the burden of showing the right to retain the property under such instructions. In the present case the appellant does not pretend that the husband has given him any authority to make the defense, but his claim to retain the certificate is based upon his other claim that the money, as well as the certificate, was never given to the plaintiff, but was held by her for her husband as his agent; and that a garnishment therefor against the husband has been served upon him; and the only ground upon which in his answer he justified his refusal to deliver it to the plaintiff is that ever since the 4th day of September, 1888, he has held, and does now hold, said certificate "under and pursuant to said writ of attachment, and the said notice and command of said sheriff as aforesaid." Such right to hold the certificate depends entirely upon his ability to prove that it belonged to her husband, but the evidence showing that the husband had given the money to the plaintiff destroyed the defendant's right to retain the certificate under this claim.

Various exceptions were taken at the trial to the rulings of the court and its instructions to the jury, but an examination of the record shows that the court instructed the jury in accordance with the principles herein, and in its other rulings we are of the opinion that no error was committed which would justify a reversal of its judgment or order. The judgment and order denying a new trial are affirmed.

We concur: Paterson, J.; Garoutte, J.

93 Cal. 288

Sheehy v. Miles *et al.* (No. 13,913.)

(*Supreme Court of California.* Feb. 6, 1892.)

Vendor and Vendee—What is Perfect Title—Community Property—Homestead—Rights of Surviving Widow and Children—Probate Court—Jurisdiction.

1. Under a contract for the sale of land, which provides for a perfect title, the title must be free from reasonable doubt, and fairly deducible of record.

2. Code Civil Proc. § 1468, prior to April, 1880, provided that when property was set apart for the use of the family the widow should take one-half, and the minor children one-half. *Held*, that under the section as amended in April, 1880, providing that property set apart for the use of the family should be "for the benefit of the several parties," the widow and each of the minor children took equal shares as tenants in common.

3. The proportional interests which a widow and minor children take in community property set apart for their use as a homestead are determined by the statute in force at the time the order of probate is made.

4. In an action by a vendee of land to recover a payment on the ground that the vendee's title was imperfect, the validity of the offered deed depended on whether a homestead which a prior owner had formerly acquired in the land was at the time of his death, five years later, still subsisting. *Held*, that the recitals in the homestead claim were not evidence to the vendee that at the time of said owner's death the homestead was still subsisting, and that the vendee need not accept the vendor's statement that the homestead was still subsisting, nor seek extraneous information in regard thereto.

5. On the death of a husband, community property on which a homestead exists vests absolutely in the widow.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by John Sheehy against Edwin Miles and Kate Miles to recover a deposit made on a sale of land. Judgment for plaintiff. Defendants appeal. Affirmed.

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[1] Civil Code, § 1822, provides: "A depositary must deliver the thing to the person for whose benefit it was deposited, on demand, whether the deposit was made for a specified time or not, unless he has a lien on the thing deposited, or has been forbidden or prevented from doing so by the real owner thereof, or by act of the law, and has given the notice required by section 1825."

F. J. Castelhun, for appellants. *Sawyer & Burnett*, for respondent.

GAROUTTE, J. This is an appeal from a judgment in favor of plaintiff in an action to recover a deposit made on a sale of real estate situate in the city and county of San Francisco, the plaintiff claiming the title to be defective. The condition of defendants' title to the tract of land—as to whether or not it is a good and perfect title—is the only question involved upon this appeal.

In the case of Turner v. McDonald, 76 Cal. 177, 18 Pac. Rep. 262, this court said, "A perfect title must be one that is good and valid, beyond all reasonable doubt;" and in that case it was conceded by counsel upon both sides that a title, to be good, "should be free from litigation, palpable defects, and grave doubts, should consist of both legal and equitable titles, and should be fairly deducible of record." It would seem, in fairness to the vendee, that the foregoing requirements should be held absolutely necessary in order to fully satisfy the covenant of perfect title. Certainly, such a condition of title must exist before it can be said to be good and valid beyond reasonable doubt. See Reynolds v. Borel, 86 Cal. 538, 25 Pac. Rep. 67; Richmond v. Gray, 3 Allen, 27; Sturtevant v. Jaques, 14 Allen, 526.

While the record here is silent as to the facts, we will assume that upon the 15th day of December, 1874, the legal and record title to this tract of land was vested in George Styles. Upon that day he filed a homestead upon the property, in all respects in conformity with law, setting forth, among other things, that he resided upon the property with his family, consisting of Jane Styles, his wife, and three children, and that said property was community property. Upon March 28, 1879, he died. Upon November 4, 1880, the widow petitioned to have the property set apart as a homestead for the use of the family. The court set it apart as a homestead for the use of the family, consisting of Jane Styles, widow, and George, Robert, and William Styles, minor children. One Samson was appointed guardian of the estates of the said minors, and returned in an inventory and appraisement an undivided one-half of said property as the estate of said minors; and, upon proceedings in the probate court, said property of the minors was sold to defendant Kate Miles, who at the same time received a deed of bargain and sale to all of said property from said Jane Styles. It is insisted by respondent, and was so found by the court, that by reason of the order setting aside the property as a homestead for the use of the family the widow and children took thereof in equal shares, and that consequently the title to an undivided one-fourth interest in said property still remains in said minors; the guardian's deed to defendant Kate Miles only purporting to convey an undivided one-half interest thereof. In 1880, at the time the order of the probate court was made, setting aside this property for the use of the family, section 1468 of the Code of Civil Procedure read as follows: "When property is set apart for the use of the family, such property shall be for the benefit of the several parties, as provided in section 1465 of this Code." Prior to April, 1880, this section provided that the widow should take one-half of the property set apart, and the minor children one-half. At the session of the legislature of 1881 the section was again changed so as to read practically as it did prior to the provision of 1880. We must assume that the legislature meant something by the varied and repeated legislation with reference to this section of the Code. If the quantum of this homestead property which was to pass respectively to the widow and minor children under the law as it stood in 1879 was not changed by the amendment of 1880, why the change in the law? Why idle and useless legislation? And, again, why did the legislature, in 1881, return to the old law? This question as to the vesting of the title to the homestead was the only subject of legislation involved in the section during all these changes, and the amendments at these various times were so substantial as to amount to repeals of the section as it previously stood. It would seem that under the section as quoted the widow and minor children took equal shares in this property as tenants in common. This is its intent, or it has no meaning whatever. "When parties take title and hold as tenants in common, each will be deemed to hold an equal share; there being nothing to indicate to the contrary." Hardenbergh v. Bacon, 33 Cal. 378. In this decree there is nothing to indicate to the contrary. The section of the Code is absolutely silent upon the question, and we conclude the legislative intent must be held to have been that the minor children should share equally with the widow. Consequently, if these probate proceedings were valid, and any title whatever to this property vested in these minors by reason thereof, then an undivided three-fourths vested, and they still remain possessed of the title to an undivided one-fourth thereof.

Appellants insist that as Styles died in 1879, the property being community, one-half vested immediately in the widow and one-half in the children, subject to be set apart as a homestead under the law as it stood at the time of his death, and that section 1468, as amended in 1880, if applicable to this case, would deprive the widow of vested rights. As the homestead law in existence at the time of Styles' death was repealed by the law of 1880, this reasoning would force us to the conclusion that no homestead whatever could be set apart out of this property. In Re Estate of Boland, 43 Cal. 642, the court said: "The right of Margaret Lane to have a homestead set apart to her from the estate of her former husband, John Boland, must, therefore, be determined from the facts as they existed on the 3d day of January, 1870, when the order of the probate court was made." And in Sulzberger v. Sulzberger, 50 Cal. 388, the court said: "The homestead is to be set apart in pursuance of the statute in force at the time when the order is made, and the interest therein which the widow and the surviving child will take is to be determined by the same statute." In this case it was also decided that the right to have a homestead set apart out of the testator's separate property was paramount to his right to devise the property. We conclude, therefore, that the order of the probate court setting aside this property as a homestead, under section 1468 of the Code of Civil Procedure, as it existed at the date of the order, did not give that provision a retroactive effect, and interfered with no vested rights of the widow. It follows that unless Jane Styles, the widow, by right of survivorship, under her recorded homestead, became the owner in fee of this entire property, title to a one-fourth interest thereof is still outstanding in the minor children.

It is settled law in this state that on the death of the husband the community property upon which a homestead exists vests absolutely in the widow; and in the case of Watson v. His Creditors, 58 Cal. 556, it was held that the court had no power to made a decree setting the property apart for the use of the family when such a homestead existed, and that the effect of such a decree, no matter how broad its language, is simply to take the property out of administration. This principle is supported by many authorities, and is undoubtedly the true rule; but these decisions are founded upon the previous determination of the court that a valid recorded homestead upon community property is in full life at the date of such decree, and in this case there was no record, official or otherwise, to bring home to the vendee knowledge of any such state of facts. To be sure, the trial court found that this property was community property, and that Styles and his wife resided upon it at the date of the homestead, and that the homestead had not been abandoned, and that Styles died in 1879; but we cannot see how these findings of the court, tending to show that this homestead was a valid homestead, such as would vest the title in fee in the widow upon the death of said Styles, would indicate a good and perfect title to Sheehy, the plaintiff in this action, at a period weeks previous to the time when these findings were made. All the plaintiff knew about the *status* of the title to this property was from the recorded homestead. The recitals therein filled the full measure required by the statute, but they were not binding on third parties; for their truth could be assailed by any person having an interest in setting aside the homestead. The vendee is not required to rely upon the word of mouth of the vendor that he has good title. The title must be produced before him in some tangible form, in order that it may be measured and weighed. In this case the recitals in the homestead were not evidence to the vendee that the title was good. Neither was he compelled to go out into the world upon an exploring expedition, and by an examination of witnesses determine—and perchance determine wrongly—the existence of those facts that were necessary to exist in order that Jane Styles, the widow, may have acquired this property by right of survivorship, to-wit, that it was community property; that Styles and his wife resided upon the property, with their children, at the time the homestead was declared and recorded; that it had not been abandoned; that it was not void by reason of a previous homestead having been declared; that Styles was dead, etc. Under this agreement, which contains a covenant of perfect title, when considered in connection with the condition and appearance of this title as it is presented to us, if this were an action for specific performance, it would seem no court of equity would compel the vendee to pay $10,000 for this tract of land. In addition to these matters, which are presented from a consideration of the record homestead, the vendee was confronted with this probate homestead, and the proceedings pertaining to the sale of the various interests derived therefrom. As we have seen, those authorities holding that decrees of the court setting aside probate homesteads from property upon which recorded homesteads rested were void and of no effect gave the vendee in this case no light as to the condition of this title; for he possessed no knowledge, and was not required to go forth seeking knowledge, as to whether or not this recorded homestead was such as to vest title in the widow upon the death of Styles. The inference more properly to be drawn from this action of the court in setting aside the probate homestead would be that the court would not do an idle thing, by making a useless decree, and that from some cause shown at that time the recorded homestead was adjudged void, and that this decree was a valid decree made by the court to preserve the property to the use and benefit of the family as best it could.

For the foregoing reasons, we conclude that appellants' title to this realty was not free from palpable defects and grave doubts, was not fairly deducible of record, and was not a good and valid title, beyond reasonable doubt. Let the judgment be affirmed.

I concur: Paterson, J.

Harrison, J., (*concurring.*) **1.** Upon the facts found by the trial court, the declaration of homestead filed for record in the county recorder's office by George Styles had the effect, upon his death, to vest in his surviving widow all the estate in the land therein described that was held by him in his life-time, and her deed to the appellant Kate Miles transferred to her the same estate. The order of the probate court setting this land apart as a homestead for the benefit of the widow and minor children, although made upon the application of the widow, did not divest her of the title that had already vested in her by virtue of her survivorship. That court had no jurisdiction of the subject-matter with which it purported to deal, and its order thereon was without any effect upon the title thus held by the surviving widow. The jurisdiction which is conferred upon the superior court "in all matters of probate" is separate and distinct from the ordinary jurisdiction which it exercises in civil matters, and is limited in its exercise to property of the estate of a decedent which is under its control in course of administration; and, as at the instant of the husband's death his widow became vested with the entire estate in the land, the court had no more jurisdiction over it than it had over any other land in which the decedent may have held a life-estate, and could make no order affecting its title or the right to its possession. The order setting it apart as a homestead for the use of the widow and minor children had only the negative effect of declaring that it was not subject to administration, except that, if the estate of the decedent had any interest in the land subject to administration, such interest would, by virtue of the order, pass to the widow and minor children. Whether or not the extrinsic facts were such as to cause the filing of the declaration to impress upon the land the character and incidents of a homestead, were matters *in pais*, and beyond the jurisdiction of the court sitting in probate to determine. Any issue involving that question, as well as the widow's right of survivorship, must be determined in a different forum, and could not be determined upon an application to the court in probate to set the property aside as a homestead. If the court, upon the contention of any party interested that the property was a part of the estate, notwithstanding the declaration of homestead that had been filed in the life-time of the decedent, should, upon an application therefor, set it apart as a homestead, it would still follow that only such interest as belonged to the estate could be affected by such order; and any controversy between the widow, claiming as survivor, and the children, claiming under this order, could not be determined by the probate court.

2. Assuming, however, that the filing of the declaration was insufficient to impress the land with the homestead claim, and that the land was a part of the estate of the decedent subject to administration, the effect of the order setting it apart was to vest the interest of the decedent's estate in the land so set apart in the "several parties" constituting the family, as is clearly shown in the opinion of Mr. Justice GAROUTTE; the widow and minor children each taking an undivided fourth. As the sale by the guardian did not purport to be for more than an undivided half of the property, it is evident that one-fourth of whatever interest passed under the order setting it aside as a homestead is still outstanding in the minor children.

3. It is a settled rule of this court that, under a contract for the sale of land which provides for a perfect title, the title must be free from reasonable doubt, and fairly deducible of record. The vendee is not required to accept a title depending upon adverse possession, or upon matters which rest purely in parol. Under this rule the respondent was not required to accept the title tendered him by the appellant. If the homestead created in the life-time of Styles was for any reason ineffective, it is conceded that an undivided one-fourth of the land was not embraced in that deed. The respondent was not compelled to accept the statement of the appellant, or of any one under whom she claimed, that at the time of filing the declaration the facts existed from which the homestead claim was thereby impressed upon the land, so that upon the death of Styles the title vested in his widow; nor was he under any obligation to institute such examination, and determine at his own risk whether they did exist.

4. The petition for the guardian's sale of the interest of the minors in the land was, in my opinion, sufficient in form to give to the court jurisdiction to make the order of sale.

For these reasons the judgment should be affirmed.

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93 Cal. 300

UNDERHILL v. SANTA BARBARA LAND, BLDG. & IMP. CO. *et al.* (No. 13,955.)

(*Supreme Court of California.* Feb. 8, 1892.)

CORPORATIONS — CONTRACTS — ULTRA VIRES — ASSENT OF STOCKHOLDERS—BY-LAWS—CORPORATE NAME.

1. Where a corporation executed two nonnegotiable notes and two mortgages, the consideration therefor being the promise of the mortgagees to advance money and deliver lumber as needed and ordered by the corporation for the improvement of the mortgaged property, and the money was advanced and the lumber delivered, and there was no fraud on the part of the mortgagees, such indebtedness was not fictitious.

2. Such indebtedness is not "bonded indebtedness," in the sense of Const. art. 12, § 11, forbidding, except on certain conditions, the increase by corporations of their bonded indebtedness.

3. Though the notes and mortgages were given for a debt larger than the subscribed capital stock of the corporation, their execution was not prohibited by Civil Code, § 309, forbidding directors of corporations from creating debts beyond the subscribed capital stock, and for a violation of this provision making the directors who create such debts jointly and individually liable to the corporation. HARRISON, J., dissenting.

4. It was shown that after the execution of the first note and mortgage, which was for a sum much greater than the subscribed capital stock, the matter was discussed at a meeting of the stockholders of the corporation, at which a resolution was passed affirming all the acts of the directors since the organization of the company. It further appeared that the mortgagees were engaged for about six months in carrying out their part of the contract, and that at a meeting of the stockholders subsequent to the execution of the second note and mortgage the whole matter was discussed, and no objection was then made to the acts of the directors in creating the indebtedness, though no formal resolution of approval was passed. There was no evidence that any stockholder ever objected to these transactions of the corporation until after the full consideration of the notes and mortgages was received. *Held*, that the by-law which forbade the directors creating any indebtedness exceeding the amount of the subscribed capital stock was waived.

5. Where the body of the second note expressed the promise, and the mortgage expressly purported to be the mortgage of the "S. B. Land, Building & Improvement Company," (its proper name,) but the note is signed by the president and secretary of the "S. B. Land & Improvement Company," and the mortgage is signed by the same parties as president and secretary of

the "Land & Improvement Company," and both the note and the mortgage were attested by the corporate seal, there can be no doubt as to what corporation executed the mortgage.

Beatty, C. J., dissenting.

In bank. Appeal from superior court, Santa Barbara county; R. M. Dillard, Judge.

Action by Francis Underhill against the Santa Barbara Land, Building & Improvement Company and Martha S. Barker for the foreclosure of two mortgages. Judgment for plaintiff. Defendants appeal. Affirmed.

D. P. Hatch, *C. A. Starke*, *J. F. Conroy*, and *Thos. McNulta*, for appellants. *Cope & Bayse*, for respondent.

Per Curiam. The following opinion prepared by Commissioner Vanclief, while this cause was pending in department, is hereby adopted as the opinion of the court in bank, and for the reasons therein given the judgment and order appealed from are affirmed:

"The Santa Barbara Land, Building & Improvement Company is a corporation purporting to have been organized under title 16 of the Civil Code, §§ 639-647. The purposes for which it was organized, as expressed in its articles of incorporation, are 'the purchase of real estate, the construction of buildings, and making improvement on real property;' its principal place of business is the city of Santa Barbara, Cal.; and its capital stock is $12,000, divided into 480 shares, of $25 each. The action is to foreclose two mortgages on real property of the corporation, alleged to have been executed by the corporation to Gorham & Co., (a copartnership,) and by the latter assigned to the plaintiff. Martha S. Barker was made a defendant, on the ground that she held a subsequent mortgage on the same property. Both defendants answered, denying all the material allegations of the complaint, except the allegation that the Santa Barbara Land, Building & Improvement Company was duly incorporated, which they expressly admitted, and alleging affirmative matters to show that the notes and mortgages were not executed by the corporation, and that the attempted execution of them was in excess of the power of the corporation. The judgment was for the plaintiff, ordering a sale of the mortgaged property, and application of the proceeds to the satisfaction of plaintiff's mortgages in preference to that of the defendant Barker. Both defendants appeal from the judgment and from an order denying their motion for a new trial; and the corporation also appeals from an order made after judgment, requiring it to file an undertaking in the sum of $12,000 to stay execution pending the appeal from the judgment.

"1. Appellants contend that the notes and mortgages constitute 'bonded indebtedness' of the corporation, in the sense of section 11 of article 12 of the constitution of this state; and, inasmuch as they were not executed in pursuance of any general law, nor with the consent of a majority of the stockholders at a meeting called for that purpose, on 60 days' notice, the execution of them was *ultra vires*. They also contend that the indebtedness was fictitious. The court found, however, from evidence sufficient to justify the finding, that the consideration for the notes consisted of money advanced to and paid for the corporation, and property sold and delivered to it by Gorham & Co. equal in value to the principal sums for which the notes were made; and that the whole consideration for said notes was applied by the corporation to the construction of fences, buildings, and other fixtures upon the mortgaged property. But only a part of the consideration for each note had been received by the corporation at the date of the note. Each note and mortgage was executed in pursuance of a previous agreement that Gorham & Co. were to advance and pay money and deliver lumber as needed and ordered by the corporation for the improvement of the mortgaged property, and the money was so advanced and paid and the lumber so delivered. The full consideration for the first note and mortgage (dated July 1, 1886,) was received by the corporation before the second note and mortgage were executed, and the full consideration for the second note and mortgage (of November 1, 1886) was received by the corporation before January 4, 1887. No fraud on the part of Gorham & Co. is charged, and all the transactions seem to have been in the ordinary course of business, and within the purview of the purposes for which the corporation was organized. Certainly the indebtedness secured by the notes and mortgages is not 'fictitious,' in any sense of the word. Nor is the indebtedness 'bonded indebtedness,' in the sense of section 11 of article 12 of the constitution. Without undertaking to define the meaning of the term 'bonded indebtedness,' as used in the constitution, it may be confidently asserted that it does not embrace a non-negotiable note and mortgage executed by a corporation to secure its indebtedness for money loaned, money paid, property purchased, or labor performed in the ordinary course of its authorized business, and actually received and used in such business. The notes under consideration are not negotiable, as they are payable to Gorham & Co. alone; and they were executed for the considerations received and used, as above expressed. Manifestly, it is not the intention of the constitution to prohibit the increase of all kinds of indebtedness, since the prohibition of a particular kind implies that there may be indebtedness of another kind; and, if a corporation may incur and increase any kind of indebtedness without sanction of a general law and consent of a majority of the stockholders, what is the objection to securing all such indebtedness by mortgage? If the constitution does not prohibit a corporation from securing every kind of indebtedness by mortgage, it follows that the mere fact that a corporation debt is secured by mortgage does not show that it is of the kind prohibited, and that the prohibited kind must be distinguished by some other attribute than that of mortgage security. It will hardly be contended that section 11 of article 12 of the constitution was intended to prohibit all increase of indebtedness not authorized by a general law and consent of a majority of the stockholders; much less, that it was intended to prohibit mortgage security for any kind of indebtedness which a corporation may lawfully incur. Conceding that, to constitute 'bonded indebtedness,' in the constitutional sense, it must be secured by mortgage, it does not follow, as contended by counsel, that all indebtedness secured by mortgage is 'bonded indebtedness' in that sense.

"2. Counsel for appellants further contend that inasmuch as the notes and mortgages were executed for indebtedness beyond the subscribed capital stock of the corporation, their execution was prohibited by section 309 of the Civil Code, which provides that directors of corporations must not 'create debts beyond their subscribed capital stock,' and that, for a violation of this provision, 'the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen) are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the * * * debt contracted. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts upon its dissolution or the expiration of its term of existence.' Upon a careful reading and construction of this section, in connection with section 354, defining the powers of corporations generally, and section 640, relating to the power of the special class of corporations to which the defendant corporation belongs, I think it will appear that it was not the intention of the legislature, by the enactment of section 309, to deprive corporations of the power to create debts beyond their subscribed capital stock, but merely to provide a remedy in favor of the corporation and its creditors against those members of the board of directors by whose improvident or fraudulent exercise of the powers of a corporation debts are created disproportionately to the subscribed capital stock, and beyond the ability of the corporation to pay. The section does not provide that the contracts or attempted contracts by which the excess of debts is created shall be void, but, on the contrary, seems to imply the power of the corporation to make them, and that they are valid contracts. If they are void, and create no liability of the corporation, it would be absurd, as well as unjust, to make the individual directors liable to the corporation, especially if the corporation had received a consideration equal in value to the debts created; but, as indemnity to the corporation, in case it should be compelled to pay such debts, or to its creditors, in case of the insolvency of the corporation, such liability of the directors is reasonable and just. On the construction contended for, the corporation may receive and retain the consideration, and then repudiate the debt. Again, section 309 does not purport to limit the power of the corporation, but only to regulate and check the exercise of that power by the directors, as might have been done by a by-law, though not to the extent of making the directors liable for the excess of debts. In regard to the effect of statutory prohibitions on the validity of acts thereby forbidden, Mr. Taylor, in his work on Private Corporations, at section 297, deduces from the cases the following rule: 'If a statute expressly forbids a corporation to make a certain contract, the contract is void, even though not expressly declared to be so, and is incapable of ratification; and that the contract is void as unlawful may be pleaded by any one to an action founded directly and exclusively on the contract, unless (1) the statute expressly states what the consequences of violating it shall be, and those consequences are other than that the contract is void; or (2) the statutory prohibition was evidently imposed for the protection of a certain class of persons who alone may take advantage of it; or (3) to adjudge the contract void and incapable of forming the basis of a right of action would clearly frustrate the evident purposes of the prohibition itself.' The learned author then proceeds to illustrate the rule and its qualifications by the cases. In the first place, it is to be observed that section 309 of the Civil Code does not come within this rule, even without the qualifications, for the reason that it does not expressly forbid the corporation from creating debts, etc. In the second place, it does clearly fall within the first qualification, if not within the second and third, since it does state consequences of violating it other than that the contracts creating the debts are void, and does not state that such contracts are void. From the foregoing considerations it follows that the creation of the indebtedness to plaintiff's assignor, and securing it by notes and mortgages, was not prohibited by section 309 of the Civil Code.

"3. It is also claimed that the creation of the indebtedness was *ultra vires* by force of a by-law of the corporation which provides that 'no indebtedness shall be incurred by the board of directors for any purpose whatever, which in the aggregate shall exceed the amount of capital stock actually subscribed at the time such indebtedness is incurred.' This by-law is the creature of the corporation, acting through and by its stockholders, and generally for their benefit alone, and the same authority that enacted it may repeal it. Tayl. Corp. § 584; Smith v. Nelson, 18 Vt. 511. Furthermore, if a course of action contrary to a by-law of a private corporation is acquiesced in by the shareholders, the by-law is thereby waived, and will not affect the rights of persons dealing with the corporation in good faith, (Tayl. Corp. § 197, and cases there cited,) even though such persons may be shareholders, if they did not have actual notice of the by-law; and, where notice is material, 'it must be proved against shareholders and agents, as well as against strangers, by direct or presumptive evidence, and cannot be imputed by an arbitrary rule of law,' (Mor. Corp. § 500, and cases there cited.) Acts of the directors in violation of a by-law may be ratified by the shareholders, (Id. §§ 623–625; Tayl. Corp. §§ 187, 213,) and, generally, by the same number of shareholders that would be necessary to enact them, (Mor. Corp. § 626.) Such ratification need not be formally made in a meeting of the stockholders, but may be presumed from the circumstances of the case, such as long acquiescence in acts beneficial to the corporation, with knowledge of all the material facts. In this connection it has been said: 'Very slight evidence of acquiescence is sufficient to give validity to a transfer of real or personal property to an agent who was not authorized to receive it, and a ratification may even be presumed without evidence.' Id. § 629. 'Nor can the shareholders of a corporation avoid responsibility for the unauthorized acts of their agents by abstaining from inquiry into the affairs of the company, or by absenting themselves from the company's meetings, and at the same time reap the benefit of their acts in case of success.' Id. § 630. See, also, Tayl. Corp. § 112 et seq.; Green's Brice, Ultra Vires, p. 546, note *a;* Shaver v. Mining Co., 10 Cal. 396. In this case the authority of the directors to create the indebtedness of the corporation to plaintiff's assignor, and to execute the notes and mortgages to secure such indebtedness, contrary to the by-law, was put in issue by the pleadings; and upon this issue the court found for the plaintiff, upon evidence tending to prove a ratification, which, when proved, is equivalent to original authority, and justifies a finding of original authority. This finding is justified by the evidence. It was proved that on the 10th day of July, 1886, after the execution of the note and mortgage for $10,000, a sum greatly exceeding the subscribed capital stock, a meeting of the stockholders, after discussing the matter of the note and mortgage, passed a resolution approving 'all the facts and proceedings of the present board of directors since the organization of the company.' Plaintiff's assignors, Gorham & Co., were engaged in delivering the lumber, and paying for labor to improve the mortgaged property, for a period of about six months, between June 1, 1886, and January 4, 1887, and all the lumber had been delivered and money paid for such labor, constituting the consideration for the notes and mortgages, before January 4, 1887, under such circumstances that all the stockholders who gave ordinary attention to the affairs of the corporation must have had notice thereof, and of the facts that the entire consideration of the notes and mortgages had been received and used by the corporation. The whole matter was talked over at another meeting of the stockholders, after the execution of the second note and mortgage, without objection to the acts of the directors in creating the indebtedness, although no formal resolution approving them was passed at the meeting. There is no evidence tending to prove that any stockholder ever objected to any part of the transactions of the corporation with Gorham & Co. until long after the full consideration for the notes and mortgages had been received by the corporation, and used in improving its real property. According to the authorities above cited, this evidence has a substantial tendency to prove a ratification which justifies the finding of original authority. The pleadings raise no issue as to the probative fact of ratification, and, if they had, a finding of the ultimate fact of authority is sufficient.

"4. There is nothing in the objection that the second note and mortgage were not so executed as to bind the corporation. There is no question that the president of the corporation, Charles P. Low, and the secretary, Henry B. Brastow, were authorized to execute the note and mortgage by resolution of the board of directors. The only alleged defect in the execution by them is that they described themselves as president and secretary of the 'Santa Barbara Land & Improvement Co.,' omitting from the name the word 'Building.' They attested the execution by the seal of the corporation. The body of the note expresses the promise of the corporation (properly and fully named) to pay, and the mortgage expressly purports to be the mortgage of the 'Santa Barbara Land, *Building* & Improvement Company;' but the note was signed as follows: 'CHAS. P. LOW, President of the Santa Barbara Land & Improvement Co. [Corporate Seal.] Attest: HENRY B. BRASTOW, Secretary.' And the mortgage was signed: '[Corporate Seal.] CHAS. P. LOW, President of the Land & Improvement Co. Attest: HENRY B. BRASTOW, Secretary.' The secretary is the proper officer to affix the corporate seal, and it devolves upon the party denying the execution of the deed to prove that he had no authority to affix it. The seal itself is *prima facie* evidence that it was affixed by proper authority. Ang. & A. Corp. § 224; Ditch Co. v. Zellerbach, 37 Cal. 543; Association v. Bustamente, 52 Cal. 192; Lighter Co. v. Simpson, 77 Cal. 286, 19 Pac. Rep. 426; Evans v. Lee, 11 Nev. 199 Lodge v. Montmollin, 58 Ga. 547; Morris v. Kell, 20 Minn. 531, (Gil. 474;) Sherman Center Town v. Swigart, (Kan.) 23 Pac. Rep. 569. Section 357 of the Civil Code provides that 'the misnomer of a corporation in any written instrument does not invalidate the instrument, if it can be reasonably ascertained from it what corporation is intended.' I think it can be reasonably ascertained from the note, and also from the mortgage, what corporation was intended. If there was any uncertainty as to whether Low and Brastow were president and secretary of the defendant corporation, or whether they were the persons authorized to execute the instruments, such uncertainty was removed by the pleading and evidence. The foregoing also applies to the certificate of acknowledgment which describes Low and Brastow as known to the notary 'to be the president and secretary of the Santa Barbara Land & Improvement Company, the corporation who executed the foregoing instrument.' As above stated, it appears upon the face of the mortgage with reasonable certainty that it was executed by the corporation defendant. The mortgage was therefore entitled to record. No person reading the mortgage and certificate of acknowledgment together could be mistaken as to what corporation executed the mortgage.

"5. The mortgage of the defendant Martha S. Barker is subsequent and subject to those of the plaintiff, and the court found, upon sufficient evidence to sustain the finding, that at the time she took her mortgage she had both constructive and actual notice of the mortgage to Gorham & Co., and of all the facts in relation thereto. Besides, her mortgage is subject to all objections founded upon section 11, art. 12, of the constitution of the state, and the by-law of the corporation, urged against the mortgages to Gorham & Co. Therefore the court did not err in adjudging her mortgage to be subsequent and subject to those of the plaintiff. The foregoing views of the case render all other points made by appellants immaterial. I think the judgment and order appealed from should be affirmed."

Beatty, C. J. I dissent.

Harrison, J. I dissent from the views expressed in the second proposition discussed in the foregoing opinion, and from the judgment of affirmance.

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93 Cal. 329

Schultz *et al.* v. McLean *et al.* (No. 13,991.)

(*Supreme Court of California.* Feb. 9, 1892.)

Equity—Rescission of Deed—Fraud of Agent.

1. A land-owner placed the title to his land in the hands of an agent, so that the latter might raise money to save the land from foreclosure. The agent reported to the owner that one M. would advance the money on certain terms, and the owner instructed him to accept M.'s proposition. Subsequently the agent reported that he had accepted the proposition, and that he had M.'s agreement as to terms in his possession. The owner, relying on such representations, handed his deed to the agent, with the understanding that the agent should deliver it to M., and that M. would hold the land under the terms mentioned in the agreement. It appeared, however, that M. had never entered into any such agreement, and that when he advanced the money he supposed he was taking a perfect title. *Held*, in a suit by the owner against M. for rescission, that as both parties were innocent, and the fraud had been practiced by the agent of the former, the relief prayed for would not be granted.

2. The fact that an agent is guilty of fraud, under Civil Code, § 1572, in making a promise which he has no intention of performing, and which he makes merely for the purpose of inducing a third person to execute a conveyance of land, does not render his principal guilty of fraud, if he accepts the conveyance without any knowledge of the contemplated fraud; and the grantor, therefore, is not entitled to a rescission, but only to the enforcement of the promise. Beatty, C. J., dissenting.

In bank. Appeal from superior court, San Luis Obispo county; James F. Breen, Judge.

Action by George Schultz and Henry Von Bargen against George D. McLean and others to obtain a rescission of a conveyance of real estate. There was judgment for plaintiffs, and defendants appeal. Reversed.

T. M. Osmont, (*D. M. Delmas*, *Wm. F. Herrin*, and *H. L. Gear*, of counsel,) for appellants. *Mr. Haggin* and *Van Ness & Dibble*, (*E. W. McKinstry*, *John J. Roche*, *Graves, Turner & Graves*, *James A. Waymire*, and *Pillsbury, Blanding & Hayne*, of counsel,) for respondents.

Garoutte, J. In addition to the facts of this case, disclosed by the findings hereinafter recited, it is proper to add that the plaintiffs, George Schultz and Henry Von Bargen, were the owners of a large tract of land in the county of San Luis Obispo, of the value of $45,000, which was mortgaged to one J. B. Haggin for about $26,000, who had obtained a decree of foreclosure, and was threatening to sell the land thereunder. Plaintiffs were clients of the law firm of Robinson, Olney & Byrne; and C. P. Robinson, a member of the firm, informed plaintiffs that he had a person in view who would advance the necessary money to save the property from sale under the judgment of foreclosure, but that such person would deal only with him, (Robinson,) and that for that reason it was necessary, for the purposes of the negotiation, to put the title to this land in his name. The plaintiffs, having implicit confidence in Robinson, caused the title, which was then standing in the name of one Louis Schultz, to be transferred to him, for the purpose of raising money to preserve the property. The person whom Robinson had in view was the defendant McLean, and Robinson assured plaintiffs that McLean would make the arrangement which will be found set out in finding No. 6. Plaintiffs and defendant McLean had no dealings, personally, pertaining to the transaction; but Robinson was the medium through which the entire matter was consummated. McLean insists that he was to have a perfect title to the property upon the satisfaction of the Haggin judgment, which he satisfied; and Schultz and Von Bargen insist that he took the property under the trust set out in finding No. 6. The conveyance to McLean was a bargain and sale deed, absolute in form, and signed by Schultz, Von Bargen, and Robinson. The foregoing facts are conceded by the record, and, in connection with the following findings of fact by the court, afford a sufficient history of the matters involved in this litigation. The findings which we deem necessary to consider are:

"(1) At all times named in the complaint the defendant C. P. Robinson was an attorney and counselor at law, admitted to practice in all the courts of this state, and practicing law in the city and county of San Francisco, in partnership with Warren Olney and J. K. Byrne, under the firm name and style of Robinson, Olney & Byrne. At all times from and including October, 1881, to and including March 8, 1884, plaintiffs were the clients of said firm of Robinson, Olney & Byrne, and employed said firm in their (plaintiffs') general business, and particularly to defend and protect their interests in the foreclosure suit referred to in the sixth finding herein, and for the purpose of obtaining advances of money upon the lands involved in said foreclosure suit, sufficient to pay the amounts due the plaintiff in said foreclosure suit, and thus to prevent the said mortgaged lands from being sold under said foreclosure proceedings, and lost to plaintiffs.

"(2) At all the times named in the complaint the defendant McLean was a client of the said law firm of Robinson, Olney & Byrne; and the said defendant Robinson, with the consent and approval of defendant McLean, acted for and on behalf of said McLean, and as his agent, in and about the transfer of the lands, as hereinafter stated by plaintiffs, to defendant McLean.

"(3) On or about June 12, 1882, the defendant C. P. Robinson represented to plaintiffs that a friend of his, whose name was not then disclosed, would loan and advance to the plaintiffs, upon the security of the said lands, the amount due as above stated to said Haggin; and the said Robinson stated that his said friend would not deal directly with the plaintiffs, or with any person other than the said Robinson, and that for this reason it was necessary to have the legal title to said lands vested in him, the said Robinson.

"(4) Plaintiffs fully relied upon the truth of the representations of said Robinson, and his honesty and fidelity, and, by reason of their said trust and reliance, procured the said Louis Schultz to make a conveyance of the legal title to all of the said lands held in trust, as aforesaid, by him, to said defendant C. P. Robinson.

"(5) And the said Robinson took the legal title in trust for the said plaintiffs, for the purpose of obtaining the said amount of money.

"(6) On or about July 16, 1883, the defendant C. P. Robinson represented to the plaintiffs that the defendant McLean would advance to the plaintiffs the amount due to said Haggin, to-wit, the sum of $25,906.77, and would also advance and lend to the plaintiffs the further sum of $5,000, and would take and hold the legal title to said lands as security for the said loans and advances. That said McLean would, after paying the claim of said Haggin and making said advance of $5,000, sell said land for a price satisfactory to plaintiffs and said McLean, and would, with the consent and under the control and supervision of plaintiffs, sell said land, and after deducting from this amount so realized from the sale the money advanced to pay the Haggin claim, with interest thereon at the rate of seven per cent. per annum, should pay to the plaintiffs one-half of the remainder of the proceeds of said sale, less the sum of $5,000, to be advanced as aforesaid, without interest; and as a compensation for said payment, and as a compensation for advancing said sum of $5,000 in addition to said $25,906.77, would retain the other half of said remainder to the use and profit of him, said McLean. The plaintiffs fully relied upon the said representations, and trusted therein and in the integrity of said Robinson, and accepted the said proposal in good faith, and consented to enter into said agreement.

"(7) About July 16, 1883, the said defendant Robinson, and the plaintiffs, acting under the advice and instructions of the defendant Robinson, and in pursuance of said arrangement, conveyed to said defendant McLean all of the lands described in the fourth finding, and said defendant McLean, on said last-named day, entered into possession of said premises, and has ever since continuously remained in the exclusive possession thereof, and appropriated to his own use all the rents, issues, and profits thereof, and, since said entry, said defendant McLean has made other expenditures for the care and benefit of said lands, the exact amount of which has not been ascertained, nor is, nor has ever, the amount been known to plaintiffs.

"(8) The defendant McLean was advised and fully informed as to the fact that the defendant Robinson held the legal title to said lands solely in trust for the use and benefit of the plaintiffs. But he was not informed and did not know the exact nature and character of the said trust, and during all the negotiations between Robinson and himself relating to the transfer of said lands he did not learn, nor did he seek to ascertain, by personal inquiry or otherwise, what was the particular character and nature of defendant Robinson's said trust. On the contrary, said defendant McLean absented himself from the office of Olney, Robinson & Byrne whenever negotiations were pending between said plaintiffs and Robinson relating to said transfer, and purposely avoided, during the pendency of said negotiations, all personal meetings and interviews with the plaintiffs, or either of them, lest he should become informed as to the true nature and character of the said Robinson's trust with the plaintiffs.

"(9) Defendant McLean was not informed and did not know of the representations made by defendant Robinson to the plaintiffs in respect to the advances which said McLean was represented by said Robinson as being willing to make, as set out in the tenth finding herein, [the sixth finding here.] Nor were the representations, as set out in said tenth finding, ever made by said McLean to Robinson, or by him (McLean) authorized to be made by said Robinson to the plaintiffs; but each and every one of said representations was made without the knowledge, consent, approval, sanction, or authority of said McLean.

"(10) Defendant McLean was willing and anxious to purchase said lands absolutely, and pay therefor a price equal in amount to the claims held by said Haggin against it. But he was not willing and never intended to deal with the said lands in any other way except as an absolute purchaser thereof; and for the purpose of avoiding any notice of said Robinson's trust, and the equities of plaintiffs in said lands, defendant McLean refused to have any meeting or interview with plaintiffs, or either of them; and the said defendant Robinson never communicated to defendant McLean the fact that plaintiffs were not willing to make an absolute conveyance of said lands, but were willing to convey the same only upon the trust, terms, and conditions as set out in the said tenth finding herein.

"(11) All of the said representations and promises made by the defendant Robinson to the plaintiffs in respect to the terms and conditions upon which the defendant McLean was willing to take the title to said lands were false and fraudulent, and made for the purpose of cheating and defrauding the plaintiffs, and depriving them of said lands. And all of said promises were made by said Robinson without any idea or intention that either of said defendants would comply with any of them. On the contrary, said Robinson intended that, after obtaining said conveyance, the said McLean would, after discharging the said liens upon said lands, hold and claim the same absolutely, and repudiate and deny all claims and equities of the plaintiffs in and to the same, or any part thereof; but such intention and design were by the said Robinson, during all the said negotiations, carefully suppressed, concealed, and kept from the knowledge of plaintiffs. And the said McLean intended, during all of said time after having obtained the title to said lands, to hold and claim the same absolutely, and deny all claims and equities of the plaintiffs in and to the same, or any part thereof."

Whatever may be said about the nature of this action, measured by the pleadings, findings, and judgment, the learned counsel upon both sides have practically agreed that it is a suit in equity, seeking to rescind a transfer and conveyance of real estate upon the ground of fraud, and as such we shall treat it. The judgment of the lower court decreed that plaintiffs were the owners of the land involved in this litigation, and that McLean held the legal title to said lands in trust for plaintiffs as security for money due and owing to him. It was further adjudged and decreed that plaintiffs might redeem the land from McLean by paying him the amount due and owing, with legal interest, etc., and that thereupon McLean should transfer the property to plaintiffs by a good and sufficient conveyance. Defendant McLean is now before this court, asking for a reversal of the judgment, and the order denying his motion for a new trial. The fraud upon which plaintiffs relied to rescind the transfer to McLean arises from the representations and promises made by Robinson, set out in detail in finding No. 6; and the fraud, as alleged by plaintiffs' complaint, consists in this: "That all of said representations and promises were false and fraudulent, and made for the purpose of cheating and defrauding the plaintiffs, and depriving them of said lands, and all of said promises were made without any intention of performance upon the part of the defendant McLean, and were made by the said Robinson without any intention of performance; but, on the contrary, said Robinson intended, and the said McLean intended, that, after executing and obtaining the said conveyance to the defendant McLean, the said McLean, after discharging the lien upon said lands held as aforesaid by the said Haggin, should hold and claim the said lands absolutely, and repudiate and deny all claims and equities of the plaintiffs of or in or to the same, or any part thereof." That portion of findings Nos. 8 and 10 wherein the court finds that, "for the purpose of avoiding any notice of Robinson's trust and the equities of said plaintiffs in said land, defendant McLean refused to have any meeting or interview with plaintiffs, or either of them," is not supported by the evidence; but the matter is not sufficiently material to justify a reversal of the judgment. That portion of finding 2 wherein it is found that "defendant Robinson, with the consent and approval of defendant McLean, acted for and on behalf of said McLean, and as his agent, in and about the transfer of the lands, as hereinafter stated," has but little support in the evidence; and that support is barely sufficient to maintain a restricted and limited agency. If a general and unlimited agency had been found by the court, or if counsel for respondents should insist that the finding of the trial court in this regard was a finding of agency in its broadest sense, and the final result of this important litigation depended alone upon the sufficiency of the evidence to support such finding, we would have no hesitation in declaring that the finding had not sufficient support in the evidence. If finding 2 is to be taken in its broadest sense,—that is, if it be construed that Robinson was the agent of McLean throughout the entire transaction pertaining to the transfer of this tract of land,—then the finding is directly in conflict with findings Nos. 9 and 10, and the judgment should be reversed, necessarily, for that reason. If Robinson was the agent of McLean from the inception to the termination of this transaction, then finding No. 9, wherein it is said, "nor were the representations, as set out in said tenth finding [the sixth finding here] ever made by said McLean to Robinson, or by him (McLean) authorized to be made by said Robinson to the plaintiffs, but each and every one of said representations was made without the knowledge, consent, approval, sanction, or authority of said McLean," is absolutely inconsistent with and contradictory to the existence of such fact. A finding of general agency, when taken in connection with the finding pertaining to the making of the representations by Robinson, would also be entirely inconsistent with and contradictory to that portion of finding No. 10 wherein it is said: "But he (McLean) was not willing and never intended to deal with the said lands in any other way, except as an absolute purchaser thereof." For the foregoing reasons, finding 2 can only stand as a finding of a limited and restricted agency for certain special purposes; and only as such would it have support in the evidence, and also only would it be in harmony with the findings already quoted. In Water Co. v. Richardson, 72 Cal. 606, 14 Pac. Rep. 379, it was said: "We do not think the court should strain the language of a finding to make out a case of conflict. The findings should be reconciled, if it can reasonably be done, and be so construed *ut res magis valeat, quam pereat.*" And upon this well-settled principle, that some effect should be given to each and every finding wherever possible, this finding will be allowed to stand as the finding of a special and limited agency. It is not necessary to determine the exact scope and limits of such agency. It is sufficient for present purposes to know that findings 9 and 10 expressly place the matters therein considered without the limits of such agency.

During the entire pendency of this transaction, down to and including the satisfaction of the Haggin judgment and the delivery of the title-deeds to McLean, the two principals to the contract, Schultz and McLean, exchanged no word, by voice or pen, as to its nature or terms, although both knew that negotiations were in progress, and opportunities were not lacking for consultation. Having determined that, to some extent, Robinson was the agent of McLean, it necessarily follows that in all those particulars where he was such agent he acted in the peculiar and dual capacity of agent for both parties; for there is no question, from the evidence, but that from the time the title was vested in Robinson by plaintiffs, through every step of the proceedings down to and including the delivery of the deed by plaintiffs to him to be delivered to McLean, he (Robinson) was the trusted, acting attorney and agent of plaintiffs. The fraud in this case rests upon the representations made by Robinson, as set out in finding 6. The court has found that they were false, and that Robinson knew that they were false, at the time they were made. When the question is solved as to the position Robinson occupied when he made these representations, and in what capacity he made them, the question is solved as to where the responsibility rests, and where the loss must fall, if loss has resulted. If Robinson was the actual agent of either plaintiffs or defendant in this transaction,—and, as we have seen, he was the agent of both,—and as agent of his principal made the representations to such principal that are set out in finding 6, then such principal must suffer the loss, as against an innocent third party. And, in this case, if it is entirely apparent from the findings and the evidence that, in making these representations, Robinson was acting as the agent of plaintiffs, and that by means of such representations plaintiffs parted with their title to the land, then all question as to the ostensible agency of Robinson for McLean, or as to McLean's subsequent ratification of Robinson's acts by accepting the fruits thereof, have melted away, and forever disappeared from the case. There is no direct finding as to the position Robinson occupied in making to plaintiffs the representations set out in finding 6. The finding of the court is express that he was not McLean's agent in making them; and there is no finding that he so claimed to Schultz, or that Schultz ever thought he was such agent. Indeed, the evidence would not support such a finding, if it existed. While the findings are silent in this respect, the evidence of the plaintiff Schultz clearly and conclusively shows that, in making these representations, Robinson was acting as the agent of plaintiffs, and that plaintiffs so understood the fact. The testimony of the plaintiff Schultz in this regard is as follows:

"McLean was going to pay the Haggin judgment, and give us $5,000, without interest, and he was to let us have the say about the selling of the land. We were to divide the profits,—the net profits. These statements were made at the time this deed was delivered. Robinson told me that he had a written agreement in his safe. This conversation took place in Robinson's office, in San Francisco. I then delivered Robinson the deed. I said to Robinson, 'You take all the necessary papers;' and he said: 'Of course, I will look out for that. I will look out for your interests. They will be all settled all right.' I asked him, of course, if he did not have all the necessary papers drawn, —the agreement from McLean about the lands,—the bargain we had made with Robinson. He said he would look out for that; that everything was all right and straight. I took these papers from Haggin to Robinson,—the agreement which Haggin gave to Sharp that gave us a certain time to redeem, if we gave him a deed for the land. I had several conversations with Robinson before that,—about the lands, principally, and the way I was getting along. * * * Robinson said that I should not sign any agreement like that; that it would debar us from collecting any money from Haggin; and a few days afterwards he said that he had a man who would pay off the Haggin indebtedness. He didn't say at that time what that man would do after paying off that indebtedness. About that time I concluded to transfer our business from Sharp & Sharp to Robinson. From that time (March or April, 1882) down to the termination of the Haggin business, Robinson, Olney & Byrne done our business for us. Robinson did the business. In one of my interviews with Robinson, held in March or April, 1882, he told me he had a friend who would advance the money necessary to take up the Haggin mortgage,—said he had a man. He said he had a friend who would pay the Haggin mortgage and carry the land. He advised me not to accept Haggin's proposition, and gave me as a reason that I would have no remedy against Haggin for damages; and a few days afterwards he told me he had a friend who would pay the mortgage of Haggin, and carry the land. I adopted Robinson's advice in regard to that proposition, and declined Haggin's proposal. Robinson did not tell me at that time who his friend was, but did tell me subsequently. Told me it was George D. McLean. Said that McLean was the man he was referring to. The first time Robinson stated to me he had a friend who would carry the land was about two months or six weeks before the conveyance from Louis Schultz to Robinson. In reference to making that conveyance, Robinson said his friend would deal only directly with him, and I had better put the lands in his name, and make a deed to them. There was a little hitch in getting Louis Schultz to make the conveyance to Robinson. Louis Schultz required an order to be procured. Robinson told me Louis Schultz had refused to convey the property to him without an order. Robinson made out an order for me to sign. I signed the written order by the name of Schultz and Von Bargen, and Louis Schultz would not convey the land on that order, but wanted my partner's signature and mine separate. Then I signed it, and procured my partner's signature, and gave the order to Robinson. He made out the deed from Louis Schultz to him, and Louis Schultz executed it. A deed was subsequently made by the plaintiffs to Robinson for the same lands, and also an additional thousand acres. Question. What were the terms and conditions under which the property was transferred to Robinson, and what was the agreement or understanding between you and Robinson in that matter? Answer. Simply to raise money on the property, and not to sell it. He told me he had a man who would hold the property, and carry it and pay the mortgage, and that we would have the say as to what time it would be sold, and the man was going to advance us $5,000 without interest. Q. Was this arrangement made with Robinson at the time the first deed was made to him? A. It was made before the first deed was made. $5,000 was not stipulated at that time, but he said a friend of his would advance sufficient to pay the Haggin mortgage; and the bargain for the $5,000 was made at the time he came from San Luis Obispo. At the time Robinson made those statements to me about his friend carrying the land and advancing $5,000, I relied implicitly upon his statements and integrity. At that time I did not suspect that either his friend or himself was not dealing fairly with me. Had no suspicions whatever. If I had had any suspicions that any of his statements were not true, I certainly would not have made those conveyances. The time when Robinson told me his friend would make the bargain referred to was right before they went to San Luis Obispo. Before I delivered the deed to Robinson, on the 2d of July, 1883, which was delivered by him in Haggin's office on the 16th of July, I asked Robinson if he had any agreement to the effect that I spoke of,—that he was going to pay off the Haggin mortgage and give us $5,000,—and he said he had it all straight in his safe before I delivered him the deed in July,—somewhere in the latter part of June or July. I had never heard anything derogatory to the character of McLean. Robinson said McLean was an honest man, and would live up to his bargain, and I supposed so. I had all the confidence in the world in Robinson at that time."

Cross-Examination: "Robinson told me the written agreement with McLean was in his safe, in his office. The safe was in Byrne's room, in the office of Robinson, Olney & Byrne. Each of the firm had a separate room. Byrne's room was just next door from Robinson's; the door opening into it. Think Robinson also had a smaller safe in his room. Robinson said he had the agreement in that safe, and pointed to Byrne's room, as I understood it. I have stated fully the conversation between Robinson and me in reference to the agreement, as near as I can. On the former trial of this case, I testified that I agreed to give a deed in consideration that Robinson would get the agreement from McLean; that I asked Robinson, before I delivered him the deed, whether he had the written agreement from McLean, and that I certainly would not have delivered him the deed unless he told me he had the agreement; that, if McLean would not give any agreement, I certainly would not have delivered the deed; that I wished it understood that if Robinson had not told me, on the 2d of July, that he had the agreement from McLean, in writing, I would not have signed the deed,—not delivered it. That was my testimony on the former trial. Question. Did you testify on the former trial as follows: 'When the bargain was made, Robinson said he would fix that all right for me. I told him we had to have a written agreement, and he said he would get the agreement, and I asked him before I delivered him the deed if he had the agreement.' Did you so testify? Answer. Yes, sir. Q. Did you further testify as follows: 'I said, "Robinson, have you the agreement from McLean?" And he said, "Yes, sir." And I handed him the deed?' A. That was my testimony, and it is true. Q. Was there any other time prior to that that he told you he had a written agreement from McLean? A. He told me that he was going to procure it. That was the bargain. I did so testify on the former trial, and it is true. Robinson told me that he had the release or satisfaction of the mortgage. I didn't see it. I trusted him implicitly, as my attorney, in everything. On the former trial, I testified that it was a few days before the commencement of the action that I discovered that McLean repudiated the contract. I testified that I sent McDonald after McLean when he came to town, and he clearly repudiated, and that was just before the commencement of this action. Q. Did you say on that trial that Robinson was authorized to act for you in that matter? A. Certainly. He was my attorney. He was authorized to act,—to raise money. Q. Did Robinson use the name of McLean to you at any time? A. Yes, sir. Q. How did it come that you didn't speak to McLean yourself? A. Because I didn't want to interfere. Robinson acted as my lawyer. Q. Did you so testify? Witness. I guess so. Q. Is that the reason why you didn't speak to McLean when you went to Robinson's office? A. Yes, sir. During these negotiations, I may have met McLean fifteen or twenty times, but I didn't speak to him about this matter. Q. Why do you say you didn't speak to him about this matter? A. Because Mr. Robinson was my attorney, and acted for me in this matter. Byrne and Robinson were my attorneys. Q. Robinson was acting for you, and, because you had put the matter in his hands to act for you, you wanted him to carry it through, and did not want to interfere with him by talking yourself with McLean. Was that it? A. Yes, sir. Q. You trusted the whole matter to him? A. Yes, sir; I trusted everything to Robinson. I knew that a deed was of no value until delivered; that it would be of no value to McLean until delivered to him. Q. You delivered it to Robinson to deliver it on your behalf to McLean? A. Yes, sir. Q. You instructed Robinson not to deliver that deed to McLean, he acting for you, unless he got from McLean a written acknowledgment of trust, which you say was to attach to these lands? A. That is correct. Within a day or two of the 16th of July, Robinson informed me that the transaction with McLean had been finally consummated, and the money paid to Haggin. After receiving that information, I did not see McLean."

Reduced to its lowest terms, this state of facts discloses that plaintiffs had unbounded and implicit confidence in their attorney and confidential agent, Robinson, and placed the title to this tract of land in him to enable him thereby to more readily raise the money to save the land from foreclosure sale; that, in pursuance of such agency, he reported to them that one McLean would advance the money upon certain terms and conditions. They instructed him to accept McLean's proposition. Subsequently Robinson informed them that he had accepted McLean's proposition, and then had McLean's agreement as to the terms and conditions of the trust in his safe. Believing such representations, and relying upon them, plaintiffs handed to Robinson their joint deed, including the execution thereof by said Robinson, with directions to deliver the same in their behalf to McLean, which Robinson thereupon did. These representations to plaintiffs were false, and thereby a gross fraud was perpetrated upon them. But McLean took his title, and paid his money, without notice or suspicion that such fraud was committed, and in the firm and honest belief that he was getting a perfect legal title to this tract of land. It is these fraudulent representations that give life to plaintiffs' cause of action; and if Robinson, in making them, was the actual agent of plaintiffs, then, as previously suggested, all questions as to the ostensible agency of Robinson for McLean, or subsequent ratification of those representations by McLean, have disappeared from the case, and thus the link connecting McLean with the cause of action no longer exists; for, whatever may have been the fraudulent representations of Robinson to plaintiffs, they, being made by an agent to his principal, gave no equity against McLean, an innocent vendee for a valuable consideration. Occupying such a position, McLean is proof against an attack from plaintiffs based upon the fraud of Robinson. The rule is fundamental and inflexible that a court of equity will not allow a vendee, in good faith and for value, and without notice, to be thus assailed. McLean stands before a court of equity without taint of fraud,—entirely innocent; and over such a one equity has no jurisdiction. "A court of equity acts only on the conscience of the party; and, if he has done nothing that taints it, no demand can attach upon it, so as to give jurisdiction." Sugd. Vend. § 722. In Somes v. Brewer, 2 Pick. 201, it was said by PARKER, C. J.: "It is a general and just rule that, when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune." In Mundorff v. Wickersham, 63 Pa. St. 89, Justice SHARSWOOD said: "Where one of two innocent persons has suffered by the fraud or negligence of the third, whichever of the two has accredited him ought to bear the loss." This principle is recognized by section 3543 of the Civil Code, which reads: "Where one of two innocent persons suffers by the act of a third, the one by whose negligence it happened must be the sufferer." In Compton v. Bank, 96 Ill. 306, the court said: "Even then, if appellant was induced by false representations of her husband and brother to execute the deed, since those representations were neither induced by nor made of the knowledge of those representing the bank, the bank cannot be affected by them." Somes v. Brewer, 2 Pick. 190; Spurgin v. Traub, 65 Ill. 175; White v. Graves, 107 Mass. 327; Marston v. Brittenham, 76 Ill. 617; Fisher v. Boody, 1 Curt. 206; Cornell v. Masten, 35 Barb. 161, 162; Andrews v. Solomon, Pet. C. C. 362.

In this case, plaintiffs and defendant were both innocent. Neither knew that the fraud was being practiced, but if that fraud is productive of injury the injury must result to the plaintiffs for they placed it in the power of the wrong-doer to perpetrate the fraud. The vendee will not be compelled by a court of equity to lose the benefit of a bargain obtained in all fairness and honesty because of a fraud practiced upon the vendors by their own agents. Under such circumstances, they must bear the consequences, for the loss is chargeable to the trust reposed in their agent; in this case, a trust so complete and entire as to cause them to disregard the dictates of ordinary prudence. If the rule of law required that negligence should be charged against the plaintiffs in order to defeat their recovery in this action, which is not the fact, then such negligence of plaintiffs is clearly established. They apparently closed their eyes, and trusted all to their agent. They placed their deed to this valuable property in the hands of Robinson, with instructions to deliver it forthwith to McLean, upon the bare representations of Robinson that the agreement from McLean containing the conditions of the trust was in the safe in an adjoining room. The instrument, according to Robinson's statement, was at hand,

and the simplest rules of business knowledge required an inspection of it; and the neglect so to do, under any aspect of the matter, was such negligence as to cast upon the plaintiffs all burdens flowing therefrom, as against an innocent vendee. The rule of law that a grantor cannot question his own conveyance upon the ground that a third party practiced a fraud upon him, not known to or participated in by the grantee, is well settled in this state; and the rule, certainly, would apply with equal force when the fraud was practiced by the agent of the grantor. Salter v. Baker, 54 Cal. 140; Stewart v. Whitlock, 58 Cal. 2; Arnaz v. Escandon, 59 Cal. 489; Overacre v. Blake, 82 Cal. 81, 22 Pac. Rep. 979.

Conceding the facts of this case as counsel for plaintiffs claim them to be, under the evidence and the findings, still they would not entitle the plaintiffs to a decree rescinding the conveyance, and restoring the parties to their original condition. If Robinson had been the duly-authorized agent of McLean in making these representations, there certainly would be no ground for rescission. If Robinson was not in fact McLean's agent in making the representations, but assumed so to act, and McLean ratified such assumption of agency by accepting the fruits of the agreement, such conduct upon his part is no evidence of fraud, but rather to be commended, and places him exactly as if he were an original party to the contract. If McLean ratified the acts of his agent, he has done all that honesty and fair dealing demand. To say the ratification by the principal of the unauthorized acts of his agent is a fraud of the principal, as against the party relying upon the agent's acts and representations, is an anomaly in law. Such a case is not found in the books. Defendant has committed no fraud upon plaintiffs, and plaintiffs have suffered no loss by reason of any fraud. If McLean is bound under the terms of the Robinson agreement, as is insisted, then that agreement is in full life, and plaintiffs are entitled to and can secure all the fruits of it that were anticipated at the time of its creation. The failure to advance the sum of $5,000, as agreed, affords no ground of rescission. Lawrence v. Gayetty, 78 Cal. 134, 20 Pac. Rep. 382. It affords no more ground for rescission than would a repudiation of the trust by McLean 10 years later, by a refusal on his part to sell the land and divide the moneys in accordance with the terms of the trust agreement. "Courts of equity do not punish parties for their wrongs in the administration of trusts, but only furnish adequate means of redress." Perrin v. Lepper, (Mich.) 40 N. W. Rep. 905. To rescind the transaction upon the ground of fraud would place the plaintiffs in a much better position than they would have been, under the contract they allege, if there had been no fraud; and such a result is discountenanced by the plainest principles of equity. The charge of fraud against the defendant is based upon the fact that the promise made by Robinson to Schultz and Von Bargen, and which formed the consideration for the conveyance, was a promise made without any intention of performing it. Civil Code, § 1572. McLean knew nothing of this secret intention of his agent, for the court expressly finds that he knew nothing of the promise. Plaintiffs knew nothing of this secret intention, for the court finds that Robinson carefully concealed it from them. Counsel contend that McLean, by accepting the fruits of the agreement, has ratified the agency of Robinson, and by so doing has ratified Robinson's secret intention; that is, having received the benefits, he has adopted all the means whereby the benefits were obtained. But the secret, unsuspected intentions of Robinson were no part of the means by which the fruits of the contract passed to McLean. How could such intentions be a moving cause in formulating the action of plaintiffs' minds, when they knew nothing of them? The promises made by Robinson, and relied upon by Schultz, were the instrumentalities or means which brought consent to Schultz's mind. There can be no ratification of an authority which the agent did not assume to possess, and which the other party did not believe or suspect him to possess. It would be an absurdity to say that defendant ratified the agreement by entering under it, and at the same time had no intention of performing it. In other words, if he accepts the fruits of the contract, he is not entitled to the fruits of the contract, for he is thereby guilty of fraud in ratifying an agent's secret fraudulent intentions. It is perfectly apparent that plaintiffs' remedy, upon their own theory of the case,—viz., a subsequent ratification of Robinson's agreement by McLean,—is to seek an enforcement of the trusts and conditions which were stipulated by Robinson's agreement. More than that they cannot claim. As to such remedy, it is sufficient to say the complaint does not justify the relief; and, secondly, the views which we entertain from the evidence quoted absolutely prevent the granting of such relief on this appeal, even if the pleading was sufficient. We see no other error in the record. Let the judgment be reversed, and the cause remanded.

We concur. McFARLAND, J.; PATERSON, J. SHARPSTEIN, J.

BEATTY, C. J. I dissent. There is but slight and extremely unsatisfactory evi-opinion the evidence is insufficient to justify the finding of the court below that Robinson acted as the agent of McLean in and about the transfer of the lands in controversy. Upon the other points discussed by him, I concur in the opinion of Chief Justice BEATTY. I think, if the finding as to Robinson's agency was supported by the evidence, the plaintiffs would be entitled to maintain this action.

BEATTY, C. J. I dissent. There is but slight and extremely unsatisfactory evidence to support the finding that Robinson acted as agent of McLean in and about the transfer of the lands in controversy; but it is impossible to say that said finding is totally without support in the evidence, and therefore the fact must be accepted as found, for the purposes of this appeal. This being assumed, the construction of the findings as a whole seems to me to present no difficulty. They mean that Robinson had an actual precedent authority from McLean to act for him in his interest in procuring the transfer, but that he had no actual authority to deal with Schultz and Von Bargen upon any other terms than an absolute sale and conveyance in consideration of the payment of the amount of the Haggin judgment; that Robinson, in order to induce plaintiffs to execute and deliver their deed of conveyance, made the unauthorized representations as found. It is, of course, clear, from the evidence of Schultz, that Robinson never assumed to be the agent of McLean in any of the negotiations preceding the transfer, but, on the contrary, acted ostensibly as the agent of the plaintiffs, and was so regarded by them. The court has found, however, upon evidence which, as I have said, appears extremely weak and unsatisfactory, but is yet sufficient in law to sustain the finding, that Robinson, while assuming to act for the vendors, was in fact acting for the vendee, and while so acting made the representations upon which they were induced to execute and deliver the deed which they were seeking to set aside. If so, the vendee cannot take and hold the benefit of the deed without being bound by all the consequences of the representations by which the plaintiffs were induced to make it. When he was informed of the conditions upon which the conveyance was made, and the representations of his agent, it may be conceded that he had the option either to keep the land on the conditions of the transfer or to rescind the whole transaction; but since he chose to deny the agency and repudiate the representations, claiming to be the absolute owner of the land, freed of all conditions, it seems to me he made his election to stand upon that ground, and necessarily put the plaintiffs to their action to enforce the only right they had,—that of rescission,—for they had no option. They could not compel McLean to keep the land upon the terms to which he had never consented. They could not compel him to advance $5,000, which he had never consented to advance, and to sell the land and divide the net profits. They could only claim to be restored to their original position; and this, I think, they could claim, on the facts found. In other words, I think they pursued their proper and only remedy in both the original and amended complaints, asking the only relief to which they were entitled. I concur in the conclusions of the court that the second amended complaint did not change the cause of action; that the statute of limitations is not a defense; that no formal tender of repayment of the purchase money was necessary before commencing the suit. I think the superior court erred in admitting secondary evidence of the Haggin proposal; but whether the error was of sufficient consequence to justify a new trial it is unnecessary, in this dissenting opinion, to discuss. Aside from the effect of this one error, I think the judgment and order appealed from should be affirmed.

SCHULTZ *et al.* v. McLEAN. (No. 13,039.)

(*Supreme Court of California.* Feb. 9, 1892.)

In bank. Appeal from superior court, San Luis Obispo county; JAMES F. BREEN, Judge.

Suit by George Schultz and others against George D. McLean for the rescission of a deed. The respondent obtained judgment. From that part of the judgment ordering that plaintiffs should pay interest on the amount due, plaintiffs appeal. Dismissed.

T. M. Osmont, (*D. M. Delmas*, *Wm. F. Herrin*, and *H. L. Gear*, of counsel,) for appellants. *Mr. Haggin* and *Van Ness & Dibble*, (*E. W. McKinstry*, *John J. Roche*, *Graves, Turner & Graves*, *James A. Waymire*, and *Pillsbury, Blanding & Hayne*, of counsel,) for respondent.

GAROUTTE, J. This is an appeal by plaintiffs from that portion of the judgment rendered in the above-entitled cause wherein it is ordered that appellants shall pay respondent, McLean, interest on the amount due as in said decree determined. In the appeal in this case by the defendant, McLean, from the entire judgment, and from the order denying his motion for a new trial, which appeal is numbered 13,991, this court has filed its decision, of even date herein, reversing the judgment and order denying a new trial, and remanding the cause. 28 Pac. Rep. 1053. The entire judgment being reversed, the matter presented by this appeal is now of no practical importance. Let the appeal be dismissed.

We concur: DE HAVEN, J.; McFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

(93 Cal. 371)

WELCH v. MOHR. (No. 12,710.)

(*Supreme Court of California.* Feb. 10, 1892.)

APPEAL—CONFLICTING EVIDENCE.

In an action to recover damages for the loss of a horse alleged to have been driven beyond the place to which defendant had promised to drive it, where it appears that the minds of the parties did not meet as to any particular place to which the horse was to be driven, and the evidence on that point was substantially conflicting, a verdict for defendant will not be disturbed on appeal.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Action by Patrick Welch against Emil Mohr to recover damages for the loss of a horse. Verdict and judgment for defendant. From the judgment, and an order denying his motion for a new trial, plaintiff appeals. Affirmed.

T. H. Laine, for appellant. *W. B. Hardy*, for respondent.

FITZGERALD, C. This action was brought to recover damages for the loss of a horse, hired by plaintiff to the defendant, and alleged to have been driven by him several miles beyond the place to which he had promised to go; and while being so driven by the defendant the horse died. The defendant answered by a general denial. The case was tried by a jury, resulting in a verdict and judgment for defendant for costs. The case comes here by appeal from the judgment and the order denying plaintiff's motion for a new trial.

The only question presented for decision by this appeal is whether the horse and buggy were let to the defendant by plaintiff to be driven to a specified place, viz., Mountain View and return. If so, and the horse was driven to a point several miles beyond that place, such driving was in violation of the bailment, and an unlawful conversion, and defendant's failure to return the horse would entitle the plaintiff to recover the value thereof in damages. It is claimed by appellant, who, it appears, was a livery-man having horses and vehicles to let for hire, that the letting was to drive the horse to Mountain View and return, and no further; and that, in violation of the terms of the contract, defendant purposely drove to a point five or six miles beyond that place, and on the return drive the horse died, and was never returned to plaintiff or paid for. It is clear from the evidence that the minds of the parties did not meet as to any particular place to which the horse was to be driven, and as the evidence on that point, which is the only one involved in this appeal, is substantially conflicting, the verdict, under the well-established rule of this court, will not be disturbed. It therefore follows that the judgment and order should be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(93 Cal. 377)

PEOPLE v. WILSON *et al* (No. 20,850.)

(*Supreme Court of California.* Feb. 12, 1892.)

PRELIMINARY EXAMINATION—COMMITMENT.

Pen. Code, § 872, provides that if, on a preliminary examination, it appears that a public offense has been committed, and there is sufficient cause to believe defendant guilty thereof, the magistrate must make or indorse on the depositions taken on such examination an order to that effect, and that defendant be held to answer to the same. *Held*, that the order must be in writing, signed by the judge, and an oral order, reduced to writing by the reporter, is not a compliance with the statute.

In bank. Appeal from superior court, city and county of San Francisco. J. McM. SHAFTER, Judge.

Prosecution against Wilson and Crowley for burglary. From a judgment on conviction, and an order denying a new trial, defendants appeal. Reversed.

Carroll Cook, for appellants. *Atty. Gen. Hart*, for the People.

DE HAVEN, J. The defendants were charged by information with the crime of burglary, and appeal from a judgment of conviction and an order denying their motion for a new trial.

Upon their arraignment the defendants moved to set aside the information, upon the ground that they had not been legally committed by a magistrate. The motion was denied, and the exception of the defendants to this ruling is presented in a bill of exceptions, from which it affirmatively appears that defendants were examined before a magistrate upon a complaint charging them with the crime of burglary; but no order holding them to answer was ever indorsed by the magistrate upon the complaint or upon the depositions of the witnesses who testified upon such examination. The transcript of the reporter's notes of the testimony given upon the preliminary examination was also introduced in evidence, in which is embodied the following statement of the proceedings had upon the conclusion of the evidence: "Mr. Dunne: That is all. That is the case for the people. Mr. Cook: The case is submitted. The Court: It is ordered that the defendants be held to answer the charge that is preferred against them before the superior court of this city and county, and that their bail be fixed in the sum of $4,000 each." This is followed by the certificate of the reporter to the effect that what preceded it was a correct transcript of the testimony and of the proceedings in the case. This was all the evidence which the court had before it upon the hearing of the motion to set aside the information, and it was not sufficient to show that the defendants were ever legally committed, prior to the filing of the information. Section 872 of the Penal Code provides that if, upon the preliminary examination of a defendant charged with crime, it appears that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, "the magistrate must make or indorse on the deposition" an order to that effect, and that the defendant be held to answer to the same. This statute contemplates that the order referred to shall be in writing, and signed by the magistrate. Ex parte Branigan, 19 Cal. 133. In so far as it provides that the order shall be indorsed upon the deposition, the statute may be regarded as directory, but it is essential that it should be reduced to writing, and entered either upon the official docket of the magistrate or upon the complaint or deposition. This record does not disclose anything further than that the magistrate made an oral announcement of his conclusion, which the reporter heard and reduced to writing as a part of the history of the proceedings as kept by himself; but this statement, so certified by the reporter, is in no sense an order signed by the magistrate, and cannot be regarded as a compliance with the law which makes such an order the foundation of the right to file an information against a defendant. Judgment and order reversed.

We concur: BEATTY, C. J.; GAROUTTE, J.; SHARPSTEIN, J.; PATERSON, J.; HARRISON, J.

(3 Cal. Unrep. 483)

SNEATH v. WATERMAN *et al.* (No. 14,860.)

(*Supreme Court of California.* Feb. 12, 1892.)

DISMISSAL OF APPEAL—SERVICE OF NOTICE.

Where the affidavit of service on the adverse attorney of a notice of motion to dismiss an appeal does not show that any attempt was made to serve him at his office between the hours of 8 o'clock A. M. and 6 o'clock P. M. of the day when the notice was left at his residence, the motion to dismiss will be denied.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by Sneath against Waterman and others. Judgment for defendants. Plaintiff appeals. On motion to dismiss the appeal. Motion denied.

John R. Jarboe and *James L. Crittenden*, for respondents.

PER CURIAM. The affidavit of service upon the adverse attorney of the notice of motion to dismiss the appeal herein does not show that any attempt was made to serve him at his office between the hours of 8 o'clock A. M. and 6 o'clock P. M. of the day when the notice was left at his residence. The motion to dismiss is denied, without prejudice.

HARRISON, J., being disqualified, took no part in the decision of the above motion.

(93 Cal. 380)

LOS ANGELES COUNTY v. SUPERIOR COURT OF LOS ANGELES *et al.* (No. 14,888.)

(*Supreme Court of California.* Feb. 13, 1892.)

SUPERIOR COURT—POWER TO FURNISH ROOMS FOR HOLDING COURT.

Code Civil Proc. § 144, which provides that if suitable rooms for holding the superior courts are not provided in any county by the supervisors thereof, together with the furniture, fuel, and lights sufficient for the transaction of business, the courts, or the judge or judges thereof, may direct the sheriff to provide such rooms, etc., does not authorize the judge of a department of a superior court to anticipate the action of the county court board in completing and furnishing a room of a county court-house, designed for him, though the board are unreasonably delaying the work.

In bank. Original application for writ of prohibition by the county of Los Angeles against the superior court of Los Angeles, and W. P. WADE, judge thereof. Granted.

Jas. McLachlan, Dist. Atty., for petitioner. *E. L. Campbell* and *Carran & Mathews*, for respondents.

PER CURIAM. This is an original proceeding in prohibition to restrain the enforcement of an order made by the respondent on November 14, 1891, as judge of the superior court of Los Angeles county, in the following terms: "It appearing to the court that no suitable court-room for the holding of the sessions of this court in department 3, together with the chambers of the judge of said department, has been provided by the board of supervisors of Los Angeles county, together with the necessary furniture for the transaction of the business of this department; and it further appearing that the board of supervisors have provided certain rooms in the new court-house of said county for this department, which rooms are now in course of preparation, and almost in a condition for occupancy; and it further appearing to the court that no provision has been made by the board of supervisors for the necessary furniture of said court-room and chambers, and that some time will be consumed in preparing such furniture for said rooms in a fit and proper manner to render them available for the use of said department, beyond the time necessary to finish said court-room and chambers,—the sheriff of said county is hereby ordered and directed to provide such furniture as shall be necessary for the use of the court in the transaction of business for the court-room, judge's chambers, jury-room, reporter's room, and witness-room, lights and fuel, to be reported to the judge of this department. WM. P. WADE, Judge of Superior Court."

The only question to be decided is one of authority. Did the respondent have jurisdiction to make this particular order? Section 144 of the Code of Civil Procedure is the only provision of law from which such a power can be derived. It reads as follows: "If suitable rooms for holding the superior courts, and the chambers of the judges of said courts, be not provided in any city and county, or county, by the supervisors thereof, together with the attendants, furniture, fuel, lights, and stationery sufficient for the transaction of business, the courts, or the judge or judges thereof, may direct the sheriff of the city and county, or county, to provide such rooms, attendants, furniture, fuel, lights, and stationery; and the expenses incurred, certified by the judge or judges to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof." The facts disclosed by the uncontradicted allegations of the petition, and by the answer of the respondent, which, for the purposes of this decision, we assume to be true in every particular, are these: At the date of the order in question the county of Los Angeles was engaged in the construction of a court-house, the third story of which was then and is still unfinished, the contractors having until February 20, 1892, to complete the same. The rooms and offices designed for the accommodation of department 3 of the superior court, of which respondent is the presiding judge, are in the unfinished part of the building. There has been unnecessary and unreasonable delay on the part of the board of supervisors in completing the building, and meantime department 3 is occupying quarters which are unwholesome, offensive, and otherwise unsuitable and insufficient. For the purposes of this decision, we assume these to be the facts, and that a case exists which would justify the respondent in making such an order as is authorized by section 144 of the Code of Civil Procedure, above quoted.

The only question which we shall consider is whether said order is in itself, and without reference to the allegations and denials of the petition and answer, such an order as section 144 of the Code of Civil Procedure authorizes. The recitals of the order show with sufficient clearness that the design is to anticipate the action of the board of supervisors in completing and furnishing an unfinished room in the new court-house. The completion and furnishing of this county building is a matter within the legitimate control of the board of supervisors, and it is their duty to make all necessary contracts to that end. Their right to do so, it seems to us, must necessarily be exclusive, for otherwise great confusion would result. If each of the judges of the superior court has the power, when he thinks the supervisors are unnecessarily delaying the completion and furnishing of a court-house, to take the matter out of their hands, and order the necessary work done, or the necessary furniture to be procured by the sheriff, it is easy to see what confusion would ensue. We do not think the court and judges have such power. The power conferred by section 144 is justified only by the necessity which may sometimes demand its exercise, and ought not to be enlarged by construction. All that it authorizes is an order requiring the sheriff to provide the quarters, or furniture, or lights, etc., which the court presently requires for the transaction of its business. It does not authorize the court or judge to take out of the hands of the board of supervisors the building, completion, or furnishing of a court-house, or to interfere with their contracts in that behalf. In this respect the order here in question goes beyond the statute in attempting to anticipate and preclude the action of the board of supervisors in a matter which they have in hand, and the control of which is given to them.

If, as respondent alleges, they are unreasonably delaying the completion and furnishing of his court-room, that circumstance may justify him in ordering the sheriff to procure and furnish rooms outside of the court-house, but it does not give him the right to interfere with what they are doing. When his rooms are finished and assigned to him, if found insufficiently furnished and provided, it may be that he will have the power to order the sheriff to provide such additional furniture, etc., as may be needed; but he cannot, upon the mere supposition that the board of supervisors will fail to furnish the room designed for the court promptly upon its completion, anticipate them in the performance of their duty. For these reasons we think the alternative writ of prohibition heretofore issued should be made absolute; and it is so ordered.

(93 Cal. 384)

MALONE v. BIG FLAT GRAVEL MIN. CO. *et al.* (No. 13,620.)

(*Supreme Court of California.* Feb. 15, 1892.)

JUDGMENT BY DEFAULT—SETTING ASIDE—PARTIES—TRANSFER OF INTEREST—SERVICE BY MAIL—APPEALABLE JUDGMENTS.

1. Code Civil Proc. § 473, provides that the court may, on such terms as may be just, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. Section 4 provides that the provisions of the Code shall be liberally construed, with a view to effect its objects, and to promote justice. *Held* that, under section 385, providing that, in case of transfer of interest otherwise than by death or disability, the action may be continued "in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted," a motion to set aside a default judgment, taken after a transfer of interest, is properly made in the name of the original party.

2. A grantee is the "legal representative" of the grantor, within Code Civil Proc. § 473, providing that the court may relieve a party or his "legal representative" from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect.

3. Such grantee may appeal from an order refusing to take off a default judgment against the grantor, and an objection that there was no judgment as to the grantee, and therefore the order was not subsequent to judgment, and not appealable, is untenable.

4. Where, in an action involving a large sum of money, an amended complaint, after a demurrer has been sustained on appeal, is mailed, but not received by defendant's attorney until 30 days later, though the distance is only 400 miles, and the post-mark does not indicate that it did not come by due course of mail, and neither defendant nor his grantee receives notice of the complaint, and the attorney serves a demurrer in 10 days, a judgment by default, taken meanwhile, will be set aside under Code Civil Proc. § 473.

Commissioners' decision. Department 2. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

Action to foreclose certain laborers' liens by John Malone against Big Flat Gravel Mining Company and another. Judgment for plaintiff by default. Defendants appeal. Reversed.

Atty. Gen. Hart and *Aylett R. Cotton*, for appellants. *L. F. Cooper* and *Daniel Titus*, for respondent.

BELCHER, C. The plaintiff commenced this action to foreclose 26 laborers' liens upon certain placer mining property, situate in Del Norte county, and owned by the Big Flat Gravel Mining Company. He alleged that he was the assignee of the claims, and prayed judgment for the sum of $6,644.94, the aggregate amount thereof, and $52 paid out for recording the liens, and $600 for attorneys' fees, besides costs; and that the same be adjudged a lien upon the lands and premises described. A demurrer to the complaint was interposed and overruled, and an answer was then filed. After trial the court gave judgment in favor of the plaintiff. From that judgment an appeal was taken to this court, and on June 16, 1888, the judgment was reversed, and the cause remanded, with directions to the court below to sustain the demurrer, giving leave to the plaintiff to amend his complaint. 76 Cal. 578, 18 Pac. Rep. 772. On December 17, 1888, the plaintiff filed an amended complaint, in which, after setting up the several causes of action, he prayed judgment "for the sum of $6,645.94, the amount due on said liens, and the further sum of $52, the amount paid for the recording of all said liens, with legal interest on both said sums at the rate of seven per cent. per annum, from the 15th day of November, 1880; and $1,000 for counsel fees of foreclosure, and for costs of suit; and that the same be adjudged a lien upon the land and premises above described." And attached to the complaint was an affidavit, made by plaintiff's attorney, showing service of a copy thereof by mail upon defendants' attorney on the same day. This complaint was very voluminous, covering 142 pages of the printed transcript. On January 21, 1889, no demurrer or answer to the complaint having been filed, on motion of plaintiff the default of the defendants, Big Flat Gravel Mining Company and O. M. Paris, was entered by order of the court. On January 30, 1889, a demurrer to the complaint was received by the clerk of the court from the attorney of the defendants, but he refused to file the same, on the ground that it was received after the entry of the default. Subsequently, and after giving due notice of their intention to do so, the defendants moved the court to set aside the default entered against them, upon the ground that it was taken through their mistake, inadvertence, surprise, and excusable neglect. At the hearing of the motion affidavits were presented and read by the moving parties, showing that W. H. H. Hart was and had been their only attorney of record; that for several years he had resided and had his office in the city of San Francisco; that on account of illness he was absent from his office, with the exception of two or three days, from December 15, 1888, to January 19, 1889; that he was in his office on January 15th, and again returned there on the 19th, and then first saw lying on his desk a package, which, on being opened, was found to contain a copy of the amended complaint in this case; that he asked his clerk when the package came, and was told that it came only two or three days before, and that this was true; that he had never seen or known of the package before he so found it on his desk; that there was nothing to indicate in what month or year the package was mailed except the figure "3," which could be seen in the post-mark, and, as it arrived on the 16th or 17th of January, both he and his clerk concluded that it must have been mailed on the 13th of that month; that on the 26th of January he prepared a demurrer to the amended complaint, and sent it by mail to the clerk of the court, and also sent a copy of it by mail to the plaintiff's attorney; that, owing to the distance between San Francisco and Crescent City, where the court was held, and where plaintiff's attorney resided, he believed that his demurrer would be received more than a week before the time to plead to the complaint would be out; that he had promised to defend the action until it should be tried and decided on its merits, and intended to do so; that no service of the complaint was made, or notice of the filing thereof given, except by the copy sent to Hart at his office in San Francisco; and that defendants had a good and substantial defense to the action on the merits.

In opposition to the motion, the plaintiff read affidavits showing that on the day the amended complaint was filed (December 17th) his attorney deposited in the post-office at Crescent City an envelope containing a copy of the complaint addressed to defendants' attorney at his office in San Francisco, and paid the postage thereon; and that it was forwarded to its destination by the next outgoing mail, which must have been on the next day. The plaintiff also proved by affidavits, and by deeds recorded in the office of the county recorder of Del Norte county, that shortly after the original judgment was entered, and long before the default complained of was taken, the defendants, Big Flat Gravel Mining Company and O. M. Paris, had conveyed all their right, title, and interest in the premises sought to be charged with the liens to the Del Norte Gravel Mining Company, a corporation formed and existing under the laws of this state; and that since such conveyances were made the said defendants had no interest in the premises. On these proofs the motion was submitted and denied on March 14, 1889, the court holding that, as the Del Norte Gravel Mining Company had become the owner of the property, and had not joined in the motion, nor asked to have the action continued in the names of the defendants, the defendants had no further interest in the property or proceedings, and therefore could not make the motion; citing Moore v. Kellogg, 58 Cal. 385. The court then heard the proofs offered by the plaintiff, and on the 19th of the same month rendered judgment in his favor for the sum of $10,479.09, principal and interest, and the further sum of $1,000 for attorney's fees, besides costs. It also adjudged that these sums were a lien on the property described, and that the property should be sold by the sheriff, and the proceeds applied to the payment thereof. On April 4, 1889, the defendants presented to the court and filed a petition asking leave to renew their motion to set aside the said default and judgment entered against them, and stating therein, among other things, that the Del Norte Gravel Mining Company was ready and desired to join with them in the motion, and that the requisite papers had been prepared, and were ready to be served and filed. After hearing arguments in behalf of the respective parties, the court denied the petition on the day it was presented, and refused to allow defendants' motion to be renewed. On April 20, 1889, the Del Norte Gravel Mining Company duly served and filed a notice that it would move the court to set aside the default and judgment entered against the defendants, Big Flat Gravel Mining Company and O. M. Paris, and to have the action continued in the names of said defendants. And on May 20, 1889, this motion was heard and denied. At the hearing the same affidavits were read and the same proofs introduced by both parties as at the hearing of the first motion. It was also shown by affidavits that the officers of the Del Norte Gravel Mining Company had no notice, knowledge, or information that an amended complaint had been filed in the action, or that the default of the defendants had been entered, or that any judgment had been taken against them, until March 25, 1889; and also that the said company had a good and substantial defense to the action on the merits. Exceptions to each of the rulings of the court above mentioned were duly taken, and on April 10, 1889, the defendants, Big Flat Gravel Mining Company and O. M. Paris appealed to this court from the judgment entered against them on March 19th; and on May 25, 1889, the same defendants and the Del Norte Gravel Mining Company appealed from the order made and entered on April 4th; and on July 17, 1889, the last-named company appealed from the order made and entered on May 20th. The three appeals are rested on separate bills of exceptions, but brought here in one transcript, covering more than 950 pages of printed matter, and they have been submitted together. Each of the motions was made under section 473 of the Code of Civil Procedure, which provides that the court may, "upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." It is true that applications for relief under this section are addressed to the sound legal discretion of the trial court, and orders granting or refusing the relief asked will only be disturbed, on appeal, when it appears that that discretion has been abused. But, while this is so, still the provisions of the section, like all others of the Code, are to be "liberally construed, with a view to effect its objects and to promote justice." Section 4, Code Civil. Proc.

The question, then, is, did the court abuse its discretion in making either of the orders complained of? Section 385 of the same Code provides that an action or proceeding does not abate by the transfer of any interest therein if the cause of action survive or continue, and that, in case of a transfer of interest otherwise than by death or disability, "the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." Under this section, if property is conveyed during the pendency of litigation in regard to it, the grantee may thereafter continue to prosecute or defend the action in the name of his grantor, or may cause himself to be substituted in his place. If no substitution is asked for, the case will go on in the name of the original party, as if no transfer had been made; and to have it do so no application to or action by the court is necessary. That this case was so continued is shown by the fact that after the transfers, which were of record, and known to the plaintiff, and without any permission of the court, it was prosecuted in the supreme court in the names of the original defendants; and, after the judgment was reversed, the plaintiff filed an amended complaint against them, and then caused their default to be entered, and asked for and obtained a decree foreclosing the liens and directing a sale of the property. It was proper, therefore, that the defense and all proceedings necessary therefor be continued and taken in the names of the original defendants. One of these necessary proceedings was the motion to set aside the default; and, in our opinion, it might properly be made in the names of the defendants, notwithstanding their grantee did not nominally join in the motion, and had not asked to have the action continued in their names. The case of Moore v. Kellogg, 58 Cal. 385, upon the authority of which the first motion was denied, is not necessarily in conflict with this conclusion. What was said in that case on the subject must have been upon the theory that, as the defendants conveyed all their interest in the property in controversy after the action was commenced, and before the defaults were entered, they no longer had any interest in it, and therefore could not, on their own behalf, move to set aside the defaults and judgment. Here, in the absence of anything appearing to the contrary, it must be presumed that the motion was made for and on behalf of the real party in interest, and not for the nominal parties.

But, conceding that the ruling upon the first motion was proper, and should be upheld, for the reasons assigned, then the Del Norte Gravel Mining Company, as grantee of the defendants, had a clear right, in its own name, to move to have the default and judgment set aside, and, on denial of its motion, to appeal from the order, and thus bring the matter to this court for review. Plummer v. Brown, 64 Cal. 429, 1 Pac. Rep. 703; People v. Mullan, 65 Cal. 396, 4 Pac. Rep. 348. The objection that there was no judgment as to this company, and therefore the order was not subsequent to judgment, and not appealable, is not tenable. There was a judgment which affected its rights, and to which the motion related, and the case last cited is direct authority for an appeal in such case.

The question, then, is, ought the default to have been set aside upon the showing made? This question, it seems to us, must be answered in the affirmative. The case involved a large sum of money, and its merits were not considered or passed upon on the first appeal. No service of the amended complaint was made, and no notice of the filing thereof given, except by the copy sent to Hart. This copy was mailed on the 17th of December, but it did not reach its destination until the 16th or 17th of January. This may at first seem a little strange, but, in view of the uncontradicted affidavits, must be accepted as true, and accounted for upon the ground that letters are sometimes miscarried or mislaid. When the package was received, there was nothing but a figure "3" to indicate when it was mailed, and Hart had a right, therefore, to assume that it came in the ordinary time, which was two or three days. The distance between Crescent City and San Francisco is said to be about 400 miles, and, if so, he had 26 days from the time the copy was mailed to file a demurrer or answer. He was not, therefore, guilty of any negligence because he did not send the demurrer until the 26th of the month. The Del Norte Gravel Mining Company was in possession of and operating the property, but its officers had no notice of any of the steps taken by the plaintiff until after the default was taken, and the judgment entered. There was, consequently, no negligence on its part. The affidavits of merits read at the hearing of both motions were, in our opinion, sufficient. Under the circumstances shown, therefore, the failure to demur or answer to the amended complaint in time seems clearly to have been caused by such mistake or excusable neglect as entitled the moving party to the relief demanded.

We advise, therefore, that the judgment

be reversed, and the cause remanded, with directions to the court below to set aside the default, and permit a demurrer or answer to be filed within a reasonable time after notice.

We concur: Temple, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to the court below to set aside the default, and permit a demurrer or answer to be filed within a reasonable time after notice.

(93 Cal. 407)

Chauvet v. Hill. (No. 13,681.)

(*Supreme Court of California.* Feb. 17, 1892.)

Water-Courses—Action for Diverting—Pleading.

1. Where a stream, from time immemorial, had flowed through plaintiff's land in a perceptible current, and in a well-defined channel, his right to have such flow continued was not affected by the fact that the source of the stream was a spring on defendant's land.

2. Where the cross-complaint in an action to restrain the diversion of a water-course charged plaintiff with diverting the water, plaintiff's answer, averring a prescriptive right, "open, notorious, and continuous, and adverse to defendant," was sufficient without the word "uninterrupted."

Department 2. Appeal from superior court, Sonoma county; John G. Pressley, Judge.

Action by Chauvet against Hill to restrain defendant from diverting the waters of a stream. Judgment for plaintiff. New trial denied. Defendant appeals. Affirmed.

George A. Johnson, *Barclay Henley*, *James W. Oats*, and *Atty. Gen. Hart*, for appellant. *E. S. Lippitt*, for respondent.

McFarland, J. This action was brought to restrain defendant from diverting the water of an alleged water-course. Judgment was rendered for plaintiff,—at least a judgment for costs,—and defendant appeals. If the appeal had been taken by plaintiff, some difficult questions might have been presented. Neither party seems to have had correct notions about riparian rights; but we see nothing in the record of which defendant can justly complain. There are only two or three matters that need be noticed.

1. We think that the complaint is sufficient. It states facts showing that plaintiff is a lower and defendant an upper riparian proprietor upon a stream that is sufficiently described; and the averments of plaintiff's use of the water for a mill, winery, domestic purposes, etc., are mere surplusage.

2. The main source of the water of the stream was a certain large spring on defendant's land; and many authorities are cited in the briefs about "subterranean streams," "percolation," "water filtration in the soil," the "sources of springs," etc. But the court found, upon ample evidence, that from the spring in question "a stream of water, from time immemorial, has flowed in a perceptible current, carrying a large body of water; and at a short distance below the spring the stream flows in a deep, well-defined channel into Asbury canyon." And, this being so, it is useless to consider the sources of the spring itself. The right of the owner of land to have a well-defined water-course continue to flow through it does not depend upon the length of the stream above him. His right is the same whether the stream commences on his neighbor's land or 50 miles away.

Defendant filed a cross-complaint, in which he averred, in substance, that he owned land extending from said Asbury canyon or arroyo to another stream, called "Sonoma Creek," into which said Asbury arroyo empties; that at a point on said arroyo below the point at which defendant diverted water as charged by plaintiff, the plaintiff himself had diverted the water of said arroyo, and carried it to a place called "Glen Allen;" and that by said diversion sufficient water was not left in said arroyo, or in Sonoma creek, of which the arroyo is the principal tributary, to afford a supply for defendant's live-stock, or for domestic purposes, etc. (Here, as elsewhere in the case, the notion of riparian rights seems to be chiefly that they consist of the privilege of drinking and watering stock.) And defendant prays that plaintiff be enjoined and restrained from diverting the water at said lower point as last above stated. It is doubtful if defendant could obtain the relief asked for by means of a cross-complaint in this action; but it is unnecessary to decide that point, because the plaintiff, in his answer to the cross-complaint, sets up a right by prescription to the diversion complained of, and the court, upon sufficient evidence, found that plaintiff had such prescriptive right. We think that the averment in the answer of a prescriptive right is not defective, as contended by appellant, although the word "uninterrupted" is not used. The words, "open, notorious, and continuous, and adverse to defendant," are sufficient. We think, also, that the findings of the court are sufficient, although they might have been fuller.

As before stated, it is difficult to see why defendant complains of the judgment. It appears that he first diverted the water, and has ever since continued to divert it, directly from the spring, by means of a box and a three-inch pipe, and uses it for domestic purposes, and for irrigating 20 or 30 acres of land. Afterwards, and within three years before the commencement of this action, at a point below the spring, he diverted all the water of the stream, and carried it to another part of his land, and used it in connection with his business of manufacturing wine and packing fruit for market; and, after this second diversion, as the court finds, neither plaintiff nor his tenants "had any water for domestic purposes, nor did any flow down Asbury canyon for the use of the stock of plaintiff or defendant." Now, in the judgment it is decreed that defendant may continue to take all the water which he has heretofore taken directly from the spring by means of said box and pipe, and use it for any purpose. It is also decreed that he may take all the water of the stream, and use it on any part of his land, when it is all necessary "for domestic purposes and watering his stock." And it further decreed that defendant may use for manufacturing purposes, on any part of his land, as much water as "is consumed" for such purposes, provided that he must not use it when "such diversion and use leaves an insufficient flow for plaintiff's domestic use and watering of stock;" and provided further, that "he is not entitled to use it when it cannot be returned to the stream above the land of plaintiff," and that, when there is any surplus, he must "return the surplus to the stream above plaintiff's land." We do not see what other rights in the premises defendant could well ask for; and, if plaintiff is content with the scant remnant of the stream left him by the judgment, defendant should certainly be satisfied. All that plaintiff seems to have gained by the decree is the restraining of defendant from diverting the water to a place from which it cannot possibly flow back into the canyon; and no one, by virtue of riparian ownership, can rightfully divert water beyond the water-shed of the stream from which he takes it. By the findings defendant had no right other than that of a riparian owner to divert the water, except that which he takes directly from the spring as aforesaid, and that is given him by the decree. Judgment and order denying a new trial affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

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93 Cal. 414

HUGHES *et al.* v. EWING *et al.* (No. 14,441.)

(*Supreme Court of California.* Feb. 18, 1892.)

SCHOOL-DISTRICTS—ALTERATION.

The board of county supervisors changed the boundaries of F. city school-district by transferring certain lands therein to other districts. Prior thereto F. district had voted to raise $6,000 to build a school-house, which fact was not certified by the district trustees to the county supervisors until after the change in boundaries had been made. The supervisors subsequently levied a tax sufficient to raise the sum voted for the school-house on all the lands that were in F. district when the vote was taken. *Held*, that only the lands remaining within F. district after the boundaries were changed could be subjected to such tax, the word "district," as used in the Code, being synonymous with "corporation," and by the change of boundaries such corporation or district did not lose its identity, or cease to be the same legal entity, under Pol. Code, §§ 1575, 1837, providing a corporate name for the district, and requiring the board of county supervisors to raise the amount voted by levying a tax upon all taxable property within the "district voting such tax."

Department 1. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action by Hughes and others against Ewing and others. Judgment for defendants. Plaintiffs appeal. Reversed.

Church & Cory, for appellants. *W. D. Tupper* and *H. H. Welsh*, for respondents.

HARRISON, J. The board of supervisors of Fresno county, on September 6, 1890, changed the boundaries of Fresno City school-district by excluding therefrom certain lands described in the complaint herein, and transferring the same to other districts. Prior to that date the electors of the district had voted to raise the sum of $6,000 for the purpose of building a school-house, but the trustees of the district did not certify the fact to the supervisors until the 23d of September, 1890. Thereafter, on the first Monday of October, the supervisors, at the time of levying the county taxes, levied a tax, sufficient to raise the sum thus voted, upon all the property that was within the district at the time the vote was had, including the lands described in the complaint. The present action is brought by the plaintiffs, as owners of said lands, to declare the tax null and void as to those lands, and to restrain the defendant Ewing, the tax-collector of the county, from collecting the same, and from selling any of the lands described in the complaint for said tax. A school-district, when organized as provided by the Political Code, is a public corporation of a *quasi* municipal character, possessing such authority as has been conferred by the legislature, to be exercised in the mode and within the limits prescribed by the statute. The power to change the boundaries of the district, as well as to define them in the first instance, is of legislative origin, and, whether exercised immediately by the legislature or mediately by a board of supervisors,—the local legislature,—is, whenever exercised, a legislative act. It is well settled that the legislature has the power to make such changes, and that, in the exercise of this power, it may make such provision respecting the property and obligations of the corporation as it may deem equitable or proper, and that its action in this respect is conclusive. It is also well settled that when the boundaries of such corporation are changed, either by forming a new corporation out of the territory of the original one, or by transferring a portion of the territory to another corporation, in the absence of any provision on the subject the old corporation will be entitled to all the property and be solely liable for all the obligations, and that the territory taken therefrom will not be entitled to any of the corporate property, or liable for any of the obligations of the old corporation. Town of Depere v. Town of Bellevue, 31 Wis. 120; Laramie Co. v. Albany Co., 92 U. S. 307; Dill. Mun. Corp. § 188. Under these principles and authorities, in order to render the territory which was transferred from Fresno City school-district to another district liable for any of the obligations incurred by that district, or to a contribution for any of its obligations, it is necessary to show that such liability has been declared by the legislature. While the constitution has taken from the legislature the power to impose taxes upon counties or other public corporations, it has not given to such corporations any power whatever to impose taxes, but has authorized the legislature to vest such power in them by general laws. Const. art. 11, § 12. The power of a county or other public corporation to impose any tax is only that which is granted by the legislature, and its exercise must be within the limits and in the manner so conferred. Section 1617, Pol. Code, provides that the trustees of a school-district may build a school-house "when directed by a vote of their district;" and by section 1830 the trustees are authorized to call an election, and submit to the electors of a district the question whether a tax shall be raised for that purpose, specifying in the notice of the election the amount of money proposed to be raised, and the purpose for which it is intended to be used. Section 1832. If the electors of the district vote therefor, the trustees are to certify this fact to the board of supervisors, and the supervisors, when levying the county taxes, must levy a tax, sufficient to raise the amount voted, "upon all the taxable property in the district voting such tax." Section 1837.

The vote of Fresno City school district was in the nature of an authority to the trustees from that corporation to expend the sum of $6,000 in the erection of a school-house. Under the provisions of the constitution, before this authority could be exercised, it was necessary that the money should be provided for by taxation. The legislature has designated the supervisors of the county as the body to levy a tax for school purposes, but has limited their authority to the amount voted by the district, and declared that it is to be levied upon the property "within the district voting the same." The "district" upon whose property the tax is to be levied is the "district" which has been constituted a public corporation, and which is designated by the name given it under the provisions of section 1575, Pol. Code. The word "district" as used in section 1837, is not the equivalent of "territory within the district," but is a synonym for the "corporation" voting the tax, and the tax to be levied by the supervisors is limited to the property within this corporation. The "Fresno City school-district," in the present case, was the "district" which voted the tax, and it is upon the property within the "Fresno City school-district" that the tax is to be levied. By the change in its boundaries this public corporation or district did not lose its identity or name, or cease to be the same legal entity that it was before. Bates v. Gregory, 89 Cal. 387, 26 Pac. Rep. 891. For all purposes of corporate power or liability it remained unchanged, and the property upon which the supervisors should have levied the tax is only such property as, at the time when the tax was levied, was within the boundaries of this corporation.

Irrespective of the construction thus given to the section, it would be difficult upon principle to uphold the validity of a tax upon property which is without the district to be benefited by the expenditure of the money so to be raised. The theory upon which the power of taxation is authorized is the benefit to the tax-payer. It would be manifestly unjust to compel a contribution by tax to an object or for the benefit of a class in which the tax-payer is directly excluded from participating. The case of Richards v. Daggett, 4 Mass. 534, is almost identical in its facts with the present case, and, although it is unnecessary to adopt all the views of the court in that case, yet its opinion is in accordance with the foregoing views. It is not shown in this case what proportion of the district was covered by the lands which, under the change of boundaries, were excluded therefrom; but that is immaterial, as the principle is the same whether such lands were a small portion or a majority of the district. If the tax had been levied before the change in the boundaries, so as to become a charge upon the property, or an obligation from the tax-payer, it could have been collected after such change, as was held in Moss v. Shear, 25 Cal. 38. In that case it would have become ripened into an obligation which would constitute a part of the assets or property of the corporation, and, as we have seen, would, in the absence of any legislative provision on the subject, belong to the old corporation, the same as any other public property in its custody. So long, however, as it was only an inchoate right, which had not become an enforceable obligation, the transfer of the property from the limits of the district took away the power to create such obligation. Until the assessment is made, no individual debt is incurred. Waldron v. Lee, 5 Pick. 332; Jackman v. School-Dist., 5 Gray, 413. The judgment is reversed.

We concur: Paterson, J.; Garoutte, J.

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93 Cal. 452

Morrill *et al.* v. Nightingale *et al.* (No. 14,572.)

(*Supreme Court of California.* Feb. 20, 1892.)

Duress—Fear of Malicious Prosecution—Compounding Felony.

1. Civil Code, § 1569, defines "duress" as "unlawful confinement of the person;" under section 1570, "menace" consists of threats of such duress, or of injury to the character or person; and Pen. Code, § 518, defines "extortion" to be "obtaining of property from another, with his consent, induced by wrongful use of force or fear, or under color of official right." *Held,* that a note payable to one who, for the sole purpose of intimidating the maker, illegally and fraudulently procured a warrant for his arrest on a charge of embezzlement, and which was executed in fear of, and to procure immunity from, arrest and imprisonment, is void.

2. Such note is void under Civil Code, § 1668, also, because it was given to relieve the maker from responsibility for crime; and such invalidity, though not pleaded by the maker, will defeat a recovery. Wight v. Rindskopf, 43 Wis. 348, approved.

In bank. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Suit in equity by Morrill and others against Nightingale and others to foreclose a contract, and recover the amount of several notes. From a judgment for defendants, plaintiffs appeal. Affirmed.

Waldo M. York, for appellants. *Edward S. Bragg, George J. Denis,* and *Joseph H. Call,* for respondents.

Garoutte, J. This is an action in equity to foreclose a contract and recover judgment upon four promissory notes, amounting in the aggregate to $43,000. The contract and notes were made by defendant Nightingale to the plaintiffs on account of an alleged purchase of the capital stock of the Milwaukee Furniture Company. The prayer of the complaint asks that judgment be had for the amount of the notes, and that certain real estate and the said capital stock be applied to the satisfaction of such judgment, said property having been transferred under the contract to secure the payment of the aforesaid notes. Among other matters, the answer sets out that the contract and notes were not signed by the defendant Nightingale voluntarily, but under coercion and intimidation, by threatening defendant with arrest and imprisonment upon a warrant of arrest, which the plaintiffs at the time induced Nightingale to believe had been issued. Judgment went for defendants, and this appeal is prosecuted from the judgment and order denying plaintiffs' motion for a new trial.

The merits of this appeal are fully tested by a determination as to whether or not the findings support the judgment; for, after a careful consideration of the evidence, we are satisfied that the following findings of fact made by the court are fully supported thereby: (1) "That on the 26th day of May, 1890, the plaintiffs fraudulently and illegally procured to be issued by a justice of the peace of Los Angeles city township a warrant for the arrest of the defendant Nightingale under the name of John Doe, for the purpose of coercing the defendant Nightingale to pay certain sums of money and sign contracts for the payment of money to plaintiffs, upon the claim by plaintiffs that defendant Nightingale had embezzled large sums of money from the Milwaukee Furniture Company, of which defendant Nightingale had been acting as treasurer." (2) "That such warrant was not procured for any lawful purpose, or for the purpose of prosecuting or convicting the defendant Nightingale for any crime, but for the purpose of frightening and intimidating defendant Nightingale." (4) "That on the 9th day of July, 1890, defendant Nightingale executed and delivered to the plaintiffs the contract and four promissory notes of that date, which are set forth in the complaint and supplemental complaint herein; but such contract and notes were not executed by the free or voluntary act of defendant Nightingale, but his signature and his execution thereof was induced solely by the well-grounded belief on the part of defendant Nightingale that, unless he signed them, and each of them, he would be arrested and imprisoned upon said warrant for such embezzlement, which the plaintiffs then and previously charged him with being guilty of; and that by signing the same the embezzlement with which he was so charged would be compromised and settled." (5) "That at the time of executing said contract and notes on July 9, 1890, the plaintiffs induced the defendant Nightingale to believe, and he did believe, that he would be arrested and imprisoned on said warrant if he refused to sign said contract and notes."

Measured by the facts set out in the findings, we think the defendant Nightingale was acting under a menace at the time of the signing of the contract and notes, which destroyed his free consent to the execution thereof, and which thereby afforded him ample grounds for the rescission of the same. The consent of a party to a contract must be free, and it is not free when obtained through duress or menace. Section 1569, Civil Code, declares duress to consist in the "unlawful confinement of the person of the party or of the husband or wife of such party," etc.; or "the confinement of such person, lawful in form, but fraudulently obtained." Section 1570 provides that menace consists in a threat of the duress above specified, or of a threat of injury to the character of any such person. In this case there was no arrest and confinement, hence no duress; but the history of the transaction, as disclosed by the findings, clearly indicates threats of imprisonment upon a charge of embezzlement, which, in effect, necessarily were threats of injury to the character of defendant Nightingale, and consequently a menace. The court finds that the contract and notes were executed under the influence of such menace, and, such being the fact, the defendant's free consent to the execution thereof was never gained, and the judgment should stand. Section 518 of the Penal Code provides: "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." The findings of the court disclose a state of facts lacking but few elements, if any, to fill the measure demanded by the foregoing provision of the Criminal Code of this state. The findings show that the warrant of arrest was secured in bad faith, and for purposes not countenanced in law. It was secured solely to be used as a menace for the collection of an indebtedness, and it was ever accompanied with the threat that, if such indebtedness was not satisfied, the warrant would be executed, and imprisonment follow. Such a proceeding is an abuse of criminal process, and impedes the due course of public justice.

In the case of Bane v. Detrick, 52 Ill. 27, the court said: "The mortgage was void for another reason: It was executed through a perversion and abuse of criminal process. It is proved that Bane got out this process, and used it to effect a settlement of a claim which there is much evidence to show was unfounded. It is against public policy that process should be thus used, and no court will allow the results flowing from it to be enjoyed by him who so uses it. It is a gross abuse of legal process, and no person should have the aid of a court of justice to profit by it." Under that kind of menace which consists in a threat of injury to the character of a person, it is entirely immaterial whether such person is guilty or innocent of the crime to be charged. It certainly would be no defense to the accusation of extortion that the charges or publications threatened to be made by the defendant, and by which he obtained valuable property, were true. The truth or falsity of these matters form no element in establishing the guilt or innocence of a defendant charged with extortion. In Hackett v. King, 6 Allen, 58, it was decided that, though a person was arrested under a legal warrant, and by a proper officer, yet, if one of the objects of the arrest was to extort money, or enforce the settlement of a civil claim, such arrest is a false imprisonment, by all who have directly or indirectly procured the same or participated therein for any such purposes; and a release and conveyance of property, obtained by means of such arrest, is void. In Taylor v. Jaques, 106 Mass. 294, the court, in speaking of a certain instruction given by the lower court, said: "We do not concur with that view of the law. If he had embezzled their funds, they had a right to have him prosecuted. If he owed them a debt, they had a right to accept security for it. But they would have no right to make use of a criminal process for the collection of a debt. An arrest, even upon a legal warrant, and upon a criminal charge, to compel the payment of a mere debt, would be a misuse of legal process; and the threat of such an arrest may constitute unlawful duress." In Richardson v. Duncan, 3 N. H. 511, the court said: "But it is now well settled that when there is an arrest for improper purposes, without a just cause, or where there is an arrest for a just cause, but without lawful authority, or where there is an arrest for a just cause and under lawful authority, for unlawful purposes, it may be construed a duress." It will thus be seen that an imprisonment for an unlawful purpose will constitute duress, and, such being the fact, a threat of arrest and imprisonment, made for unlawful purposes, will constitute menace. There is some authority found in the decisions of the courts of Maine opposed to these views, but we think they are not the better rule.

The findings of the court are also sufficient to defeat plaintiffs' right of recovery upon the ground that the contract entered into was forbidden by section 1668 of the Civil Code, one of its objects being, indirectly at least, to relieve the defendant Nightingale from responsibility for a violation of the law. As was said in Eadie v. Slimmon, 26 N. Y. 15: "Either the accusation which the defendant brought against Eadie was entirely unfounded, or he was seeking to compromise a criminal offense. If he knew that a crime had been committed by Eadie, he had no right to compromise it in this way, and the securities obtained upon such compromise were received as a consideration for compromising a felony, and for that reason were invalid; else the whole of his assertions and threats on the subject were a gross imposture." As the answer of defendants does not rely upon such defense, we will not pursue the subject further, although Chief Justice RYAN undoubtedly declared the true rule in Wight v. Rindskopf, 43 Wis. 348, wherein he said: "If the objection be not made by the party charged, it is the duty of the court to make it on its own behalf. Courts owe it to public justice and to their own integrity to refuse to become parties to contracts essentially violating morality or public policy, by entertaining actions upon them. It is judicial duty always to turn a suitor upon such a contract out of court, whenever and however the character of the contract is made to appear." The demurrer to the answer was properly overruled, and we see no error in the rulings of the court upon the admissibility of testimony. Let the judgment and order be affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; HARRISON, J.; DE HAVEN, J., PATERSON, J.

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93 Cal. 266

POWERS *et al.* v. CHABOT *et al.* (No. 13,858.)

JOHNSON *et al.* v. POWERS *et al.* (No. 13,910.)

(*Supreme Court of California.* Feb. 5, 1892.)

STAY-BOND—VALIDITY.

The statutory undertaking given on appeal will operate as a stay of execution; and, where another undertaking is given for the purpose of staying the execution, it is without consideration, and cannot be enforced, either as a statutory or common-law obligation, against the sureties thereon, though the judgment was for the foreclosure of a chattel mortgage on perishable property, and the obligee, relying on such undertaking, refrained from disposing of such property pending the appeal, and was thereby damaged, as the statutory undertaking did not contemplate a stay of sale of the property.

Commissioners' decision. Department 2. Appeals from superior court, Alameda county; W. E. GREENE, Judge.

Action by James A. Johnson and another to restrain O. B. Powers from transferring a certain note. Defendant had judgment on a cross-complaint, which was affirmed on appeal, and defendant moved for judgment on the undertaking filed in stay of execution pending the appeal. Motion was denied, and defendant appeals. Pending the latter motion, O. B. Powers and others, as his assignees, brought action on the same undertaking against the sureties thereon, E. H. Pardee, and the representatives of Antoine Chabot, deceased. Defendants had judgments on demurrer, and plaintiffs appeal. Both appeals were heard together, and the judgments appealed from affirmed.

W. R. Daingerfield and *Edward Lynch*, for appellants. *Metcalf, Metcalf & Yule* and *Moore & Reed*, for respondents.

TEMPLE, C. These two appeals have been considered together. The last named is a proceeding in a case brought to restrain defendant Powers from transferring a certain promissory note. Powers answered, and by a cross-complaint sought to foreclose a chattel mortgage. A decree of foreclosure was entered, and plaintiffs appealed, giving two bonds, one for $300, and a stay-bond in double the amount of the judgment, with Pardee and Chabot as sureties. The judgment having been affirmed, upon return of the *remittitur*, a sale was had of the mortgaged property, from which only a part of the debt was realized. Motion was then made for judgment against the sureties on the stay-bond for the deficiency. Judge CRANE refused to entertain the motion, and application was made by Powers to this court for a mandate, which was refused on the ground that no stay-bond was required in such cases. It was therefore held that the stay-bond was without consideration, and void. Powers v Crane, 67 Cal. 65, 7 Pac. Rep. 135. Chabot having died, a claim was presented against his estate for the deficiency, and was rejected March 30, 1888. June 4, 1888, Powers commenced the proceeding in the original suit to obtain a judgment against the sureties on the stay-bond for the deficiency. This was denied October 9, 1889, and from the order denying this motion one of these appeals is taken. This proceeding is authorized only on statutory undertakings; and, inasmuch as the bond in question here had no validity as a statutory bond, this motion was properly denied, and the order should be affirmed.

Appellant claims that he might have had the mortgaged property sold as perishable, notwithstanding the appeal, and that he forbore to do this because of the stay-bond on appeal, which he supposed afforded him ample security for his debt. He claims that this fact constitutes a consideration for the undertaking, and as this fact was not before the court in Powers v. Crane, 67 Cal. 65, 7 Pac. Rep. 135, that case is not authority for the conclusion that the bond is absolutely void. But if appellants were right in this contention, it would simply go to the effect that the undertaking is valid as a common-law obligation. The case is still conclusive authority for the proposition that the bond was void as a statutory bond; that it was not a stay-bond on appeal, and therefore judgment without suit could not be entered against the sureties in the original action. While the last-mentioned motion was pending, to-wit, June 30, 1888, an action was commenced by Powers and Bromley and Lynch, the last two being assignees of Powers, against Pardee and the representatives of Chabot, upon the undertaking. The complaint was demurred to and several times amended. Judgment upon demurrer was entered in favor of Pardee, March 25, 1889, and in favor of the representatives of Chabot, June 14, 1889. From these judgments appeals are taken.

One of the questions presented on the demurrer evidently was whether the representatives of the deceased, Chabot, could be joined with the living surety. In the last amended complaint, however, this misjoinder, if it were one, was avoided, as it was against the representatives of Chabot only. The demurrer must have been sustained on the ground that the undertaking sued upon was void, notwithstanding the alleged consideration that Powers was induced thereby to forbear having a sale of the property as perishable, and in consequence lost some portion of the money due him. Whether this ruling was correct is the question involved in the appeal from that judgment, and, if sustained, will dispose of both appeals. We have the decision that on such appeal the stay-bond serves no purpose under the statute. It was given, however, solely under the mistaken idea that it was necessary to secure to the appellants in that case a stay during the appeal. It was not given to prevent a sale of perishable property, nor would a stay-bond, if one had been required, have had that effect. This is stated by appellants in their briefs. They ask us to "realize vividly that nothing on earth can stay a sale pending an appeal when the judgment requires perishable property to be sold." That is, nothing except the acquiescence of the respondent. Realizing this, we do not see how the fact that Powers forbore to procure a sale can constitute a consideration. The bond was not given to accomplish anything save what might have been accomplished by a stay-bond. No such bond could in any case have had such effect. How could the sureties understand that they might be held liable for damages arising from the fact that Powers refrained from exercising a right that no stay-bond whatever would ever have deprived him of? We do not think, however, that it is necessary to pursue this matter. The undertaking was not given in pursuance of any agreement between the parties, but simply to secure a statutory privilege. It did not have that effect, and was therefore wholly without consideration and void, and could not be valid as a common-law undertaking. The cases cited by appellant as upholding his position illustrate this. Hathaway v. Davis, 33 Cal. 161, was upon a bond strictly in accordance with the statute in form, but it was claimed that the appeal, to secure which it was given, was taken too late, and therefore this court had no jurisdiction to affirm the judgment. The undertaking, then, it was claimed, was void. But the court said the question was not open. The undertaking had secured the privilege of an appeal, which was the consideration mentioned in the undertaking. This court had assumed jurisdiction in consequence of it, and the appellant and his sureties could not now question such jurisdiction. That differs from this in the fact that the privilege sought was in fact secured by the undertaking. Similar to that is the case of Gardner v. Donnelly, 86 Cal. 367, 24 Pac. Rep. 1072, which was an undertaking for the release of property attached. It was contended that the undertaking contained provisions not at all like those required by certain sections of the Code. This court held the undertaking good under another section, but said the issue was immaterial. The undertaking was given to secure a release of the property, and did secure such release; it was therefore good as a common-law obligation. The case here is widely different. The parties on whose behalf the undertaking was given gained nothing by it, and, conceding that Powers lost because he mistook the law and relied upon it, such loss was incidental, and was only occasioned and not caused by the undertaking, as its direct legal effect, nor was it the purpose of the undertaking to prevent such sale. We think the judgment should be affirmed.

We concur: FITZGERALD, C.; BELCHER, C.

Per Curiam. For the reasons given in the foregoing opinion the judgments and orders in the above-entitled causes are affirmed.

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